

**CONSTITUTIONALISM AND THE RULE OF LAW: EVALUATING WHETHER DUE  
PROCESS IS APPLIED IN THE PROSECUTION OF TERROR SUSPECTS IN KENYA**

**(2012-2019)**

**BY**

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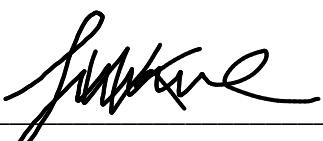
**A THESIS SUBMITTED TO THE SCHOOL OF HUMANITIES AND SOCIAL  
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## DECLARATION

I, undersigned, declare that this is my original work and has not been submitted to any other college, or university other than the United States International University- Africa for academic credit.

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## **LIST OF ABBREVIATION AND ACRONYM**

<b>9/11</b>	September 11, 2001, United States Bombing
<b>ATPU</b>	Anti-Terror Police Unit
<b>CIA</b>	Central Intelligence Agency
<b>CT</b>	Counter-Terrorism
<b>FBI</b>	Federal Bureau of Investigation
<b>IED</b>	Improvised Explosive Device
<b>JTTF</b>	Joint Terrorism Task Force
<b>NCTC</b>	National Counter-Terrorism Center
<b>NIS</b>	National Intelligence Services
<b>PFLP</b>	Popular Front for the Liberation of Palestine
<b>POTA/PTA</b>	Prevention of Terrorism Act
<b>SLAA</b>	Security Law Amendment Act
<b>UNSC</b>	United Nation Security Council

## ABSTRACT

The purpose of the study was to evaluate whether due process is applied in the prosecution of terror suspects in Kenya. Specific objectives included: to examine whether the counterterrorism laws, particularly provisions on the arrest of suspected terrorists follow due process as provided under the Constitution of Kenya, 2010; to evaluate whether counter-terrorism strategies are guided by due process rights and/or crime prevention principles of the criminal justice system; and to assess the impact of deviation of counterterrorism strategies from the due process on the social rights of suspected terrorists and their families in Kenya. The study adopted a constitutionalism theoretical framework, liberal democracy theoretical foundation and the due process model of criminal justice to explain the phenomenon. The study site was Eastleigh North and Eastleigh South wards of Kamukunji Constituency, Nairobi County. This research adopted qualitative analytical approach. The research used key informants interviews to collect information from the key informants. The questionnaires were administered to the individual community members from the two wards of Eastleigh Area. In-depth interview was scheduled to collect qualitative information from third category of population. The study was based on descriptive statistics and mixed methods of data analysis. The study established that most of the provisions of the counter-terrorism law such as the Prevention of Terrorism Act, 2012 (POTA) regarding the arrest of suspected terrorists were in line with the Constitution of Kenya, 2010. However, the study established that the Kenyan courts are sometimes fundamentally unfair under the law to accused terror suspects. The study also revealed that the criminal justice system in Kenya focused more on the speed of concluding terrorism-related criminal cases than on the due process of determining whether a person is guilty or not guilty of terrorism. The study also established that sometimes the criminal justice system in Kenya does not protect the rights of the terror suspects. Notwithstanding, the study further revealed that police powers especially on the arrest provisions in the counter-terrorism laws were sweeping. Also, the study established that the right to equality and freedom from discrimination is usually denied to persons accused of terror acts. Furthermore, the study established that there were instances where respondents felt that they were held in indefinite detention and tortured. Nevertheless, the study suggested that there should be a balance between the three arms of the government: Executive, Judiciary and Legislative in counterterrorism measures. The balance between the branches of the government plays a vital role in securing the civil liberties of individuals accused of terrorism.

## **CHAPTER ONE**

### **1.0 INTRODUCTION**

#### **1.1 Introduction and Back Ground of the Study**

Over the past two decades since the 9/11 attack on the World Trade Center in the United States, terrorism has become a priority for both domestic and global security. Terrorism has set off a paradigm shift in our society on how we interact, exist, integrate, and trade globally. Generally, counter-terrorism approaches have been modelled based on deterrence, preventive, and punitive legislation on terrorism. Thus, Kenya has put in place counterterrorism policies at the national level where it has adopted legislation and policies to combat terror (Wanjiru, 2006).

##### **1.1.1 Terrorism and Constitutionalism in Kenya**

Terrorism is the premeditated, deliberate, systematic murder, mayhem, and threatening of the innocent to create fear and intimidation in order to gain a political or tactical advantage, usually to influence an audience (James, 2008). Terrorism is the unlawful use of force or violence against persons or property to intimidate or coerce a government, the civilian population, or any segment thereof, in furtherance of political or social objectives (Coady, 2012).

These various definitions have made it hard to comprehensively conceptualize the term terrorism and thus difficult to develop effective and standardized counter-terrorism measures among the affected states in the international system. While there is some general agreement that all acts of deliberate violence against innocent civilians and other non-combatants directed towards achieving specific political objectives belong to the genre of terrorism, there remain serious differences in respect of violent reactions and resistant movements that emerge in situations where processes of peaceful resolution of political conflicts are denied and people are forced to struggle against repression, occupation or aggression (Khurshid, 2016).

Globally, the definition of terrorism varies from one institution to another and from one state to another. For instance, the United Nations General Assembly resolution 49/60, sought to criminalize certain armed activities considered to be "terrorist" in nature:

[A]cts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes are in any circumstance unjustifiable, whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or any other nature that may be invoked to justify them. (Para. 3) (United Nations General Assembly, 1994).

Consequently, the United Nations Security Council defined "terrorism" in Resolution 1566 (2004), to enable States to meet their obligations under Security Council Resolution 1373 (2001). Thus, it stated that terrorism is:

a criminal act, including against civilians, committed with intent to cause death or serious bodily injury, or taking of hostages, with the purpose to provoke a state of terror in the general public or a group of persons or particular persons, intimidate a population or compel a government or an international organization to do or to abstain from doing any act, which constitutes offenses within the scope of and as defined in the international conventions and protocols relating to terrorism, are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature, and calls upon all States to prevent such acts and, if not prevented, to ensure that such acts are punished by penalties consistent with their grave nature. (Para. 3) (United Nations Security Council, 2004).

However, the Kenyan legal and criminal justice system does not have a defined term of terrorism. Moreover, Acts of Parliament enacted on matters national security such as the Prevention of Terrorism Act, 2012 only defines a terror act:

- i. involves the use of violence against a person;
- ii. endangers the life of a person, other than the person committing the action;
- iii. creates a serious risk to the health or safety of the public or a section of the public;
- iv. results in serious damage to property;
- v. involves the use of firearms or explosives;
- vi. involves the release of any dangerous, hazardous, toxic or radioactive substance or microbial or other biological agent or toxin into the environment;
- vii. interferes with an electronic system resulting in the disruption of the provision of communication, financial, transport or other essential services;
- viii. interferes or disrupts the provision of essential or emergency services;
- ix. prejudices national security or public safety (Prevention of Terrorism Act, 2012).

Since the 1998 United States Embassy bombings in Kenya, the country has faced many more attacks by the Al-Shabaab, a terror group found in the heartland of Somalia. For instance, on November 28, 2002, at Kikambala hotel in Mombasa County, terrorists attacked and killed 13 people at the hotel owned by some Israeli nationals. Consequently, on September 21, 2013, Al-Shabaab associates attacked the Westgate Mall in Nairobi and killed at least 67 people in one of the worst terror attacks in Kenya. Moreover, in another incident, between the 15 -17 June 2014 over 60 were killed in Mpeketoni, Lamu County by Al-Shabaab (Bryden & Bahra, 2019).

On April 2, 2015, The Al-Shabaab terror group hit again. This time in an institution of higher learning - Garissa University College and killed more than 150 people. This was the

deadliest attack since the August 1998 United States Embassy bombings. A recent attack occurred, on January 5, 2019, at the DusitD2 complex at Riverside in Nairobi. It was reported that over 21 people were killed and several others injured in the attack that was later claimed by the Al-Shabaab (BBC News Africa, 2019). The terror attacks in Kenya have happened as late as 2019 at DusitD2 complex, Riverside in Nairobi, Kenya begging the question on the counter-terrorism specific laws passed in 2012 and 2014. The continued attacks even with counter-terror laws in place casts a doubt whether counter-terrorism laws in itself especially whether due process is achieved when dealing with terror (Bryden & Bahra, 2019).

## **1.1.2 Constitutionalism and Due Process Model of Criminal Justice**

### **1.1.2.1 Constitutionalism**

Liberal scholars such as Ali Mazrui have been greatly committed to the ideals of constitutionalism in Kenya. Ali Mazrui contextualized constitutionalism as an anchor of stability which helps define the rules of the game, check the excessive powers of government, and instil democratic rights and due process. Moreover, Mazrui defined constitutionalism as a procedural approach to politics; a faith in legal solutions to political tensions; a relatively open society with institutionalized competition for power in the polity (Ghai, 2016).

Accordingly, the idea of constitutionalism in Kenya could be depicted as a principle where governments must act inside the limitations of a given constitution. It is a thought of an administration attached to an arranged structure of unoriginal laws. This concept has its underlying foundations in the seventeenth-century battle between monarchist support for the principle of the divine right of kings and parliament, and the judiciary's attestation of the power of an arrangement of power dependent on the law (Mbondenyei *et al.*, 2011)

Previously, Kenya has had various constitutional documents pre and post-independence before it adopted the Constitution of Kenya, 2010. However, the significant difference with the 2010 Constitution of Kenya and its precursor was the fact that ordinary citizens took part in the constitutional making process and the institution of the document through a referendum. This includes Chapter Four, Bill of Rights of the Constitution of Kenya, 2010 (CoK) that deals with fundamental rights and freedoms of all its citizens. Also, the constitutionalism and the rule of law were paramount when dealing with individuals who have been accused of committing crimes. This was essential in limiting government authority by following due process when dealing with accused persons. (Kanyinga & Long, 2012).

#### **1.1.2.2 Due Process Model of Criminal Justice**

In the 1960s, legal scholar Herbert L. Packer created the due process model to describe exceeding expectations of the criminal justice system (Packer, 1964). The due process model starts with “skepticism about the morality and utility of the criminal sanction”. This skepticism is based on the liberal values of “the primacy of the individual and the complementary concept of limitation on official power” (Packer, 1968) and concerns about the intrusive policing required to enforce laws.

The due process model is also concerned with equality in the sense that all accused regardless of wealth or social status should receive equal treatment. It is assumed that protecting the due process rights of all accused will protect the rights of the most disadvantaged. The due process model imposes numerous restraints on the police to protect the rights of suspects and minimize informal fact-finding in the streets and station houses (Packer, 1968).

Consequently, in the due process applied in terrorism criminal proceeding, the police should not arrest or detain terror suspects to develop their case. If there is any communication

between the police and the terror suspect, the accused should be carefully informed about the right to be silent and the right to contact counsel. Any statements taken absent a clear and voluntary waiver by the accused of his or her rights should be excluded from a subsequent criminal trial to protect the accused from unfair self-incrimination (Packer, 1968).

### **1.1.3 Counter Terrorism Regulations in Kenya**

Counterterrorism refers to proactive policies that are designed to do away with terrorist environments or movements. Responding to terrorism requires either a hard-line or a soft line response. The goal of counterterrorism is either to minimize or prevent terrorist attacks. The options available for counterterrorism are varied and no one answer can be used to tackle the different terror group or threats posed by them (Kolodkin, 2017).

The United Nations Security Council (UNSC) came up with several resolutions on terrorism. These resolutions are 1373/01, 1377/01, and 1624/2005. The UNSC resolutions highlighted counterterrorism measures for states to follow. The measures intended to provide counter-terrorism strategies that include; legislative reforms, institutional capacity building, training, and bilateral and multilateral collaboration with other states. Thus, Kenya joined other states in adopting these resolutions into their national counter-terrorism measures (Sempijja & Nkosi, 2019).

Nonetheless, Kenya has adopted both judicial and extrajudicial counter-terrorism strategies which the government of Kenya has denied stating that they adopted counterterrorism strategies that balanced national security and the fundamentals of human rights. Moreover, Amnesty International has argued that the counterterrorism strategies are not compatible with Chapter Four of the Constitution of Kenya, 2010 (Amnesty, 2014).



The counterterrorism measures in question were adopted through constitutional amendments after various attacks in Kenya by the Al-Shabaab. Thus, Kenya introduced various laws such as the Prevention of Terrorism Act 2012, and the Security Laws Amendment Act of 2014 to help in countering terrorism in Kenya.

### **1.1.3.1 Prevention of Terrorism Act, 2012**

In 2012, following cases of terror attacks in Kenya, the National Assembly enacted the Prevention of Terrorism Act of 2012 (POTA). The POTA was meant to complement the Bill of Rights enshrined in the 2010 Constitution of Kenya. However, some Sections in the POTA were inclined to violate the rights of citizens when dealing with terrorism and the rights of suspected terrorists. For the relevance of the study, the research will examine Section 31 – 36 of the Prevention of Terrorism Act in relation to the rights of suspected terrorists.

For instance, in as far as police powers are concerned; Section 31 of POTA (2012) states that: a police officer may arrest a person where he has reasonable grounds to believe that such person has committed or is committing an offense under this Act. The powers of arrest vested in police officers in this section are ambiguous and absolute without judicial oversight. Furthermore, in Section 32 -33 of POTA (2012), the police are required to base all arrests on reasonable grounds, and the suspect is to be either taken to court or released within 24 hours as provided by the Constitution.

Section 35 of POTA (2012) of the Act allows, subject to the Article 24 derogation clause of the Constitution of Kenya, 2010 (CoK), limitations on specified fundamental rights for the purposes of investigating, detecting, or preventing terrorist acts, and to balance opposing fundamental rights. Unless a court closely scrutinizes its application, law enforcement can apply section 35 in an expansive manner. Nevertheless, Section 36 of the POTA (2012) grants the police

powers to intercept communications if they have sufficient grounds to suspect involvement in the planning and commission of a terrorist act. The power to intercept is however subject to administrative and judicial oversight amongst other protections.

