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The response of IPOA and other state institutions to deaths in custody and police misconduct in Kenya

Russel Crowe*

Abstract

This article looks into deaths in police custody and police oversight in Kenya. Death in police custody includes instances where an individual in the custody of police loses their life in one way or another, including through suicide. The article defines death in custody, discusses the right to life, and briefs on the reports made by institutions such as Independent Policing Oversight Authority (IPOA). It also analyses the Kenyan legal framework that governs police conduct and institutions responsible for reporting, investigating and prosecuting cases on death in police custody. It describes the process through which reports can be made to relevant authorities and establishes that IPOA plays a major role in holding police officers accountable. This article also posits that the State in general, IPOA, the Internal Affairs Unit, Office of the Director of Public Prosecutions and police officers have failed in their mandate to report and investigate and satisfactorily prosecute complaints of deaths in custody. It highlights the success and challenges IPOA faces in effecting its mandate. It goes further to give recommendations towards improving the prosecution of death in custody cases.

Keywords: death in custody; police accountability; prosecution; right to life; police conduct; IPOA

1. Introduction

Deaths in custody cause untold grief to the victims' loved ones and creates fear among the general populace. The right to life is enshrined in the Constitution of Kenya (2010) and, although it can be limited, its limitation can only be valid if done within the constraints of the law.¹ Under the provisions of the Constitution, rights can only be limited after the consideration of certain factors. These factors include: the nature of such a right, importance or purpose of its limitation, nature and extent of its limitation, and finally the relation between the limitation and purpose and whether less restrictive means to achieve such limitation are present.² Individuals have a right not to be subjected to any form of violence or torture not to be treated or punished in a cruel inhumane or degrading manner.³ These rights encompass the right to freedom and security of a person.⁴ In *Zeitun Juma Hassan v Attorney General and 4 others*,⁵ the High Court opined that the right to life is foundational, sacrosanct and cannot be limited unless its limitation is within the provisions of law. The enjoyment of other rights is dependent on the very enjoyment of the right to life.

The state has a responsibility of guaranteeing the right to life. Organs such as the National Police Service established under Article 243 have a mandate to comply with constitutional standards of human rights and fundamental freedoms. The National Police Service Act further requires both the Kenya Police Service and the Administration Police to protect life, and prevent and detect crime.⁶ Ironically, the police appear to be the perpetrators of violations of the right to life.

¹ Constitution of Kenya (2010) Article 26(3).

² Constitution of Kenya (2010) Article 24(1).

³ Constitution of Kenya (2010) Article 29.

⁴ Constitution of Kenya (2010) Article 29.

⁵ Petition No. 57 of 2011, Judgement of the High Court at Nairobi (2014) eKLR, para 25.

⁶ National Police Service Act (No. 11A of 2011), Section 24(d), 27(d).

In 2022 alone, 72 individuals are reported to have been killed and 3 to have disappeared in police custody.⁷ In 2021, 187 were killed in police custody while 32 disappeared.⁸ Of the deaths in custody reported, 2 young citizens in Kianjakoma, Embu County, Benson Njiru Ndwiga and Emmanuel Mutura Ndwiga, lost their lives to police officers who were enforcing COVID-19 curfew orders. Emmanuel Mutura was our colleague at Kabarak Law School. Consequently, protests took place in Embu and live rounds of ammunition were used to disperse crowds, one individual was shot dead.⁹ In 2020, 158 people were killed while in police custody, and 10 disappeared.¹⁰ The Independent Policing Oversight Authority (IPOA) conducted a survey which revealed that only 30% of incidents get reported.¹¹ IPOA reports that in 2020, they received and processed 1,557 complaints, investigated 330, 16 were referred to the National Police Service Internal Affairs Unit, 45 were forwarded to the Office of the Director of Public Prosecutions (ODPP) and 95 were filed before court.¹²

The criminal justice system is comprised of the community, the police who investigate alleged crimes and arrest suspected criminals, the judiciary and the prison service as key actors.¹³ It is also comprised of institutions with the goal of maintaining social control and deterring crime.¹⁴ These have different functions and powers entrenched in the

⁷ Missing Voices Kenya, 'Extrajudicial killings in 2022' *Missing Voices- Trial Tracker*, 25 July 2022.

