

SOURCES OF CRIMINAL LAW IN KENYA

1.1 The Constitution

The Constitution as the supreme law of the land governs all law generally. It makes provision for the prosecution system, the court system and the appeal system for criminal cases, the rights and duties of both accused persons and victims.

1.1.1 The rights of an accused person

The constitution guarantees an accused person a raft of rights.

- Firstly, see generally the Bill of Rights
- Secondly, are absolute rights under article 25:
 - a) freedom from torture and cruel and inhuman and degrading treatment or punishment;
 - b) freedom from slavery or servitude
 - c) the right to a fair trial; and
 - d) the right to an order of *habeas corpus*
- Thirdly, article 49 guarantees numerous rights to an arrested person. These include: the right to be informed of the reasons for the arrest, the right to remain silent, the right to communicate to their advocate, the right not to be compelled to make any confession or admission; the right to be held separately from persons who are serving sentence; the right to be brought to court within 24 hours of arrest; the right to be charged at the first court appearance or be informed of the reasons for continued detention; the right to be released on bond or bail unless there are compelling reasons not to be released.
- Fourthly, article 50 (2) of the Constitution guarantees the right to fair trial. This entails the presumption of innocence, sufficient information on the charge; adequate time to prepare for defence; a public trial under a court established under the Constitution; trial without unreasonable delay; to be present at trial unless it is impossible; the right to legal representation of their own choice; the right to remain silent; the right to be informed in advance of the evidence; not to be tried of an offence based on a previous acquittal or conviction; to benefit of the least severe punishment if this has changed between the time the offence was committed and the time of sentencing; the right to appeal and the principle of legality. Article 50 (4) further underscores that that “evidence obtained in a manner that violates the fundamental rights of an accused is inadmissible to the extent that it renders the trial unfair. Finally, article 27 guarantees an accused person equality and freedom from discrimination;

1.1.2 The rights of victims of crime

The constitution guarantees victims of crime the right to access justice. The state is obligated to ensure the realization of this right and where fee is levied, this is to be made reasonable. (Article 48).

1.1.3 The right of persons detained, held in custody or imprisoned

- In Kenya, an accused person can be detained before their trial, during their trial and upon sentencing.
- All these categories of persons retain all the rights and fundamental freedoms enshrined under the Constitution. [article 51 (1)] They are also entitled to petition for an order of *habeas corpus*.

1.1.4 The powers of the Director of Public Prosecution

- The office of the Director of Public Prosecution (ODPP) is established under article 157 of the Constitution. The section further provides for the qualifications for appointment to the office of the DPP, their removal and resignation.
- This section also provides for the powers of the ODPP to constitute the discretion to...
 - (a) institute and undertake criminal proceedings against any person before any court (other than a court martial)...;
 - (b) take over and continue any criminal proceedings commenced in any court (other than a court martial)...; and
 - (c) subject to clause (7) and (8), discontinue at any stage before judgment is delivered any criminal proceedings
- In Kenya, the general practice of the office of the prosecutor withdrawing cases without explaining the reasons to such withdrawals is a common occurrence. Underlying some of these withdrawals are plea negotiations or other interventions from the defense lawyers.¹ Concessions are the most common forms of such informal plea negotiations where an accused person commits themselves to cooperate with the prosecution as a prosecution witness.

1.1.5 Presidential immunity in criminal law:

- The Constitution guarantees the president immunity over ordinary crimes in national courts. Article 143 (1) provides that

‘Criminal proceedings shall not be instituted or continued in any court against the President or a person performing the functions of that office, during their tenure of office.’
- The constitution adopts a contrary position with respect to international crimes. Article 143 (4) ‘The immunity of the President under this Article shall not extend to a crime for which the President may be prosecuted under any treaty to which Kenya is party and which prohibits such immunity.’ The constitution adopts the Rome Statute position under article 27 which excludes all forms of immunities in relation to international crimes.

See *Kenya Section of the International Commission of Jurists v Attorney General &*

¹ Esther Steyn, Plea Bargaining in South Africa, Current and Future prospects (2007)<
https://open.uct.ac.za/bitstream/handle/11427/27579/Steyn_Article_2007.pdf?sequence=1 >
accessed on 31st March, 2022

Another, e KLR 2011

In this case, the High Court of Kenya upheld article 143(4) with respect to President Al Bashir of Sudan and called upon the government to effect his arrest in the future. The case was instituted after Kenya snubbed its obligations under the Rome Statute to arrest and surrender Al Bashir to the ICC for his alleged role in committing international crimes when, at its invitation, al-Bashir attended the official ceremony promulgating the country's new Constitution of 2010.