### **1.1.3.2 Security Laws (Amendment) Act, 2014**

The Security Laws Amendment Act No. 19 of 2014 (SLAA) was enacted in the National Assembly on December 18, 2014. To stress the relevance of the law to the State, the Kenyan President Uhuru Kenyatta signed the law within 24 hours after it passed in Parliament. The SLAA are amendments of laws related to security in Kenya such as the Prevention of Terrorism Act, 2012, and the National Intelligence Service Act, 2012 which gave the government authority to exercise on issues relating to security.

The SLAA (2014) like the POTA (2012) gave security officials powers to arrest and detain people and could infringe fundamental rights and international human rights law. Certain sections of the SLAA expanded the powers of security officials to stop and detain suspects, search and seize private property, and monitor communications without a court warrant. For instance, Section 12 of the SLAA (2014) amended the Penal Code [Cap.63 Section 66A] of Kenya by making it criminal to publish or broadcast through print, digital or electronic means, or images of dead or injured persons likely to cause fear and alarm in the general public or disturb the peace. The Act contravenes Article 34 (2) of the Kenyan Constitution that protects freedom of the media; particularly the rights barring any control of state over or interference with any person engaged in broadcasting, production or circulation of any publication or the dissemination of information by any medium.

Section 15 of SLAA (2014) amended the Criminal Code [Section 36A (8) of Cap. 75] of Kenya makes it possible for persons to be held without charge for a period of up to 90 days. This

allows for detention without trial. Nonetheless, Section 16 of the SLAA (2014) amended the Criminal Procedure Code by the insertion of section 42A(2) in pursuant of the Prevention of Terrorism Act among others. It allowed the State to withhold evidence against an accused person denying an opportunity to interrogate the same and prepare for defense until before hearing. This exposes the accused person who is protected by Article 50 Constitution of Kenya, 2010 (right to a fair hearing) to unfair trial and ambush by the State before looking at the evidence against them.

Nevertheless, Section 56 of SLAA (2014) authorizes National Intelligence Service of Kenya (NIS) officers to "do anything necessary to preserve national security" and to detain people even on suspicion of "engaging in any act or thing or owning anything which poses a threat to national security." Besides, Article 238 of the Constitution of Kenya (2010) provides that "National Security shall be promoted and guaranteed subject to the authority of the constitution and parliament and further, that the national security shall be pursued in compliance with the law and utmost respect for the rule of law, democracy, human rights and fundamental freedoms". This is an absolute requirement and not subject to the exercise of discretion.

### **1.1.3.3 Arrest of suspects provisions of the Constitution of Kenya, 2010**

Article 49 (1) of the Constitution of Kenya, 2010 stipulates that a person has right under the due process of the law when arrested or detained by the authorities:

An arrested person has the right-

- a. to be informed promptly, in language that the person understands, of-
  - i. the reason for the arrest;
  - ii. the right to remain silent; and
  - iii. the consequences of not remaining silent;
- b. to remain silent;

- c. to communicate with an advocate, and other persons whose assistance is necessary;
- d. not to be compelled to make any confession or admission that could be used in evidence against the person;
- e. to be held separately from persons who are serving a sentence;
- f. to be brought before a court as soon as reasonably possible, but not later than--
  - i. twenty-four hours after being arrested; or
  - ii. if the twenty-four hours ends outside ordinary court hours, or on a day that is not an ordinary court day, the end of the next court day;
- g. at the first court appearance, to be charged or informed of the reason for the detention continuing, or to be released (Article 49, Constitution of Kenya, 2010).

## **1.2 Statement of the Problem**

During times of crisis, the state balances the scale of national security against those of individual liberties. National security outweighs fundamental rights and liberties when it comes to threats such as terrorism (Kolodkin, 2017). Nations have the absolute obligation and right to protect innocent civilians against those seeking to harm them. The essence of the constitution is granting and protecting the civil and political rights of suspects and victims across the board. Failure to provide due process to individuals suspected of involvement in terrorism leads society down a slippery slope from which there is no return (Amnesty, 2014).

The anti-terrorism measures in Kenya have been marred with challenges and criticism. The government has resorted to using heavy-handed measures in their counterterrorism efforts. Thus, rights groups, both national and international have accused the government of Kenya of adopting counter-terrorism strategies that violate human rights and constitutional principles. This is because the government's criminal process operates to screen suspects, determine guilt, and secure

appropriate dispositions of persons convicted of a crime based on crime control model of criminal justice. Therefore, the proposed study intends to investigate whether due process is applied in the prosecution of terror suspects in Kenya.

### **1.3 Research Questions**

The main research question of the study was; whether due process is applied in the prosecution of terror suspects in Kenya? The study was guided by the following specific research questions:

- i. Are the counterterrorism laws, particularly provisions on the arrest of suspected terrorists follow due process as provided under the Constitution of Kenya, 2010?
- ii. Are counter-terrorism strategies guided by due process rights and/or crime prevention principles of the criminal justice system?
- iii. What is the impact of deviation of counterterrorism strategies from due process on the social rights of suspected terrorists and their families in Kenya?

### **1.4 Research Objectives**

The main objective of the study was to evaluate whether due process is applied in the prosecution of terror suspects in Kenya. However, the study was guided by the following specific objectives:

- i. To examine whether the counterterrorism laws, particularly provisions on the arrest of suspected terrorists follow due process as provided under the Constitution of Kenya, 2010;
- ii. To evaluate whether counter-terrorism strategies are guided by due process rights and/or crime prevention principles of the criminal justice system;
- iii. To assess the impact of deviation of counterterrorism strategies from the due process on the social rights of suspected terrorists and their families in Kenya?

### **1.5 Significance of the study**

The study will offer insights on the due process in the prosecution of terror suspects in the course of the fight against terrorism in Kenya. Therefore, the study will be of significance to institutions that deal with counter-terrorism in Kenya in ensuring that due process is followed in the prosecution of terror suspects.

### **1.6 Scope of the Study**

The study focused on evaluating whether due process of the law is applied when it comes to suspected terrorists in Kenya. Specifically, the study gathered data from various key informants and residents of Eastleigh North and Eastleigh South Wards of Kamukunji Constituency, Nairobi County that has been blamed for harboring and assisting terror attacks suspects in Kenya. The data examined was from 2012 -2019. The period was selected based on the period Kenya enacted the first counter-terrorism law.

### **1.7 Definition of Terms**

The following terms guided the study:

**Constitutionalism** - is a procedural approach to politics; a faith in legal solutions to political tensions; a relatively open society with institutionalized competition for power in the polity (Ghai, 2016).

**Counterterrorism** - Refers to proactive policies that are designed to do away with terrorist environments or movements (Kolodkin, 2017).

**Due process** – It is the legal requirement that the state must respect all legal rights that are owed to a person (Kanyinga & Long, 2012).

**Due process Model** - is a model of criminal justice that focuses on having a just and fair criminal justice system for all and a system that does not infringe upon constitutional rights of the accused.

Furthermore, the model is more like an ‘obstacle course’ rather than an ‘assembly line.’ (Yerkes, 1969).

**Terrorism** - is the unlawful use of force or violence against persons or property to intimidate or coerce a government, the civilian population, or any segment thereof, in furtherance of political or social objectives (Coady, 2012).

### **1.8 Organization Structure of the Research**

This thesis is structured as follows: The abovementioned chapter one provides the research introduction, background of the study, research objectives and questions, significance of the study, scope, and the definition of terms encountered in the course of the study. Chapter two presents the literature review on counter-terrorism approaches globally, regionally and locally in Kenya. Lastly, it highlights the research gap and the theoretical framework. Chapter three examines the site study, research design and sampling methods, analysis, ethical considerations and limitations of the research. Chapter four presents the findings of the study together with discussions concerning the study objectives. Finally, chapter five elaborates the summary of the findings, conclusion, recommendations and areas of further studies.

## **CHAPTER TWO**

### **2.0 LITERATURE REVIEW**

#### **2.1 Introduction**

This section discusses a review of the literature related to the research problem. Before accessing various works of literature on terror suspects and the constitution in Kenya, the research will first contextualize the global war on terror and counterterrorism strategies in the United States, and Africa (Egypt and Nigeria). However, the emphasis is on the counter-terrorism approaches concerning constitutionalism and the rule of law in Kenya.

#### **2.2 Due Process Model of Criminal Justice**

In the 1960s, legal scholar Herbert L. Packer created the due process model of criminal justice to describe exceeding expectations of the criminal justice system (Packer, 1964). The due process model starts with skepticism about the morality and utility of the criminal sanction. This skepticism is based on the liberal values of the primacy of the individual and the complementary concept of limitation on official power and concerns about the intrusive policing required to enforce laws. Many police cases of abuse could be prevented if the legislature did not insist on criminalizing such activities. The due process model places much less emphasis on efficiency and guilty pleas taken in the court system (Packer, 1968).

Furthermore, the due process model is also concerned with equality in the sense that all accused regardless of wealth or social status should receive equal treatment. It is assumed that protecting the due process rights of all accused will protect the rights of the most disadvantaged. Moreover, it imposes numerous restraints on the police to protect the rights of suspects and minimize informal fact-finding in the streets and station houses (Packer, 1968).



For instance the police should not arrest or detain suspects in order to develop their case. If there is any communication between the police and the suspect, the accused should be carefully informed about the right to be silent and the right to contact counsel. Any statements taken absent a clear and voluntary waiver by the accused of his or her rights should be excluded from a subsequent criminal trial in order to protect the accused from unfair self-incrimination (Packer, 1968, p. 203).

The rationale of exclusion is not that the confession is untrustworthy, but that it is at odds with the postulates of an accusatory system of criminal justice in which it is up to the state to make its case against a defendant without forcing him to co-operate in the process, and without capitalizing on his ignorance of his legal rights. The criminal trials of the factually guilty accused must address violations of their rights because those subject to police abuse will not as required by the crime control model be able to bring separate civil, disciplinary, or criminal actions against the police and prosecution (Packer, 1968, p.191).

Besides, the police and prosecutors are so concerned with short cuts that it is necessary within the trial to penalize, and label as inefficient any violations of the accused's rights. Strong “prophylactic and deterrent exclusionary rules” are necessary because police abuse will never reach the stage of a criminal trial. Notwithstanding, due to the presumption of innocence and the harmful effects of pre-trial detention on the preparation of a defense, an accused should be detained awaiting trial only when absolutely necessary to ensure attendance at trial (Roach, 1999).

Also, alternatives to cash bail should be used because “a system that makes pre-trial freedom conditional on financial ability is discriminatory. Neither the prosecutor nor the judge should encourage guilty pleas by offering deals to an accused who pleads guilty. A criminal trial should be viewed not as an undesirable burden but rather as the logical and proper culmination of

the process. The criminal trial is concerned not with factual guilt but with whether the prosecutor can establish legal guilt beyond a reasonable doubt because of legally obtained evidence. Only defense lawyers and appointed judges can be relied upon to appreciate the importance of legal guilt (Packer, 1968,p. 122).

Moreover, due to concerns of minor risks of convicting the innocent, the accused should have wide rights of appeal. Appellate courts should reverse convictions whenever trial judges failed to protect the accused's rights. "The reversal of a criminal conviction is a small price to pay for an affirmation of proper values and a deterrent example of what will happen when those values are slighted". Besides, the legislature sets the tone by criminalizing much conduct under the crime control model making the Supreme Court the most important institution in the due process model because it defines the legal rights and remedies of the accused (Roach, 1999, p.15).

Nonetheless, due process in the context of terrorism in criminal proceedings demands that the police should not arrest or detain terror suspects in order to develop their case. If there is any communication between the police and the terror suspect, the accused should be carefully informed about the right to be silent and the right to contact counsel. Any statements taken absent a clear and voluntary waiver by the terror suspect of his or her rights should be excluded from a subsequent criminal trial in order to protect the accused from unfair self-incrimination (Packer, 1968, p. 203).

### **2.3 United States Counterterrorism**

The global fight against terrorism took a different angle when the former President of United States George W. Bush announced the now-famous word "War on Terror". The United States led its allies in a conflict that was considered both cultural and religious. Scholars such as Samuel P. Huntington (2000) had predicted the conflict in his book, *Clash of Civilization*. The

prediction was based on hypothesis that the fundamental source of conflict in the new world will not be primarily ideological or primarily economic. The great divisions among humankind and the dominating source of conflict will be cultural. Nation-states will remain the most powerful actors in world affairs, but the principal conflicts of global politics will occur between nations and groups of different civilizations. The class of civilizations will dominate global politics. The fault lines between civilizations will be the battle lines of the future (Huntington, 2000).

The prediction was accurate regarding source of conflict being based on cultural differences. However, the prediction was not accurate given that the prediction underscored the significance ideology and economic difference in conflicts in general and terrorism in particular. The terrorism and war on terror has also taken the ideological and economic power in addition to being cultural divide of religious in nature. Besides, the United States argued its goal was to deter, disrupt, and defeat radical Islamic terror groups that were targeting the United States and its allies (Greenberg, 2005).

In 2002, President Bush gave the Central Intelligence Agency, CIA a directive to establish the “High Valued Target (HVT)” Program to capture individuals who pose serious threats to the United States population and its interests. The intelligence agencies had maximum power to capture, detain, and transfer prisoners from any country even without the consent of the host country. Military prisons for captured suspected terrorists were established in places that the United States Courts had no jurisdiction such as Abu Ghraib in Afghanistan, and Guantanamo Bay Naval Base in Cuba. This provided room for the United States to conduct clandestine operations against those that they considered being enemies of the United States and its allies (Greenberg, 2005).