⁸ Missing Voices Kenya, 'Extrajudicial killings in 2021' *Missing Voices- Trial Tracker*, 8 September 2021.

⁹ 'Kenya: One killed in protests over brothers' deaths in custody' *Al Jazeera* 5 August 2021.

¹⁰ Missing Voices Kenya, 'Extrajudicial killings in 2021'.

¹¹ Independent Policing Oversight Authority, *Baseline survey on policing standards and gaps in Kenya* (2013) 16, 17.

¹² Independent Policing Oversight Authority, *Annual report and financial statements for the year ended 30 June 2020*.

¹³ National Council for the Administration of Justice, *Criminal justice system in Kenya: An audit*, 2017, 33-35.

¹⁴ SAGE, 'An introduction to crime and the criminal justice system', 16 September 2021.

Constitution and relevant statutes and they are all expected to work together in order to maintain a peaceful and orderly country.¹⁵

1.1 Death in custody

For the purposes of this present discussion, 'Custody is the confinement of a person in any place by the State and it includes custody of person while in transit.'¹⁶ Custody begins when an individual is arrested or deprived of his liberty by agents of the state it includes detention or imprisonment where one is not allowed to leave at will and ends when one is permitted to leave.¹⁷ Hence, death in custody is death of an individual while in the hands of the State or its agents.

The police are guided by laws and regulations including the Constitution of Kenya 2010, the Criminal Procedure Code (CPC) Cap 75, the National Police Service Act (NPS) (No 11 of 2011), and the National Police Service Standing Orders.

The Criminal Procedure Code outlines the procedure to be followed when a person is taken into custody by a police officer. Custody is effected through arrest. Arrest is the act of apprehending a suspect by a legal authority.¹⁸ A police officer or a person may make an arrest.¹⁹ In conducting an arrest, the Criminal Procedure Code allows for use of all means necessary to effect the arrest but only to the extent that such means are reasonable and proportional to the conduct of the offender at the time of arrest.²⁰ Arrests should be done lawfully and in compliance with the guidelines set out in the Sixth Schedule of the NPS Act in the event of the use of force.²¹ The guidelines, inter alia, stipulate the use of

¹⁵ SAGE, 'An introduction to crime and the criminal justice system'

¹⁶ National Coroner Services Act (No 18 of 2017), Section 2.

¹⁷ International Committee of the Red Cross, 'Guidelines for investigating deaths in custody', (2013) 8

¹⁸ National Police Act (No 11A of 2011), Section 2.

¹⁹ Criminal Procedure Code (Cap 75), Section 21.

²⁰ Criminal Procedure Code (Cap 75), section 21(1, 2).

²¹ National Police Service Act (No 11A of 2011), Section 49(4), (5).

non-violent means of arrest first, and only allow for resort to forceful means if the former does not work.²² Elements such as necessity, proportionality, seriousness of the offence and resistance if any of the person being arrested guide the conduct of such arrests.²³ An officer who commits any offence by going against the said regulations is liable to prosecution as stipulated in the NPS Act.²⁴

In *Republic v IP Veronicah Gitahi and PC Issa Mzee*,²⁵ the Court held that police officers in their judgement should have either shot the victim in her arm or should have disarmed her instead of shooting her in the head and chest. Consequently, the officers were found guilty of murder.

The Constitution provides for the rights of an arrested person and such rights include the right to be arraigned in court within 24 hours after arrest, or as soon as is reasonably possible.²⁶ During such period if the arrested individual dies, then he or she is said to have died in custody.

2. Legal framework on police conduct

The Constitution of Kenya establishes the following actors in the criminal justice system; the Office of the Director of Public Prosecutions, the National Police Service, the office of the Inspector-General of the National Police Service, the courts and other independent institutions.

2.1 Institutions in charge of police conduct

2.1.1 Office of the Director of Public Prosecutions

This Office of the Director of Public Prosecutions (ODPP) is established under Article 157 of the Constitution of Kenya 2010. It mandates the Director of Public Prosecutions to direct the Inspector General of the

²² National Police Service Act (No 11A of 2011), Sixth Schedule (1).

²³ National Police Service Act (No 11A of 2011), Sixth Schedule (1).

²⁴ National Police Service Act (No 11A of 2011), Section 49(13).

