

**SPORTS AND DRUGS: A CRITICAL ANALYSIS OF THE LEGAL FRAMEWORK ON  
DOPING IN KENYA**

**SUBMITTED IN PARTIAL FULFILMENT OF THE REQUIREMENTS OF THE BACHELOR  
OF LAWS DEGREE, STRATHMORE UNIVERSITY LAW SCHOOL**

**BY  
SILICHO SIMIYU SOITA  
075785**

**PREPARED UNDER THE SUPERVISION OF  
SARAH OCHWADAH**

**JANUARY 2017**

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## **DEDICATION**

To the Almighty God for his grace and my Brother, Andrew for his support throughout the journey.

## **ACKNOWLEDGEMENTS**

I am greatly indebted to my supervisor, Ms. Sarah Ochwadah for her encouragement, insight and invaluable guidance throughout this study. I also acknowledge Mr. Desmond Tutu for his insightful comments during my defence of this proposal.

My sincere gratitude to my family and friends that often times stood by my side through these enduring times in my study.

**DECLARATION**

I declare that this research is my original work and has not been submitted to any other university for a degree or diploma.

Signed: .....

Date: .....

This dissertation has been submitted for examination with my approval as University Supervisor.

Signed: .....

Sarah Ochwadah

## ABSTRACT

Doping has been inadequately provided for in law, policy and practice in Kenya over a long period of time. Proliferation of doping cases among Kenyan athletes raised doubts over the ability of the Kenyan legal framework on anti-doping to regulate the use of performance enhancing substances. This resulted into a sanction by the World Anti-Doping Agency<sup>1</sup>. This study seeks to critically analyse the Kenyan legal framework on doping and assess its suitability to curb the number of doping incidences among Kenyan athletes.

Among the issues to be considered include: the sufficiency and efficiency of existing Kenyan anti-doping laws, factors impeding the application of these laws and finally recommendations to improve their applicability and efficiency.

The study was conducted through literature review on anti-doping laws and adopted a qualitative analysis. It established that there is a general belief about the inefficacy of anti-doping laws, programmes and the manner in which tests are conducted. Most people consider the severity of punishment as inappropriate and lenient.<sup>2</sup> It was further realized that law alone is insufficient to regulate doping.

In order to reduce doping cases among Kenyan athletes, it is this paper's recommendation that barriers hindering the application of doping laws be eliminated. It further proposes that appropriate educational programmes be established to enhance awareness among athletes. Sporting institutions besides physical training should invest in programmes aimed at discouraging the use of performance enhancing substances. Event organizers and sport federations should closely work together to establish rules of each competition to disincentivize dopers. Improved research methods should also be put in place.

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<sup>1</sup> Keating S, 'WADA Declares Kenya Non-Compliant, Rio at Stake' *Reuters*, 2016. Available at <http://uk.reuters.com>. Kenya was declared non-compliant on Thursday, May 12, 2016.

<sup>2</sup> Most countries the world over regard breach of anti-doping laws as sport offences alone. They are yet to criminalize the offence. Most athletes are punished through bans where they are denied the chance to participate in the sport for a certain period of time.

## **LIST OF ABBREVIATIONS**

ADAK	Anti-Doping Agency of Kenya
ADN	Anti-Doping Norway
CHINADA	China's National Anti-Doping Agency
PEDs	Performance Enhancing Drugs
WADA	World Anti-Doping Agency
WADC	World Anti-Doping Code

## CHAPTER ONE-INTRODUCTION

### 1.1 Background

Sport continues to play an integral role in the many and varied cultures of the world.<sup>3</sup> It serves multiple purposes among them personal fulfillment, enjoyment and entertainment - all of which have transformed sport into a multibillion-dollar business globally.<sup>4</sup> To the winners go colossal sums of money in form of prizes and adulation.

Kenya as a member of the international sporting community has had tremendous success in a number of sports.<sup>5</sup> However, the most astounding performances have been witnessed on the track and field by our athletes.<sup>6</sup> These performances have pulled in colossal sums of money and fame for our athletes hence tempting some into doping. This risks casting blight on Kenya's sporting prowess.<sup>7</sup>

Doping is as old as sport and abounds in almost every sport today.<sup>8</sup> It is every sport's association's concern today to curb this vice among their sport persons. Unlike the ancient times where doping was considered ethical and legal, scientific findings in contemporary days have led to an opinion shift regarding the efficacy of doping due to its negative effect on both sport and individuals.<sup>9</sup>

The Kenyan sporting society has not been spared of any blushes by the doping conundrum. The menace is deeply entrenched in Kenyan sports, far much more than what is in the public domain.<sup>10</sup> For instance, statistics released by WADA and published by Athletics Kenya in 2013<sup>11</sup> on the list of athletes serving a ban for doping at that time indicated a drastic rise of Kenyan athletes

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<sup>3</sup> Connolly R, 'Balancing the Justices in Anti-Doping Law: The Need to Ensure Fair Athletic Competition Through Effective Anti-Doping Programs vs. the Protection of Rights of Accused Athletes' 5 *Virginia Sports and Entertainment Law Journal*, 2006.

<sup>4</sup> Yesalis E, Kopstein N, Bahrke S, 'Difficulties in Estimating Prevalence of Drug Use Among Athletes' in Wilson W, Edward D (ed), *Doping in Elite Sport: Politics of Drugs in the Olympic Movement*, Human Kinetic Publishers, 2001

<sup>5</sup> For instance the Kenya 7s Rugby Team on April 14, 2016 was crowned champions of the Singapore Sevens Rugby Tournament.

<sup>6</sup> Wekesa M, 'Regulation of Doping in Sports: Implications for Kenya' *University of Nairobi, School of Law*, 2016.

<sup>7</sup> Cardovillis S, Doping Cases Cast a Blight on Kenya's Track and Field Success. [Http://www.nation.co.ke/sports](http://www.nation.co.ke/sports)

<sup>8</sup> Andren-Sandberg A, *The History of Doping and Anti-Doping: A Systematic Collection of Published Scientific Literature 2000-2015*

<sup>9</sup> Baron D, Martin D, Magd S, 'Doping in Sports and its Spread to at-risk Populations: An International Review' 6 *World Psychiatry Association*, 2007.

<sup>10</sup> Muigai K, The Doping Menace is deeply Entrenched in Kenyan Sports, 2016. <http://www.the-star.co.ke/news>

<sup>11</sup> Anti-Doping Taskforce, Final Report, Republic of Kenya, April 2014.

on the list, from four in 2010/2011 to seventeen in 2012/2013.<sup>12</sup> This has raised questions on the ability of its existing legal structures to effectively promote desirable sporting behavior.<sup>13</sup>

It is against this backdrop that I propose a panacea be prescribed at the earliest possible time. Ergo, a critical analysis of the legal framework on doping in Kenya is required to assess its provisions and propose an effective way to curb this malpractice. It can be argued that although there has been political goodwill against doping in sports in Kenya, there has been for over a long period no legal provision in the legal regime dealing with anti-doping in Sports in Kenya.<sup>14</sup>

Supremacy of the law demands that we look at all the laws in the Kenyan legal system through the constitutional mirror since the constitution is the supreme law of Kenya.<sup>15</sup> It structures the government at two levels; the national and county governments.<sup>16</sup> Both levels of government have legislative functions in all spheres and are only limited by their distributive functions. Promotion of sport and sports education is a function designated to the national government.<sup>17</sup> The corollary is that doping is a national government prerogative. However, it is the duty of the county governments as well as sports organizing entities to ensure that sport is free of performance enhancing drugs.<sup>18</sup>

Furthermore, the Constitution of Kenya 2010 provides that international treaties ratified by Kenya shall comprise Kenyan law.<sup>19</sup> It then follows that the post-2010 era has led to a shift from dualism to monism. In a monist state, any international treaty forms part of that country's legal system upon ratification. However, Kenya has not ratified any international treaty regarding doping since the promulgation of the new constitution in 2010. Prior to the progressive provisions of the new constitution, Kenya had ratified the International Convention on Doping in Sports. At the time, international treaties and conventions did not form part of Kenyan laws unless they were domesticated.<sup>20</sup>

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<sup>12</sup> David B, Drugs in Sport: WADA Weakened by Funding and Constitution, 2013 available at <http://www.bbc.com/sport>

<sup>13</sup> Raz J, The Authority of Law: Essay on Law and Morality, Clarendon Publishers, 1979

<sup>14</sup> Onywera V, Feedback Report on the Anti-Doping Policy Advice Project, *Country Assessment Report*, Kenya, 2015

<sup>15</sup> Article 2 (1), *Constitution of Kenya*, 2010

<sup>16</sup> Article 1 (4), *Constitution of Kenya*, 2010

<sup>17</sup> Fourth Schedule, *Constitution of Kenya*, 2010

<sup>18</sup> Onywera, Feedback Report on the Anti-Doping Policy Advice-Project, 2015.

<sup>19</sup> Article 2 (6), *Constitution of Kenya*, 2010

<sup>20</sup> See decision in *Okunda v Republic* (1970) EALR 18

From the above, it suffices to state that the Kenyan Anti-Doping legal regime just like the international regime has been characterized by fragmentation of effort, a general lack of momentum and inadequate resources.<sup>21</sup> Furthermore, much more needs to be done besides the law.

## **1.2 Statement of Problem**

Doping is a global menace in the sporting world today.<sup>22</sup> Anti-doping efforts in their existence and historical variations have indicated the inability of sports bodies to curb this menace in their autonomous operations. This has called for aggressive and concerted efforts from all stakeholders interested in sport. In complementing the efforts of sports bodies, governments have invoked legislative, judicial and administrative mechanisms.

Kenya has experienced a proliferation in doping incidences among its athletes in recent times.<sup>23</sup> This has resulted into the imposition of a sanction on it. Despite efforts by the sports bodies and government agencies to enhance drug-free sport, different players in the sport unrelentingly will to risk so as to harness the benefits that come with it. For instance, even after Kenya had just enacted the Anti-Doping Act,<sup>24</sup> Team Kenya's field and track manager in the Rio Olympics, Major Michael Rotich was deported back to Kenya over doping allegations.<sup>25</sup>

It is against this backdrop that this paper seeks to critically analyse the Kenyan legal framework on doping and assess its suitability to curb the menace. This study looks at both the past and present legal frameworks that have dealt with or deal with doping. It should be noted that Kenya has enacted a new anti-doping legislation which will form the gravamen of this study. It intends to analyze whether the new law alone is sufficient to curb the problem.

## **1.3 Research Objectives**

- i. To investigate the suitability of the Kenyan legal framework on doping in curbing doping incidences among Kenyan sportsmen and women.
- ii. To examine factors impeding the efficient operation of anti-doping laws in Kenya

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<sup>21</sup> Hanstad V, 'Anti-Doping in Sport: A Study of Policy Development since 1998' Dissertation from the Norwegian School of Sport Sciences, 2009

<sup>22</sup> Wekesa M, Regulation of Doping in Sports: *Implications for Kenya*

<sup>23</sup> According to the Anti-Doping Task Force, between 1993 and April 2014, there were 36 known cases of positive dope tests amongst Kenyans from diverse sports, 18 of them between January 2012 and December 2013 in track and field alone.

<sup>24</sup> No. 5 of 2016

<sup>25</sup> Adam W, Rio 2016: 'Olympics Hit by New Doping Scandal over Bribery Allegations against Kenya Track and Field Chief' Available at <http://www.independent.co.uk/sport/olympics/rio-2016>.

- iii. To make recommendations to ensure the efficient operation of the anti-doping laws in Kenya.

### **1.3.1 Research Questions**

- i. What comprises the current Kenyan legal framework on doping?
- ii. Whether an anti-doping legal regime needs to be efficient in order to curb doping incidences?
- iii. What factors affect the efficient application of the anti-doping legal regime?
- iv. How is it intended to operate?
- v. What prerequisites are necessary to ensure the Kenyan anti-doping legal regime efficiently or effectively operates to reduce doping incidences among Kenyan sportsmen and women?

### **1.4 Justification and Scope of the Study**

Kenya's sporting prowess has recently suffered a tumultuous time with the proliferation in the number of doping incidences among its sportsmen and women.<sup>26</sup> It would therefore be prudent to pierce the veil in order to unearth the reasons behind the spike in the number of doping incidences among Kenyan sportsmen and women in different sports. Kenya has risked and continues to risk losing the prestige of being home to premier athletes in Africa and the world over. Furthermore, the government has a duty to protect its citizens. Since PEDs are likely to harm the health of its athletes who are its citizens, there is every reason for the government to protect its citizen.

Athletes harbour immense influence on society. As role models to a substantial number of fans, they shape thought and belief about sport. Youths look up to most of the top-notch athletes. They spend most of the time fantasizing themselves in the shoes of their favourite athletes. Their biggest desire is to pull in the same level of success. They are likely to do anything to achieve the same. The government therefore has a responsibility to ensure clean sports so as to breed a spirit of fair competition.

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<sup>26</sup> According to the Anti-Doping Task Force, between 1993 and April 2014, there were 36 known cases of positive dope tests amongst Kenyans from diverse sports, 18 of them between January 2012 and December 2013 in track and field alone.

The major output to be expected of this paper is a set of recommendations on how we can improve the effectiveness of the Kenyan legal framework on doping in a bid to curb the doping menace. This paper therefore intends to fill in legislative gaps. Furthermore, I hope that this piece will be a great addition to the existing body of knowledge on doping hence furthering the understanding of the topic.

