

The effectiveness of the investigative powers of the Independent Policing and Oversight Authority

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Abstract

Is the Independent Policing Oversight Authority (IPOA) a toothless dog or a lame duck? Some have put forward that IPOA was set up for failure since inception. This commentary critiques the reality of these sentiments from the perspective of IPOA's power to investigate complaints on Kenyan police use of excessive force. Investigations into the reported claims of police brutality is among IPOA's key accountability measures over police (mis)conduct. However, IPOA has encountered various challenges in executing its mandate, especially the 'blue conduct of silence'. This paper demonstrates that despite the challenges in executing investigations, IPOA has managed to complete some investigations and secure some convictions.

Keywords: reporting, investigation, conviction, police brutality, IPOA

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Introduction

Police brutality in Kenya has an aspect of perpetuity as it is heavily rooted in Kenya's history. During the British colonial era, being a police officer meant that service was owed to the polity and administration and not to the general public.¹ After Kenya gained Independence, successive Kenyan politicians used the police force to impose their ideologies, further their interests and maintain political regimes.² For example, Adar and Munyae note that police committed numerous human right abuses in the President Moi era, where policing was a tool for repression and torture of political opponents.³

Efforts to reform the police force started to take shape in 2002 albeit unsuccessfully. Soon after he seized office, President Kibaki established a police-led taskforce that sought to reform the police force.⁴ Osse accuses this task force of skewing their agenda towards increasing salaries and allowances for police officers and enhancing budget allocations to improve police operations, rather than substantive changes to police accountability.⁵

The Post-Election Violence of 2007-2008 (PEV) heightened the necessity for sharper focus on accountability for police misconduct in the National Police Service (NPS).⁶ In 2009, the Commission of Inquiry into Post Election Violence (CIPEV) reported on the failure by the police to conduct themselves professionally resulting in the violence and the

¹ Anokhee Shah, 'Reopening old wounds: The never-ending tale of police brutality in Kenya' *Lacuna Magazine*, 24 March 2021.

² Douglas Lucas Kivoi, 'Why violence is a hallmark of Kenyan policing and what needs to change' *The Conversation*, 5 June 2020.

³ Korwa Adar and Isaac Munyae, 'Human rights abuse in Kenya under Daniel Arap Moi, 1978-2001' 5 *Africa Studies Quarterly* 1 (2001).

⁴ Thomas Probert, Brian Kimari, and Mutuma Ruteere, *Strengthening policing oversight and investigations in Kenya: Study of IPOA investigations into deaths resulting from police action*, Centre for Human Rights and Policy Studies, 2020, 6.

⁵ Anneke Osse, 'Set up to fail? Police reforms in Kenya' *The Elephant*, 1 June 2016.

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

massive killing of Kenyans after the general election.⁷ Consequently, the National Task Force on Police Reforms was established to implement substantial reforms of the NPS. One of its key recommendations was the 'creation of an oversight body that will not only benefit the police themselves, but also give the public confidence that their complaints are dealt with and that justice and fairness will prevail.'⁸

The promulgation of the Constitution of Kenya, 2010 (2010 Constitution) contributed to the ongoing efforts of reforming the NPS. The Bill of Rights entrenched state obligations to respect, promote, protect and fulfil human rights.⁹ Further, Article 10 enlists accountability of state agents as a national principle.¹⁰ Furthermore, Article 244 stipulates that the NPS should strive for the highest standards of professionalism and discipline.¹¹

The establishment and performance of IPOA, through the IPOA Act (2011), sought to realise the constitutional aspiration to reform the NPS. In entirety, the IPOA Act endows IPOA with both institutional and operational powers to carry out its mandates. This will be elaborated later in the next section. Pointedly, IPOA undertakes to investigate cases of police misconduct and extremities such as rape, instant deaths, severe injuries as well as deaths resulting from the injuries caused by police officers.

There have been varying sentiments on the effectiveness of IPOA.¹² Some have termed IPOA as a toothless bulldog and some have stated that IPOA was destined for failure.¹³ However, IPOA has a track record of successes stemming from its institutional design and its ability to

⁷ Truth, Justice and Reconciliation Commission, *CIPEV report*, 16 October 2008, 396-398.

⁸ Report of the National Task Force on Police Reforms, Government Printer, Nairobi, 2009.

⁹ Constitution of Kenya (2010), Chapter 4.

¹⁰ Constitution of Kenya (2010), Article 10.

¹¹ Constitution of Kenya (2010), Article 244.

¹² Bryson Ometo, 'Improving police accountability in Kenya: Curing the shortcomings of the IPOA in bringing an end to police brutality in the country' *SSRN* (2020).

¹³ Joe Kiarie, 'Is the Independent Policing Oversight Authority (IPOA) the new toothless bulldog in town?' *The Standard*, 22 February 2014.

overcome some of the systemic challenges that hinder it from fulfilling its mandate of promoting police accountability. The most pertinent systemic challenge that this paper highlights is the 'blue code of silence', where police officers refuse to cooperate in investigations.¹⁴

The next section of this paper analyses the establishment of IPOA and its investigative power, under the IPOA Act, as a response to the long-lived police brutality. The performance of IPOA in investigating reported cases of police brutality reported especially through the tried cases is also analysed before the conclusion section.