²⁵ Criminal Appeal 23 of 2016, Judgement of the Court of Appeal (2016) eKLR.

²⁶ Constitution of Kenya (2010), Article 49(f).

National Police Service to investigate criminal conduct allegations.²⁷ The ODPP has power to institute, take over and discontinue prosecution of cases.²⁸ In performing the latter, the ODPP requires the permission of a court.²⁹ The ODPP has power to direct an investigative agency to conduct investigations.³⁰ The ODPP is required to implement an effective prosecution mechanism to maintain the rule of law, contribute to fair justice and effect the protection of citizens.³¹ Further, the Office is required to cooperate with investigative agencies to ensure effective public prosecutions.³² The ODPP reports to the president on the fulfillment of the functions of the office. The president may also require a report on a particular issue.³³ The ODPP has the discretion of determining cases for prosecution.³⁴

2.1.2 National Police Service

The Constitution of Kenya provides for the establishment of national security organs to protect Kenyans.³⁵ It establishes among other organs the National Police Service (NPS) that comprises of the Kenya Police Service and the Administration Police. It is headed by the Inspector General (IG) and two deputies. The Constitution mandates parliament to enact legislation to provide for its functions and administration.³⁶ To effect this, Parliament enacted the National Police Service Act No 11A of 2011. Article 243 mandates the Service to comply with constitutional standards of human rights and fundamental freedoms.³⁷

The IG and deputy IGs are responsible for monitoring, evaluating, supervising and providing internal oversight of the Kenya Police Ser-

²⁷ Constitution of Kenya (2010), Article 157(4).

²⁸ Constitution of Kenya (2010), Article 157(6).

²⁹ Constitution of Kenya (2010), Article 157(8).

³⁰ Office of the Director of Public Prosecutions (No 2 of 2013), Section 5(2)(b).

³¹ Office of the Director of Public Prosecutions (No 2 of 2013), Section 5(4)(b).

³² Office of the Director of Public Prosecutions (No 2 of 2013), Section 5(4)(c).

³³ Office of the Director of Public Prosecutions (No 2 of 2013), Section 7(2,3).

³⁴ Office of the Director of Public Prosecutions (No 2 of 2013), Section 23(1).

³⁵ Constitution of Kenya (2010), Article 238(1).

³⁶ Constitution of Kenya (2010), Article 239(1)(c).

³⁷ Constitution of Kenya (2010), Article 244(c).

vice and Administration Police.³⁸ The National Police Service has the mandate of protecting life and property, investigating, preventing and detecting crime and enforcing all laws and regulations with which they are charged.³⁹

The Act requires police officers to report to their superiors occurrences and incidences encountered while on duty.⁴⁰ Moreover, they are required to act in conformity with the law and if they use force, they are to act as per the provisions in the Sixth Schedule to the Act.⁴¹ The Act further requires that in the event complaints are made against any police officer, the complaint should be reported to IPOA.⁴²

The Act sets out that arrests and detention should adhere to the provisions in the Fifth Schedule to the Act.⁴³ That is to comply with all rights set out in Articles 49, 50 and 51 and to report to IPOA in the event a death occurs.⁴⁴

2.1.3 *Internal Affairs Unit*

Section 87 of the NPS Act establishes the Internal Affairs Unit. Its functions include receiving and investigating complaints lodged against the police and maintaining records of such complaints.⁴⁵ The Unit receives and investigates complaints of misconduct from both the public and members of the Service.⁴⁶ The Unit may investigate complaints on its own initiative, following the direction of senior officials and the Inspector General or at the request of IPOA.⁴⁷ Following such investigation, the unit may recommend appropriate actions to the Inspector General. The recommendations include: interdiction of an officer, sus-

³⁸ National Police Service Act (No 11A of 2011), Section 23 and 26.

³⁹ National Police Service Act (No 11A of 2011), Sections 24 and 27.

⁴⁰ National Police Service Act (No 11A of 2011), Section 49(3).

⁴¹ National Police Service Act (No 11A of 2011), Section 49(5),(6).

⁴² National Police Service Act (No 11A of 2011), Section 50(3).

⁴³ National Police Service Act (No 11A of 2011), Section 59.

⁴⁴ National Police Service Act (No 11A of 2011) Fifth Schedule, 13.