### **1.5 Hypothesis**

Two hypotheses have been formulated to guide this piece of work.

- i. An efficient multi-stakeholder approach in regulation of doping is necessary. Aggressive and concerted efforts between sports federations or bodies and the government will be pertinent in saving the sport, face of the nation, fans, athletes and their interests among other things.
- ii. An efficient legislative framework on doping is key in combating the doping menace in Kenya. It should be certain, well-coordinated and structured. Offences and penalties should be stipulated in a crystal clear manner.

### **1.6 Assumptions**

A major assumption in this research will be that an attempt to achieve a fully drug-free sport is impossible. However, with a comprehensive, error-proof, effective and efficient legislative framework, doping incidences can be reduced and ultimately made extinct

Despite all the efforts to eliminate crime in society, it has and will stay long in human society. The best society has done has been to reduce its occurrence. In the same vein, drug abuse in society has not been completely eliminated. What the law has done is simply reduce its incidence in society. Anti-doping laws should therefore in the first place aim to reduce incidences of doping as a means to an end of the eventual rooting out of doping from sport.

### **1.7 Theoretical Framework**

This study employs figurational sociology in analyzing how suitable our anti-doping legal framework is in terms of regulating doping. Figurational sociology has substantially developed out of the work of Nibert Elias who undertook to synthesize elements of different paradigms and

establish a central theory that would facilitate greater research. It concerns the structure of mutually dependent people.<sup>27</sup>

The concept of 'figuration' is key to Elias's figurational sociology.<sup>28</sup> A 'figuration' according to Elias is a structure of mutually oriented and dependent people. He therefore propounds that man as an individual is not self-dependent and sufficient. He exists in an interdependent society where its members are influenced by social structures. Sociology on the other hand views the world as open pluralities of interdependent people bonded together in dynamic constellations.<sup>29</sup>

This theory goes to the kernel of sport. Most sports if not all are characterized by interdependence going by the fact that participants need opponents to compete with. However, power has always been at the center of every competition since all competitors aim winning. Most athletes employ all possible tactics to overcome their opponents. Doping is one among the methods to outdo opponents. It could therefore be concluded that man by nature is competitive and will employ all possible means to achieve his goal.<sup>30</sup> This creates a need to curtail methods that transcend social norms.

The second limb of the above mentioned theory deals with regulation. There are multiple players involved in regulation including the athletes themselves. Elias applies the concepts of power and game models where he asserts that it is impossible for individuals or some groups of individuals to be considered as omnipotent whereas others are powerless. He opines that there must be a power balance where the two can interact and that there is what he refers to as 'functional interdependence.' In Kenya, there are various players involved in sport and anti-doping regulation. Among them is the government, sports federations, international sports bodies and the athletes among other players impacted upon by doping incidences. From the above, for a proper and efficient anti-doping framework, there must be cooperation and interdependence between the regulating agencies. They must act in a well-coordinated manner that will enhance the reduction of doping incidences among our athletes.

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<sup>27</sup>Hanstad, *Anti-Doping in Sport: A Study of Policy Development since 1998*

<sup>28</sup>Hanstad, *Anti-Doping in Sport: A Study of Policy Development since 1998*

<sup>29</sup>Hanstad, *Anti-Doping in Sport: A Study of Policy Development since 1998*

<sup>30</sup>Yesalis E, Bahrke S, 'History of Doping in Sport' *21 International Sports Studies*, 2002.

The study is further informed by the Utilitarian School of Thought, of which Jeremy Bentham ascribes to. It proffers that man is governed by pursuit of pleasure and avoidance of pain. These factors influence man's behavior and could be utilized to control mankind through careful application of the law.<sup>31</sup> This theory could inform the Kenyan anti-doping legal framework when prescribing penalties or sanctions. It would be in order to impose heavier sanctions where there are increased doping incidences.

## **1.8 Literature Review**

This paper employs a thematic approach in its review of the literature used. It seeks to analyse the Kenyan legal framework in a critical manner and attempt to fill loopholes in order to improve its effectiveness and efficiency. Among the subtopics covered include: the definition of doping, history of doping in sport, attempts at regulation and the Kenyan doping situation.

### **a) Definition of doping**

This part mainly concerns what amounts to doping. It covers substantial literature that has attempted to define what doping entails.

Klaus Vieweg in an article<sup>32</sup> notes that there is no definite legal definition of the term 'doping' among the different sports, neither are there any binding legal criteria for such a definition. Rather, the definitional task of the offense has been left to the sports bodies in their own capacity. As a corollary, the definition varies from one international sports organization to another. The definitions are then adopted by national sports organizations responsible for regulation of sports in their countries or states. Most national sports organizations are responsible for the incorporation of the definitions into their regulatory framework.

Vieweg nevertheless appreciates the fact that the definition by the World Anti-Doping Code (WADC) has nearly acquired a universal acceptance. WADC (hereinafter the Code) has nearly become a standard for doping rules and regulations.<sup>33</sup> It defines doping as *the occurrence of one or more of the anti-doping rule violations set forth in Article 2.1 through Article 2.8 of the Code*.<sup>34</sup>

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<sup>31</sup>Pollock J, Prisons Today and Tomorrow: *Criminal Justice Illuminated*,2005.

<sup>32</sup> Vieweg K, 'The Definition of Doping and the Proof of a Doping Offense (An Anti-Doping Rule Violation) under Special Consideration of the German Legal Position' 15 *Marquette Sports Law Review*.

<sup>33</sup> Vieweg, The Definition of Doping and the Proof of a Doping Offense under Special Consideration of the German Legal Position.

<sup>34</sup> Article 1, World Anti-Doping Code, available at <http://www.wada.ama.org/docs/web/standards>

It involves the presence of a prohibited substance in an athlete's sample, trafficking in prohibited substances, administration to athletes of prohibited substances and possession of prohibited substances among other provisions.<sup>35</sup>

It is the author's view and rightly so in my opinion that Article 1 of the Code is abstract in its definition of the word 'doping'. It needs to be fleshed for a conclusive definition. It leaves questions as to when the breach of the rules begin. In this regard, an attempt to define doping should take into account the aims and purposes of the fight against doping as it has been explicated in the Code: *The purpose of the Code and the World Anti-Doping Program are to protect the athlete's fundamental right to participate in doping-free sport and thus promote health, fairness and equality for athletes worldwide and to ensure harmonized, coordinated and effective anti-doping programs at the international and national level with regard to detection and prevention of doping.*<sup>36</sup>

Judges are forced to adhere to the list of prohibited substances provided by the sports bodies such as the International Association of Athletics Federations or the International Olympics Committee. However, with the advancement of technology and medicine, these lists only serve as an example of the classes of forbidden substances.

In considering municipal laws, the Kenyan Anti-Doping Act<sup>37</sup> will be sufficient since it is part of the legal framework under analysis by this work. It defines doping as *the use of prohibited substances and methods in any sporting activity whether competitive or recreational in order to artificially enhance performance.*<sup>38</sup> It mainly adopts the definition from the World Anti-Doping Code.<sup>39</sup>

Other definitional aspects of doping include the motivation behind doping among athletes and the concerns against it.

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<sup>35</sup> Article 2-2.8, World Anti-Doping Code

<sup>36</sup> World Anti-Doping Code

<sup>37</sup> No.5 of 2016.

<sup>38</sup> Section 2, Anti-Doping Act of Kenya, No. 5 of 2016.

<sup>39</sup> Article 1, World Anti-Doping Code

## b) Attempts at Regulation

Despite doping being as old as sports, regulation attempts do not go as far back as its origins.<sup>40</sup> The rising need for regulation was prompted by various factors such as a better understanding of the doping menace as a result of increased scientific and technological developments and fatal cases in sports. For instance, the deaths of Danish cyclist Knud Enemark Jensen<sup>41</sup> in the 1960 Olympic Games and Tommy Simpson,<sup>42</sup> a British cyclist in the 1967 Tour de France raised public awareness about the dangers and depth of doping in sports.<sup>43</sup>

The first International Sport Federation to proscribe the use of performance enhancing substances was the International Amateur Athletics Federation in 1928.<sup>44</sup> However, despite the ban there were no mechanisms to effect it.<sup>45</sup> Despite the International Olympics Committee contemplating the doping problem in Olympics competitions, substantive efforts geared towards its regulation begun in 1961 with formation of the Medical Commission. At a session in Madrid in 1965, Belgium's Prince Alexandre de Merode presented a report on the doping problems experienced in the 1964 Tokyo Olympics. This report is considered as the departure point for anti-doping efforts of the IOC and its Medical Commission.<sup>46</sup>

The first anti-doping legislation was enacted in France in 1963 followed by a series of international congresses. Other nations and International Sports Federations followed suit. Besides the first anti-doping legislations, anti-doping legislations were also established. For instance, France established an anti-doping commission in 1958, Austria 1962 and Italy in 1963. Other notable happenings included the Union Cycliste Internationale and FIFA introducing doping tests in 1966. In Olympics doping tests were introduced in the 1968 Mexico Summer Games in Mexico which resulted in a number of disqualifications.

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<sup>40</sup> Wong B, *Doping in Sport: An Overview and Analysis of Doping and its Regulation in International Sport*, 2003

<sup>41</sup> He died in the 1960 Rome Olympics. Traces of amphetamine were found in his body after an autopsy was conducted. His trainer Oluf Jorgensen admitted to Danish Government Officials of administering the substance to his team

<sup>42</sup> He collapsed and died in the 1967 Tour de France. The post-mortem revealed traces of amphetamine and alcohol taken to improve his resilience.

<sup>43</sup> Muller, 'History of Doping and Doping Control': *Doping in Sports*, Springer, 2010.

<sup>44</sup> UKAD, Protecting the Right to Participate in Clean Sport: The Story of Anti- Doping. Available at <http://ukad.org.uk/our-organisation/global/story-of-anti-doping/>

<sup>45</sup> For instance there was no legal framework to prescribe punishment for the breach. Furthermore, there was no testing mechanism to prove breach of anti-doping rules.

<sup>46</sup> Muller R, 'History of Doping and Doping Control': *Doping in Sports*, Springer, 2010.

### c) The Kenyan Situation

The media, both local and international has well documented the plight of the Kenyan doping situation. This has in large part been occasioned by an increase in the number of its athletes testing positive while others banned from the sport.<sup>47</sup>

Ms. Sarah Ochwadah telling the story in our own voice in her article “Anti-Doping: What More Needs to Be Done to Combat Doping in Kenya?”<sup>48</sup> contends that Kenya as a country has had a history of poor access to doping control and testing going by the IAAF sanction list that showed a spike in positive doping tests.<sup>49</sup> In her assessment of the state of anti-doping in Kenya, she did come to a conclusion that Kenya lacked an effective anti-doping control mechanism. The legal framework laid down by the Sports Act is insufficient to deal with doping. Under Section 73, it only mentions doping in passing.<sup>50</sup> Nothing substantial has been mentioned or provided for in terms of how doping will be dealt with.

### 1.9 Design and Methodology

This research paper approaches the subject matter through literature review. It further intends to employ qualitative analysis in the course of the study of the subject matter. A review of both primary and secondary sources will be critical to this work: the Constitution of Kenya, 2010, statutes and other relevant legal documents obtaining from Kenya.<sup>51</sup> On the other hand, scholarly material in the form of books, newspaper articles, journals, conference papers among others will also be used.

I intend to do a comparative analysis of the anti-doping legislations of various countries which have been trailblazers in anti-doping legislations. France was the first country to adopt an anti-doping legislation. Germany on the other hand has a radical legislation on doping. South

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<sup>47</sup> ‘Another Kenyan Runner Banned for Doping: Latest Positive Test for Famous Distance Runners.’ Available at [www.outside.com](http://www.outside.com). Rita Jeptoo was banned after testing positive of Erythropoietin. Similarly, Mumbi Maraga was banned for using the same banned substance.

<sup>48</sup> Ochwada S, ‘Anti-Doping: What More Needs to be Done to Combat Doping in Kenya?’ *LawinSport Journal*, 2015.

<sup>49</sup> Ochwada, ‘Anti-Doping: What More Needs to be Done to Combat Doping in Kenya?’

<sup>50</sup> Section 73, Sports Act provides that *every person involved in sport and recreation shall observe anti-doping powers*. It further goes on to grant the Cabinet Secretary the power to make regulations regarding penalties in case of a breach. It should be noted that only this section together with the long title was the only legal provision on doping before the enactment of the Anti-Doping Act.

<sup>51</sup> Among the statutes include: The Anti-Doping Act of 2016, The Sports Act of 2013, WADA Code and the International Code against Doping in Sport et al.

Africa being an African country with a legislative framework on doping will also be of special interest to my research.

### **1.10 LIMITATIONS**

This work is constrained by various factors. Among them is the time factor. The work is considered part of the coursework as a requirement for the Bachelor of Laws degree hence has to be submitted within the prescribed time. Due to this, some research methods that require a lot of time will not be conducted.

Furthermore, sports law and doping has not been accorded much attention legally and scholarly. It suffers from legal neglect yet its impact on society cannot be downplayed. Most countries have their legal frameworks on doping still at their embryonic stages.<sup>52</sup> In Kenya for instance, the Sports Act and the Anti-Doping Act have been enacted recently and much is yet to be done. On the other hand, scholars have dedicated less of their time on doping. This has resulted into a dearth of anti-doping material.