### **2.3.1 The Torture Memos**

The Office of Legal Counsel at the Department of Justice, senior White House staff members, and the U.S. Joint Chief of Staff gave the U.S. government the green light to conduct military operations on suspected terrorists claiming that suspected terrorists were not subjected to the Geneva Conventions and neither did the U.S. laws protect them (Horton, 2005). The United States came up with new interpretations of existing laws that prohibited torture and shielded those that conducted the interrogations from criminal liability. For instance, suspected terrorists were exposed to harsh conditions such as harsh weather, physical pain, confinement, and poor hygiene as methods of interrogation (Londras, 2011).

However, everything came to light when a series of correspondence letters called the *Torture memos* were exposed showing the world the unethical and unconstitutional operations the United States was conducting (Neuborne et al., 2005). Criticism from elected officials and the international community was felt in the Bush Administration. Lawyers offered pro bono services to suspects who had their rights violated. One such case was of Jose Padilla, a U.S citizen who was detained on allegations of terrorist activities. He was detained in a military facility without being afforded any criminal charges violating his constitutional rights (Murphy, 2003).

### **2.3.2 Extraordinary Rendition of Suspected Foreign Nationals**

Rendition is simply defined as transfer and surrendering of a suspect from one country to another. On the other hand, *Extraordinary rendition* is the transfer of terrorist suspects covertly to a secret detention facility in another country. The practice circumvents the legal frameworks and procedural process of detaining suspects in the U.S judicial system. Extraordinary rendition of foreign prisoners to other countries such as Egypt and Syria by the U.S intelligence agencies was done to change the climate of interrogation practices (Murray, 2011).

Notwithstanding, the Middle East relationship with Western countries has been a major concern in the age of the War on Terror. Counter-terrorism has been a key United States strategic interest in the whole of the Middle Eastern region. For instance, the Abu Ghraib detention Center in Afghanistan was used to torture suspected terrorist with collaboration with some Middle Eastern countries such as Saudi Arabia. Khaled El-Masri, an innocent person was kidnapped and taken to Afghanistan by the CIA where he was interrogated and tortured before being dumped in the Albanian countryside. This is a direct operational collaboration between the Middle Eastern regimes and the United States' secret operative abuse of rights of citizens in the Middle East (Honigsberg & Chemerinsky, 2009).

## **2.4 African Response to Terrorism**

### **2.4.1 Nigeria**

Nigeria for years has been plagued by the terror group, Boko Haram which means “Western education is forbidden”. Boko Haram, a terror group mainly in the Northern part of Nigeria has established a campaign of violence that has led to an enormous loss of life and property, destroyed sources of livelihood and fractured many families in northern Nigeria, thus constituting a violation of the right to life as well as the right to private and family life (Tinnes, 2019).

However, the Nigerian Joint Task Force (JTF) for counter-terrorism have been accused of greater violence, human rights abuses, in stark contrast to Nigeria's obligations under international human rights law, the Nigerian 1999 Constitution and the ideal vision and principles espoused in both the 2014 National Counter-Terrorism Strategy and Nigerian Terrorism Prevention Act (TPA), 2013. Reports on the security challenges in the North-East Zone of Nigeria have reaffirmed the allegations of high-handedness by the Nigerian JTF, bordering on rape,

destruction of property, extra-judicial killings, harassment and intimidation of Maiduguri residents in the North (Hassan et al., 2018).

The Nigerian JTF has a reputation for summarily executing persons arrested on suspicion of being members of Boko Haram. Most victims are killed during JTF operations and labelled as terrorists while others are executed after arrest or in custody. Others are abducted from their homes and executed in isolated places outside their homes, shot or beaten to death in detention, or killed and dumped on the streets. Amnesty International has chronicled some incidents of extra-judicial executions and enforced disappearance in its reports (Knoechelmann, 2014).

Furthermore, Nigeria's criminal justice system is dealing with thousands of people in mass trials related to terrorism offenses such as those committed by Boko Haram terror suspects. Nigeria conducted trials between 2017 and 2018 in three phases each phase lasting no more than five days. Thus, the system is struggling to ensure fair trials for terrorism suspects who have been arrested and detained. This has shown that the Nigerian criminal justice system has been strenuous for the terror suspects to get a fair trial (Knoechelmann, 2014).

#### **2.4.2 Egypt**

On 24 July 2013, three weeks after Egypt's army removed Muslim Brotherhood member Mohammed Morsi from the presidency, Abdel Fattah el-Sisi, the then defense minister called on the Egyptian people to back the army and the police in the fight against terrorism across the country. Seen as a way to create a mandate for continued military rule after the coup, this call to fight terror has defined Egypt ever since (HRW, 2018).

Since 2014, the Egyptian government has used terror threats to justify repressive counter-terror (CT) laws to clamp down on dissent, mass incarceration, military tribunals, torture and extra-judicial killing. The strategy not only targets suspected criminals but also journalists and dissenting

citizens. In Sinai, the war is due to the collective punishment of local communities who have faced aerial bombardment, forced displacement, and deprivation of essential services (Egypt, 2020).

For instance, on 9 April 2017, an ISIS affiliate planted bombs at St George's Church in Tanta and St Mark's Church in Alexandria, killing 45 and injuring 125 others. The government declared a national state of emergency and granted the Egyptian government further license to pursue counter-terrorism policies at any cost. The Egyptian government issued legislation and amended old ones on counter-terrorism issues. They blocked websites, put approximately 3,000 people on 'terrorism' lists, killed over 3,000 people, and made arrests numbering in the tens of thousands. Key threads of Egypt's repressive web of counterterrorism measures include its legal foundations, the detention, trial and incarceration system, the reliance on disappearances, torture and extra-judicial killings, and the dismantling of press freedom (HRW, 2018).

## **2.5 Counter-Terrorism in Kenya**

On paper, Kenya like any other State has affirmed its commitment to international treaties and conventions that deal with counter-terrorism. Moreover, Kenya has been at the forefront of the African Union counter-terrorism agenda where it plays a key role in security issues in the Horn of Africa. Moreover, Kenya has established its counter-terrorism strategies in the fight against terrorism such as the regeneration of the National Security Intelligence Service (N.S.I.S) to the National Intelligence Service (N.I.S) to provide a clear mandated structure to the organization (Aronson, 2013).

Kenya has partnered with the United States through the United States Anti-Terrorism Assistance (A.T.A) to establish the Anti-Terrorism Police Unit (A.T.P.U), a clandestine police unit and established the first overseas Joint Terrorism Task Force – Kenya (JTTF-K) when it partnered with the U.S Department of State and the Federal Bureau of Investigation (FBI) (U.S Embassy

Kenya, 2019). However, the government efforts to counter terrorism have resulted in sweeping police powers that have been used to violate human rights abuses and silence government critics. Enacted anti-terrorism laws provide only a vague definition of terrorism, greatly expanding police powers, and allows the state to create lists of suspected terrorists and terrorist organizations without due process (Mazrui, 2018).

For instance, in the aftermath of the 2015 al-Shabaab attack on Garissa University College, two civil society organizations MUHURI and HAKI Africa had their bank accounts suspended after they were accused of funding terrorism but the state was unable to prove the allegations in court. In a 2015 report, the Kenya National Commission on Human Rights (KNCHR) documented over 120 cases of egregious human rights violations, including 25 extrajudicial killings and 81 enforced disappearances, since the start of the crackdown against terrorism in 2013 (KNCHR, 2015).

### **2.5.1 Kasarani Detention Chronicle**

From the onset, anti-terrorism measures have been seen to target individuals from a certain ethnic and religious affiliation. Thus, the Somali communities who are predominantly Muslims have been targeted by counter-terrorism security agencies whenever a terrorist attack occurs. For instance, between March and May 2014 under the security operation dubbed, “Operation Usalama Watch” (Amnesty, 2014) members of the Somali community in Eastleigh and its environs were rounded up in the wee hours of the night without arrest warrants, and taken to the Kasarani Sports Stadium Complex, Nairobi where the State had accommodated the suspects. This was done under the guise of combating terrorism that the government had stated was the basis of the operation. A mixture of refugees and asylum seekers from Somalia were detained on suspicion of terrorist activities and for being sympathizers of Al-Shabaab (ICJ-Kenya & Justice Forum, 2015)



Some refugees and asylum seekers were forcefully returned to Somalia and refugee camps experiencing harsh living conditions and violations of human rights for refugees. The government had violated the human rights of foreign individuals under the 1985 Universal Declaration of Human Rights, Refugee Act Section 16 (2006), and Chapter IV, Bill of Rights in the Kenyan Constitution which guarantees the fundamental rights and freedoms of all individuals in Kenya. (ICJ-Kenya & Justice Forum, 2015).

Nonetheless, The International Commission of Jurists, Kenyan Chapter wrote a report, *African Charter on Human Rights and People's Rights against Somali Refugee and Asylum Seekers in The Republic of Kenya During "Operation Usalama Watch"* stating that the rights of the Somali foreign national were violated by the Kenyan government. The research report found that the Somali nationals were mistreated in the detention and forcefully deported or taken to camps without consent (ICJ-Kenya & Justice Forum, 2015).

### **2.5.2 Extrajudicial Measures**

According to Elfversson and Höglund (2019, p.358), Kenya's Anti-Terrorism Police Unit (ATPU) has been abusing human rights and violating international, regional, and domestic laws when combating terrorism. The ATPU has used excessive force when raiding houses of people suspected of terrorism, torturing them, and in the process of mistreating detainees whenever in custody. Moreover, they have been accused of extrajudicial measures such as arbitrary detentions, disappearances of suspects, and the rendering of terror suspects to other jurisdictions where they usually face torture (HRW, 2014).

For instance, there have been documented cases on allegations that the ATPU has been executing terror suspects such as the case of Kassim Omollo and Salim Mohammed Nero in Mombasa, Kenya. Moreover, the pattern has shown that the unconstitutional operations have been

directed on a particular ethnic and religious group such as the Somali-Muslims in Kenya. Nonetheless, the government of Kenya has repeatedly denied such allegations and any involvement in extrajudicial killings by their counter-terrorism unit (Open Society Justice Initiative, 2013).

Consequently, the Open Society Justice Initiative has accused the government of rendition of terror suspects to other countries. The rendition of terror suspects is unconstitutional because they infringe on the Bill of Rights and Citizenship right under the Constitution of Kenya, 2010. For instance, on July 11, 2010 revelers in two locales watching the 2010 World Cup final match were bombed by the militant group Al-Shabaab. After investigations, nine suspects from Kenya were held accountable for the bombings and were captured and rendered to Uganda to face terror charges. This was unlawful as authorities did not follow proper extradition rules of suspects to other countries. Also, the rendition of terror suspects in Kenya has been done to jurisdictions in Somalia and the United States where suspects have faced torture and ill-treatment in detentions (Open Society Justice Initiative, 2012).

### **2.5.3 Criminal Justice System and Terror Suspects**

The legal frameworks in the application of bail are from Article 49 of the Constitution of Kenya (2010), the Criminal Procedure Code (Cap. 75 of the Laws of Kenya), and the Bail and Bond Policy Guidelines, 2015. Moreover, Article 49(1)(h) of the Constitution of Kenya (2010) gives an arrested person the right to be released on bond or bail, on reasonable conditions, pending a charge or trial, unless there are compelling reasons not to be released. Furthermore, Article 49(2) of the Constitution stipulates that A person shall not be remanded in custody for an offense if the offense is punishable by a fine only or by imprisonment for not more than six months.

Pinto (2016) argued that the main issue of terrorism regarding the issuance of bail to terror suspects should be about public safety and not public opinion. The Kenyan government's various new security laws had deprived some of the rights of its citizens in the criminal justice system. However, even though Article 49(h), Constitution of Kenya (2010) has constituted the right to bail of an arrested person, the anti-terrorism laws sought to deny bail to terror suspects because citizens would not feel safe if suspected terrorists were released from custody.

Kantai (2017) supported the arguments made by Pinto (2016) where he reiterated that the bond and bail guidelines had failed to clarify matters on bail for suspected terrorists. This compelled the Judiciary to further interpret and define compelling reasons leading to inconsistencies in the manner in which bail is granted. Furthermore, the release of some suspected terrorists on bail by the Courts in Kenya was against the security of the state as some who were released had gone to commit further acts of terrorism.

Omondi (2015) on the *issue of balancing bail and state security in Kenya* stated that there should be a clear understanding of terrorism and terrorism act before an individual is considered a terror suspect. Also, the executive, legislature, and judiciary should play an important role in ensuring that the fundamental rights and freedom enshrined in the Constitution of Kenya are guaranteed to individuals who are suspected of terror activities. Furthermore, there should be a balance in legislation between the right to bail and the state of security in Kenya. Thus, the author argued that the executive and legislature have established and implemented laws that are outside the constitutional framework. Therefore, it is up to the judiciary to ensure that the rule of law and the fundamental rights in the Kenyan constitution 2010 were observed.

Notwithstanding, every right of terror suspects is fundamentally enshrined in the Constitution of Kenya (2010). Terror suspects need to be afforded bail hearing and deserve a fair

trial because terrorism can be regarded as any other criminal activity. Thus, criminals are protected by the Bill of Rights under the Constitution of Kenya, 2010 (CoK). Legislations by Parliament on issues of related to terrorism should be consistent with article 2(1) and (4) of the Constitution of Kenya 2010. Meaning, "the constitution is the supreme law of the Republic and binds all persons in all state organs at both levels of government and that any law including customary law that is inconsistent with the CoK is void to the extent of the inconsistency and any act or omission in contravention of this constitution is invalid". Therefore, the SLAA (2014) and the POTA (2012) limited the fundamental freedoms and rights of terror suspects making it unconstitutional (Omondi, 2015).