⁴⁵ National Police Service Act (No 11A of 2011), Section 87(2).

⁴⁶ National Police Service Act (No 11A of 2011), Section 87(4) (a).

⁴⁷ National Police Service Act (No 11A of 2011), Section 87(4)(b)(c)(d).

pension of an officer, administration of a severe reprimand (that is a formal expression of disapproval) or any other lawful action.⁴⁸ The offences the unit can speak to include offences in the Eighth Schedule. As for criminal offences occasioned by police officers they should subject them to criminal proceedings in the court of law.⁴⁹ Police officers who torture individuals are subject to imprisonment for a term not exceeding 25 years and those who treat individuals with cruelty are subject to imprisonment for 15 years.⁵⁰

2.1.4 Independent Policing Oversight Authority (IPOA)

The Independent Policing Oversight Authority Act No 35 of 2011 establishes the Independent Policing Oversight Authority.⁵¹ The Act established the Authority to make provision on civilian oversight over the work of police.⁵² IPOA's mandate is to receive and investigate complaints related to both disciplinary and criminal offences of police officers.⁵³ IPOA has a mandate to monitor and investigate policing operations, review and audit investigations and keep record of actions taken by the Internal Affairs Unit.⁵⁴ It has the power to take over on-going internal investigations and request the ODPP to provide a response to any recommendation IPOA makes in as far as prosecutions are concerned.⁵⁵

2.2 Procedures for lodging complaints of deaths in custody

2.2.1 Procedure according to the Criminal Procedure Code

The Criminal Procedure Code (Cap 75) provides a procedure through which death in custody cases may be handled. This is done

⁴⁸ National Police Service Act (No 11A of 2011), Section 87(6).

⁴⁹ National Police Service Act (No 11A of 2011), Section 88(3).

⁵⁰ National Police Service Act (No 11A of 2011), Section 95(2) (3).

⁵¹ Independent Policing Authority Act (No 35 of 2011), Section 3.

⁵² Independent Policing Authority Act (No 35 of 2011), long title.

⁵³ Independent Policing Authority Act (No 35 of 2011), Section 6 (a-c).

⁵⁴ Independent Policing Authority Act (No 35 of 2011), Section 6(d).

⁵⁵ Independent Policing Authority Act (No 35 of 2011), Sections 7(b, d).

through inquests which are authorised by the magistrate within the jurisdiction in which the death occurred.⁵⁶

This begins with a full report from an officer to the nearest magistrate court and to the Director of Public Prosecutions through the Inspector General informing them of such death.⁵⁷

Section 387 provides thus:

- a. that the nearest magistrate with the power to hold inquest shall hold an inquiry into the cause of the death.
- b. if such inquiry is successful and the perpetrator is known or disclosed, the magistrate is to issue a warrant of arrest for such person and cause them to answer to the charge.
- c. if the perpetrator is still unknown the magistrate is to give his or her opinion on the issue and share the copy with the Director of Public Prosecutions (DPP) through the Inspector-General of Police (IGP).

2.2.2 Procedure in accordance to the National Police Service Act

The NPS Act makes provision on the procedure to be followed in the event a detained individual dies in custody. General powers of a police officer include reporting incidences in a daily occurrence book and availing such reports to their superiors.⁵⁸ This includes death reports. Such accountability enhances the response of the criminal justice system to deaths in police custody as it imposes an obligation on fellow police officers to make reports. The NPS Act provides that in the event of death in custody, a police officer should report to the officer in charge or the direct superior of the officer who caused the death.⁵⁹ The reporting officer is required to secure the scene for investigation.⁶⁰ Police officers that submit such reports to IPOA are immune from disciplinary proceedings and unfair administrative actions.⁶¹

⁵⁶ Criminal Procedure Code (Cap 75), Section 385.

⁵⁷ Criminal Procedure Code (Cap 75), Section 386.

⁵⁸ National Police Service Act (No 11A of 2011), Section 49(3).

⁵⁹ National Police Service Act (No 11A of 2011), Sixth schedule, Condition 5.

⁶⁰ National Police Service Act (No 11A of 2011), Sixth schedule, Condition 7(5).

⁶¹ National Police Service Act (No 11A of 2011), Section 49(12).