### **1.11 Chapter Breakdown**

#### a) Chapter One- Introduction

This chapter provides an introduction to the study, outlines the statement of problem, literature review, objectives of the study, hypothesis, the theoretical framework and design and methodology.

#### b) Chapter Two- The Legal Framework on Doping in Kenya.

This chapter discusses the legal framework on doping in Kenya. It will give an overview of the attempts Kenya has made to establish an effective anti-doping regime.

#### c) Chapter Three-Comparative study on Anti-Doping Legal Regimes

This part looks at anti-doping legal regimes in other jurisdictions with a particular interest on their strengths as compared to Kenya's in order to improve our own system. Jurisdictions to be taken into consideration include Germany and South Africa.

#### d) Chapter Four- Suitability of our Anti-Doping Legal Regime in preventing doping

This chapter draws experiences from our local jurisdiction to those in other jurisdictions. It seeks to establish features that will make our system more efficient in regulating doping.

#### e) Chapter Five-Conclusion and Recommendations.

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<sup>52</sup> Few countries in the world have anti-doping legislations since most people believe that use of performance enhancing drugs is not bad. Germany, France, Britain, South Africa among others are the few to enact anti-doping legislations.

This part will form the concluding part of the dissertation and then come up with recommendations of means to improve our legal system.

**1.12 Research Timeline**

Chapter Two- Month of November

Chapter Three- Month of December

Chapter Four-Month of December

Chapter Five- Month of January

## **CHAPTER TWO: THE LEGAL FRAMEWORK ON DOPING IN KENYA**

### **2.1 Introduction**

This chapter discusses the existing Kenyan legal and institutional framework on doping. It goes without mentioning that even though there has been goodwill politically to curb doping through regulation, there has, for over a long period of time existed no legislative framework within which doping could be regulated.<sup>53</sup> The anti-doping legal regime has for over a long period of time been fragmented and uncoordinated. The murky situation could be alluded to the principle of sports autonomy which eschewed the government and its agencies from dabbling in sports matters. Hence, primary agents tasked with regulation of doping were sports federations which were to a large extent incapacitated.<sup>54</sup>

Kenya has for over a long period of time lacked a legal regime within which doping could be regulated. Dr. Moni Wekesa succinctly puts it across that Kenya's past legal regimes did not address the issue of doping in sports expressly.<sup>55</sup> This section will attempt to look into the legislative efforts by the government and other stakeholders to regulate doping in the past.

#### **2.1.1 Sports Policy Framework**

The policy framework<sup>56</sup> was formulated by the then Ministry of Heritage and Sports in 2002 to act as a guideline and a principle in sports governance and its operation in Kenya.<sup>57</sup> It impliedly dealt with doping by providing for drug use in sports. Section 2.4 provided for drugs and substance use in the following words:

##### **2.1.1.1 Drugs and Substance Abuse in Sports**

Drugs and substance abuse adversely affects sports developments for it damages the body organs, muscles, the skeleton and the general health of those involved. Youth and some adults engage in this harmful act due to peer pressure and the false belief of enhancing their performance in sports.

To stem these negative practices, the following measures will be put in place:-

- i) The general public will guard against selling of beer, cigarettes, miraa and other harmful substances to the youth

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<sup>53</sup> Onywera V, Feedback Report on the Anti-Doping Policy Advice Project: Country Assessment Report, Kenya, 2015.

<sup>54</sup> Onywera, Feedback Report on the Anti-Doping Policy Advice Project.

<sup>55</sup> Wekesa M, Regulation of Doping in Sports: Implications for Kenya

<sup>56</sup> Kenya National Policy Framework by the Ministry of Heritage and Sports

<sup>57</sup> Kipchumba B, Jepkorir R, Sports Policy in Kenya: Deconstruction of Colonial and Post-Colonial Conditions, International Journal of Sports Policy available at <http://www.tandfonline.com/doi/full>

- ii) All sports organization will only seek sponsorship from firms whose products promote good health.
- iii) Corporate sponsors and mass media will educate the public on the dangers of taking addictive substances, which would derail youth from sports.

From the above, it is crystal clear that doping was not expressly dealt with since the policy only gave a general prescription on drug use. Furthermore, recommendations on how to deal with problems of drug use were general and did not specifically tackle the issue of doping. A detailed policy framework should have provided for athlete testing and future establishment of laboratories. In addition, the government should have been greatly tasked with the fight against doping in sports. It would seem that the responsibility to curb doping at the time was to be shouldered mainly by the sports federations.

It would be fair to state that efforts to fight doping at the time were fragmented and uncoordinated. A point in case would be the ban imposed on Daniel Munyasia, a Kenyan boxer in the Athens Olympics Games.<sup>58</sup> After arriving in Athens, he was subjected to a standard dope test to which he tested positive of cathine (a substance found in ‘Miraa’), a listed substance. He had to leave the Olympics village without having the chance to unpack his bag. Kenyan boxing officials accompanying him confessed of their unawareness of cathine being a listed substance since ‘miraa’ was and still is legal in Kenya.<sup>59</sup>

Despite the fact that doping regulation was inadequately addressed by the policy document,<sup>60</sup> Kenya relied on other instruments to guide its regulation of doping. For instance, Kenya was a signatory to the Copenhagen Declaration that was key to the establishment of WADA.<sup>61</sup> The declaration was supposed to act as a guiding instrument in shaping the anti-doping legal framework but its operation was hindered by the fragmented efforts of stakeholders in Kenyan sports. The situation was however to change with the adoption and ratification of the 2005 International Convention against Doping in Sports.<sup>62</sup>

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<sup>58</sup> Ateka S, Kenya: Both Daniel and the two Kenyan officials accompanying him to the games were unaware of the fact that ‘Khat’ contained of Cathine which was a banned substance on the WADA list of prohibited substances. This acts as a proof enough that doping education is important to all players in the sport. Be it the individual athlete, support personnel, members of the public among others.

<sup>59</sup> Kenya Boxing Page, ‘Kenya Boxing Results at the 2004 Olympics’ Available at [kenyapage.net](http://kenyapage.net)

<sup>60</sup> By the mere fact that doping regulation was impliedly dealt with under section 2.4 of the policy is a clear indication that doping was not taken seriously by the required stakeholders in sports. Furthermore, the word ‘doping’ received no mention in the policy document. The situation could be alluded to the fact that sports at the time had not acquired the high status it now enjoys. It was at best regarded a socio-cultural activity whose chief purpose was entertainment. However, sport today is an economic activity whose fecundity has turned around lives. High returns and special status in society among athletes such as Victor Wanyama and Kenyan long distance runners has attracted many in the game.

<sup>61</sup> WADA, Copenhagen Declaration List of Signatories, available at [www.wada-ama.org/en/copenhagen-declaration-list-of-signatories](http://www.wada-ama.org/en/copenhagen-declaration-list-of-signatories)

<sup>62</sup> Butler N, WADA Praises Global Commitment after Five New Countries Sign Convention against Doping in Sport available at <http://www.insidethegames.biz/articles>

### **2.1.2 Sessional Paper No. 3 of 2005 on Sports Development**

The document was prepared by the Ministry of Gender, Sports, Culture and Social Services in 2004 as a framework to guide sustainable development and growth of sports in the country.<sup>63</sup> Its main recommendation was the education of athletes on the use of performance enhancing drugs by all the stakeholders. Under section 3.1, it called for an understanding from athletes of the dangers of using performance enhancing substances.<sup>64</sup> Furthermore, it proposed the establishment of an effective and credible doping control system<sup>65</sup> and also encouraged sports organizations to engage the services of professionally trained technical and medical personnel.<sup>66</sup>

By all means, this draft paper appeared to be an upgrade on the sports policy. Most important was the proposal of a credible and effective anti-doping control regime. The paper furthered its recommendations by proposing the establishment of the Centre for Sports Science under the Kenya National Sports Institute that would have been responsible for setting up a drug testing and anti-doping unit.<sup>67</sup>

These policy documents, the sports policy of 2002 and the draft Sessional Paper No. 3 together with the 2005 International Convention against Doping in Sport have helped shape the country's current anti-doping legal framework and sports policies.<sup>68</sup>

## **2.2 International Anti-Doping Legal Regime**

The international anti-doping legal regime forms part of the global legal and regulatory regime. It has gained prominence in contemporary days due to its large scale and rapid establishment.<sup>69</sup> Among its characteristics are the less apparent but nonetheless important features of the highly successful partnerships between governments and private entities and the level of compliance in enforcement of penalties meted out to those culpable of breaching anti-doping rules.<sup>70</sup>

At the center of the international anti-doping legal regime is the **2005 International Convention against Doping in Sport** which was adopted by the United Nations Educational, Scientific and Cultural Organization and became effective in 2007. It requires states to put in place measures to fight doping both on a domestic and international front. Among the measures include legislation, regulation, and policy

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<sup>63</sup> Kipchumba B, Jepkorir R, 'Sports Policy in Kenya: Deconstruction of Colonial and Post-Colonial Conditions'

<sup>64</sup> Section 3.1.1, Draft Sessional Paper No. 3 of 2005 on Sports Development

<sup>65</sup> Section 3.1.2, Draft Sessional Paper No. 3 of 2005

<sup>66</sup> Section 3.1.3, Draft Sessional Paper No. 3 of 2005

<sup>67</sup> Section 4.10.6, Draft Sessional Paper No. 3 of 2005

<sup>68</sup> Wekesa M, Regulation of Doping in Sports: *Implications for Kenya*.

<sup>69</sup> Mitten M, Opie H, 'Sports Law': Implications for the Development of International, Comparative, and National Law and Global Dispute Resolution' *19 Marquette Law Scholarly Common*, 2010.

<sup>70</sup> Mitten, Opie, : Sports Law: Implications for the Development of International, Comparative and National Law and Global Dispute Resolution

formation among other administrative actions.<sup>71</sup>The main aim of the Convention against Doping was to enhance the harmonization and establishment of a set of rules that would act as a worldwide guideline against doping since it was supposed to act as a basis or guideline for local legislations.

The World Anti- Doping Agency was established in 1999 as a private agency to aid in monitoring, coordination and promotion of the struggle against doping the world over. Concerted efforts between the International Olympics Committee and national governments yielded to the 2003 Copenhagen Declaration against Doping in Sport which formed the basis for the development and establishment of the World Anti-Doping Code. The code comprises a set of rules that are pertinent to regulation of doping.

Kenya signed onto the World Anti-Doping Code in 2006 through the National Olympics Committee.<sup>72</sup>The implications were that all sports federations in Kenya were subject to the Code as the standard of regulation in doping. The Code in combination with the 2005 International Convention against Doping in Sports have played a pertinent role in structuring the Kenyan anti-doping legal framework.

### **2.3 National Anti-Doping Legal Framework**

Kenya has for over a long period of time lacked a definite legal framework that has exclusively committed itself to the question of doping regulation. Nonetheless, there have existed various legislations that have dealt with regulation and use of drugs. Among them include the Pharmacy and Poisons Act,<sup>73</sup>The Use of Poisonous Substances Act,<sup>74</sup>The Medical Practitioners and Dentists Act<sup>75</sup>, The Narcotics and Psychotropic Substances (Control) Act,<sup>76</sup> The Children Act<sup>77</sup> and the Penal Code,<sup>78</sup> among many others.<sup>79</sup>

The above represents a fragmented system that dealt with doping in the past leading to a weak anti-doping legislative framework. The corollary was a proliferation in the number of Kenyan athletes caught in breach of the World Anti-Doping Code and the subsequent sanction of Kenya by the World Anti-Doping

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<sup>71</sup> Mitten, Opie, : Sports Law: Implications for the Development of International, Comparative and National Law and Global Dispute Resolution

<sup>72</sup> McLennan N, 'Together against Doping' *UNESCO Social and Human Sciences Sector*.

<sup>73</sup> Chapter 244, Laws of Kenya

<sup>74</sup> Chapter 247, Laws of Kenya

<sup>75</sup> Chapter 253, Laws of Kenya

<sup>76</sup> Act No. 4 of 1994

<sup>77</sup> Chapter 41, Laws of Kenya

<sup>78</sup> Chapter 63, Laws of Kenya

<sup>79</sup> Wekesa M, Regulation of Doping in Sports: *Implications for Kenya*.

Agency.<sup>80</sup>This has necessitated the establishment of new anti-doping legislative framework that is still in its formative stages.<sup>81</sup>

This part will then endeavor to discuss the above mentioned Acts and the current Anti-Doping legal framework made of but not limited to the Constitution of Kenya, 2010, Sports Act,<sup>82</sup> and the Anti-Doping Act.<sup>83</sup>

### **2.3.1 Legislations Relevant to Doping Before the New Anti-Doping Legal Framework.**

#### **2.3.1.1 The Pharmacy and Poisons Act.<sup>84</sup>**

The main legislative aim of the Act is “*to make better provisions for the control of the profession of pharmacy and the trade in drugs and poisons.*”<sup>85</sup> The Act does not address itself specifically to the question of doping regulation hence no specific mention to doping and its control despite its regulation of players in the pharmacy industry and trade in different types of drugs.<sup>86</sup>

Before delving further into the provisions of the Act, it would be necessary to mention that doping in most instances concerns the application of drugs. For a doctor to recommend the use of a certain drug, or before a pharmacist sells a drug to a buyer, he or she should at least be aware of the effects of the drug on the user. For this, they should be able to distinguish the different types of drug users.<sup>87</sup> This calls for doping education among pharmacists. Our Act lacks a provision for doping education among pharmacists and doctors.<sup>88</sup> It would be advantageous if the Act in its regulatory role would require doctors and pharmacists to produce a certificate indicating that they have at least attained some level of training in doping and its regulation before they are licensed or registered as such.