## **2.6 Research Gap**

Previous studies on counter-terrorism have focused on issues such as torture, internment, indefinite detention, and rendition of terror suspects. Relevant literature has been written on how states are violating their constitutional frameworks and international human rights laws when combating terror. Thus, literature review from the United States, Nigeria, Egypt and specifically Kenya examined issues such as arrest, extrajudicial measures, issuance of bail, fair trial, and torture of suspected terrorists as part of the violation of fundamental and international human rights.

Moreover, the literature review in Kenya has indicated a tension between the fundamental liberties granted by the Kenyan Constitution and the need for government to protect its citizens. Other literature has reviewed issues of legal discourse in determining whether civil liberties have been infringed upon to a dangerous extent. Thus, the literature review on Kenya has not clearly shown that Kenya's counterterrorism strategies have modeled crime control principles that disregard individual rights and freedoms of terror suspects in the criminal justice system, most of

the research have been done in foreign countries. Terror suspects have not been given due process of the law mandated by the constitution.

## **2.7 Theoretical Framework**

The main objective of the study was to evaluate the efficacy of due process model of criminal justice in countering terrorism in Kenya. Thus, in order to explain the objective, the study adopted a constitutionalism theoretical framework underpinned by the liberal democracy theoretical foundation. Lastly, the study analyzed the due process theoretical model against the crime control theory of criminal justice to best understand the due process rights during the criminal process of suspected terrorists. The theories underpinned the study on the application of due process when dealing with individual rights of terror suspects.

### **2.7.1 Constitutionalism**

According to Anderson (2012), constitutionalism is an ideology that advocated for the need for a limited government. Constitutionalism can be simplified as a synonym for limited government. The government's legitimacy and authority should be derived from the limited powers prescribed in the Constitution. Accordingly, constitutionalism is defined as a complex of ideas, attitudes, and patterns of behavior elaborating the principle that the authority of government derives from and is limited by a body of fundamental law.

Constitutionalism is a broad spectrum that includes the rule of law. S A de Smith in *The new Commonwealth and its constitutions (1964)* stated that:

Constitutionalism is practiced in a country where the government is genuinely accountable to an entity or organ distinct from itself where elections are freely held on a wide franchise at frequent intervals, where political groups are free to organize in opposition to the

government in office and where there are effective legal guarantees of fundamental civil liberties enforced by an independent judiciary.

A constitution is a collection of written or unwritten fundamental rules and principles that prevent the government from exercising arbitrary power. Notwithstanding, principles of constitutionalism cannot be universally interpreted because they have to be applied and constituted to different social settings such as local, regional, national, and internationally based on differences in governance. Moreover, constitutionalism and the rule of law exemplify the values of a pre-existing society and also develop values which go beyond historical and social likelihoods (Mbondenyei et al., 2011).

Classical republican political theorists argue that constitutionalism should establish political equality and balance of power in political leadership within the polity. However, modern liberal theorists argue that individual rights and freedoms, separation of powers and the rule of law are paramount to the ideals of constitutionalism. There should be institutions in place that guarantee constitutional arrangements and prevent the violation of the constitution (Billias, 2009). Also, Louis Henkin stated that for the realization of such provisions, constitutionalism should have the following principles:

(1) government according to the constitution; (2) separation of power; (3) sovereignty of the people and democratic government; (4) constitutional review; (5) independent judiciary; (6) limited government subject to a bill of individual rights; (7) controlling the police; (8) civilian control of the military; and (9) no state power, or very limited and strictly circumscribed state power, to suspend the operation of some parts of, or the entire, constitution (Henkin, 1989).

### **2.7.2 Liberal Democracy**

Liberal democracy strengthens the constitutional frameworks of separation of powers, an independent judiciary, and a system of checks and balances among the branches of government. Liberal democracy framework outlines the importance of the state observing the principles of rule of law and due process of the law such as the law is supreme, equality before the law, accountability to the law, fairness in the application of the law, participation in decision-making, legal inevitability, lack of arbitrariness and procedural, and legal transparency (Galston, 2018).

Furthermore, Galston (2018) argued that legal restraint imposed on the government in the form of constitutional protections, forms an integral part of any liberal democratic polity. This is because the rights of the accused must be protected, the powers of police must be limited by such imperatives as reasonable suspicion and due process, and lastly, legal redress must be available for those accused of committing a crime. It is the existence of such protections that legitimize and create public acceptance of the state's use of coercive violence in the exercise of criminal justice.

Notwithstanding, the legitimacy of the state is paramount and there should be an authority that leads those connected to it to believe that it is appropriate, proper, and just. Changing people's perceptions through coercion and use of power is ineffective and costly. Moreover, empirical research has shown that the legitimacy of authority is the primary reason for individual obedience of the law rather than deterrence (Renzo, 2011). Law enforcement may possess the power to deter illegal actions but legitimacy from the general public is essential in upholding the law. The benefits of legitimacy especially in combating terrorism are too important for countries such as Kenya to neglect.

Furthermore, the legitimacy of state practices generates support from the community and ensures cooperation in policing the community. For instance, the United States counter-terrorism

strategies lost global legitimacy due to policies that violated the fundamental rights and freedoms of suspected terrorists. Former President Barack Obama once stated that Guantanamo Bay became a recruiting tool for U.S enemies such as ISIS (Arsenault, 2017).

### **2.7.3 Comparing Due Process and Crime Control Models as a Counterterrorism Tools**

The criminal justice system can be quite complicated especially in the attempt to punish offenders for wrongs committed. Society expects the system to uphold on the protection of individual rights and justice fairly delivered. Ultimately, the balance of these goals is ideal but can be challenging to control crime while ensuring constitutional rights are not infringed during the delivery of justice.

In the 1960s, legal scholar Herbert L. Packer created two criminal justice models to describe exceeding expectations of the criminal justice system: crime control and the due process model. These two models can be competing ideologies in criminal justice but can be merged or balanced to work together. The first tension between these models is often the values they place as most important in the criminal justice system (Packer, 1964).

Firstly, *crime control model* focuses on having an efficient system with the most important function being to suppress and control crime to ensure that society is safe and there is public order. Under this conservative model, controlling crime is more important than individual freedom. To protect society, the crime control model advocates for swift and severe punishment for offenders. The justice process may resemble an ‘assembly-line’ where law enforcement apprehends suspects, the courts determine guilt, and guilty people receive appropriate, and severe, punishments through the correctional system (Packer, 1964).

On the other hand, the *due process model* focuses on having a just and fair criminal justice system for all and a system that does not infringe upon constitutional rights. Furthermore, this



liberal model is more like an ‘obstacle course’ rather than an ‘assembly line.’ The protection of individual rights and freedoms is of utmost importance and has often been aligned more with a liberal perspective (Yerkes, 1969). On the other hand, the crime control model is used when promoting policies that allow the system to get tough, expand police powers, change sentencing practices. Conversely, the due process model may promote policies that require the system to focus on individual rights such as requiring police to inform people under arrest that they have rights not to answer questions without an attorney, provide suspects with an attorney or protect suspects from abuse while in custody (Packer, 1964). Accordingly, Hebert L. Packer stated that the due process model is a liberal perspective that advocates and consists of these six arguments.

**Table 2. 1 Hebert L. Packer’s Due Process Model of Criminal Justice (Duff, 1998).**

<b>DUE PROCESS MODEL</b>	
1.	The most important function of criminal justice should be to provide due process or fundamental fairness under the law.
2.	Criminal justice should concentrate on defendants' rights, not victims' rights because the Bill of Rights expressly provides for the protection of defendants' rights.
3.	Police powers should be limited to prevent official oppression of the individual.
4.	Constitutional rights aren't mere technicalities; criminal justice authorities should be held accountable to rules, procedures, and guidelines to ensure fairness and consistency in the justice process.
5.	The criminal justice process should look like an obstacle course, consisting of a series of impediments that take the form of procedural safeguards that serve as much to protect the factually innocent as to convict the factually guilty.
6.	The government shouldn't hold a person guilty solely based on the facts; a person should be found guilty only if the government follows legal procedures in its fact-finding.

The due process model formed the back born of this study. Precisely, this research filled in the gap of research and the due process model of criminal justice in combating terrorism in Kenya. It examined the due process model from the perspective of arrests and custody and how these processes are articulated and implemented. The study evaluated the provisions of the counter terrorism laws enacted in Kenya and compare them with the principles of the due process model to identify any deviations.

## **CHAPTER THREE**

### **3.0 METHODOLOGY**

#### **3.1 Introduction**

This section presents a discussion of the methodology adopted for the study. It begins with the site of study, research design, study population and sample technique procedure of the study. Also, the data collection methods, instruments and procedures, and data analysis procedures are presented. The section ends with a presentation of the ethical issues and limitations in the proposed study.

#### **3.2 Site of Study**

The site of study for this research was Eastleigh North and Eastleigh South wards (wards are subdivided locations which form a constituency) of Kamukunji Constituency, Nairobi County. Eastleigh was deemed to be a good site for study due to its population where you will find people of all works of lives and from different tribes in Kenya and for it being a business hub which is targeted by terrorists. Nairobi houses the headquarters for counterterrorism and criminal justice institutions that are helpful to the study. Also Nairobi County being the capital city was the place to find experts and respondents for this research.

#### **3.3 Research Design**

This research adopted a mixed methods design to answer the research questions guiding the study. Mixed methods research was used to collect and analyze both quantitative and qualitative research to help address questions concerned with developing an understanding of the meaning due process and constitutionalism in the counter-terrorism strategies. The qualitative research design sought to answer the research questions based on content analysis of qualitative data collected. The qualitative method of research was favorable for this study because the

researcher does not know inductively what to expect. This design is beneficial for terrorism and counterterrorism analysis because of its exploratory approach. Hence, the research was intergrated with quantitative research to quantify the collection and analysis of qualititative data. The mixed methods reaserch is used to strengthen a study's findings and contribute to answering the research questions.

Nonetheless, the research was guided by a case study approach, where the researcher studied the case of Eastleigh North and Eastleigh South wards in Kamukunji Constituency. The use of case studies helps explore the phenomenon in context by making use of the varied information sources for an in-depth analysis. Consequently, the approach evaluated the outcomes of the use of Kenya's counterterrorism approach and its legal implications if any.

### **3.4 Study Population and Sample Selection Procedure**

#### **3.4.1 Study Population**

The target population for the study was segmented into three major groups. The first category included counter-terrorism experts, police officers, officers from Independent Police Oversight Authority (IPOA), officers from Amnesty International, officers from Law Society of Kenya (LSK) and officers from Kenya National Human Rights Commission (KNHRC). The category of the population are people who are knowledgeable and have relevant experience concerning counter-terrorism strategies and laws. The second category of the population included the residents of Eastleigh North and Eastleigh Southwards of Kamukunji Constituency, Nairobi County. The category dealt with issues concerning the residents of Eastleigh. The third category of the population was specifically residents of Eastleigh North and Eastleigh South of Nairobi County who had either been directly accused of being a terror suspect or witnessed a relative, a friend, or a person close to them accused of being a terror suspect.

### **3.4.2 Sample Selection Procedure**

Concerning the first segment of the population comprising counter-terrorism experts, police officers, officers from Amnesty International, officers from Independent Police Oversight Authority (IPOA), officers from Law Society of Kenya (LSK) and officers from Kenya National Human Rights Commission (KNHRC), the researcher adopted purposive sampling to select participants in the study. In purposive sampling, a researcher has the research objectives to be achieved and the prospective participants have the required information needed to achieve research objectives (Etikan, Musa, & Alkassim, 2016). The researcher purposively picked one (1) representative from Independent Police Oversight Authority (IPOA), three (3) police officers from Kenya Police Service, one (1) representative from Kenya National Human rights commission (KNHRC) and one (1) representative from Amnesty International, and three (3) counter terrorism experts drawn from academia and counter-terrorism department. All the key informants were nine (9) in total.

Regarding the second category of the population comprising of residents of Eastleigh North and Eastleigh South wards of Kamukunji Constituency of Nairobi County, the researcher adopted stratified random sampling technique where the total population of 268,276 people living in Kamukunji Sub County were segmented into five wards. Thereafter, two wards, Eastleigh North and Eastleigh South wards were singled out as the target population. The population living in the two wards according to the last census report was 163,462 people (KNBS, 2019). Consequently, the study used simple random sampling to pick respondents to participate in the study. The respondents were adults who were above 18 years of age and possessed any form of Identification documents recognized by the Kenyan government. The sample size was determined by the formulae suggested by Kothari (2012, p.77) to determine the sample size for the residents of

Eastleigh North and Eastleigh South wards to participate in the study. The formulae is presented below:

$$n = \frac{z^2 pq N}{e^2 (N-1) + z^2 pq}$$

Where  $e$  is the error for this study, taken as 9%;  $p$  is the population reliability, taken as  $p=0.5$ ;  $q = (1-p)$ ,  $z$  is the normal distribution at 0.05 level of significance such that  $z = 1.96$ ,  $N$  is target population and  $n$  is the sample size. The sample size is therefore calculated as shown below.

$$n = \frac{1.96^2 * 1.96^2 * 0.5 * 0.5 * 163462}{0.1^2 * 0.1(163462-1) + 1.96^2 * 1.96^2 * 0.5 * 0.5}$$

$$n = 95.92$$

$$n = 96$$

Nonetheless, on the third category of the population, snowball sampling was adopted to first identify a few residents who have in the past been directly accused of being a terror suspect or witnessed a relative, a friend, or a person close to them accused of being a terror suspect. The first respondents identified linked the researcher to other would-be respondents possessing the same characteristics. The researcher intended to collect information from at least ten respondents who had been a victim of the court criminal justice system or related to someone who underwent the criminal justice system in a terrorism case.