Responsible officers are required to report to IPOA, and any other body required by law to be so notified in writing, within twenty four hours of the incident for purpose of investigations.⁶² The superior officers or station commanders are also required to report such cases to IPOA and supply them with necessary information that may assist the investigations.⁶³

2.2.3 Procedure under the Independent Policing Oversight Authority Act

IPOA receives and investigates claims and recommends prosecution of suspected officers.⁶⁴ Such claims may not only be made by police officers but also civilians. In 2019, IPOA reported to have received 84% of complaints from civilians, 3.1% were complaints by police officers and the other reports were from their own motion or by state and non-state actors.⁶⁵

Complaints to IPOA are made either orally or in writing. When made orally, they should be reduced to writing.⁶⁶ Upon receipt of a complaint, IPOA shall call for information or reports from the appropriate government department, agency or any other body and shall initiate an inquiry into the complaint.⁶⁷ IPOA also investigates deaths in custody.

Once IPOA receives such a complaint, it is then obligated to investigate such death with the help of police who are to obtain and secure evidence related to the investigation.⁶⁸ IPOA's duty in that regard only goes as far as investigating and acquiring evidence since they do not have powers to prosecute.⁶⁹

⁶² National Police Service Act (No 11A of 2011), Fifth Schedule, Rule 13; National Police Service Standing Orders, Chapter 15(8).

⁶³ National Police Service Act (No 11A of 2011), Sixth Schedule, Condition C, 3.

⁶⁴ Independent Policing Oversight Authority Act (No 35 of 2011), Section 6.

⁶⁵ Independent Policing Oversight Authority *Annual Report 2018-2019*, 20.

⁶⁶ Independent Policing Oversight Authority Act (No 35 of 2011), Section 24(1).

⁶⁷ Independent Policing Oversight Authority Act (No 35 of 2011), Section 24(4).

⁶⁸ Independent Policing Oversight Authority Act (No 35 of 2011), Section 25.

⁶⁹ Independent Policing Oversight Authority Act (No 35 of 2011), Section 29(a).

After conclusive investigations that disclose criminal liability, IPOA refers the matter to the ODPP and recommends prosecution for the individual(s).⁷⁰ If the ODPP fails to prosecute, IPOA may apply to the court to enforce its recommendations.⁷¹

2.2.4 Procedure according to the National Coroners Service Act (No 18 of 2017)

This Act exists to make provision for independent investigation of reportable deaths by coroners.⁷² It establishes the National Coroners Service that investigates the causes of all reportable deaths.⁷³ In the event of death in custody, officers are required to report to the coroner within 6 hours of the death of the individual.⁷⁴ The coroner then conducts a medical investigation on the cause of death and reports to IPOA.⁷⁵ For purposes of criminal investigations and subsequent prosecution, the coroner also submits an interim and subsequently a final report of its investigation to the National Police Service and ODPP.⁷⁶ A coroner is also required to conduct or prepare and submit an autopsy report to the investigating police officer if requested.⁷⁷

From the above provisions, it is clear that investigations regarding deaths in custody almost always find their way to the Independent Policing Oversight Authority.

⁷⁰ Independent Policing Oversight Authority (No 35 of 2011), Section 29(a).

⁷¹ Independent Policing Oversight Authority (No 35 of 2011), Section 29(2).

⁷² National Coroners Service Act (No 18 of 2017), long title, Section 8.

⁷³ National Coroners Service Act (No 18 of 2017), Section 28(c).

⁷⁴ National Coroners Service Act (No 18 of 2017), Section 25(1).

⁷⁵ National Coroners Service Act (No 18 of 2017), Section 25(3).

⁷⁶ National Coroners Service Act (No 18 of 2017), Section 32(4).

⁷⁷ National Coroners Service Act (No 18 of 2017), Section 46(2).