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<sup>80</sup> According to the Report by the Anti-Doping Task Force, between 1993 and April 2014, there were 36 known cases of positive dope tests amongst Kenyans from diverse sports, 18 of them between January 2012 and December 2013 in track and field alone

<sup>81</sup> The new Anti-Doping Act was just enacted in 2016 and much is yet to be implemented. Furthermore, despite the Sports Act being in existence for a longer time, most institutions established by it are yet to be fully functioning. Most of them are at their formative stages.

<sup>82</sup> Act No. 25 of 2013

<sup>83</sup> Act No. 5 of 2016

<sup>84</sup> Chapter 244, Laws of Kenya.

<sup>85</sup> Long Title of the Act provides for the aim of the Act as the regulation of pharmacy and trade in drugs and poisons

<sup>86</sup> Regulation of the pharmacy industry could be in the form of licensing, regulation and training of pharmacists. It lays down the criteria that determines who can be a player in the pharmacy industry.

<sup>87</sup> In our case it would be the athletes who are most likely to be affected.

<sup>88</sup> This unawareness puts athlete at risk since they could easily acquire and consume drugs that contain substances listed on the WADA Prohibited List. General awareness among doctors and pharmacists regarding doping could be of great help to athletes and the general public since they could be informed of their effects when purchased or when being administered.

The Act in its attempt to protect the public provides for the labeling of drug containers.<sup>89</sup> This should be extended to drugs containing substances listed on the WADA Prohibited List. However, their labels should be indicated in bold or in a manner easily distinguishable from other drugs.<sup>90</sup> Schedule III of the Act should be amended to allow for the special labeling of drugs containing prohibited substances.<sup>91</sup> With clear labels, athletes could be able to explain how doping substances entered their bodies as per the requirements of the WADA Code.<sup>92</sup> As a general provision, the labels or instructions should be in a simple and easy to understand language since most athletes have not been trained in pharmacy.

Thirdly, the Act classifies drugs into Part I and Part II poisons.<sup>93</sup> Part I poisons are drugs whose dealing in is strictly regulated.<sup>94</sup> The Pharmacy and Poisons Body prepares a list on which drugs are classified.<sup>95</sup> This listing affects the supply and use of drugs hence there is a need to amend the Act in a manner that positively influences the use of drugs containing performance enhancing substances. For instance, it is Dr. Moni Wekesa's view that performance enhancing drugs be classified under Part I. I concur with his view to some extent. However, it is my opinion that a third category be established where drugs containing performance enhancing substances could be listed separately.<sup>96</sup>

Suppose there was Part III Drugs, their production, access, supply and use could be easy to control. However, the main thing that needs to be regulated is the production of drugs containing PEDs. The Act should prescribe the quantity that could be produced and released in the market. Furthermore, quantities in terms of stock held by wholesalers and retailers should be limited. An excess stock in the hands of distributors should amount to breach of the Act's provisions. Where local production is impossible or inadequate, imported quantities should also be put in check.

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<sup>89</sup> Section 34, Pharmacy and Poisons Act, Cap 244 Laws of Kenya. It requires that the name of the poison, mode of preparation if any required, the word 'poison', among other facts be indicated on the label.

<sup>90</sup> With this special label, pharmacists should be put under obligation to explain to consumers what effects they could cause. More so, athletes should be required to produce an identity before acquiring certain drugs.

<sup>91</sup> Schedule III of the Pharmacy and Poisonous Acts exempts certain drugs from labeling. It is in my opinion that special labeling of drugs with prohibited substances be allowed to enhance awareness both for Pharmacists and athletes.

<sup>92</sup> Article 2.1 WADA Code, it is the responsibility of an athlete to ensure that prohibited substances does not get into their body. However, if he tests positive, he or she is under an obligation to explain how it got into his system. A well-marked and labeled container will make it easier for athletes to explain their situations when tested positive

<sup>93</sup> Section 25 (2), Pharmacy and Poisons Act.

<sup>94</sup> Wekesa M, Regulation of Doping in Sports: *Implications for Kenya*. The Pharmacy and Poisons Act restricts the people who deal in these type of drugs. Only those authorized can sell or distribute them.

<sup>95</sup> Section 25 (1), Pharmacy and Poisons Act

<sup>96</sup> With this independent listing comes ease of identification. This will make it easy for athletes, pharmacists and doctors to identify drugs containing performance enhancing drugs since they stand on their own. Mixing of PEDs and other drugs under Part I could make identification difficult.

### **2.3.1.2 The Medical Practitioner's and Dentists Act<sup>97</sup>**

The Act's main aim is to *consolidate and amend the law to make provision for the registration of medical practitioners and dentists and for connected purposes.*<sup>98</sup> The Act just like the Pharmacy and Poisons Act addresses the question of doping indirectly. It fails to mention doping in its provisions.

Just as it was when discussing the Pharmacy and Poisons Act, it would also be important to mention the special role doctors play in doping. It is commonplace that doping involves in most if not all scenarios the use of drugs. These drugs are in most cases prescribed by doctors. It would therefore be important to enhance doping education among the doctors' fraternity. The Medical Practitioners and Dentists Act does not provide for education of doctors. It should be amended to make it a requirement for new entrants in the profession to have a certificate on doping regulation.

Furthermore, it should be appreciated that there are doctors who began their practice when doping was not a problem. It is obvious that most of them did not interest themselves with its study. However, with its prevalence, there is need for awareness among these 'old generation' doctors. The Medical Practitioners and Dentists Board could include doping education in its continuous education program for their benefit.

Such awareness could be important to both the doctors and athletes. Doctors could be engaged in the education of athletes about the negative effects of doping since they are better placed than any other profession. On the other hand, as Dr. Moni puts it, and rightly so doctors could be of great importance when included in the Therapeutic Use Exemption Committee because of their knowledge in the field.<sup>99</sup> There is need to empower doctors more since their empowerment means more awareness to both the public and the athletes.

### **2.3.1.3 The Children's Act<sup>100</sup>**

The Act under section 16 protects children against the use of hallucinogens, narcotics, alcohol and tobacco products or psychotropic drugs and any other drugs that could be detrimental to the normal functioning of a child's body. Some of these drugs are listed on the WADA Prohibited List.<sup>101</sup>

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<sup>97</sup> Chapter 253 Laws of Kenya

<sup>98</sup> Long Title of the Medical Practitioners and Dentist's Act

<sup>99</sup> Wekesa M, Regulation of Doping in Sports: *Implications for Kenya*.

<sup>100</sup> Chapter 41, Laws of Kenya. It was enacted in 2001 *to make provisions for parental responsibility, fostering, adoption, custody, maintenance, guardianship, care and protection of children; to make provision for the administration of children's institutions, to give effect to the principles of the Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child* according to its long title

<sup>101</sup> For instance, narcotics are prohibited in-competition. A child as per the Act (section 2) is any human being below 18 years. However, children represent their nations at various levels in sports. A case in point would be IAAF World Championships in Nairobi on July 12<sup>th</sup> to 16<sup>th</sup>. Athletes in this event could be held liable for doping despite their tender age.

It is a much appreciated fact the world over that tender age is important in development of sport.<sup>102</sup> Most athletes hone their skills at this age with perfection coming much later on in their careers. An example would be the likes of Wayne Rooney and Marcus Rashford who have represented their countries at a young age. Rooney at the age of sixteen years was a first team member at Everton.

Since most of the people at this age are still in school, doping education could be provided for by the Act. The Act could require that doping education be included in primary or secondary school curriculum. Furthermore, use of drugs containing performance enhancing drugs should be discouraged. Doctors should not administer or prescribe such drugs to children unless circumstances demand so.

#### **2.3.1.4 The Narcotics Drugs and Psychotropic Substances (Control) Act.<sup>103</sup>**

The Act was enacted to regulate the possession of, and trafficking in, narcotic drugs and psychotropic substances and cultivation of certain plants; to provide for the forfeiture of property derived from, or used in, illicit traffic in narcotic drugs and psychotropic substances.<sup>104</sup> Despite the fact that the Act deals with substances prohibited in sports, it is mute on the question of regulation of doping.<sup>105</sup>

Part II of the Act outlines penalties for breach of the Act.<sup>106</sup> A fine ranging from Kenya Shillings two hundred and fifty thousand to over one million could be meted in addition to jail sentences of five years to life imprisonment. Medical practitioners risk deregistration from if convicted of an offence under the Act.<sup>107</sup>

In an attempt to structure part II towards regulation of doping, amendments should be made to include doping substances.<sup>108</sup> However, the penalties should be raised to ward off potential users of PEDs.<sup>109</sup> Doctors on the other hand should also be fined substantially besides deregistration because of their special knowledge in the field and the need to act in a professional manner.

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<sup>102</sup> Murphy S, Three Stages of Athletic Development: Sampling, Specializing, Investment. Available at [www.Momsteam.com](http://www.Momsteam.com). Murphy outlines the stages of development as: Phase one (Exploration or sampling), Phase Two (Commitment and specialization and finally proficiency. The first two stages are very important since children are still learning the skills. Drugs could easily kill the learning process since they interfere with the thinking process.

<sup>103</sup> Act No. 4 of 1994

<sup>104</sup> Long Title of the Narcotic Drugs and Psychotropic Substances Control Act.

<sup>105</sup> It fails to mention doping or the use of narcotic drugs or psychotropic substances in sport. It however provides for the control or use of these drugs.

<sup>106</sup> Section 3-5 outline penalties for breach of the Act.

<sup>107</sup> Section 15, Narcotic Drugs and Psychotropic Substances (Control) Act

<sup>108</sup> Wekesa M, Regulation of Doping in Sports: *Implications for Kenya*

<sup>109</sup> It is important to raise the penalties since the stakes are high in sports. Winning athletes are lured by prize money which is usually large. Furthermore, there has been an increase in doping instances among Kenyan athletes. One way to reduce the incidences is to raise the fine higher.

The Act further prohibits the smoking, inhaling, sniffing or use of narcotic drugs or psychotropic substances.<sup>110</sup>Breach of the afore-mentioned provision attracts a fine of Kenya Shillings two hundred and fifty thousand or to imprisonment for a term not exceeding ten years.<sup>111</sup>However, to enhance regulation of doping, the Act should met out both penalties to defaulters when it concerns doping in sort due to high stakes involved.

Concerning the case of Boxer Daniel Munyasia,<sup>112</sup> it would have been unfair to domestically charge him under this Act because ‘Khat’ was and still is legal in Kenya and its chewing would not have led to its breach. Furthermore, both the officials and the boxer were unaware of the listing of Cathine in the WADA Prohibited List. Despite the fact that they ought to have known, its legality in Kenya might have blindfolded them. It is in the opinion of Dr. Moni Wekesa that legal action should have been taken against Munyasia by the Kenyan authorities as the IOC did.<sup>113</sup>However, it is in my opinion that to remedy the situation we need to amend the Act to provide for penalties in case of a breach regarding prohibited substances contained in narcotic drugs.

In the same vein as the Pharmacy and Poisons Act, the Act should require manufacturers and importers to label narcotic and psychotropic substances. Section 16 of the Act gives the Medical Practitioners and Dentists Board the power to issue licences for importation, exportation, diversion, sale and manufacture.<sup>114</sup> Before granting licences, it is my opinion that the Board should require that doping substances be labeled in a unique manner that is easily identifiable. Furthermore, a lid on the quantities of narcotic drugs and psychotropic substances that could be used in sport-doping should be put in place.

### **2.3.1.5 The Constitution.**

The Constitution of Kenya, 2010, as the supreme law forms the basis of regulation of doping.<sup>115</sup>Its dispensation ushered in the monist era where ratified treaties and conventions become part of our municipal

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<sup>110</sup> Section 6, Narcotic Drugs and Psychotropic Substances (Control) Act. It further prohibits possession of narcotics and psychotropic substances for the purpose of smoking

<sup>111</sup> Section 5 (1) (d), Narcotic Drugs and Psychotropic Substances (Control Act).

<sup>112</sup> As discussed earlier, he was banned for the use of Miraa which contains Cathine that is a prohibited substance on the WADA Prohibited List.

<sup>113</sup> The IOC expelled Munyasia from the games and then subsequently banned him for two years

<sup>114</sup> Section 16 (2), Narcotic Drugs and Psychotropic Substances (Control) Act.

<sup>115</sup> Article 2(1), Constitution of Kenya, 2010 outlines the supremacy of the Constitution. All other laws derive their legitimacy from the provisions of the Constitution. Furthermore, Article 2(4) requires all the laws to be in consistence with it. Furthermore, under Article 94(5) Parliament alone enjoys the monopoly of making provisions with a force of

laws.<sup>116</sup> It further created both the national and county governments with different mandates.<sup>117</sup> These functions are limited to its delineation.<sup>118</sup> For instance, the promotion of sports and sports education is a responsibility to be shouldered by the national government.<sup>119</sup> However, county governments have a crucial role to play since athletes obtain from different regions that merge to form counties.<sup>120</sup>

Prior to the promulgation of the new constitution, ratified treaties and conventions had to be domesticated to form part of national laws.<sup>121</sup> Domestication entailed the passing of a ratified treaty or convention as an Act of Parliament. For instance, the 2005 International Convention on Doping in Sports which was ratified in 2009 did not form part of Kenyan law because its ratification was prior to the promulgation of the new constitution and the enactment of Ratification of Treaties Act of 2011. However, its implementation has been through the enactment of the Anti-Doping Act<sup>122</sup> of Kenya of 2016.