### **3.5 Data Collection Technique**

#### **3.5.1 Key Informant Interviews**

The research used key informants interviews to collect information from the key informants comprising of police officers, counterterrorism experts and human rights defenders. An interview guide comprising of open-ended questions was administered by the researcher. The key informant interview was administered conversationally with questions that do not limit the

interviewee and focuses the conversations in the desired path regarding research objectives. This allowed a degree of freedom and adaptability in getting the information from the interviewee. The disadvantage with this is that it is subject to personal moods and interpersonal dynamics (Pallavi, 2002).

### **3.5.2 Questionnaires**

The data collection instrument was administered to the individual community members from the two wards of Eastleigh Area as a self-administered questionnaire. Semi-structured questionnaires were used to collect qualitative information from residents of Eastleigh North and Eastleigh South Wards of Kamukunji Constituency, Nairobi County. Also, the researcher asked residents of Eastleigh North and Eastleigh South to fill the questionnaires through ward administrators and assistant chiefs. The questionnaires were distributed to the participants through the help of two voluntary research assistants. Thus, all the filled questionnaires were collected back immediately after for further analysis. Besides, the data collection happened during the COVID-19 pandemic limiting direct interaction with people. However, the researcher observed the guidelines outlined by the Ministry of Health (MoH) and wore protective mask, sanitizers and observed social distancing with the respondents and among respondents who filled the questionnaires as advised.

### **3.5.3 In-Depth Interview**

The study adopted an in-depth interview schedule to collect qualitative information from residents who have in the past been directly accused of being a terror suspect or witnessed a relative, a friend, or a person close to them accused of being a terror suspect. The researcher intended to collect information from at least ten respondents possessing the above qualities. The respondents were subjected to questions already formulated before the interview (Kombo and

Tromp, 2013, p.55). The interview schedule had open-ended questions to record the respondents' views and additional experiences. Nonetheless, the researcher noted the information given by writing down the points during the interview. The researcher also used a voice recorder to capture the deep experiences of the respondents who narrated of the time they were either accused or watched someone close to them accused.

### **3.6 Data Analysis Methods**

The study was based on descriptive statistics and mixed methods of data analysis. Data collected using questionnaires were first checked for consistency and completeness. Data were then coded and entered into statistical package for social scientists (SPSS) version 23 for further analysis. Data were analyzed using simple descriptive statistics. In the descriptive analysis, frequencies, percentages, the mean and standard deviation will be employed.

Consequently, the researcher relied on mixed methods of data analysis. The interviewer recording was transcribed and organized in the form of major themes. The systematic content analysis method was adopted to analyze the qualitative data collected in the key informant's interview and in-depth interview. The researcher then documented narrative responses at a sufficient level of detail to permit a systematic content analysis of the qualitative data. Narrative reviews of responses provide an in-depth understanding of the respondent's thoughts, experiences and perceptions regarding counter-terrorism measures and the due process model. This further presented in verbatim to help put a human face to the respondents' views and experiences. Content analysis enabled the researcher to draw out themes that are necessary to help answer the research questions. The analyzed data was presented based on major themes around research objectives.



### **3.7 Ethical Consideration**

The study sought and obtained permission to conduct the study from the relevant institutions involved in the area of study. Before embarking on the research, the researcher requested from the University's Institutional Research Board (IRB) a letter for issuance of research permit by the National Commission for Science, Technology and Innovation (NACOSTI). Thus, NACOSTI granted the researcher permission to conduct research in Kenya.

Another key ethical issue was in the area of voluntary participation of the respondents. The researcher obtained informed consent from the participants before commencing the study. The respondents were also free to excuse themselves from the study at any stage if they felt threatened by the questions asked. Also, confidentiality of the respondents and use of information collected was considered by the researcher. The study safeguarded the confidentiality of study subjects by concealing their identity. The researcher has not published any information that can directly be identified with individual respondents.

Nonetheless, the researcher used code names to refer to respondents in the data collected and the respondents were not required to give identifying information such as names, identification documents, telephone numbers or residential house numbers. Moreover, downloaded literature, pictures and graphs from the internet and the library were for the sole purpose of reviewing the study and not to claim ownership of the material used. Thus, the researcher recognized the sources of information used through properly citing the authors of the works. In reporting of research findings, the researcher made sure not to omit any important information provided by the respondents nor falsify the participants' information to suit the researcher's opinion or preempted outcome.

### **3.8 Limitation of Study**

Present-day state practices in response to acts and threats of terrorism are considered to be delicate issues of public safety and national security. As such, information is treated in confidence because states take long to release information on threats even after the threat has been neutralized. The study insignificantly suffered from the limitation of government resources since most of them are considered secret and classified. However, the researcher made use of alternative sources for information about the study to overcome the limitations. The alternative information sources included independent reports by Amnesty international, Kenya National Human Rights Commission.

## **CHAPTER FOUR**

### **4.0 FINDINGS AND DISCUSSIONS**

#### **4.1 Introduction**

The chapter presents the findings and discussion regarding the evaluation of whether due process is applied in the prosecution of terror suspects in Kenya. The data was collected based on the admission of research questionnaires, in-depth interview and key informants interview. The quantitative data collected using questionnaires was analyzed using simple descriptive statistics, the qualitative data was collected using in-depth interview and key informants interview was analyzed using systematic content analysis.

##### **4.1.1 Response Rate**

The researcher printed and administered 96 questionnaires to residents of Eastleigh North and Eastleigh South Wards of Kamukunji Constituenc, Nairobi County. Out of the 96 questionnaires administered, 77 questionnaires were filled and returned to the researcher. The return rate was 80.2% and therefore adequate for further analysis as held by Mugenda and Mugenda (2009) who suggested that a questionnaires return rate of at least 70% is good enough and representative for analysis.

Concerning the key informants' interviews, the researcher was able to collect information from eight (8) informants that included one (1) representative from Independent Police Oversight Authority (IPOA), three (3) police officers from Kenya Police Service, one (1) representative from Kenya National Human Rights Commission (KNHRC), one (1) representatives from Amnesty International, and two (2) counter terrors experts drawn from both the academia and counter-terrorism department. Thus, the response rate of 8(88.8%) of the expected 9(100%) respondents was recorded. Nevertheless, with regards to the in-depth interview, the researcher was able to

collect information from ten (10) respondents who have either been a victim of the court criminal justice system or related to someone who underwent the criminal justice system in a terrorism case in Kenya. The information is summarized in Table 4.1

**Table 4. 1: Response Rate**

<b>Data collection tools</b>	<b>Number of Expected respondents</b>	<b>Actual respondents reached</b>	<b>Percentage Return rate (%)</b>
<i>Questionnaires</i>	96	77	80.2
<i>Key informants interview</i>	9	8	88.8
<i>In-depth interview</i>	10	10	100
<b>Total</b>	<b>115</b>	<b>95</b>	<b>82.6</b>

#### **4.2 Counterterrorism Legislation and the Constitution of Kenya, 2010**

The study sought to examine whether the counter-terrorism legislation, particularly provisions on the arrest of suspected terrorists, is satisfactory as provided under the Constitution of Kenya, 2010. The objective was examined based on information collected from key informant interview comprising of police officers, counterterrorism experts and human rights defenders. The respondents were of the general view that most of the provisions of the counter-terrorism law, the Prevention of Terrorism Act, 2012 (POTA), regarding the arrest of suspected terrorists were in line with the Constitution of Kenya, 2010 (CoK).

Consequently, the respondents were of the general view that POTA has ample safeguards for the rights of persons and entities affected in the process of combating terrorism at least in terms of those areas of contention raised by the 2003 Bill (Suppression of Terrorism Bill, 2003). Also, the respondents were of the view that the Prevention of Terrorism Act , 2012 marks an

improvement in the civil liberties sensibilities of Kenya's counter-terrorism law. Furthermore, the respondents stated that even though the act is by no means perfect since more progress is welcomed, it is a critical document to Kenya's citizens who value both their national security and their human rights. The criminal law expert recruited from academia stated:

“Regarding power of arrest, Section 31 of the act states that: a police officer may arrest a person where he has reasonable grounds to believe that such person has committed or is committing an offence under this Act. The powers of arrest that are vested in police officers under this article are subject to judicial oversight. The police are required to base all arrests on reasonable grounds, and the suspect is to be either taken to court or released within 24 hours as provided by the Constitution. Any continued detention has to be sanctioned by the courts of law...”

However, they were of the view that the enforcement of the counter-terrorism law sometimes goes beyond the constitutional dictates. The officer who makes the arrest may sometimes abuse the powers of arrest given that it is within the opinion of the officer to determine what constitutes terrorism act. In consequence, the representative from Kenya National Human rights commission stated:

“An area of concern is the act is that the police are authorized to arrest without a warrant so long as they have reasonable grounds that an individual is about to commit/is committing or has committed an offense. These are very wide powers that can also be used to arrest (legally) individuals who might never be charged under this act. The arresting officer need not have a particular offence in mind in order to arrest an individual; it's entirely based on his/her perception and whatever he/she considers a terrorist act at that moment...”

### 4.3 Relationship between Counter-Terrorism Strategies and the Principles of Due Process

Additionally, the study sought to investigate the counter-terrorism legislation and strategies and their relationship to the principles of due process and crime control in criminal justice. The objective was first examined based on information collected using a questionnaire. The respondents were presented with several statements regarding due process in the handling of terrorism cases and were required to rate based on the Likert scale (Appendix B).

**Table 4. 2: Perception of the Counterterrorism Strategies Based on Due Process Model**

STATEMENTS	MEAN	SD
The Kenyan courts are fundamentally fair under the law to the accused	2.4043	.61029
The criminal justice in Kenya gives more focus to the process of determining whether a person is guilty or not than the speed of concluding the case	2.3936	.67550
The criminal justice system in Kenya does not protect the rights of the terror suspects	3.3830	.53090
Police powers are limited to prevent official oppression of the individuals accused of terrorism activities	2.2872	.57962
The police and other criminal justice authorities in Kenya are usually held accountable to rules and procedures to ensure fairness for the accused persons.	2.2660	.69057
The government of Kenya through the courts usually hold a person guilty of terrorism activities solely on the facts	3.0532	.44882
A person accused of terror activities in Kenya is only found guilty after the government has followed legal procedures in its fact-finding.	2.5894	.42741

#### **4.3.1 Fairness of Kenyan courts to Accused Persons**

Firstly, the respondents were asked to rate the statement whether the Kenyan courts are fundamentally fair under the law to accused terror suspects. The respondents had a contrary opinion with mean responses tending towards disagreement with the statement ( $M=2.4043$ ). This implies that the Kenyan justice system is not always fair to terror suspects. Also, the study collected information based on in-depth interview of victims affected directly or indirectly by terror cases in Kenya. In the in-depth interview with victims of the criminal justice system in terror cases in Kenya, the respondents were asked what they felt about the whole process when they were accused. The respondents generally tended to hold a deep feeling of disgust about the unfairness by the justice system in Kenya that violated Article 50 of the Constitution of Kenya, 2010 (CoK). They were of the view that the system was never fair to them. One of the respondent stated:

“...I remember around the month of March in 2014, my husband and I were rounded up in the wee hours of the night without any arrest warrants like animals...they took us to Kasarani Stadium and detained us in some makeshift cage overnight. They told us we Somalis are hiding Al-Shabaab and are supporting them with money to kill Kenyans...we felt so bad knowing how hardworking we are and have never participated in any terror activities...”

#### **4.3.2 Focus on the process of determining whether a person is guilty or not**

In addition, the statement that criminal justice system in Kenya gives more focus to the process of determining whether a person is guilty or not than the speed of concluding the case was also not supported by most respondents as depicted by mean responses tending towards disagreement ( $M= 2.3936$ ). This implies that the criminal justice system in Kenya regarding

terrorism cases are more focused on concluding cases rather than the process of determining whether a person is guilty or not.

#### **4.3.3 Criminal Justice System Protects the rights of the Accused**

Respondents were narrowly divided on the statement whether the criminal justice system in Kenya protects the rights of the terror suspects given by mean responses tending towards neutral (M=3.3830). This implies that sometimes the court system is fair but in certain cases, they may be unfair. The respondents were asked whether the police got access to their phone and computer and if yes, did they seek permission from the courts to access their phone and computers in their conversations. Most of the respondents stated that during their arrest, the police took their mobile phones and other communication gadgets. However, the police never waited to seek permission from the court before assessing their phones and other communications gadgets. The police even got into the content of the messages in their phones without any permission from the courts. Thus, it violated Article 50(4) of the CoK, 2010 if any evidence obtained from the devices were obtained illegally deeming any trial unfair and detrimental to the administration of justice.

On the contrary, the representatives from the Kenya Police service (KPS) and other counterterrorism institutions were of the general opinion that criminal justice system in Kenya observes the due process and that the rights of the accused are always protected unless public security is at a stake. The officers were of the general view that they mostly follow the due process of the law while handling terrorism cases. Nonetheless, they confessed that sometimes they are forced to deny respondents their rights to privacy by seizing their communication gadgets to prevent the suspect from interfering with evidence collection and even assisting other suspects from evading arrest. One of the officers interviewed from the Kenya Police Service stated:



“We as Kenya police are law abiding members of the society; we follow due process before arresting and presenting any person in court. On the issue on whether we have excess powers to arrest suspects, I can tell you we deserve to have those powers. Tell me, what should a police officer who gets information that some people somewhere are planning to cause terror in the middle of the night do when the the courts are closed at night ? If we fail to arrest them because we do not have a warrant of arrest and then they go and kill hundreds of Kenyans, who is to be blamed?...”