3. Successes, failures and challenges of IPOA and other institutions and offices in the investigations of death in custody

3.1 Successes and failures of IPOA

Before enactment of the IPOA Act, a police-led taskforce was constituted in 2004. It mainly focused on addressing operational, infrastructural and administrative problems.⁷⁸ There was also the Commission of Inquiry into the Post-Election Violence in 2009 which noted that the police failed to conduct themselves professionally and used excessive force which led to many deaths.⁷⁹ The National Task Force on Police Reforms in 2009 recommended the establishment of an oversight body that would not only benefit the police themselves, but also ensure public confidence in having their complaints dealt with and in the dispensation of justice and fairness.⁸⁰ As a result, the enactment of Independent Policing Oversight Authority Act (No 35 of 2011) saw the establishment of the Independent Policing Oversight Authority in November 2011.⁸¹

In its inaugural report for the period of June to December 2012, IPOA stated that it had embarked on among others, the formulation of IPOA regulations, development of an internal policy framework and the recruitment of professionally qualified staff.⁸² The Authority admitted that it also faced some challenges such as lengthy government procurement procedures which were due to lack of sufficient personnel to constitute a tender committee.⁸³ There was also lack of investigative staff and lack of awareness by the public about its existence.⁸⁴

⁷⁸ Thomas Probert, Brian Kimari, Mutuma Ruteere, *Strengthening policing oversight and investigations in Kenya; Study of IPOA investigations into deaths resulting from policing action*, Centre for Human Rights and Policy Studies, 2020, 6.

⁷⁹ Probert, Kimari, Ruteere *Strengthening policing oversight and investigations in Kenya*, 6.

⁸⁰ Report of the National Task Force on Police Reforms, Government Printer, Nairobi, 2009 (Ransley Report).

⁸¹ Independent Policing Oversight Authority, 'Who are we', 26 July 2022.

⁸² Independent Policing Oversight Authority 'Inaugural performance report' Chairperson's remarks, (2012) 4.

⁸³ Independent Policing Oversight Authority 'Inaugural performance report' Chairperson's remarks, 4.

⁸⁴ Independent Policing Oversight Authority 'Inaugural performance report' Chairperson's remarks, 4.

In 2014, Kenya submitted a report to the United Nations Committee against Torture where the government was required to respond to its recommendations.⁸⁵ The report noted that IPOA had formulated regulations that propose stringent measures against police officers who do not assist in securing of evidence in the occurrence of death in custody through disciplinary or criminal proceedings.⁸⁶ The regulations, in their opinion, addressed the issue of clarity between the Internal Affairs Unit and IPOA, where IPOA will deal with cases of gross misconduct and deaths while IAU deals with other cases which IPOA may take over in case of delay.⁸⁷ However, up until now, the regulations have not been adopted or gazette. They are still at the stakeholder feedback stage.⁸⁸

From the performance reports of IPOA from 2014 to 2019, IPOA has been able to form its regulations and establish six board committees, which include: investigations and legal committee; inspections committee; monitoring and research committee; communications and outreach committee; risk and audit committee; human resource and compensation committee; and finance and administration committee.⁸⁹ IPOA has been able to make itself known to the public through its communications and outreach committee by receiving invitations in the broadcasting companies.⁹⁰ It has also received media coverage including interviews of the chairman on numerous occasions.⁹¹ In these interviews,

⁸⁵ Independent Policing Oversight Authority 'Inaugural performance report' Chairperson's remarks, 4.

⁸⁶ Follow-up information to the concluding observations of the UN Committee against Torture in connection with the consideration of the second periodic report of Kenya on the International Convention against Torture and Other Cruel, Inhumane and Degrading Treatment or Punishment, 214, 2.

⁸⁷ Follow-up information to the concluding observations of the UN Committee against Torture in connection with the consideration of the second periodic report of Kenya on the International Convention against Torture and Other Cruel, Inhumane and Degrading Treatment or Punishment, 214, 2.

⁸⁸ IPOA Publications, 'External stakeholder feedback template on draft IPOA regulations', 26 July 2022.

⁸⁹ Independent Policing Oversight Authority, 'Performance Report January-June 2013', 3.

⁹⁰ On 22 August 2013, IPOA organised a media briefing breakfast at Laico Regency Hotel, Nairobi.