The Constitution further grants parliament the power to legislate on any matter. Article 94(5) provides that:-

*“No person or body, other than parliament, has the power to make provision having the force law in Kenya except under authority conferred by this Constitution or by legislation.”*

It is by this power that parliament enacted the Sports Act and the Anti-Doping Act. These Acts have gone a long way to regulate the conduct of sport in Kenya and regulation of doping.

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law. Therefore, as the basis of anti-doping laws, it grants Parliament the power to make laws regulating doping in Kenya.

<sup>116</sup> Article 2(6), Constitution of Kenya, 2010. Provides that any treaty or convention ratified by Kenya shall form part of Kenyan laws. However, since the new constitutional dispensation, Kenya has not ratified any treaty concerned with regulation of doping.

<sup>117</sup> Article 6, Constitution of Kenya, 2010

<sup>118</sup> The Fourth Schedule distributes the functions between the national and county governments.

<sup>119</sup> Fourth Schedule, Distribution of Functions between the National Government and the County Governments, Part 1 Article 17.

<sup>120</sup> The Fourth Schedule, Part 2 Article 4 (h). County governments have the responsibility of promoting and regulating sports in their counties as part of cultural activities, public entertainment and public amenities. It is common sense that promotion of sport would concern clean sport in the counties. By promoting clean sport in their counties, the overall effect would be a general improvement on a country basis in terms of doping

<sup>121</sup> It was better explained in *Okunda v R* where the Court held that International treaties and conventions did not form part of Kenyan laws unless they had been promulgated.

<sup>122</sup> Act No. 5 Of 2016

### 2.3.1.6 The Sports Act<sup>123</sup>

This could be termed as the first legislative attempt aimed at regulating doping in Kenya though in a subtle way.<sup>124</sup> The Act could be termed as a general statute which deals with the conduct and management of sports in Kenya. It fails to commit itself to the most pertinent question of doping and its regulation.

It mentions doping in passing. Nonetheless, the Act establishes institutions that have crucial roles in the management and regulation of doping in the country. For instance it establishes the following institutions;-

#### i. Sports Disputes Tribunal.<sup>125</sup>

It is mandated to determine:-

- a) *Appeals against decisions made by national sports organizations or umbrella national sports organizations, whose rules specifically allow for appeals to be made to the tribunal including:*
  - i) *Appeals against disciplinary decisions*
  - ii) *Appeals against not being selected for a Kenyan team or squad;*
- b) *Other sports-related disputes that all parties to the dispute agree to refer to the tribunal and that the Tribunal agrees to hear; and*
- c) *Appeals from decisions of the Registrar under this Act*

The Act recognizes the special role played by Alternative Mechanisms of dispute resolution. It grants the Tribunal the discretion to apply alternative methods of dispute resolution when determining sports related disputes where it deems it fit for that specific dispute.<sup>126</sup>

The Sports Dispute Tribunal mechanism comes in handy with various advantages. By the mere fact that it hears appeals means that Federations act as courts of first instance. This gives them ample time to cope with emerging trends in their respective fields since they are charged with the responsibility of adjudicating over disputes in their respective fields. They can easily tap to current and evolving jurisprudence in anti-doping law.<sup>127</sup>

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<sup>123</sup> No. 25 of 2013

<sup>124</sup> Section 73(1) mentions observation of anti-doping rules in passing. It fails to delve into ways to be used to ensure the observance it demands.

<sup>125</sup> Section 56 of the Sports Act, No. 25 of 2013

<sup>126</sup> Section 60, Sports Act, 2013.

<sup>127</sup> Onywera V, Feedback Report on the Anti-Doping Policy Advice Project, 2015

Furthermore, the wide discretion given to federations gives room for requisite expertise to be applied in doping matters. Flexible procedures and remedies can be put in place to enhance doping regulation in Kenya.<sup>128</sup> In addition, dispute resolution by federations enhances effective cooperation between athletes and their respective federations. This close relationship results into easy monitoring of players by federations hence making it possible to restrict participation in sports event. The result is easy coercion of members to adhere to anti-doping rules.

### **2.3.1.7 The Anti-Doping Act.<sup>129</sup>**

This could be termed as the second legislative attempt to regulate doping in Kenya. It was enacted after Kenya was sanctioned by WADA for non-compliance with the World Anti-Doping rules and the subsequent threats of a ban. It was enacted to give effect to or provide a framework for the implementation of the United Nations Educational, Scientific and Cultural Organization Convention Against Doping in Sport: the regulation of sporting activities free from the use of prohibited substances and methods in order to protect the health of athletes: the establishment and management of the Anti-Doping Agency and to provide for the Agency's powers, functions and management and for connected purpose.<sup>130</sup>

It establishes the Anti-Doping Agency of Kenya with powers, obligations and duties of a body corporate.<sup>131</sup> It shoulders among others the main responsibility of regulating doping in the country through various mechanisms.<sup>132</sup> In order to ensure effective performance of its duties, its independence has been secured. For instance, the Agency does not require consent of any other body to commence investigations or impose sanctions. It further operates on its own account since it is required to be under no direction of any authority when exercising their powers and performing their duties.<sup>133</sup>

In an attempt to ensure implementation of the Act, Kenya in collaboration with China and Norway have seen through the establishment of the Anti-Doping Agency of Kenya.<sup>134</sup> China and Norway were tasked to oversee the technical training and guidance through the process.<sup>135</sup> The Chinese Anti-Doping

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<sup>128</sup> According to Greg Haff in his article, 'The Science of Doping and how Cheating Athletes Pass Drug Tests' technology poses both a scientific and legal challenge to authorities concerned with regulation of doping. This is because the nature of doping changes from time to time. We therefore need laws that are able to adapt and suit to future doping incidences without the need of amendments each and every time a new incident occurs.

<sup>129</sup> No. 5 of 2016

<sup>130</sup> Section 4, Anti-Doping Act, No. 5 of 2016

<sup>131</sup> Section 5, Anti-Doping Act, No. 5 of 2016

<sup>132</sup> Section 7, Anti-Doping Act, No. 5 of 2016. It outlines the functions of the Anti-Doping Agency of Kenya. Mechanisms employed by ADAK to curb doping include the creation of public awareness regarding doping and coordinates for research on performance enhancing drugs among other mechanisms.

<sup>133</sup> Section 9, Anti-Doping Act of Kenya, No. 5 of 2016

<sup>134</sup> World Anti-Doping Agency, WADA Foundation Board Approves 2015 Compliance Plan at November Meeting. Available at <https://www.wada-ama.org/en/media/news/2014>.

<sup>135</sup> World Anti-Doping Agency, WADA Foundation Board Approves 2015 Compliance Plan at November Meeting. At the meeting in South Africa, a comprehensive plan of action was laid down to guide the establishment of ADAK which would function as the National Anti-Doping Agency. Chinese Anti-Doping Agency and Anti-Doping Norway were chosen to guide the process especially through technical training.

Agency and Anti-Doping Norway were proposed by WADA to Kenya due to their high level of expertise in the field.<sup>136</sup>

Pertinent to the regulation of doping are institutions such as National Federations on their own independent accounts.<sup>137</sup> Their legal frameworks are composed of constitutions made up of substantive rules by the World Anti-Doping Agency or other international sports organizations such as the IAAF. For instance, the Constitution of Tennis Kenya provides that World Anti-Doping Code and any other rules by the National Anti-Doping Organization shall be an integral part of it.<sup>138</sup> In the same vein, Athletics Kenya as a member of the IAAF is bound by its Anti-Doping rules.<sup>139</sup>

Other mechanisms employed by the federations are the establishment of disciplinary committees.<sup>140</sup> For instance the Football Kenya Federation has a succinct constitutional provision for disciplining its members.<sup>141</sup> A clear appeal procedure has also been stipulated in the Constitution.<sup>142</sup>

Bodies such as the National Authority for the Campaign Against Alcohol and Drug Abuse (NACADA) could also play a vital role in the regulation of doping by virtue of its mandate.<sup>143</sup> It was established under the National Authority for Campaign Against Alcohol and Drug Abuse Act, 2012.<sup>144</sup> It is mandated to carry out public education on alcohol and drug abuse directly and in collaboration with other public or private bodies and institutions among other duties. Since some drugs contain doping substances, NACADA could play a big role in the management of such drugs through regulation of their supply and use. Furthermore, they could conduct intensive public awareness on drugs containing doping substances.

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<sup>136</sup> World Anti-Doping Agency, WADA Signs Partnership Agreement in Boost to Kenyan Anti-Doping Program. Available at <https://www.wada-ama.org/en/media/news/2015>. WADA will oversee the implementation of the project that is expected to last for three years. WADA Director General, David Howman argued that the choice of partners in the project was based on the level of expertise in the field of doping and its regulation.

<sup>137</sup> Onywera V, Feedback Report on the Anti-Doping Policy Advice Project, 2015

<sup>138</sup> Article 25.4, The Constitution of Tennis Kenya. Tennis Kenya is the sport organization in charge of tennis in Kenya; its management, growth and development in the country. The constitution under this section provides that the World Anti-Doping Code binds both the Association and its members.

<sup>139</sup> Rule 30, IAAF Anti-Doping Rules provides for the scope of application of the Anti-Doping Rules.

<sup>140</sup> Articles 53 and 62, FKF Constitution establish the Committee for Ethics and Fair Play and the Disciplinary Committee respectively to deal with breach of its rules. Section 2(f) mandates the Federation to prevent all methods and practices which might jeopardise the integrity of matches or lead to abuse of football. It therefore follows that among the methods that are likely to jeopardise football's integrity is doping. The above mentioned committees will thus deal with breach of anti-doping rules by clubs and individual players. Among the penalties include expulsions, match suspensions and bans among others.

<sup>141</sup> Article 62, FKF Constitution. The Disciplinary Committee is guided by the FKF Disciplinary Code. This code is informed by FIFA Rules.

<sup>142</sup> Article 63, FKF Constitution. Establishes an Appeals Committee with the mandate to hear appeals from the FKF Disciplinary Committee or the Independent Disciplinary and Complaints Committee.

<sup>143</sup> Section 5, National Authority for the Campaign Against Alcohol and Drug Abuse Act. Outlines the functions of NACADA. Among them is carrying out public education on drug use. The authority could use the same avenue to educate the public about performance enhancing substances.

<sup>144</sup> Section 4, National Authority for the Campaign Against Alcohol and Drug Abuse Act.

## CHAPTER THREE- COMPARATIVE STUDY ON ANTI-DOPING LEGAL FRAMEWORKS

### 3.1 Introduction

This chapter examines anti-doping legislations in other jurisdictions and aims at studying the differences and lessons that Kenya can draw from them. I take a look at Germany and South Africa. Germany has had a deep, rich and insightful background in sport and doping.<sup>145</sup> Its legal framework offers much for study particularly the criminalization of the doping infractions.<sup>146</sup> On the other hand, South Africa has had mature doping laws than Kenya.<sup>147</sup> Unlike Germany, it does not tend towards criminalization of the offence.

### 3.2 Germany

#### 3.2.1 History of Doping in Germany

Germany as a nation has had a rich doping history among its athletes in Olympics games.<sup>148</sup> This can be traced back to the breaking up of the German nation into West and East Germany in 1949.<sup>149</sup> It goes without mentioning that East Germany was of the communist faction in search of international recognition whereas the West was capitalist and supported by the Allied Powers. As a symbol of their bitter rivalry, the Berlin wall was erected to prevent migration to and from the two factions.

Despite the physical presence of their rivalry, competition was manifest in other fields such as the sports arena. Each nation wanted its fair share of recognition in the world of sports. However, it was the East that so hunkered for success in sports that it rolled out a state-sponsored doping program where some sports persons were compelled to use performance enhancing drugs.<sup>150</sup> It was a belief among officials of the East that sports could advance their nations recognition on international platform.<sup>151</sup> On the other hand,

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<sup>145</sup> Cole B, *The East German Sports System: Image and Reality*. It details how the separation of Germany into the West and East led to doping in sport especially in the East (German Democratic Republic).

<sup>146</sup> The German Anti- Doping Code provides for criminalization of doping.

<sup>147</sup> Maturity in this case is in terms of the time frame. The South African Institute for Drug Free Sport Act was enacted in 1997 whereas the Kenyan Anti-Doping Act was enacted in 2016. Besides criminalization, what other best practices could be adopted to curb doping? Germany and Kenya could learn one or two things from the South African situation.

<sup>148</sup> Noland M, *Russian Doping in Sports, 2016* . Available at <https://piie.com/system/files/documents>

<sup>149</sup> Ziebarth R, Wagner G, 'Top-Down vs. Bottom Up: The Long Term Impact of Government Ideology and Personal Experience on Values' *IZA Discussion Paper No. 7279*, 2013.

<sup>150</sup> 'Doping for Gold: The State-Sponsored Doping Program' Available at <https://www.pbs.org>.