#### **4.3.4 Limitation of Police Powers**

Most of the respondents were in disagreement with the statement that police powers are limited to prevent official oppression of the individuals accused of terrorism activities as depicted by mean response nearing disagreement ( $M= 2.2872$ ). The respondents were also asked whether they considered the police to be justified in arresting them or the person who was close to them. Most of the respondents had a feeling that the arrests were not justifiable. The respondents believed that most of the arrests were not based on any warrant or facts about them. Furthermore, they said that arrests were not carried out humanely. Victims of such arrests talked of experiences of being arrested at night while asleep without cause or even an arrest warrant presented to them on why they are being arrested. Moreover, they were later made aware of cases against them in the courts after the arrest was done. One respondent whose husband was arrested and taken to court stated that:

“Thinking about how they arrested my husband still gives me fear to date. The police came in our house armed with guns as if we were thugs. They banged the door and before we could even open, the door was broken into with a very loud bang from a heavy metal they had in their hands. My husband who attempted to ask who they were and why they are

breaking into his house was slapped and carried down to a waiting unidentified vehicle. They then told me to close the door as they left...My husband came to learn of the reason for his arrest for the first time when he was being presented to court. They later released him when there was no evidence linking him to terrorism act....”

#### **4.3.5 Police and criminal justice authorities held accountable to rules and Procedures**

The study also asked respondents to rate the statement whether the police and other criminal justice authorities in Kenya are usually held accountable to rules and procedures that ensure fairness for the accused persons. The respondents tended to disagree with the statement as depicted by mean responses leaning to disagreement (M= 2.2660). Also, the respondents were asked whether they or the person arrested was produced in court within 24 hours and if not, was there any reason given for continued detention. Moreover, they were asked if the police gave them a copy of court order authorizing their continued detention.

Thus, most of the respondents said that even though they were presented in court within 24 hours as stipulated in Article 49(1) of Constitution of Kenya, 2010 (CoK), they continued to be detained without justifiable reasons thus violating Article 49(1)(g) of the CoK, 2010. The respondents felt that their continued detention was aimed at planting evidence on them using non-legal methods to collect incriminating evidence against them. Precisely, one of the respondents stated:

“....when they arrested as on March 2014, they never presented us to court within 24 hours as they took advantage of the weekend to detain us up to the following Monday. When they finally presented us to the courts...Believe you me, they asked for more days to continue detaining us as they collect more evidence...what more time did they need to collect more evidence, when they had rounded us like animals and kept us for a whole weekend in

cages? Finally, we were later released when the evidence they were looking for was not convincing to the court. I thank Allah for saving us that day...”

Key informants’ especially human rights defenders believed that the police and other investigating agencies take advantage of the stated provision to confiscate properties such as communication gadgets of the accused person to simulate an urgency and impracticability of getting to court to seek for application. Also, the police sometimes even after seizing communication gadgets belonging to accused person did not make any necessary application within seventy hours as stipulated in the Prevention of Terrorism Act, 2012.

#### **4.3.6 Courts Hold a Person Guilty Solely On the Facts and Evidence**

The respondents were divided on whether the government of Kenya through the courts usually hold a person guilty of terrorism activities solely on the facts as evidenced by mean response tending towards neutral of (M=3.0532). These findings imply that sometimes the accused persons are charged purely based on facts but sometimes the court system tends to be swayed by other factors which may never be facts. Finally, the statement that a person accused of terror activities in Kenya is only found guilty after the government has followed legal procedures in its fact-finding was disapproved by most respondents given that mean responses were tending towards disagreement of (M=2.5894). Also, the researcher collected information from key informant who participated in the study. The respondents from the academia and rights groups like KNHRC and Amnesty had a general view that the criminal justice system in Kenya regarding terror cases did not follow the due process of the law. The representative from KNHRC stated that:

“...I am privy to a number of cases regarding terrorism allegations and court proceedings and I can tell you for a fact that most of the cases never follow due process. We have so many suspects languishing in detention and cells in Kenya on mere allegations of being

sympathizers to al-Shabaab. I know of a case where my client who was arrested in a criminal case was being forced to accept that he had been communicating with Al-Shabaab leadership. Such evidence collected through coercion is illegal and is not in accordance with the due process as enshrined in the Constitution of Kenya...”

#### **4.3.7 Discussion of Finding**

Generally, the study concludes that arresting officers and the criminal justice system officials as a whole mostly do not follow the due process of the law in cases concerning terrorism or terror suspects. The findings from the respondents recruited from residents of both Eastleigh wards in Nairobi County and key informant interviews from human rights groups clearly showed that the problem of not following due process is mostly with the arresting officers and not much with the law itself. Besides, they were of the opinion that the arresting officers sometimes failed to follow the due process of law that were fundamental to rights and freedoms of the accused persons. Thus, it violated various Sections of Chapter Four (Bill of Rights) in the Constitution of Kenya, 2010.

However, the respondents interviewed from the criminal justice system specifically the police officers were of the opinion that out of necessity for the safety of the majority of Kenyan in terms of national security, an individual's rights may be compromised in specific cases. Nonetheless, due to the finding being underpinned by the theoretical framework of due process model of criminal justice system; most of the counter-terrorism strategies in Kenya do not follow the demands of due process model in criminal cases of terrorism in nature. Besides, the due process model holds that protecting the rights of all accused will protect the rights of the most disadvantaged. The due process model imposes numerous restraints on the police to protect the

rights of suspects and minimize informal fact-finding in the streets and station houses (Packer, 1968).

Notwithstanding, in terrorism criminal proceeding, the police should not arrest or detain a terror suspects in order to develop their case. This violates Article 49(1) of the CoK, 2010 that protects the rights of an arrested person. Also, if there is any communication between the police and the terror suspect, the accused should be carefully informed about the right to be silent and the right to contact counsel as stipulated in both Article 49(b)(c) & 50(g) of the Constitution of Kenya, 2010. Any statements taken absent a clear and voluntary waiver by the accused of his or her rights should be excluded from a subsequent criminal trial to protect the accused from unfair self-incrimination (Packer, 1968).

#### **4.4 Deviation of Counterterrorism Strategies from Due Process and Individual Rights**

The study also sought to assess the effects of deviation of counterterrorism strategies from the due process model on the civil and/or social rights of suspected terrorists and their families in Kenya. The data was collected from residents of Eastleigh wards in Nairobi county Kenya. The respondents were presented with several civil right in the Constitution of Kenya and were asked to rate the extent to which the counter-terrorism strategies have impacted on those rights. Likert scale was adopted where 1 was the least extent, 2 was a small extent, 3 was the moderate extent, 4 was a great extent and 5 was a very great extent. The findings are presented in table 4.3.

**Table 4. 3: Effect of Counterterrorism Strategies on Individual Rights**

<b>Rights in the bill of rights</b>	<b>Mean</b>	<b>SD</b>
Right to equality and freedom from discrimination	4.40	0.60845
The right to have dignity respected and protected.	4.38	0.67311
A person shall not be held in slavery or servitude.	4.29	0.58115

Every person has the right to privacy.	4.28	0.59543
Right to be informed promptly of reason of arrest, communicate with an advocate, not to be compelled to make any confession or admission that could be used in evidence against the person.	4.01	0.43759

**4.4.1 Right to equality and freedom from discrimination**

Table 4.4 presents the findings. The study established that the right to equality and freedom from discrimination is affected by the counter-terrorism strategies to a great extent as evidenced by mean responses tending to a very great extent (M=4.40). This implies that the right to equality and freedom from discrimination is usually denied to persons accused of terrorist acts. The responses from the in-depth interview with victims of the criminal justice system in terrorism cases were in agreement with the finding from the respondents who participated in the filling of the questionnaires. Unanimously, the victims believed that the counter-terrorism laws and strategies in Kenya affected negatively the right to equality and freedom from discriminations. The victims’ narrated instances where they felt discriminated based on their faith and descent. Most of the respondents who professed Muslim faith and were of Somali descent believed that the laws of counter-terrorism discriminated upon them. One respondent who participated in the study stated that:

“We as Muslims deeply feel that the counter terrorism strategies and laws in Kenya were made to harass the Muslims especially those of us who are Somalis. How would you explain the government singling out the Somali Muslims out of all the tribes and religion in Kenya, arresting them indiscriminately, and bundling them for mere suspicion that they are supporting terror acts? It is a known fact that those who participate in terrorism cut across all religions, tribes and races. Why single out us (Muslims)?”

#### **4.4.2 Right to have dignity respected and Protected**

Also, the right to have dignity respected and protected was another right that the respondents stated was usually denied in the counter terrorism strategies and law. The mean responses was tending towards an agreement to a great extent (M= 4.38). The respondents who participated in the in-depth interview showed that their right to respect and dignity as a human being were violated by counter-terrorism strategies. Moreover, the respondents narrated of incidences and experiences they had in the hands of security agencies where they were treated without dignity that should be accorded to all human beings. There were instances where the accused persons were picked from their houses and bundled into police vehicles with the victims incurring injuries as a result. For instance, incidences of mass detention where the state treated the accused person without dignity violating their fundamental rights and freedoms. One respondent narrated that:

“I can remember in May 2014 when contingent security forces budged in our house in the middle of the night right here in Eastleigh. My wife and I were grabbed from our bedroom in our sleeping clothes and bundled into a waiting Land Rover. My hand ended up dislocated from being forced to climb on a police Land Rover. We were then taken to Kasarani where we spent the whole night in the cold in our scanty sleeping dresses. What kind of human act was that? Can’t the government just have arrested us in the day or even allowed us the courtesy of changing into better clothes before arresting us? ....”

#### **4.4.3 Protection from Torture and Indefinite Detention**

The respondents were also asked on whether the counter terrorism strategies and law lead to holding accused persons indefinite detention. The respondents were of the general opinion that the right has been denied to a great extent as shown by mean response pointing to a great extent (M=4.29). The victims of counter-terrorism strategies who participated in the in-depth interview

narrated on cases when they were held like slaves in their own country Kenya. The respondents complained about various incidences when they were detained for long in cages without their family knowing their location before they could be charged in court. The long detention in cages and undisclosed locations was a clear depiction of torture and indefinite detention. One respondent whose husband has been detained for close to two years narrated:

“My husband was arrested in 2019 just after the terror attacks in Westland Nairobi...He was accused of having assisted the suspects who participated in the attack at DusitD2 complex at Riverside in Nairobi. Since then, we have never heard from him. We are not even aware of the police station he being held in up to now. My children usually ask me where their father went. I usually lie to them that he went to work abroad and he will be back soon. It breaks my heart telling a lie to my children. How can I even tell them that I do not know where their father is being held?.”

In the KII with the representative from the Independent Police Oversight Authority (IPOA), the Officer was of the general opinion that protection from torture and indefinite detention was not breached by counter-terrorism strategies and laws. The Officer stated that section 32 of Prevention of Terrorism Act, 2012 on the right to be released conforms to the 24-hour detention maximum given in the constitution. Any other extension to the stipulated period requires court approval under several stringent conditions and may not exceed a total of 90 days, inclusive of the initial period of arrest. Furthermore, the provision was in line with Article 49 of the Constitution of Kenya, 2010 on the rights of an arrested person. The officer further argued that the accused persons have the right to petition the courts or the IPOA in cases where police or judicial officers have violated the freedom against torture and indefinite detention as per the CoK, 2010.



#### **4.4.4 Right to Privacy**

The right to privacy is another right that is often denied such that a person is denied the right to privacy and that of his family members. This was evident by mean responses tending towards a great extent (M=4.28). The findings were in agreement with information collected during in-depth interview with victims of the criminal justice system in Kenya. The respondents narrated on incidences when they felt that the government denied their right to privacy. There were incidences where the victims narrated how the security agencies confiscated their mobile phones and other communication gadgets. To make it worse, the police even logged into their social media platforms and checked on the postings. Also, there were incidences where security agencies called using the accused mobile phones impersonating them to get information from the contacts listed that would later be used to incriminate upon them. Some respondents even claimed that they had lost their money in their M-Pesa accounts when the police took their phones away during arrests after asking for their pin numbers.

Notwithstanding, in the Key Informant Interviews done with criminal law expert, the respondent stated that under Article 24 of the Constitution of Kenya, 2010 certain provisions of rights can be limited such as the right to privacy of an accused person within the law. Furthermore, the Prevention of Terrorism Act, 2012 (POTA) is in line with the CoK, 2010 regarding the restriction of the said rights and freedoms. For instance, the respondent stated that section 36 of the POTA, 2012 allows a police officer to intercept conversations subject to the approval of the high court.

Moreover, the respondent considered the provision to be necessary given that terrorism is a complex phenomenon often involving a chain of events and players at different stages. The respondent revealed that the provision is intended to make law enforcement agencies proactive as

opposed to being reactive and hence pre-empt what the terrorists are planning. Interception is a law enforcement tool that is acceptable in most jurisdictions. However, the respondent added that, the powers by police officers to intercept are still subject to administrative and judicial oversight especially the POTA, 2012 which has several inbuilt safeguards. Also, the officer from IPOA while also commenting on the right to privacy stated that:

“...The administrative and judicial oversight regarding power to intercept communication and the admissibility of intercepted communication is intended to prevent the abuse of interceptions by rogue officers. The independent police oversight authority is also expected to address any grievances that may be raised on complaints regarding the abuse by police officers....The interception of communication includes phone tapping, internet monitoring, and house bagging among other methods. This power of intercept communication may have been misunderstood to mean violation of right to privacy”

#### **4.4.5 Rights Arrested Person**

Finally, the study established that the counter-terrorism laws and strategies always deny accused person the rights stipulated in Article 49 of CoK, 2010 of an arrested person. For instance, the right to be informed promptly on the reason of arrest; the right to communicate with an advocate; and the right not to be compelled to make any confession or admission that could be used in evidence against the person. This was depicted by mean responses gravitating to a great extent (M=4.01). The respondents who participated in the in-depth interview narrated on instances when their rights of an arrested person as prescribed in Article 49 of the the CoK, 2010 was denied by the government. For instance, respondents narrated how they were arrested without being informed of the reason for the arrest. Also, they reported incidences when they were not allowed to communicate with their advocates for legal representation in the cases they were being accused.