⁹¹ Interviews on NTV AM Live (13 November 2013), KTN News (20 November 2013), and GBS News (22 November 2013).

the chairman highlighted the key achievements of IPOA since inception and the way forward for achieving its mandate.⁹²

IPOA developed a Strategic Plan 2019-2024 that focuses on police accountability, stakeholder cooperation, and complementarity.⁹³ In this Plan, IPOA notes that there has been lack of cooperation from police, delayed implementation of recommendations, inadequate resources such as funding, inadequate protection of whistle blowers from the service and low public awareness.⁹⁴ In the period 2014-2018, out of 10,381 complaints made, only 105 were recommended for prosecution, 53 were filed before court and 3 convictions were obtained.⁹⁵

Finally, IPOA lacks clear data, despite giving reports on the outcome of investigations and cases to their completion. This is because as they report it they hardly specify the nature of cases. Their reports are general hence making it difficult to account for cases related to death in custody. From 2014 to 2021, IPOA reported only 14 convictions.⁹⁶ Moreover, it has between January and June 2021, received 71 death complaints from police action, 21 of which were deaths in custody complaints.⁹⁷

3.2 Challenges faced by IPOA

There has been an existing readiness by the police to abandon the law especially when conducting an operation in a 'hostile environment'. During the Covid-19 dusk to dawn curfew imposed on 27 March 2020, the police caused the death of at least six people within 10 days.⁹⁸ Despite efforts of IPOA to curb police violence, cases keep rising. This puts the relevance of IPOA into question.

⁹² Independent Policing Oversight Authority, 'Performance report July-December 2013', 17.

⁹³ Independent Policing Oversight Authority, *Strategic Plan 2019-2024*.

⁹⁴ Independent Policing Oversight Authority, *Strategic Plan 2019-2024*, 18.

⁹⁵ Independent Policing Oversight Authority, *Strategic Plan 2019-2024*, 22.

⁹⁶ Independent Policing Oversight Authority, 'Convictions', 26 July 2022.

⁹⁷ Independent Policing Oversight Authority, 'Convictions'

⁹⁸ Human Rights Watch Kenya: *Police brutality during curfew*, 20 September 2021.

IPOA lacks prosecutorial powers,⁹⁹ hence it is like a toothless dog in exercising its oversight role over the police.¹⁰⁰ This is because when referring the cases to the Office of the Director of Public Prosecution, effecting their recommendations takes time, hence the public sees IPOA as not taking action.¹⁰¹ This limits the number of complaints brought in by the affected parties.¹⁰²

There has also been the lack of resources and personnel that could cover the whole country and cater to the rising increase in complaints by the public.¹⁰³ This has hampered the effectiveness of IPOA in dealing with the cases thus the low number of convictions in the cases it deals with.¹⁰⁴

Furthermore, there is a lack of clarity among various laws that make provision on investigations of deaths in custody. For instance, the Criminal Procedure Code in Section 385 empowers the magistrate to hold inquests into sudden deaths where the officer in charge has to report back to them.¹⁰⁵ Whereas, in the National Police Service Act, the police officer or the officer in authority is supposed to report to the Independent Policing Oversight Authority.¹⁰⁶

Generally, there is low public confidence in IPOA leading to low public turn-up by in lodging complains to the Authority.¹⁰⁷ As a result a number of cases are not reported leading to constitutional injustice.¹⁰⁸

⁹⁹ Independent Police Oversight Authority Act (No. 35 of 2011), Section 29 1(a).

¹⁰⁰ Bryson O Omukonyi, *Improving police accountability in Kenya: Curing the shortcomings of the IPOA in bringing an end to police brutality in the country*, Kenya School of Law (KSL), 2020, 2.

¹⁰¹ Probert, Kimari, Ruteere, *Strengthening policing oversight and investigations in Kenya*.

¹⁰² Probert, Kimari, Ruteere, *Strengthening policing oversight and investigations in Kenya*.

¹⁰³ Independent Policing Oversight Authority 'Inaugural performance report' Chairperson's remarks, 4.

¹⁰⁴ Probert, Kimari, Ruteere, *Strengthening policing oversight and investigations in Kenya*, 6.

¹⁰⁵ Criminal Procedure Code, Section 385.

¹⁰⁶ National Police Service Act (No 11A of 2011), Sixth Schedule, Section 5.

¹⁰⁷ Probert, Kimari, Ruteere, *Strengthening policing oversight and investigations in Kenya*.

¹⁰⁸ Probert, Kimari, Ruteere, *Strengthening policing oversight and investigations in Kenya*.