<sup>151</sup> Scholarprof, 'The Role of Sport in the GDR' Available at [scholarprof.blogspot.co.ke](http://scholarprof.blogspot.co.ke). Sport was considered an important symbol for the supremacy of East Germany's system over that of the West. Furthermore, it was considered as a tool that could enhance the country's image on the world stage.

doping in West Germany and other members of the Western bloc revolved around individuals such as coaches and teams.<sup>152</sup>

It is against this deep, rich and insightful background of doping and sports in Germany that informed my decision to choose it as a jurisdiction to inform my study. Regulation of doping becomes evident after the fall of the iron curtain and the eventual reunification of East and West Germany to form the Federal Government of Germany.

### **3.2.2 Role of the Federal Government in fighting doping**

In Germany, just as it is in majority of the countries, sports bodies are responsible for detecting and punishing breach of anti-doping rules by athletes.<sup>153</sup> However, since the fight against doping is a multi-stakeholder affair, governments also play a key role in the fight against doping. For instance, the Federal Government of Germany has devised ways to deal with the menace. Among them include a discriminate state-funding program only to those associations which actively engage in the prevention of doping.<sup>154</sup> These associations are expected to lay down rules that act as guidelines to athletes, their coaches and other support officers.<sup>155</sup> The Government expects the associations to implement or meet requirements outlined in grant approvals.<sup>156</sup>

The second and most important way of regulating doping has been through legislation. The Federal Government is tasked with the responsibility of enacting laws and laying down a legal framework to safeguard public health. To that end, it has enacted Anti-Doping and Pharmaceuticals Products Acts (Arzneimittelgesetz). Furthermore, criminal law provisions have been adopted to curtail the prevalence of doping among athletes, producers, traffickers and distributors of doping substances.<sup>157</sup>

### **3.2.3 The German Anti-Doping Legal Framework**

German sport has been characterized by a long and rich tradition of clubs.<sup>158</sup> There exist all kinds of clubs in Germany. These clubs benefit from the principle of sports autonomy which requires a distinction between the state and sport. Germany's Basic Law (Grundgesetz für die Bundesrepublik Deutschland), or the Constitution provides for separation of sport and government.<sup>159</sup> The government is eschewed from

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<sup>152</sup> Wekesa M, Regulation of Doping in Sports: *Implications for Kenya*.

<sup>153</sup> Monitoring Group (T-DO), Respect by Germany of the Anti-Doping Convention: Draft Auto-Evaluation Report by Germany, 2010.

<sup>154</sup> Monitoring Group(T-DO), Respect by Germany of the Anti-Doping Convention

<sup>155</sup> Monitoring Group(T-DO), Respect by Germany of the Anti-Doping Convention

<sup>156</sup> Monitoring Group(T-DO), Respect by Germany of the Anti-Doping Convention

<sup>157</sup> Monitoring Group(T-DO), Respect by Germany of the Anti-Doping Convention

<sup>158</sup> Monitoring Group(T-DO), Respect by Germany of the Anti-Doping Convention

<sup>159</sup> Article 9, Basic Law (Grundgesetz) provides for the freedom of association, sports associations and clubs. The version of the Basic Law used was a translation of the International Constitutional Law Project which is an internet project to facilitate comparison of constitutional material.

interfering into sports matters. However, through grant approvals, the government can intervene in sport matters especially in the field of doping.

Since the state funds sports associations, the government makes conditional funding in order to influence the operations of sports organizations. The government could, for instance, lay down requirements to be fulfilled by sports associations in grant approvals before they can be funded. Among the requirements, anti-doping provisions are included.<sup>160</sup> Furthermore, the government requires associations to implement and where necessary comply with the German National Anti-Doping Agency Code and punish those who violate it.<sup>161</sup>

To further enhance its grip on anti-doping, the government requires individual associations to implement National Anti-Doping Agency Code through their constitutions and rules. The associations enter into agreements or contracts with the National Anti-Doping Agency promising to implement the provisions of the Code.<sup>162</sup> The trickle-down effect is that individual associations then enter into subsequent agreements with athletes and teams in their respective fields to implement their constitutions which are informed by the National Anti-Doping Code.<sup>163</sup> Breach of the agreement with the National Anti-Doping Agency could result to a denial of state funding.

Germany has for over a long period of time lacked a national anti-doping law that codified all the relevant anti-doping rules or legislations.<sup>164</sup> It was only until 2014 that the Anti-Doping Act was enacted.<sup>165</sup> However, before its enactment, there existed the Pharmaceutical Products Act which included provisions that specifically aimed to regulate doping among athletes.<sup>166</sup> These legislations are as discussed below:

### **3.2.3.1 The Pharmaceutical Products Act**

The Act was enacted to *guarantee, in the interest of furnishing both human beings and animals with a proper supply of medicinal products, safety in respect of the trade in medicinal products, ensuring in particular the quality, efficacy and safety of medicinal products.*<sup>167</sup> Despite it not being directly aimed at addressing questions of doping, various sections proscribe the use of certain drugs in sports or their

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<sup>160</sup> Monitoring Group(T-DO), Respect by Germany of the Anti-Doping Convention

<sup>161</sup> Monitoring Group(T-DO), Respect by Germany of the Anti-Doping Convention

<sup>162</sup> Monitoring Group(T-DO), Respect by Germany of the Anti-Doping Convention

<sup>163</sup> Monitoring Group(T-DO), Respect by Germany of the Anti-Doping Convention

<sup>164</sup> Keidel C, Klein N, 'Should Doping in Sport Be Criminalised? A Review of Germany's New Anti-Doping Act' Available at <http://www.lawinsport.com>

<sup>165</sup> It came into force on 1 January 2016.

<sup>166</sup> Monitoring Group(T-DO), Respect by Germany of the Anti-Doping Convention

<sup>167</sup> Section 1 ,Pharmaceutical Products Act of German. A non-official translation of the Act available at <https://www.gmp-compliance.org>

procurement for illegal use in sports.<sup>168</sup> For instance, section 6a and section 95 of the Pharmaceutical Products Act prohibit distribution, prescription and administration of pharmaceutical or medicinal products for purposes of doping. It further limits the purchase of doping substances to a certain quantity.<sup>169</sup>

In furthering the above discussed Act, stricter liability provisions were introduced by the enactment of the Act on Improving Measures against Doping in Sport.<sup>170</sup> It introduced stricter penalties for doping crimes under the Pharmaceutical Products Act<sup>171</sup>. It further deepened section 6a by including drugs used in conjunction with methods prohibited in the appendix to the Anti-Doping Convention and for doping purposes.<sup>172</sup> The Act further required inclusion of warnings and special information on the packets to guide physicians on the use of drugs which could also be used to dope.<sup>173</sup> Criminal sanctions for possessing quantities beyond the limits were also introduced.

### **3.2.3.2 The German Anti-Doping Act.<sup>174</sup>**

The pre-existing German anti-doping legal framework discussed above was perceived as ineffective and insufficient because it failed to fully tackle the question of doping regulation. Furthermore, it was unconsolidated. Thus, there was need to enact a law that would sufficiently and effectively deal with regulation of doping in Germany.

The Anti-Doping Act was enacted in 2014 and became enforceable in 2016.<sup>175</sup> The main feature characterizing it is the criminalization of doping.<sup>176</sup> It explicitly outlines some of the offences that can be related to doping. Among them is production, trade, administration and possession of a quantity beyond the prescribed quantity which if found guilty could be punishable with prison sentence up to three years.<sup>177</sup> A sentence of up to ten years could be meted out to persons guilty of providing the substances. However, the offence must be qualified. For instance, the substance in possession exposes the user to the danger of bodily harm to a significant number of people, resulting to death or threat thereof or serious harm to the body to another person or acting for commercial gain.<sup>178</sup>

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<sup>168</sup> For instance, Section 6a proscribes the prescription and administering of pharmaceutical products for purposes of doping in sports.

<sup>169</sup> Sections 6a and 95 of the Pharmaceutical Products Act.

<sup>170</sup> Dr. Mortsiefer L, Challenges and Ways of the 2015 Code Implementation, 2016.

<sup>171</sup> Monitoring Group(T-DO), Respect by Germany of the Anti-Doping Convention

<sup>172</sup> Monitoring Group(T-DO), Respect by Germany of the Anti-Doping Convention

<sup>173</sup> Monitoring Group(T-DO), Respect by Germany of the Anti-Doping Convention

<sup>174</sup> Federal Law Gazette 1, Pg 2210, Anti-Doping Act of 10 December 2015.(Official translation to English by the Language Service of the Federal Ministry of the Interior)

<sup>175</sup> Keidel , Klein , Should Doping in Sport Be Criminalised? A Review of Germany's New Anti-Doping Act

<sup>176</sup> Section 4, German Anti-Doping Act. It outlines the penalties that could be meted out to those who breach the rules.

<sup>177</sup> Section 4(1) , German Anti-Doping Act.

<sup>178</sup> Section 4(4) , German Anti-Doping Act.

Athletes who use performance enhancing substances with the aim to gain an unfair advantage over their competitors risk imprisonment for a term of up to three years.<sup>179</sup> However, this provision mainly applies to top-level athletes who engage in organized sport.<sup>180</sup> On the other hand, athletes who merely possess or acquire performance enhancing substances aiming to gain an unfair advantage in competition may be sentenced to a prison term of up to two years.<sup>181</sup>

From a critical analysis of the Anti-Doping Act, it is explicit that the Federal Government adopted a radical approach to protect the integrity of sport. For over a long period of time, doping has jeopardized credibility of sport in Germany. Other nations should thus follow in the heels of the Bundestag.

### **3.3 SOUTH AFRICA**

Regulation of doping is on both a legal and institutional basis.<sup>182</sup> The main legislation that specifically dedicates itself to the question of regulation of doping is the South African Institute for Drug Free Sport Act.<sup>183</sup> The Act's goal is to promote a drug free sport clean of performance enhancing substances. It goes further to explain how this legislative objective could be achieved. For instance, section 10 provides for various objectives aimed at regulation of doping.<sup>184</sup>

The South African Institute for Drug Free Sport (SAIDS) is an independent body that acts as the National Anti-Doping Agency responsible for regulation of doping in the nation. It is a creation of the South African Institute for Drug Free Sport Act.<sup>185</sup> The institute has laid down South African Institute for Drug Free Sport Anti-Doping Rules, 2015 which are in line with the World Anti-Doping Code by which Sports Associations and athletes are expected to abide by. Furthermore, the Institution is in charge of the establishment of doping control laboratories. Among the established laboratories was the Doping Control Laboratory at the University of Free State in Bloemfontein whose accreditation had been revoked but has since been reinstated.<sup>186</sup>

Apart from the SAIDS, other bodies such as the South African Sports Confederation and Olympics Committee (SASCOC) also play an important role in the regulation of doping.<sup>187</sup> It is an umbrella body with

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<sup>179</sup> Section 4(7) , German Anti-Doping Act

<sup>180</sup>Section 4(7) defines an elite athlete as a member of an anti-doping testing pool, who are subject to mandatory tests even in training.

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<sup>182</sup> South African Institute for Drug Free Sport(SAIDS), Anti-Doping Disciplinary Hearing for Darron Winston Omaticus, 2011.

<sup>183</sup> Act No. 14 of 1997

<sup>184</sup> Section 10 of Act No. 14 of 1997 provides for the encouragement of development programs aimed to educate sporting communities about the negative effects of doping

<sup>185</sup> Section 10, South African Institute for Drug Free Sport Act, Act No. 14 of 1997

<sup>186</sup> SAIDS: Doha Doping Control Laboratory Closure will not Compromise South African Test Results

<sup>187</sup> Ndlovu P, Anti-Doping Law in South Africa: The Challenges of the World Anti-Doping Code

representatives from all sports tasked with the responsibility of overseeing the development and progress of athletes within the realms of the World Anti-Doping Code.<sup>188</sup> Its main goal is to promote and develop high performance sports in South Africa. With regard to doping, SASCO in its Articles of Association requires all members to comply and be bound by the World Anti-Doping Code.<sup>189</sup>

### **3.3.1 Lessons from the Comparative Study**

The case studies reveal that regulation of doping by law alone is insufficient to solve all the doping problems in sport. Nonetheless the existence of clear laws is a prerequisite in this fierce struggle. Other factors besides the law are key in the fight against the use of performance enhancing drugs.

It is evident from the two jurisdictions that the independence of the National Anti-Doping Agencies is key in ensuring efficient and effective regulation of doping. Government interference should be discouraged. However, intervention should be initiated only when necessary.

The study also indicates that public awareness and education on doping is pertinent in reducing cases of doping among athletes. Germany conducts an intensive anti-doping awareness program to educate the public about the effects of applying performance enhancing drugs. Developing nations should borrow a leaf from such nations.

### **3.3.2 Conclusion**

The case studies lead us towards the independence of national anti-doping agencies operating under legal frameworks characterized by clarity, certainty and flexibility of rules. Despite their independence, multi-stakeholder cooperation is also important. Governments, sports associations, individual athletes among other players need to afford National Anti-Doping Agencies maximum cooperation. Germany serves as an exemplar where there is cooperation among the relevant stakeholders in sports in regulation of doping. Furthermore, it acts as a trailblazer in criminalization of doping. On the other hand, South Africa gives us an alternative against criminalization of breach of doping rules.

