

Scoping study on the prosecution of wildlife related crimes in Kenyan courts

January 2008 to June 2013

Paula Kahumbu · Levi Byamukama
Jackson Mbutia · Ofir Drori





Above: Qumquat, one of the best-known matriarchs in the elephant population of the Amboseli ecosystem on the Kenya-Tanzania border, was photographed with her family by Nick Brandt on October 27 2012. **Just 24 hours later, Qumquat and most of her family were gunned down by poachers.** The alleged poachers who were apprehended soon after the slaughter remain free on bail and their case has seen numerous postponements. It's been more than a year since Qumquat and her two daughters were brutally gunned down. Qantina and Quaye's tusks were really small, but they were not spared - for a few extra dollars.

The youngest calf Quanza was rescued in an operation that was orchestrated by the David Sheldrick Wildlife Trust in collaboration with Big Life Foundation, Kenya Wildlife Service and the Amboseli Trust for Elephants.

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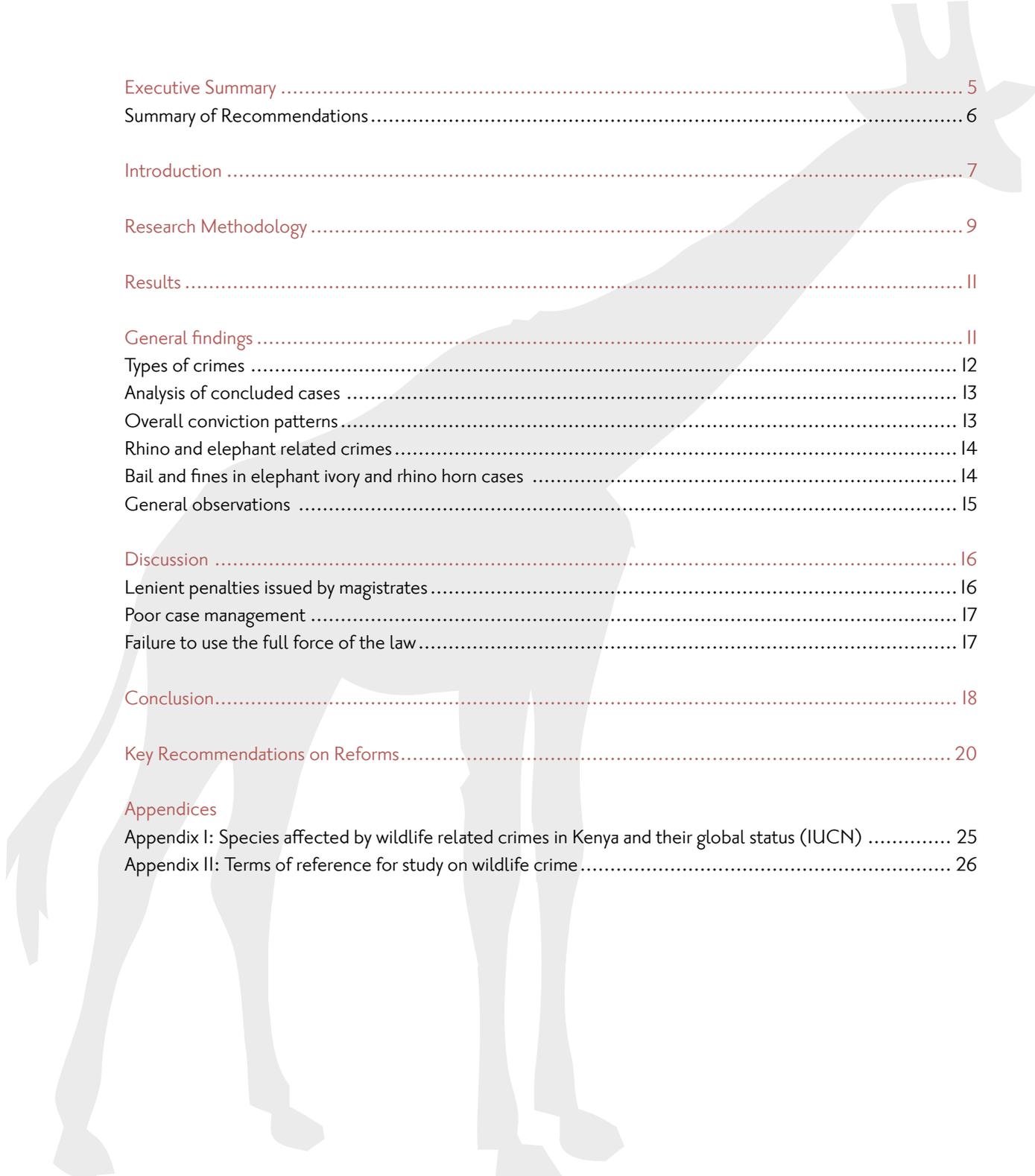
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Cover photo: Qumquat with daughter and granddaughter, Amboseli 2012
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Preface