The respondents also narrated on the cases where they were not produced in court within the 24 hours stipulated in the constitution. One respondent who was arrested together with her husband narrated:

“...my husband who attempted to ask who they were and why are they breaking into his house was slapped and carried shoulder high into their waiting vehicle. They then told us to close the door and they left...My husband came to learn of the reason for his arrest for the first time when he was presented in court. They later released him when there was no evidence linking him to being a terrorist....”

Also, another victim narrated on how he was denied legal representation since he could not afford to pay for the services of an advocate. The respondent spoke of how the police harassed him with questions without any legal representation. One victim of the ordeal stated that even after making pleas with the police while he was held in the police station, they refused to allow him to talk to his wife who arranges for him to get legal representation. Another respondent stated how the police used intimidation to compel him to confess to being an accomplice.

In the KII interview with a criminal law expert from the University of Nairobi, they stated that section 31 of Prevention of Terrorism Act, 2012 (POTA) posits that: “a police officer may arrest a person where he has reasonable grounds to believe that such person has committed or is committing an offence under this Act”. The respondent argued the section gave police powers of arrest that were vague and ambiguous making them subject to judicial oversight. Furthermore, the police are required to base all arrests on reasonable grounds, and the suspect is to be either taken to court or released within 24 hours as provided by Article 49 of the Constitution of Kenya, 2010.

Nonetheless, continued detention has to be sanctioned by the courts of law. Moreover, the police should not be authorized to arrest without a warrant so long as they have “reasonable

grounds” that an individual is about to commit/is committing or has committed an offense. The respondent further argued that these are very wide powers that can also be used to legally arrest individuals who might never be charged under the act. The respondent felt that instances, where the accused has been arrested illegally, could be due to officers having wide powers under the act.

#### **4.4.6 Discussion of Findings**

Generally, the study has established that the rights enshrined in Chapter 4 (Bill of Rights) of the Constitution of Kenya, 2010 have been violated in various cases of counterterrorism. The respondents who participated in the questionnaires and the in-depth analysis highlighted a Kenyan criminal justice system that is unfair to the accused persons. Moreover, there was a consensus that various rights are denied by the criminal justice system in Kenya. For instance, rights of arrested persons, right of privacy, protection from torture and indefinite detention among others. However, it was noted that the opinion of the general public could be influenced by other factors such as what the media bias on the criminal justice system, and isolated cases that may not capture the whole picture of the criminal justice system in Kenya. Nonetheless, responses from the key informants’ interview reveal that there are justifiable cases where civil liberties and rights may be denied especially when the safety of the public and their property are at stake. This they backed by referencing Article 24 of the Constitution of Kenya, 2010 that stipulates on the limitation of fundamental rights and freedoms only when “the limitation is reasonable and justifiable in an open and democratic society”.

Regarding fundamental rights, the Constitution of Kenya is quite exhaustive and is the supreme law of the land. Thus, all other laws must be in tandem with the constitution to stand the test of constitutionalism and the rule of law. The rights and freedoms which have been limited in

the POTA, 2012 have all passed the test of Article 24 of the Constitution of Kenya, 2010 which states that :

(1) A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—

(a) The nature of the right or fundamental freedom;

(b) The importance of the purpose of the limitation;

(c) The nature and extent of the limitation;

(d) The need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and

(e) The relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose (CoK, 2010).

## **CHAPTER FIVE**

### **5.0 SUMMARY, CONCLUSIONS AND RECOMMENDATIONS**

#### **5.1 Introduction**

The chapter examines the summary of findings, conclusion, recommendations and areas for further research.

#### **5.2 Summary of Findings and Conclusion**

The main objective of the study was to evaluate whether due process is applied in the prosecution of terror suspects in Kenya. The study was guided by the following specific objectives. To examine whether the counterterrorism laws, particularly provisions on the arrest of suspected terrorists, are satisfactory as provided under the Constitution of Kenya, 2010; To evaluate the counter-terrorism strategies correlation to the principles of due process and crime control in criminal justice. To assess the impact of deviation of counterterrorism strategies from due process on the human rights of suspected terrorists and their families in Kenya.

##### **5.2.1 Counterterrorism Legislation and the Constitution of Kenya, 2010**

The study sought to examine whether the counterterrorism legislation, particularly provisions on the arrest of suspected terrorists, is satisfactory as provided under Article 49 of the Constitution of Kenya, 2010. The study revealed that most of the provisions of the counterterrorism law such as POTA, 2012, regarding the arrest of suspected terrorists were in line with the Constitution of Kenya, 2010. The study revealed that the POTA, 2012 had ample safeguards for the rights of persons and entities affected in the process of combating terrorism at least in terms of those areas of contention raised by the Suppression of Terrorism Bill, 2003. The study further revealed that the POTA, 2012 marks an improvement in the civil liberties sensibilities of Kenya's counterterrorism law. The study showed that even though POTA, 2012 was not perfect, it was

progressive to Kenya's citizens who value their national security. However, that is not for the case of Security Laws Amendments Act, 2014 (SLAA) that sought to amend certain sections of POTA, 2012 thus violating the rights of accused.

Notwithstanding, the study revealed that even though the police had sweeping power on the arrest of persons accused of terrorism, such powers were subject to judicial oversight. The police are required to base all arrests on reasonable grounds, and the suspect is to be either taken to court or released within 24 hours as provided by Article 49 & 50 in the Constitution of Kenya, 2010. However, any continued detention of a terror suspect has to be sanctioned by the courts of law. Also, the study revealed that sometimes the enforcement of the counter-terrorism law goes beyond the constitutional parameters. The officer making the arrest may sometimes abuse their powers of arrest given that it is within the opinion of the officer to determine what constitutes a terrorism act.

### **5.2.1 Counter-Terrorism Strategies and the Principles of Due Process**

The study also sought to investigate the counter-terrorism legislation and strategies and their relationship to the principles of due process and crime control in criminal justice. The study established that the Kenyan courts are sometimes fundamentally unfair under the law to accused terrorism suspects. The respondents were of the view that the criminal justice system in Kenya is less focused on the process of determining whether a person is guilty and more focused on the speed of concluding criminal cases. Also, the study revealed that police powers in the arrest and detention of terror suspects were sweeping as prescribed in the POTA, 2012 and the SLAA, 2014. Moreover, the arresting authorities in Kenya are rarely held accountable to rules and procedures to ensure fairness for the accused persons. Furthermore, the study also showed that the government

of Kenya sometimes held person accused of terrorism activities not on facts but through obtaining of evidence using coercion and undue pressure.

Moreover, there were cases where police officers were forced to balance between the due process of the law in cases of emergency and with the purpose to protect lives and property. Thus, the study concluded that arresting officers and the criminal justice system officials do not always follow the due process in cases concerning terrorism suspects. Furthermore, the findings from the respondents recruited from residents of Eastleigh wards in Nairobi County and Key interview informants from the human rights groups clearly showed that the violation of due process was done by arresting officers and not so much with the law itself. However, the respondents recruited from the criminal justice system such as Kenya police thought that sometimes for the good of the majority of Kenyans in regards to national security, an individual's rights may be limited in the enforcement of counter-terrorism measures.

### **5.2.3 Counterterrorism Strategies and Individual Civil Rights**

Subsequently, the study sought to assess the effects of deviation of counterterrorism strategies from the due process model on the civil and/or social rights of suspected terrorists and their families in Kenya. Thus, the study established that the right to equality and freedom from discrimination is sometimes denied to persons accused of terrorism acts. The victims of counterterrorism operations outlined instances where they felt discriminated upon based on their faith and ethnicity. Also, the study revealed that Somali Muslims believed that the counterterrorism measures by various security agencies discriminated upon them. The study also showed that the right to have dignity respected and protected was another right that most terrorism suspects were denied. The respondents narrated of incidences and experiences they had in the hands of security agencies where they were treated without dignity that should be accorded to all human beings. The



study revealed that there were instances where the accused persons were picked from their houses and bundled into police vehicles with the victims incurring injuries as a result. The incidence of mass detention of Muslims at Kasarani was another case where the state treated the accused person without dignity that should be accorded to a human being.

The study also established that there were instances where respondents felt that they were held indefinitely and tortured. The respondents complained about various incidences when they were detained for long before they could be charged in court. The long detention in extreme conditions was a clear depiction of indefinite detention and torture. However, based on responses from IPOA representative, the study showed that most of the instances, protection against indefinite detention and torture was not violated by counterterrorism strategies given that there were provisions in SLAA, 2014 and POTA, 2012 that could allow police to detain terror suspects for more than 24-hour before being presented to the court. Moreover, the research also established that any other extension to the stipulated period requires court approval under several stringent conditions and may not exceed a total of 360 days as stipulated in section 66 of SLAA, 2014 which amended section 33 of the POTA, 2012 from 90 days inclusive of the initial period of arrest.

Also, the study revealed that right to privacy is often denied by counterterrorism strategies where some respondents narrated on incidences where security agencies confiscated their mobile phones and other communication devices, and used their mobile phones to impersonate them to get information that would later be used to incriminate them. However, the study was able to elaborate further that the right to privacy may be denied based on Article 24 of CoK, 2010 that stipulates the limitation of rights and fundamental freedoms within the law. Criminal law expert noted that the CoK, 2010 can limit the right to privacy of an accused person only when it is reasonable and justifiable, and has a great “importance to the purpose of limitation”. Nonetheless,

the study revealed that Section 35(3) of the POTA, 2012 gave police officers powers to intercept communication regarding an accused person is necessary given that terrorism is a complex phenomenon often involving a chain of events and players at different stages. The purpose of intercepting communication was intended to make law enforcement agencies proactive as opposed to being reactive and hence pre-empt what the terrorists are planning. The study also established that the power to intercept any communication is subject to administrative and judicial oversight that has several inbuilt safeguards.

Finally, the study established that the counter-terrorism laws and strategies sometimes deny accused person the rights of the arrested person enshrined in Article 49 of the CoK, 2010. For instance, the right to be informed of the reason for arrest, right to communicate with an advocate, and the right not to be compelled to make any confession or admission that could be used in evidence against the person. Some respondents in the study narrated how their rights as proscribed in Chapter Four (Bill of Rights) of the Constitution of Kenya, 2010 were denied by the Kenyan government. Also, there were instances where accused persons were arrested without being informed of the reason for the arrest, and some were not allowed to communicate with their advocates for legal representation. However, from the discussion with criminal law expert, section 31 of POTA, 2012 covered the police officers where it states that: a police officer may arrest a person where he has reasonable grounds to believe that such person has committed or is committing an offence under this Act. This section gives the police broad powers to arrest anyone within the rule of law.

Nevertheless, the study had a consensus that most Chapter Four of the CoK, 2010 was violated by the legislation that amended provisions that dealt with counterterrorism. Thus, based on the respondents of the questionnaires and the in-depth analysis, the Kenyan criminal justice

system did not fairly observe the due process of the law when dealing with terror suspects. However, it was noted that public opinion could be influenced by factors such as media bias towards the police and a few isolated cases that may not capture the whole picture of the criminal justice system in Kenya. Also, responses from the Key interview informants reveal that there are cases where rights and fundamental freedoms may be limited especially when the safety of the public and their property are at stake as stipulated by Article 24 of the CoK, 2010.

### **5.3 Recommendations**

The study makes a few recommendations based on study findings that could be of use to various stakeholders including judicial officers, the police, arrested persons and the counter-terrorism institutions in the country.

#### **5.3.1 The Balance between the Branches of the Government**

The study suggests that there should be a balance between the three arms of the government: the Judiciary, Legislature and the Executive. The balance between the Executive and the Judiciary plays a vital role in ensuring that human rights and fundamental freedoms of the accused follow the due process of the law. Moreover, the Judiciary is important in ensuring checks and balances in the criminal justice process constantly by scrutinizing all measures that are likely to infringe on civil liberties while at the same time authorizes and reviewing laws from the Legislature that are not in line with constitutional and human rights norms. Also, the Executive powers should be subject to Legislative oversight and the Judiciary to prevent it from acting in excess of the provisions of the constitution and the due process of the law.

#### **5.3.2 Contentious Provisions of the Prevention of terrorism act should be amended**

Firstly, the process taken by the Legislature and the Executive to enact the POTA, 2012 was somewhat consultative, where a majority of the stakeholders except the civil society and the

public since it made fundamental changes to the Constitution of Kenya, 2010 were not consulted. Thus, the remainder of controversial clauses must be streamlined, more safeguards put in place, and domestic court rulings upheld. The role of the Courts cannot be understated in shaping counterterrorism legislation. The country must strive to thrive on constitutionalism and the rule of law. Court rulings that are upheld by the Judiciary should set precedence for any future litigation. Kenya should ensure that judicial system stands the test of time and operate independently.

### **5.3.3 Balance between Civil Liberties and National Security**

Finally, this thesis suggests that a balance must be achieved between civil liberties and national security. Counterterrorism measures implemented by the government will always have a negative or positive effect on human rights and fundamental freedoms of its people. The balance may be hard to achieve but with political will and efficient mechanisms in place to check and countercheck security and other government agencies, it is expected that civil liberty concerns can be reduced.

### **5.4 Areas for Further Research**

The study recommends that further research can be carried out on whether due process is applied in the prosecution of terror suspects in Kenya. the study should not only be confined to Eastleigh North and Eastleigh South Wards of Kamukunji Constituency, Nairobi County in Kenya but should cover the whole of Africa and also the world at large thus to come up with findings of the general Worldview.

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## APPENDICES

### Appendix A: Interview Schedule for Victims of Criminal Justice System

#### Introduction

This interview provided is for academic purposes and intends to assess Kenyan values on counterterrorism measures. Please answer the questions as truthfully as possible .