Establishment of IPOA's investigative role

Following the history of flagrant human right abuses by police in the name of policing, IPOA was established in 2011 by the enactment of the IPOA Act.¹⁵ The Act gives effect to Article 244 of the 2010 Constitution, which outlines the principles of the NPS, including training staff to the highest possible standards of competence, integrity and relationships with the broader society.¹⁶

Predominantly, IPOA holds the police accountable to the public through receiving and investigating complaints on the disciplinary and criminal offenses of police officers.¹⁷ IPOA also monitors, reviews, audits and keeps a record of actions undertaken by the Internal Affairs Unit (IAU).¹⁸ IAU, is a National Police Service unit that receives and investigates complaints lodged against the police.¹⁹ In addition, IPOA recommends cases for prosecution to the Director of Public Prosecutions

¹⁴ Fred M, 'Blue code of silence: Big threat to professional policing' *IPOA News*, 17 March 2021.

¹⁵ Independent Policing Oversight Authority Act (No 35 of 2011), Section 3.

¹⁶ Independent Policing Oversight Authority Act (No 35 of 2011), Section 5b. Constitution of Kenya (2010), Article 244.

¹⁷ Independent Policing Oversight Authority Act (No 35 of 2011), Section 6 (a)(c).

¹⁸ Independent Policing Oversight Authority Act (No 35 of 2011), Section 6d.

¹⁹ National Police Service Act (No. 11A of 2011), Section 87(2).

(DPP), which includes the power to demand for follow-up on the DPP's decision to prosecute the recommended case.²⁰

The composition of the IPOA Board ensures investigative efficacy of IPOA. For a start, the chairperson of the Board should be a qualified Judge of the High Court.²¹ In addition, the remaining seven IPOA Board members should have at least ten years' experience in the fields of criminology, psychology, law, medicine, human rights and gender, alternative dispute resolution, security matters, or community policing.²²

IPOA has a developed reporting system. First, any person can report on police misconduct to IPOA.²³ From a survey conducted in 2022, 32.4% of the respondents agreed that the IPOA is reachable and accessible at any time.²⁴ Complaints against the police are lodged with IPOA verbally, in writing or in any other format prescribed in the IPOA regulations.²⁵ Complaints made orally are reduced into writing by the IPOA secretariat, which not only receives the complaints but also helps with the ensuing investigations.²⁶ Between January and June 2021, IPOA received and processed 1,324 complaints ranging from death resulting from police action, enforced disappearances, sexual offenses, abuse of office, physical assault and arbitrary arrests.²⁷ The complaints were received through walk-ins, letters, telephone calls, social media, emails, IPOA's complaint form housed in its official website and outreach activities; 133 complaints were received through the IPOA Call Centre.²⁸ In 2022, IPOA received 3,302 complaints.²⁹

²⁰ Independent Policing Oversight Authority Act (No 35 of 2011), Section 7d.

²¹ Independent Policing Oversight Authority Act (No 35 of 2011), Section 9(1)(a).

²² Independent Policing Oversight Authority Act (No 35 of 2011), Section 9(1)(b)

²³ Independent Policing Oversight Authority Act (No 35 of 2011), Section 24.

²⁴ IPOA, *Performance Report Jan-June 2022*, 23 March 2023.

²⁵ Independent Policing Oversight Authority Act (No 35 of 2011), Section 24(1).

²⁶ Independent Policing Oversight Authority Act (No 35 of 2011), Section 24(2).

²⁷ IPOA, *Performance Report January - June 2021*, 9.

²⁸ IPOA, *Performance Report January - June 2021*, 9.

²⁹ IPOA, *Performance Report July - June 2022*, 23 March 2023.

Part of IPOA's reporting system involves collaboration with government agencies. Section 24 of the IPOA Act dictates that depending on the nature of the received complaint, IPOA may seek information or initiate an inquiry about the complaint from any appropriate government department or agency or any other body within a specified period.³⁰ As mentioned earlier in this paper, some of these government agencies are the NPS, IAU and the DPP. Notably, IPOA maintains the power to refuse to consider a complaint where it finds it vexatious or frivolous.³¹

The NPS is legally obligated to enhance IPOA's investigations on police brutality. As a condition to the use of force, police officers in charge or superiors are to report to IPOA any death, serious injury or grave consequences resulting from the use of force.³² Thereafter, the police should secure the scene in the interest of investigations and report to the victim's kin.³³ Where the police officer fails to make such a report, they commit a disciplinary offense and should face disciplinary action.³⁴

Finally, IPOA has investigators selected for their experience, expertise and integrity, who observe a set guiding principles in their work. These investigators have backgrounds in law, policing, investigating human-rights violations and other relevant investigative work.³⁵ A number of specialized units, including international experts from the United Nations and foreign governments, support the IPOA investigators. The Investigations Manager works closely with the IPOA Board to ensure that quality and integrity is maintained during the investigations.³⁶ Additionally, the IPOA investigators observe the following investigation principles:

³⁰ *Independent Policing Oversight Authority Act* (No. 35 of 2011), Section 24(4).