1.2 Statutes and subsidiary legislation

Article 50 (2)n requires that no one is prosecuted of a criminal offence unless it amounts to an offence under Kenyan law or international law. On the basis of this constitutional requirement, almost all offences in Kenya, are proscribed by statutes or parliamentary legislations.

The primary legislations that govern criminal law include the Penal Code, the Sexual offences Act and the Criminal Procedure Code. These are the main statutes that regulate criminal law. It is a guide to a court of law on what to do at any given time in criminal proceedings.

The Penal Code lays down the general rules and principles of criminal liability in addition to proscribing a broad spectrum of offences. It classifies these offences into several categories: offences against public order; offences against administration of lawful authority; offences relating to administration of justice; these include: rescues and escapes and obstructing officers of court. The other category of offences injurious to public in general, which include: offences relating to religion, offences against morality; offences relating to marriage and domestic obligations; nuisances and offences against health and convenience and defamation. The other category comprises offences against the person. These are murder and manslaughter and connected offences. Finally, are offences relating to property; theft, robbery and robbery with violence.

The Criminal Procedure Code provides for the procedure and the governing rules and principles of a criminal process beginning from arrest, the trial process and the sentencing process.

The focus of the Sexual Offences Act is sexual offenders. The Act prescribes numerous sexual offences and their punishment. It also spells out some specific guidelines in establishing criminal liability for sexual crimes.

Another significant statute in criminal law is the Traffic Act. The Traffic Act is focused on traffic offences, their penalties and some specific rules of guidance in establishing criminal liability for these crimes.

See also the Proceeds of Crime and Money Laundering Act; and Prevention o Terrorism Act.

All other statutes create specific offences within the various thematic areas that they seek to regulate. Some of these include: the Income Tax Act, the Banking Act, the Environmental and Impact Assessment Act et cetera. The major purpose of each of

these statutes is to regulate an aspect of governance but which impose criminal sanctions on those who breach the Acts.

In some instances, criminal offences are created by subsidiary legislations. A statute may give power to a minister or local authority to make regulations and prescribe for their breach. Such laws are known as subsidiary legislation and some create criminal offences. This is a common occurrence among the county assemblies that seek to regulate certain specific aspects unique to their counties through prescribing offences and their punishment.

1.3 Common law

Common law and doctrines of equity were borrowed into Kenya during colonial time. While there is a continuous use of common law in the United Kingdom in that serious offences like murder, manslaughter and conspiracy to defraud are still derived from judicial pronouncements, in Kenya, almost all offences (with the exception of contempt of court) have been captured in Statute. Even in the United Kingdom, there is a general agreement among the court not to create new offences or abolish those in existence. The House of Lords in Kneller Ltd v Director of Public Prosecutions [1973] AC 435 unanimously rejected the existence of a residual power vested in the courts to create new offences or so widen existing offences as to make punishable conduct of a type not hitherto subject to punishment. Jones (2006) UKHL 16; Goldstein and Rimmington (2005) UKHL 63.

Article 50 (2) n ii, Constitution of Kenya guarantees an accused person the right 'not to be convicted for an act or omission that at the time it was committed or omitted was not—

- (i) an offence in Kenya; or
- (ii) a crime under international law'

While common law is not a source of law in the sense of criminalizing certain actions in the society, it remains to be an important source of criminal law as an interpretational tool. In most instances where statute do not offer sufficient guidance in elaborating on some of the crimes, common law and doctrines of equity have been used to fill the gap.

1.4 International law

Article 2 (6) and 50 (2) n ii of the Constitution of Kenya recognize international law as a source of law in Kenya.

Although article 2(6) makes a mandatory requirement of general rules of international law and any treaties ratified by Kenya to form part of the laws of Kenya and article 50 (2) n ii is categorical that one can be prosecuted for an offence so long as it is an offence under international law, the practice seems to contradict the latter of the law. Although Kenya was a state party to the Rome Statute,² the government found it prudent to domesticate it under the International Crimes Act (Act no. 16 of 2008) in order to facilitate domestic prosecution of international crimes. If a

² Kenya ratified the Rome Statute on 15 March 2005.

mere ratification sufficed to enable Kenya to locally prosecute international crimes, then why was it necessary for the Rome Statute to be domesticated.

This raises the debate as to whether Kenya is a dualist state or a monist state in so far as applying international law in its domestic courts is concerned, especially with respect to international crimes.

1.5 African Customary Law

In the criminal law context so far, African customary law has mainly featured during the plea-bargaining process. It is an alternative dispute resolution in the criminal trial process which finds application in criminal cases through article 159 of the constitution.