Kenya is experiencing a surge in wildlife related crime that threatens the survival of key wildlife species and associated industries such as tourism. This scoping study, looking at how legislation is implemented in Kenya to combat wildlife crime, was inspired by conversations between Dr. Paula Kahumbu and the late Dr. Anthony King who were interested in the subject of poaching and trafficking in wildlife products and the failure of the Kenyan legal system to discourage this behaviour. Anecdotal evidence suggested that poachers and traffickers were undeterred by the penalties; worse, that the judicial system, through its loopholes might be encouraging wildlife crime and unwittingly facilitating the illegal wildlife trade in Kenya. The study was designed in consultation with criminal barrister Shamini Jayanathan (UK) who also provided

technical advice on legal matters around wildlife law enforcement. It was conducted in 2013 ahead of the enactment of new legislation which came into effect on 10th January 2014. The results of the study highlight the high and continuing degree of threat to wildlife posed by inadequate investigation, poor file management in courts, and prosecution and adjudication of offences that fails to deter offenders. The outcome of this study will inform the ongoing dialogue on wildlife crime law enforcement and give guidance on appropriate reforms. It will also contribute towards enactment of regional laws through the East African Legislative Assembly.

We would like to thank the African Fund for Endangered Wildlife, the David Sheldrick Wildlife Trust and Save the Elephants for funding this study.



Executive Summary

This report is based on a survey conducted in May and June 2013, which looked at court records in eighteen courts adjudicating on wildlife related crime. The offences involved killing wild animals and/or trading in their products. The aim of the study was to examine the files and analyse outcomes of those cases with a view to determining how legislation in Kenya was being implemented in combating wildlife crime. The study focused on the judicial outcomes of elephant and rhino related offences, but crimes involving other species were also considered.

Between January 2008 and June 2013, a total of 743 pending and closed wildlife related cases were registered in criminal registries of law courts in Embu, Isiolo, Kajiado, Karatina, Kerugoya, Makadara (Nairobi), Makindu, Maralal, Meru, Mombasa, Nakuru, Nanyuki, Narok, Nyahururu, Nyeri, Rumuruti⁵, Voi, and Wajir towns. These towns were chosen because of their proximity to key conservation areas including Amboseli, Isiolo, Laikipia, Maasai Mara, Samburu and Tsavo as well as major ports through which wildlife trophies are known to be trafficked. The magistrates' courts in these towns have jurisdiction falling within the target ecosystems. All cases are brought to court by the Kenya Police Service and/or the Kenya Wildlife Service and most are prosecuted by the Police.

A major finding of the study was that in total, **only 4% of offenders convicted of wildlife crimes went to jail**. In cases of offences against elephants and rhinos which can potentially attract jail sentences of up to 10 years, only 7% of offenders in this category were jailed. Though there were frequent news reports of KWS officers being arrested for involvement in these crimes, the study did not find a single verdict that highlighted this problem.

The study clearly showed that wildlife related crime in Kenya is treated as a misdemeanour or petty crime and is 'mismanaged' within the Kenyan court systems. Of the 743 cases registered that were part of the study, 70% of the case files were reported missing or misplaced in the courts. Only 202 files were available to the study team for perusal, and these were of cases against 314 offenders that had been concluded. 224 offenders (78%) were found guilty of crimes ranging from illegal hunting, illegal possessions of weapons with intent to kill animals, trespassing in protected areas, illegal possession of wildlife trophies, dealing/trafficking in wildlife etc. No case file could be found for ivory or rhino horn trafficking in Mombasa despite frequent news reports of ivory seizures in the Port of Mombasa and allegations that Mombasa is one of the world's most notorious ports for ivory trafficking. In Nairobi's Makadara Court which deals with airport arrests, suspects were exclusively foreign – mainly nationals of Asian origin. All pleaded guilty but only one defendant received a jail sentence of six months in June 2013. During the period of the study, criminals were consistently given lenient sentences and fines well below the maximum of KES 40,000/= (approx USD\$ 460).