#### Part A: Due Process and Counter-Terrorism Strategies

1. Were you personally accused of being terror suspect or it was someone close to you who was accused of being terror suspect? If it was not you accused, what was the relationship between you and the person who was accused?
2. When you were accused/ witnessed a person accused, how did you feel about the whole process?
3. Would you say the police were justified in arresting you/ arresting the person who was close to you who was accused? Please explain why you say so?
4. When they arrested you/ the person close to you, did they present you/the person arrested in court within 24 hours? If no, what were the reasons they gave you? Was the reason satisfactory?
5. When they failed to present you/ the person accused in court within 24 hours, did they apply in writing to the Court for an extension of time for holding the suspect in custody. If they applied in writing, did they give you a copy of the application. If they did give you a copy, did the application by them state the ground for continuing to detain you/ the person accused?
6. When they detained you / the person further with order from the court, did they produce you in court before the expiry of the period of remand specified by the Court? If no, did they apply for a fresh to continue detaining you in remand?
7. Did the police apply to the court to be given permission to collect information about your/ the person involvement in the case you were/ the person was accused of? If no, how did they collect the information about your involvement?
8. Did the police get access to your/the person accused phone and computer communications? if yes, did they have the permission from the courts to access your/their phone and computers in their conversation?

#### Part B: Perception on counter terrorism strategy and civil rights of accused

1. During your/ the accused person arrest did the police inform promptly in a language that the person understands, of the reason for the arrest, the right to remain silent; and the consequences of not remaining silent? If not what were their reason?

2. Did the police allow you to communicate with an advocate, and other persons whose assistance was necessary? If not what were their reason? If no, how did you feel about it?
3. After you / the person accused was arrested, were you/ the person compelled to make any confession or admission that was used in evidence against the you/ the person in court? If yes, what was the experience when the police used force to get confession from you?
4. During your/the person brief detention before appearing in court, were you held separately from persons serving a sentences? If No what was the reason given? if No how did you feel about being bundled together with people already serving sentence?
5. When you/ the person first made court appearance, were you/ the person charged or informed of the reason for the detention continuing? How did you feel about the whole process?

## Appendix B: Counterterrorism Questionnaire

### Introduction

This questionnaire provided is for academic purposes and intends to assess Kenyan values on counterterrorism measures. Please answer the questionnaire by stating brief statements or taken in the boxes provided as applicable.

### Part A: Kenya's Counterterrorism Measures and Due Process Model

Please rate the following statements regarding the relationship between counter terrorism strategies and due process model. Use the scale where 1 strongly disagree (SD), 2 is disagree (D), 3 is not sure(N) , 4 is agree (A) and 5 is strongly agree (SA).

		SD	D	N	A	SA
1	The Kenyan courts are fundamentally fair under the law to accused terrors suspects					
2	The criminal justice in Kenya gives more focus to the process of determining whether a person is guilty or not than the speed of concluding the case					
3	The criminal justice system in Kenya does not protects the rights of the terros suspects					
4	Police powers should be limited to prevent official oppression of the individuals accused of terrorism activities					
5	The police and other criminal justice authorities in Kenya are usually held accountable to rules and procedures to ensure fairness for the accused persons.					
6	The government of Kenya through the courts usually hold a person guilty of terrorism activities solely on the facts					
7	A person accused of terror activities in Kenya is only found guilty after the government has followed legal procedures in its fact-finding.					

**Part B: Effect of Counter Terrorism on Individual Civil Right**

To what extent has, the counter terrorism laws and strategies denied individuals of rights and liberties enshrined in the bill of rights in the constitution.

		Least extent	small extent	Moderate extent	great extent	very great extent
1	Right to equality and freedom from discrimination					
2	The right to have dignity respected and protected.					
3	A person shall not be held indefinitely in detention and tortured					
4	Every person has the right to privacy					
5	Right to be informed promptly of reason of arrest, communicate with an advocate, not to be compelled to make any confession or admission that could be used in evidence against the person.					

## **Appendix C: Key Informants Interview**

### **Introduction**

My name is William Kirima, a Master's student from the United States International University-Africa. I'm currently undertaking an academic research as part of a fulfillment for a Master's degree in International Relations. The purpose of this research project is to evaluate the due process in the arrest of suspected terrorists against national security in Kenya. I will highly appreciate your taking a few minutes of your time to fill this questionnaire. The data collected from this research will be used for academic and research purposes only. Your participation is completely voluntary and anonymous. The information will be kept strictly confidential. For any further inquiry kindly call me on 0714 163 121 or email to [williebald05@gmail.com](mailto:williebald05@gmail.com)

### **Part A: Counterterrorism legislation and the Constitution of Kenya, 2010**

1. Would you say the counter terrorism policies and laws are in line with provisions on the arrest of suspected terrorists as provided under the Constitution of Kenya, 2010? If no or yes, please explain further?
2. Please justify your answer in part 2(3) above giving the provisions in the counter terrorism laws that are either in line or in conflict with the Constitution of Kenya, 2010

### **Part B: Counter-terrorism strategies and their relationship to the principles of due process**

1. Would you say that the counter terrorism laws and strategies in Kenya are in line with the principles of due process in criminal justice? Please explain your answer?
2. Please justify your answer in part 3(1) above giving the provisions in the counter terrorism laws that are either in line or in conflict with the due process principles.

### **Part C: Deviation of counterterrorism strategies with due process model on the civil and/or social rights of suspected terrorists and their families in Kenya**

1. Would you say that the counter terrorism laws and strategies applied in Kenya are infringing on bill of rights as provided for in the Constitution of Kenya, 2010? Explain your answer?

2. Would you say the counter terrorism laws and strategies in Kenya that are not in line with the due process model are infringing on the civil and social rights of the accused and their families? Please explain how?

**Appendix D: Confidentiality Form**

**PI Name:** WILLIAM KIHARA KIRIMA

**Date:** 20 September 2020

**Title of Research:** CONSTITUTIONALISM AND THE RULE OF LAW: EVALUATING WHETHER DUE PROCESS IS APPLIED IN THE PROSECUTION OF TERROR SUSPECTS IN KENYA (2012-2019)

In conducting this research project, I agree to the following:

1. Keep all the research information shared with me confidentially by not discussing or sharing the research information in any form or format.
2. Keep all research information in any form or format securely maintained on a daily basis, during the process of conducting and writing the research.
3. At the conclusion of the research, dispose of any documents that contain identification information, such as participant names or other information that could reveal the identity of the human subject.
4. Monitor all other researchers who work with me, i.e. research assistants, administrative persons, etc., to ensure their compliance to confidentiality. Any violation of this agreement would constitute a serious breach of ethical standards, and I pledge not to do so.

**Principal Investigator**

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<b>Name</b>	<b>Signature</b>	<b>Date</b>
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## **Appendix E: Debriefing Form**

### **DEBRIEFING FORM**

Thank you for taking part in this research on Constitutionalism and The Rule of Law: Evaluating the Efficacy of Due Process Model in Countering Terrorism in Kenya (2012-2019). Please read the material on this form carefully to learn important information about your experience in this study, and ask me any questions that you have. After this debriefing, you may choose to have the information I collected about you removed from this research study. For this study, it was important that I withhold some information from you about some aspects of the study. Now that your participation is completed, I will describe what information was withheld and why. I will also answer any of your questions, and give you the opportunity to decide whether you would like to have your data included in this study or removed from it.

#### **What You Should Know About This Study**

Before you started participating in this research, you were told that the purpose of the study was to evaluate Kenyan values in counterterrorism measures. However, the actual purpose of the study was to collect data from you regarding adverse effects by counterterrorism strategies on the social rights of suspected terrorists and their families in Kenya. I did not tell you the true purpose of the study because it was important that your responses were spontaneous and not influenced by having this information.

#### **Your Right to Withdraw Data**

Now that you know the true purpose of this research study you may decide whether you want to have your data removed from the study or not. If you choose to have your data removed, explain precisely what data will be withdrawn and the procedures to be followed. There will be no penalties

or negative consequences for you if you withdraw from the study. Before making your decision, please ask me any questions you have.

**Confidentiality**

Whether you allow your data to be used in this study or not, please remember that the integrity of this research depended on keeping some of the details from you and the other participants. Therefore, it is important that you do not tell anyone else about the details of this study until after November 31, 2020, when my collection of data from other participants will be complete. Although the purpose of this study is different from what was originally explained to you, everything else on the consent form is correct. I will keep all information I have about you completely confidential, including your decision about whether to withdraw from the study.

**If You Have Any Questions or Concerns**

Please keep a copy of this Debriefing Form for future reference. If you have any questions or concerns about this study and the research procedures used, you may contact me, William Kirima at williebald05@gmail.com, or my USIU-Africa faculty supervisor, Dr. Francis Khayundi at fkhayundi@usiu.ac.ke

**To be completed by Participant**

My signature below indicates that I have read and understood the information in this debriefing form, and (select one)

\_\_\_ I give permission for the data collected from or about me to be included in the study.

\_\_\_ I DO NOT give permission for the data collected from or about me to be included in the study.

-----

**Print name of the participant**

-----

**Signature of participant**

-----

**Date**

**To be completed by Researcher**

I confirm that the participant named above has been given an opportunity to ask questions about the study, and all the questions asked by the participant have been answered to the best of my knowledge and ability. A copy of this Debriefing Form has been provided to the participant.

-----

**Print name of the investigator**

-----

**Signature of investigator**

-----

**Date**

## Appendix F: Study Work Plan

Phase	Activity	Months						Person in Charge
		1	2	3	4	5	6	
1	Proposal Writing							Researcher
2	Introduction							Researcher
3	Literature Review							Researcher
4	Methodology							Researcher
5	Proposal Submission							Researcher
6	Proposal Defense							Researcher
7	Data Collection							Researcher
8	Findings and Summary							Researcher
9	Final Thesis Draft Submission							Researcher and Supervisor
10	Thesis Submission							Researcher

## Appendix G: Introduction Letter



National Commission for Science Technology and Innovation  
P. O. Box 30623, 00100,  
Nairobi, KENYA.

22<sup>nd</sup> October, 2020

Dear Sir/Madam

**REF: PERMISSION TO CONDUCT RESEARCH- WILLIAM KIHARA**  
**STUDENT ID NO 656467**

The bearer of this letter is a student at United States International University (USIU) –Africa and is pursuing **Master of Arts in International Relations**.

As part of the program, the student is required to undertake a dissertation on “**Constitutionalism and The Rule of Law: Evaluating The Efficacy of the Due Process Model in Countering Terrorism in Kenya (2012-2019)**” which requires the student to collect data.

Kindly assist the student with the research permit and should you have any queries contact the undersigned.

Yours Sincerely



**Prof. Amos Njuguna,**  
Dean – School of Graduate Studies, Research and Extension  
Tel: 730 116 442  
Email: [amnjuguna@usiu.ac.ke](mailto:amnjuguna@usiu.ac.ke)

## Appendix H: IRB Letter



USIU-A/IRB/376-2020

USIU-A Institutional Review Board (IRB)

22<sup>nd</sup> October, 2020

**William Kihara,**  
United States International University-Africa  
[williebald05@gmail.com](mailto:williebald05@gmail.com)

Dear William,

### **IRB-RESEARCH APPROVAL.**

The USIU-A IRB has reviewed and granted an ethical approval for the research proposal titled **“Constitutionalism and The Rule of Law: Evaluating The Efficacy of the Due Process Model in Countering Terrorism in Kenya (2012-2019)”**.

The approval is for **twelve months** from the date of IRB. A continuing review application must be approved within this interval to avoid expiration of IRB approval and cessation of all research activities. A mid-term report and a final report must be provided to the IRB within the twelve months' approval period. All records relating to the research (including signed consent forms) must be retained and available for audit for at least 3 years after the research has ended.

You are advised to follow the approved methodology and report to the IRB any serious, unexpected and related adverse events and potential unanticipated problems involving risks to subjects or others.


Should you or study participants have any queries regarding IRB's consideration of this project, please contact [irb@usiu.ac.ke](mailto:irb@usiu.ac.ke).


Sincerely,

A handwritten signature in blue ink is written over a circular blue stamp. The stamp contains the text "RESEARCH OFFICE" and "UNITED STATES INTERNATIONAL UNIVERSITY - AFRICA".

**Dr. Juliana Namada,**  
IRB chair  
Tel: +254 730 116 628  
Email: [jnamada@usiu.ac.ke](mailto:jnamada@usiu.ac.ke)


# Appendix I: NACOSTI Research Permit

  
REPUBLIC OF KENYA

  
NATIONAL COMMISSION FOR  
SCIENCE, TECHNOLOGY & INNOVATION

Ref No: **952228** Date of Issue: **09/November/2020**


**RESEARCH LICENSE**




This is to Certify that Mr.. William Kihara Kirima of United States International University Africa, has been licensed to conduct research in Nairobi on the topic: **Constitutionalism and the Rule of Law: Evaluating the Efficacy of the Due Process Model in Countering Terrorism in Kenya (2012-2019) for the period ending : 09/November/2021.**

Licensed No: **BAHAMAS ABS/P/20/7551**

**952228**  
Applicant Identification Number

  
Director General  
NATIONAL COMMISSION FOR  
SCIENCE, TECHNOLOGY &  
INNOVATION

Verification QR Code



NOTE: This is a computer generated License. To verify the authenticity of this document, Scan the QR Code using QR scanner application.

## Appendix J: Budget

<b>PARTICULARS</b>	<b>ITEM</b>	<b>AMOUNT (KES)</b>
PROPOSAL DEVELOPMENT		
	Project fees	78,800
	Internet access	10,000
	Printing and stationery	10,000
DATA COLLECTION		
	Communication and	10,000
	Internet access	30,000
	Transport expenses	15,000
	Printing and stationery	
DRAFT REPORT PRESENTATION		
	Computer access for compilation of Project report	3,000
	Printing and Stationery	1,200
FINAL PROJECT PRESENTATION		
	Printing 4 copies @ 670	2,680
	Binding 4 copies @ 400	1,600
<b>Total budget</b>		<b>162,280</b>