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<sup>188</sup> Ndlovu P, Anti-Doping Law in South Africa: The Challenges of the World Anti-Doping Code

<sup>189</sup> Article 26 of the SASCO Articles of Association. It requires associations and individual athletes to adhere to the anti-doping rules.

## **CHAPTER FOUR- SUITABILITY OF THE KENYAN ANTI-DOPING LEGAL FRAMEWORK IN REGULATION OF DOPING**

### **4.1 Introduction**

This chapter looks at the prominent features of the Kenyan anti-doping legal framework and analyzes its suitability to the Kenyan situation. It further goes ahead to explain why criminalization of doping is among the most suitable ways to regulate doping among Kenyan sports persons. The anti-doping legal framework enmeshes different players.<sup>190</sup> Kenya has to devise means to ensure maximum cooperation in the regulation and fight against doping.

### **4.2 The Constitution of Kenya 2010.**

The Constitution of Kenya, 2010, as the supreme law recognizes international law as part of Kenyan municipal law.<sup>191</sup> Treaties and conventions on regulation of doping form part of international law.<sup>192</sup> This relationship gives Kenyan law the flexibility it needs to curb doping.<sup>193</sup> For instance, if states enter into a treaty to regulate a breach of an anti-doping rule aided by new technology, Kenya is able to adopt the same and learn how to regulate it on its own.

Furthermore, the distribution of functions between the national government and the county governments in crystal clear terms has served right the regulation of doping.<sup>194</sup> In succinct terms, the national government is responsible for the regulation and development of sports in the country. However, county governments also have a role in the regulation of sport though in a subtle manner.<sup>195</sup>

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<sup>190</sup> For instance the government, sports federations, World Anti-Doping Agency, Anti-Doping Agency of Kenya, individual athletes and coaches et al have an interest in the Kenyan anti-doping situation and sport in general.

<sup>191</sup> Article 2(6), Constitution of Kenya, 2010. Provides that ratified treaties and conventions BY Kenya form part of its laws.

<sup>192</sup> Despite this provision, there has not been another international convention on doping to ratify.

<sup>193</sup> By flexibility I mean the ability of the law to deal with future doping incidences which could either be foreseeable or unforeseeable. Laws could easily be adopted to cater for future circumstances. An advantage that accompanies treaties is that most are informed by expertise most developing nations lack.

<sup>194</sup> Fourth Schedule, Constitution of Kenya, 2010. The country has not experienced lapses in regulation of doping because of wrangles between the national and county governments over whose responsibility it is as has been in some other sectors such as health.

<sup>195</sup> Part 2, Fourth Schedule, Constitution of Kenya, 2010.

This distinction of roles has granted the national government the monopoly to deal with regulation of the doping scourge amicably. For instance, it was the national government through the Ministry of Sports, Culture and the Art with the assistance of the Ministry of Foreign Affairs that negotiated with the World Anti-Doping Agency over the extension of the dead line that Kenya was required to meet in compliance with the World Anti-Doping Code.<sup>196</sup> Furthermore, the national government was mandated to establish an independent anti-doping agency responsible for regulation of doping. Fragmented efforts would have been experienced if each county was to be allowed to establish its own agency.

However, it is my opinion that the fight against doping be intensified by involving counties more in the struggle. They could for instance be required to establish their own anti-doping rules to regulate doping in sport in their regions.<sup>197</sup> Furthermore, public awareness on doping could be furthered by counties since they are better placed to do it than the national government.<sup>198</sup>

#### **4.3 The Sport Act**

Prior to its enactment in 2013, there existed no legislation that directly addressed itself to the question of sports regulation. Government intervention before 2013 was minimal. However, its enactment signified a shift from non-intervention to government intervention.<sup>199</sup> Among its aims is the promotion of drug-free sports and recreation and to provide for sports institutions, facilities, administration and management of sports in the country.<sup>200</sup>

The Act's most important section relating to doping regulation is section 73. It grants the Minister for Sports, Culture and the Art the power to intervene into sports matters. He or she is granted the power to make anti-doping rules.<sup>201</sup> These delegated powers are essential to enact or amend changes in the law where doping or sporting trends demand so.

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<sup>196</sup> Omulo I, WADA approves Kenyan Anti-Doping Laws-Minister, 2016.

<sup>197</sup> This is because different regions are associated with different sports. For instance, most long distance athletes obtain from different counties in the Rift Valley region while soccer and rugby are common in the Western Region of the country. The fight could be made more specific by educating sports persons on drugs mainly used in their sport.

<sup>198</sup> We have to appreciate the fact that most athletes are less educated. The best way to reach them is through their mother tongue. They are likely to understand doping far much better when it is discussed in their language than in English. County governments could afford the human resource to do this since they are close to the people.

<sup>199</sup> Akech, Public Regulation of Sports in Kenya.

<sup>200</sup> Long Title, Sports Act.

<sup>201</sup> Section 73 provides that '*the Cabinet Secretary shall make regulations for the better management of anti-doping activities.*'

The appeal mechanism both under this Act and the Anti-Doping Act is advantageous because it allows national sports federations to act as courts of first instance. This is good for doping regulation because it allows federations to keep up with the development of anti-doping regulations by their respective international sports bodies and emerging trends.<sup>202</sup> Furthermore, decisions are likely to be informed by high-level expertise since the adjudicators are specialists in the field.

Besides the appeal mechanism, intervention by the government in sports matters has to some extent enhanced regulation of doping in Kenya. It goes without mentioning that sports bodies lack the financial muscle required to establish a framework to maintain some aspects of the sport.<sup>203</sup> For instance, regulation of doping is too expensive an affair to be shouldered by sports bodies. Furthermore, there are aspects of the sport that affect society in general and since the government is the guardian of the society, it is obligated to intervene.<sup>204</sup>

It could therefore be argued that the Sports Act is the parent legislation of the Anti-Doping Act since it grants the Minister of Sports, Culture and the Art the power to make rules regarding regulation of doping.

#### **4.4 The Anti-Doping Act**

This is the main legislation that objectifies the question of doping regulation in Kenya.<sup>205</sup> Its main provisions regarding regulation of doping include:

- a) Establishment of an independent anti-doping agency.<sup>206</sup>
- b) Outlines an appeal structure in case of disputes.
- c) Criminalization of doping offences.<sup>207</sup>

##### **a) Establishment of the independent Anti-Doping Agency of Kenya (ADAK).**

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<sup>202</sup> Onywera, Feedback Report on the Anti-Doping Policy Advice Project.

<sup>203</sup> For instance, regulation of doping and establishment of facilities such as laboratories require a lot of funds which cannot be solely raised by the sports bodies.

<sup>204</sup> For instance, elite athletes act as role models in society. They could negatively influence youths who look up to them. Furthermore, doping allegations have economic ramifications in terms of sponsorship deals et al.

<sup>205</sup> Long Title, Anti-Doping Act of Kenya.

<sup>206</sup> Section 5, Anti-Doping Act of Kenya.

<sup>207</sup> Section 42, Anti-Doping Act of Kenya. It outlines offences one can be charged with and penalties that can be meted out.

The Act establishes the Anti-Doping Agency of Kenya as a body corporate with the sole purpose of ensuring a drug free sport.<sup>208</sup> It further goes ahead to secure the Agency's independence by empowering it to act on its own account without the consent or control of any other authority.<sup>209</sup>

Independence in this case serves to insulate the National Anti-Doping Agency from the influence of sport bodies and the government.<sup>210</sup> This is important because of conflict of interest.<sup>211</sup> Most if not all sport bodies are responsible for the selection, preparation and presentation of the best athletes in competitions.<sup>212</sup> They can easily be tempted to prioritise financial gains ahead of regulation of doping.<sup>213</sup>

A case in point to illustrate conflict of interests would be Mr. Michael Rotich, Kenya's track and field manager in the Rio Olympics who allegedly requested a bribe worth ten thousand pounds in order to forewarn athletes of tests.<sup>214</sup> The question then would be whether Mr. Rotich as an officer of both ADAK and Athletics Kenya would be able to prevent doping incidences among Kenyan athletes. In another incidence, the then Chief Executive Officer of Athletics Kenya, Mr. Isaac Mwangi was accused of demanding a bribe of twenty four thousand pounds from two athletes each who had been suspended over doping claims.<sup>215</sup> At the time, the Kenya Anti-Doping Agency was an affiliate body under Athletics Kenya.<sup>216</sup> The corollary then is that it is very difficult for sport bodies to objectively regulate doping while at the same time manage teams and competitions.<sup>217</sup>

In addition to minimal interference and conflict of interest, independence positions the Agency to function effectively and efficiently by employing expertise.<sup>218</sup> When the Agency is run

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<sup>208</sup> Long Title, Anti-Doping Act. All the functions of the Agency aim at ensuring a sport free of performance enhancing substances.

<sup>209</sup> Section 9, Anti-Doping Act of Kenya.

<sup>210</sup> Vijayukumar S, 'Anti-Doping Agencies Call for Independence from Sporting Bodies' (Reuters) *A summit of National Anti-Doping Agencies*, 2016.

<sup>211</sup> Vijayukumar S, *Anti-Doping Agencies Call for Independence from Sporting Bodies*, 2016.

<sup>212</sup> Onywera, *Feedback Report on the Anti-Doping Policy Advice Project*.

<sup>213</sup> Bergan A, *Is Anti-Doping Agency of Kenya (ADAK) an Independent, Trustable Anti-Doping Agency?*

<sup>214</sup> Agence France Presse, 'Kenyan Athletics TM Deported over Doping Bribe in Rio' Available at <http://www.capitalfm.co.ke>.

<sup>215</sup> Associated Press, *Kenya Athletics CEO asked for Bribe to Reduce Doping Suspensions, allege Athletes*. Joy Sakari and Koki Manunga claimed that the CEO asked for twenty four thousand pounds from each of them so that he could help in reducing their suspensions.

<sup>216</sup> Athletics Kenya, 'Medical/ Anti-Doping Available at <http://www.athleticskenya.or.ke>.

<sup>217</sup> Vijayukumar S, *Anti-Doping Agencies Call for Independence from Sporting Bodies*, 2016.

<sup>218</sup> Bergan, *Is Anti-Doping Agency of Kenya (ADAK) an Independent, Trustable Anti-Doping Agency?*

by independent experts chosen out of their expertise and experience in the field, chances are high that best policies, practices and laws will be established to boost regulation of doping. The Kenyan situation has seen the Agency seek technical training and guidance from the more established CHINADA and ADN.

From the aforementioned cases of CEO Isaac Mwangi and Mr. Michael Rotich, it is explicit that despite their independence, anti-doping agencies need to be transparent in order to raise confidence in the anti-doping legal framework. Disclosure of activities will increase accountability of Agency's officials.

### **b) Criminalization of Doping Offences.**

Recent years have seen a gain in momentum among legislators to add to their legal arsenals the criminalization of doping.<sup>219</sup>This represents a radical shift from the traditional belief that doping was only unethical but legal by the mere fact that it only violated the fundamental ideals of sports hence could not fall under the realm of criminal law and state control.<sup>220</sup> However, the development of sport into an important economic and influential global affair has greatly changed that belief and further affected the status of sports itself and the dynamics of society.<sup>221</sup>National teams today are symbols of country's strength whereas elite athletes enjoy elevated status in society.

With increased incidences of breach of anti-doping rules, it would be important to analyse whether criminalization is the best method to adopt in regulation of doping. This section aims to look at both sides of the coin, the advantages and disadvantages, arguments for and against criminalization of doping especially for the Kenyan situation.

#### **i. Rationale for Criminalization.**

Initial attempts to regulate doping have been characterized by limited success.<sup>222</sup>This could be related to the elevated status sports enjoy in society today resulting in high prospects

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<sup>219</sup> The Anti-Doping Acts of both Kenya and Germany which both came into force in 2016 have criminalized doping. In the same vein, Russia is in the process of enacting an anti-doping legislation with criminalization of doping among its objectives.

<sup>220</sup> Hoberman J, 'Athletes in Handcuffs?': *The Criminalization of Doping*.

<sup>221</sup> Hoberman J, 'Athletes in Handcuffs?': *The Criminalization of Doping*.

<sup>222</sup> Hoberman J, 'Athletes in Handcuffs?': *The Criminalization of Doping*. This has been due to an increase in the number of athletes who have been caught doping.

economically.<sup>223</sup>The regulatory failure registered has caused much anxiety and frustration among regulators both domestically and internationally causing a public outcry for criminalization of doping offences.<sup>224</sup>

Before criminalizing regulation, the pertinent question would be: what has made elite sport so unique that its regulation merits the application of coercive force of the state? Why then, should the state intervene in regulation of sports when sports bodies fail?<sup>225</sup>Reasons for criminalization are as discussed below:

### **Harm to the Integrity of Sport.**

Doping has to a large extent undermined and destroyed the perception of sport as a worthy endeavor to pursue.<sup>226</sup> It undermines fairness by creating an unfair advantage and destroying the level playing ground that is much needed in competitive sport.<sup>227</sup>With this abrasion of fundamental sports tenets, it loses its economic and social value because its interests are hinged upon its integrity.