The police on the other hand continue to use excessive force in dealing with arrested persons and suspects causing grievous harm that eventually leads to death. Further, they fail to report on such cases as they are required to, and in some instances they fail to report events in the occurrence book.¹⁰⁹ It is possible that just like in *Nahashon Mutua v Republic*, the police hide and even blame other cell mates for injuries and harm caused to individuals while in custody. In this case the officer in charge of the police station in Ruaraka caused the death of the person in custody through inflicting injuries using a metal pipe on a suspect identified as Martin and attempted to blame another suspect, Tom.¹¹⁰

4. Proposed solutions to enhance the response of the police to deaths in custody and the establishment of liability

In 2020, the police used excessive force while implementing curfew orders that led to deaths of individuals.¹¹¹ From a reading of the ODPP Act, it is clear that the president can require the DPP to report on particular issues. Therefore, in order to ensure accountability, the president should urgently seek for reports concerning police brutality and death in custody cases.

Over the years, there has been a general perception by the public that the police still use archaic methods of policing used in the colonial times.¹¹² A possible solution to this would be to review the training of the officers in order to instill in them the importance of abiding in the existing laws and procedures while undertaking their duties.

IPOA should also ensure effective protection of whistleblowers in the police service. Although the Witness Protection Act is in existence it

¹⁰⁹ Defenders Coalition: The Police Reforms Working Group-Kenya condemns the death of siblings Benson and Emmanuel Njiru within the jurisdiction of Manyatta Police Station, 27 July 2022.

¹¹⁰ Criminal Appeal 55 of 2019, Judgement of the Court of Appeal (2020).

¹¹¹ Mercy Asamba, 'President Uhuru apologises to Kenyans for police brutality', *East African Standard* 1 April 2020..

¹¹² Amos Kareithi, 'Echoes from the past: Kipande's dark past', *The Standard*, 23 November 2021.

has been ineffective especially in as far as whistleblowers are concerned. As such, there is need for specific provisions in regards to police officers who are to appear as witnesses to police human rights violations.

The adoption of pending IPOA regulations need to be fast-tracked to ensure implementation of the proposal that IPOA focuses on deaths in custody and gross misconducts while IAU focuses on other cases. This will place focus on cases of deaths in custody.

IPOA receives monies to finance their mandate parliament, donations and loans approved by the Cabinet Secretary for finance.¹¹³ IPOA's budgeting and finance ought to be increased to enable it obtain personnel who will enable it implement its mandate effectively.

Parliament should review the laws relating to the procedures of reporting deaths in custody. Such a revision should include provisions that mandate IPOA and IAU as the only institutions to which reports can be made. This will ensure that magistrates focus on hearing and determining cases of deaths in custody as opposed to following up on inquests.

In order to ensure police do not subject suspects to inhumane treatment and torture, the state can install cameras within the police station to record occurrences within the station. The State can also take the approach used in the United States where in some states the police use body cameras that are required to always be on while on duty.¹¹⁴ The State can create a policy requiring police officers to use body cameras and have them on while on duty. In addition to this, IPOA officers should be stationed in police stations to effect their oversight role in ensuring adherence to the laws and policies to govern the police.

IPOA needs to submit their reports and progresses in regards to cases of deaths in custody with clarity and specificity. Furthermore, even where cases have not been given attention, it would be prudent to mark such cases as blind spots that need critical attention and redress.

¹¹³ Independent Policing Oversight Authority Act, Section 32.

¹¹⁴ Candice Norwood, 'Body cameras are seen as key to police reform. But do they increase accountability?' *PBS News Hour*, 25 June 2020.

Finally, all actors in the criminal justice system should endeavor to cooperate with one another to ensure implementation of the protection of the right to life and accountability of the police.

5. Conclusion

The state of a criminal justice system is very essential in determining its ability to respond to deaths in custody. There are a number of shortcomings on the effectiveness of IPOA which is mandated to investigate deaths in police custody. This has therefore affected the overall outcome of cases and has failed in accounting for the deaths in police custody. Therefore, legal and structural changes should be effected in order to realise an improvement in the system. Hence, every sector should be robust and function properly as stated in the relevant statutes.

This article has established that despite the fact that the role of curbing death in custody revolves around IPOA it is clear that it cannot work alone. It has thus called for actors like the Internal Affairs Unit, the Director of Public Prosecutions, National Police Service members to work together with IPOA to effect accountability. The state may have created a means through which it responds to deaths in police custody, however, it has been ineffective.