³¹ *Independent Policing Oversight Authority Act* (No. 35 of 2011), section 24(8).

³² *National Police Service Act* (No 11A of 2011), Sixth Schedule, para 5.

³³ *National Police Service Act* (No 11A of 2011), Sixth Schedule, para 7.

³⁴ *National Police Service Act* (No 11A of 2011), Sixth Schedule, para 8.

³⁵ <<https://www.ipoa.go.ke/investigations/>> accessed on 29 November 2023.

³⁶ <<https://www.ipoa.go.ke/investigations/>> accessed on 29 November 2023.

- a. Ensuring that appropriate terms of reference are clearly defined and an investigation plan is established;
- b. Conducting investigation in a professional and ethical manner;
- c. Ensuring that risk management strategies are adopted;
- d. Constantly reviewing investigations to ensure they remain focused;
- e. Ensuring appropriate confidentiality and security is maintained with respect to the investigation and information;
- f. Reaching evidence-based conclusions as soon as practicable;
- g. Reporting on the investigation findings, conclusions and recommendations; and
- h. Remaining independent and objective at all times throughout the investigative process.³⁷

An appraisal of convictions resulting from IPOA's investigation

As at 30 June 2021, IPOA completed investigations for 397 cases.³⁸ 18 of these cases were recommended for closure after legal review.³⁹ 96 cases were forwarded to the ODPP for action and 5 convictions were made.⁴⁰ This section analyses the different cases that have been investigated by IPOA and forwarded to the DPP for prosecution. It seeks to show that the challenges and successes in these investigations are attributed to IPOA's institutional reporting and investigative design outlined in the previous section.

³⁷ <<https://www.ipoa.go.ke/investigations/>> accessed on 29 November 2023.

³⁸ Report of Independent Policing Oversight Authority on Performance January - June 2021.

³⁹ Report of Independent Policing Oversight Authority on Performance January - June 2021.

⁴⁰ Report of Independent Policing Oversight Authority on Performance January - June 2021.

The case of *Titus Ngamau Musila Katitu v Republic (2020)*, centred on the ‘blue code of silence,’ a systemic hindrance in conducting IPOA investigations.⁴¹ Titus Katitu, the Appellant and a police officer, was convicted of maliciously firing at the deceased at close range when attempting to recover a stolen phone and secure an arrest, and thereby sentenced to 15 years’ imprisonment.⁴² The Appellant unsuccessfully appealed as the Court of Appeal affirmed the trial court’s finding that he had manipulated the firearms register to conceal evidence of the fatal shooting, thus, ‘honouring’ the blue code of silence. However, IPOA managed to executing its investigative mandate, which was lauded by the Court as follows:

PW18, an officer from IPOA alluded to manipulation of the firearms movement register. Out of the 15 prosecution witnesses, 8 were police officers, who were determined to maintain the “blue code of silence” and ensure they saved one of their own. Indeed, it was only after the intervention by IPOA and other pressure groups that the Appellant was apprehended and convicted to 15 years imprisonment after nearly two years of freedom.⁴³

The High Court of Garissa decision in *R v Dennis Langat & Kennedy Okuli (2021)* showcases IPOA’s investigators in action.⁴⁴ Evans Okenyo, an IPOA investigator, testified as PW16 on the facts surrounding the police shooting of the unarmed deceased. He stated that all facts proved the negligent officers shot the accused at close range causing her death. From the culmination of the evidence, the accused was convicted of manslaughter.⁴⁵ In my opinion, this illustrates how zealous IPOA undertakes its mandates. Its investigative personnel are aware of the need to testify and give evidence in court regarding the investigations they do upon receipt of a complaint. This is important because it shows

⁴¹ Court of Appeal at Nairobi (2020) eKLR.

⁴² *Titus Ngamau Musila Katitu v Republic*, Judgment of the Court of Appeal at Nairobi, 24 April 2020, eKLR.

⁴³ *Titus Ngamau Musila Katitu v Republic*, Judgment of the Court of Appeal at Nairobi (2020) eKLR.

⁴⁴ Criminal Case No. 23 of 2019, Judgment of the High Court at Garissa, 29 June 2021.

⁴⁵ Criminal Case No. 23 of 2019, Judgment of the High Court at Garissa, 29 June 2021, para 21.

the willingness IPOA has towards righting the wrongs of police officers who act unprofessionally.

These convictions, being the final step in gauging the efficacy of IPOA investigations into police brutality, can only be attributed to IPOA's institutional design and how it has helped achieve effectiveness. Also, the interplay between IPOA and other institutions in policing the police can be drawn out clearly.

Conclusion

IPOA is not a toothless bulldog as it has been termed. This commentary has highlighted the 'blue code of silence' as among the main challenges that IPOA faces in trying to investigate its received complaints. In some instances, like the *Titus Katitu* case, IPOA's investigative efforts overcame this hindrance by securing a conviction, which was also upheld by an appellate court. Just like any organ, IPOA is likely to have operational challenges that obscure effective investigations. Therefore, IPOA is neither a lame duck as this paper has shown, the police are 'policed', hence, they are not above the law.