Today, the economic impact of sports is humongous.<sup>228</sup> For instance, Omari Williams, a program leader for sports at the University of Derby estimates that the English Premier League brought in an estimated £706 million to the British economy in 2011 alone from sports tourism.<sup>229</sup>Besides benefitting the economy, it incredibly pays athletes. Athletes pull in large sums of money in terms of salaries and endorsements.<sup>230</sup> With such significant stakes in sports, harm to sports signifies low economic and social returns and thus has attracted regulatory machinations of states.

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<sup>223</sup> Boit M, Dimeo P, Onywera V, Theuri G, Kiplamai F, Sigei S, Stewart D, Cronin L, Doping Education Status in Kenya: *Evaluation of Knowledge, Attitudes and Practice of Doping among Elite Kenyan Athletes*

<sup>224</sup> Doping in Kenya. Available at <http://www.runningin10ten.com>.

<sup>225</sup> Völlmecke J, The Policy Issue Concerning the Choice of the Method to Deal with Doping. Available at <https://www.questia.com/library/journal>. She suggests that where sports bodies are overwhelmed, governments can intervene due to their regulatory ability based on expertise and finances.

<sup>226</sup> Lowther J, Effectiveness, Proportionality and Deterrence: *Does Criminalizing Doping Deliver?*

<sup>227</sup> Dimant E, Deutscher C, The Economics of Corruption in Sports: The Special Case of Doping. Available at <https://ethics.harvard.edu>

<sup>228</sup> Dimant , Deutscher , The Economics of Corruption in Sports.

<sup>229</sup> Thorne R, Economic Impact of Sporting Events. Available at <http://www.independent.co.uk>

<sup>230</sup> An example is Carlos Tevez, a football player for Shanghai Shenhua whose GDP is more than the Island Nation of Tuvalu. Available at <https://www.thesun.co.uk/sport/football>

Secondly, elite sports persons act as role models in society.<sup>231</sup> They draw the attention of fans through their performances and personality.<sup>232</sup> Youths tend to emulate what their role models do. This creates a need for clean sports since they are likely to produce clean athletes who most probably will lead others in the right direction.

Kenya as a country has greatly achieved in the field of sports on the international scene. This has had a tremendous effect on the Kenyan economy.<sup>233</sup> Our long distance runners act as ambassadors of the country to the outside world whenever they set foot on the pitch.<sup>234</sup> This has resulted to sports tourism that has injected in substantial sums of revenue. Claims of breach of anti-doping rules among our athletes have only served to taint our name as a nation. Recent days have seen Kenya widely criticized for an ever increasing number of athletes caught using performance enhancing substances.<sup>235</sup>

### **Concerns for athletes' health and the Public.**

The most pertinent question would be: What merits the criminalization of doping on health grounds? Doping poses a serious threat to the health of both the athlete and the general public.<sup>236</sup> Public health has been the rationale behind regulation of drugs the world over.<sup>237</sup> In its historical variation, doping has proved how detrimental it could be on athletes. For instance, the death of Knud Enemark Jensen reminds us of the need for stringent anti-doping rules.<sup>238</sup>

However, despite the need to regulate doping on health grounds, there is need for proportionality in terms of enforcement.<sup>239</sup> The United Kingdom through the Advisory Council for the Misuse of Drugs has classified drugs based on their potential harm to the users. It therefore prescribes penalties depending on the potential harm a certain drug it could pose to its users.

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<sup>231</sup> Wekesa M, Regulation of Doping in Sports: *Implications for Kenya*.

<sup>232</sup> Adair D, Athletes of Influence-The Reality of Sports Role Models. Available at <http://www.uts.edu.au/about/uts>

<sup>233</sup> Mwisukha A, Njororai W, Onywera V, Contributions of Sports towards National Development in Kenya.

<sup>234</sup> Nairobi Business Monthly, Establish the Real Economic Value of Sports to our Economy, 2015.

<sup>235</sup> The Telegraph, Kenya under Fire from WADA after Alarming Increase in the Number of Athletes Testing Positive for drugs. Available at [www.telegraph.co.uk/sports](http://www.telegraph.co.uk/sports).

<sup>236</sup> Tomiuc E, World: Doping- Performance Enhancing Drugs a Threat to Health and Ethics. Available at <http://www.rferl.org>.

<sup>237</sup> Lowther, Effectiveness, Proportionality and Deterrence: *Does Criminalizing Doping Deliver?*

<sup>238</sup> Knud Enemark Jensen was a Danish cyclist who died in-competition due to the use of Amphetamine during the Summer Olympics games in Rome

<sup>239</sup> Lowther, Effectiveness, Proportionality and Deterrence: *Does Criminalizing Doping Deliver?*

### **Organized Criminality.**

The need to tackle groups behind the manufacture, possession, distribution and sale of performance enhancing drugs is a well-documented fact.<sup>240</sup> It is in Interpol's view that a doping athlete is just but an element in a syndicated network.<sup>241</sup> The World Anti-Doping Agency on the other hand has clearly stated the relationship between organized criminal groups, doping and the incapability of sports bodies to deal with them.<sup>242</sup> It is of the opinion that governments enter the fray to help manage these groups.<sup>243</sup>

To further prove the existence of criminal gangs, the Australian Crime Commission in its report revealed that the use and administration of performance enhancing substances among athletes was being facilitated by coaches, sports scientists and support personnel.<sup>244</sup> The response was an increased role by the Australian government in regulation of doping whereby it adopted a zero tolerance policy for doping athletes and their support personnel.<sup>245</sup>

### **Lessons from the above discussion.**

From the above, it is clear that it is the proliferation of doping incidences among athletes that has intensified the urge for its criminalization.<sup>246</sup> Increased breach of anti-doping rules will further undermine the integrity of sports and pose a bigger threat to athletes' health and the general public. Cases to illustrate how an increase in doping cases has resulted to its criminalization are France and Germany.

The two nations adopting criminalization as a means to curb doping is deeply rooted in their history of both sports and doping. France hosts the Tour de France annually. It concerns cycling

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<sup>240</sup> Interpol, Doping. Available at <https://www.interpol.int/Crime-areas>.

<sup>241</sup> Interpol, Doping. Available at <https://www.interpol.int/Crime-areas>

<sup>242</sup> MacMichael S, WADA says Organized Crime's Links to Doping and Match-fixing too Big for Sport to Fight Alone. Available at <http://road.cc/content/news>

<sup>243</sup> The Guardian, Drugs in Sport: WADA says Doping and Organised Crime 'too big to Manage'.

<sup>244</sup> Australian Sports Anti-Doping Authority, Ministerial Statement: Organised Crime and Drugs in Sport. Available at <https://www.asada.gov.au>

<sup>245</sup> Australian Sports Anti-Doping Authority, Ministerial Statement: Organised Crime and Drugs in Sport

<sup>246</sup> The Kenyan example serves to explain this better. Proliferation of doping incidences among Kenyan athletes has forced authorities to resort to its criminalization.

through France and neighboring countries. It was first organized in 1903.<sup>247</sup> Despite its popularity, it has been marred by various doping scandals that have caused ripples the world over.<sup>248</sup> These events have served to taint the image of France and its sports fraternity in general. To curb this, I believe France resorted to criminalization of doping.

Germany's doping history dates back to the breaking up of Germany into the East and West.<sup>249</sup> The German government today is still grappling with the effects of the state-funded doping program that was run by the East.<sup>250</sup> For instance, it had to award one hundred and eighty four athletes 9250 euros each to cater for their health problems they are still facing due to doping.<sup>251</sup> It is such a history that pushes the state to criminalize an offence such as doping.

It therefore suffices to state that the criminalization of doping by the Anti-Doping Act of Kenya is a sure way to curb doping. However, it must be appreciated that even though this legislation is important, it is inadequate. It requires the complement of other methods to be sufficient.

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<sup>247</sup> Bacic V, The History of Tour de France from the Geographical Point of View

<sup>248</sup> The Huffington Post, Tour de France Doping. Available at <http://www.huffingtonpost.com>. Talks about Lance Armstrong who confesses how it is impossible to win Tour de France without doping.

<sup>249</sup> Cole B, The East German Sports System: *Image and Reality*.

<sup>250</sup> East Germany's Doping Program Casts Long Shadow over Victims. Available at <http://www.dw.com>.

<sup>251</sup> East Germany's Doping Program Casts Long Shadow over Victims. Available at <http://www.dw.com>

## **CHAPTER 5-CONCLUSION AND RECOMMENDATIONS**

### **5.1 Introduction**

This chapter outlines the findings, recommendations and conclusions of the study. The study was undertaken to critically analyse whether the Kenyan anti-doping legal framework is suitable for the regulation of doping in Kenya.

### **5.2 Findings**

#### **5.2.1 Treatment of Doping as a Sports Rule Violation rather than a Crime.**

Most people against criminalization of doping argue that it only affects sports. However, they fail to appreciate the much elevated status sports enjoy today and the role it now plays in society. Economic interests are hinged on the integrity of sports. Furthermore, elite athletes today play an integral in society. They are role models in society due to their personality besides being ambassadors of their states on the international scene.

Furthermore, doping poses great risk to both athletes and the public. Athletes who were nationals of East German are still suffering from doping despite the fact that it took place a number of years back. In France, the Tour de France has registered numerous deaths on grounds of doping.

It therefore emerges that doping does not only affect sports. It affects other aspects of society and if poorly managed could destroy both itself and the social fabric of society.

#### **5.2.2 Need to further Harmonize Laws Regulating Doping.**

It is clear that nations doing well in doping regulation have an integrated system with harmonized laws. For instance the Germany Anti-Doping Act refers to other laws such as the Pharmaceuticals Products Act, the Penal Code and the Act on Improving Measures against Doping for further guidance where it is not specific.

Kenyan law dealing with drugs should be in tandem with the Anti-Doping Act. For instance, the Pharmacy and Poisons Act, the Narcotics and Psychotropic Substances (Control) Act and the Medical Practitioners and Dentists Act should deepen the Anti-Doping Act through amendments which incorporate doping. At the moment, it is only the Anti-Doping Act that is dealing with regulation of doping.

### **5.2.3 Independence of the Anti-Doping Agency of Kenya.**

For a long time, the Kenyan national anti-doping agency has not been independent. ADAK's predecessor was an affiliate of Athletics Kenya hence was subject to interference from it due to conflict of interests. When compared to agencies like the German National Anti-Doping Agency, we have much to learn from it.

### **5.2.4 Establishment of a Physical Anti-Doping Infrastructure.**

Kenya lags behind in terms of resources such as accredited anti-doping laboratories to conduct tests. We have to depend on other countries for tests. This is an expensive affair taking into account factors such as transportation costs, fees for the tests and possible delays in results.

### **5.2.5 Public Awareness**

The Anti-Doping Task Force of Kenya in its report noted that the level of awareness among Kenyans on performance enhancing drugs was low. This has to some extent hampered regulation due to unawareness on the substance to be regulated and the law itself.

## **5.3 Recommendations.**

### **5.3.1 Need for Enlightenment on Doping**

It is a much appreciated fact that law alone is insufficient to regulate society. For efficiency, it requires the support of other means such as awareness on the subject of regulation and the existence of the law itself. In order to do this, the government could invoke the help of certain agents. Doctors being experts in the medical field could be taught about doping and in turn transfer the same to athletes and members of the public.

Furthermore, the media could be given a prominent role in this task. Local stations, both television and radio, able to present in vernacular could teach athletes about doping in their mother tongue for easy understanding. On a national basis, the government could use print media such as newspapers to educate the public on penalties for breach of anti-doping rules.

Since coaches and support personnel play an important role in sports, they need special training on regulation of this menace. It is sad that boxer Daniel Munyasia was disqualified from Athens Olympics because of unawareness of the officials on the listing of Cathine as a banned

substance.<sup>252</sup> They should be the people with first-hand information regarding regulation of doping.

South Africa serves as a good example since it has conducted a nationwide program to educate the people on anti-doping. South African Institute on Drug Free Sports together with Virgin Africa funded a drive to raise awareness on effects of PEDs nationally.<sup>253</sup>

### **5.3.2 Need to ensure Independence of ADAK.**

Independence of the national anti-doping agency is a prerequisite for its efficient functioning. It needs to be shielded from interference from the government and other agencies. However, despite its independence, it should be granted some power over the sports bodies and athletes it is mandated to oversee.

Kenya could borrow from the German system where sports bodies are funded by the government only through the National Anti-Doping Agency. It recommends to the government sports bodies that have participated in the fight against doping by abiding to its rules. Those that fail to meet the Agency's criteria are denied state funds.

It is therefore my proposal that ADAK be given a more pronounced role through the funding mechanism.

### **5.3.3 Establishment of a Physical Anti-Doping Infrastructure**

The government, ADAK and sports bodies should join hands to build necessary resources such as laboratories to aid in regulation of doping. Kenya depends on other nations for testing of samples. This has been disadvantageous because of the costs and delay of results.

## **5.4 Conclusion**

The study concludes that criminalization of doping is necessary for the Kenyan situation. It however denounces legislation as the only method to regulate society. It appreciates other means that complement and make it more efficient.

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<sup>252</sup> Kenya Boxing Page, 'Kenya Boxing Results at the 2004 Olympics' Available at <http://kenyapage.net>.

<sup>253</sup> SAIDS, Virgin Active on Anti-Doping Educational Drive with SA Institute for Drug Free Sport. Available at <http://www.drugfreesport.org.za>.

It further goes on to recommend mechanisms that can fill the gaps in the Kenyan anti-doping legal framework by doing a comparative study of the German and South African anti-doping legal systems.

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