It is also apparent that poor file and case management is hindering the prosecution of wildlife related crime and that the full might of the existing law is not being brought to bear on offenders. There is a huge financial incentive for non-compliance which has led to a culture of impunity amongst the criminal fraternity and even within the government departments responsible for protecting these national assets. If this impunity is not stopped, Kenya may be viewed as a safe haven for local, as well as organized international wildlife traffickers, poachers and dealers.

5 All cases from Rumuruti are referred to Nyahururu

Summary of Recommendations⁶:

1. Office of the Director of Public Prosecutions (ODPP) to develop and/or adopt Standard Operating Procedures to allow sufficient time for investigation and application of appropriate laws associated with endangered species like elephants and rhino. Currently, cases of wildlife related offences are charged and disposed of by police prosecutors and are not always reported to KWS or the ODPP. As a result, poor charging decisions are rife, ancillary orders such as forfeiture are rarely applied for and sentencing powers are not fully utilized possibly through lack of awareness by police prosecutors of what is available.
 2. Office of the Director of Public Prosecutions (ODPP) to be responsible for charging decisions on all rhino, elephant, rhino horn and ivory cases. KWS prosecutors are gazetted to prosecute under the Wildlife Conservation and Management Act (Cap 376 of 1989) while the ODPP can prosecute under other Acts such as the Firearms Act, the Proceeds of Organized Crime Act (POCA) and (POCAMLA) or Money Laundering Act.
 3. Chief Justice (CJ) to assign a dedicated judge and court in each of the conservation areas and together with the Attorney General, CJ and Director of Public Prosecutions (DPP), seek agreement to take judicial notice that poaching offences are 'organised criminal activities', and support ODPP with adequate capacity to prosecute these under the full range of laws.
 4. The National Council of the Administration of Justice (NCAJ) to adopt and implement rules for streamlining wildlife trials to achieve interagency cooperation. With the enactment of the new Wildlife Act, it is foreseeable that there will be an increase in the number of trials relating to wildlife offences. The NCAJ should agree upon and implement rules for streamlining the progress between first appearance and the conclusion of the case and avoid unnecessary delays.
 5. Chief Justice to issue Sentencing Guidelines. Sentencing patterns are haphazard across the country and there is currently no consistency between courts.
- With the new wildlife law and possible increase in prosecutions, magistrates will need guidance on the task of sentencing e.g. aggravating features, value and quantity of the trophy, whether the defendant was in a position of authority etc.
6. Chief Justice to issue a practice direction to the judiciary identifying compelling reasons for withholding bail in offences associated with endangered species like elephants and rhino. Bail is currently issued on a haphazard basis across the country and is hampering wildlife prosecutions.
 7. An NGO structure to support wildlife investigations and prosecutions needs to be established. In order to address the gap between law and implementation, a specialized NGO structure that collaborates closely with Government on investigations, arrest operations and prosecutions of wildlife traffickers should be established. This structure would fight corruption within the enforcement and justice system, ensuring good governance and transparency.
 8. Government to authorise an independent annual stock take and audit of all ivory and horn stockpiles, exhibits and movement of exhibits currently in Government custody. Wildlife trophies that have been confiscated are handed over to the Kenya Wildlife Service. Allowing an independent body to undertake a stock take and audit of the same would reduce loss of exhibits.
 9. Kenya Wildlife Service to transform its relationship with communities and private sector in line with provisions in the Constitution of Kenya, and empower citizens to participate in the fight against wildlife crime by encouraging them to act as independent court monitors and through the creation of a wildlife reporting hotline. The role of ordinary Kenyans is crucial and under-utilized in the fight against poaching and trafficking.
 10. Chief Justice should fast track reforms in court registries on the establishment of an efficient and effective standardized case file management with rapid file call-up system (preferably digitized).

⁶ See page 20 for details

Introduction

Kenya is one of the world's most biodiverse countries and has global recognition for wildlife spectacles such as the wildebeest migration in the Maasai Mara. The country's wildlife is an extremely important economic asset which attracts over one million tourists per year, resulting in a tourism industry that generates over 12% of the National GDP (WTTC, 2013) and directly employs 232,500 people. However, elephants, rhino and other species are increasingly threatened by illegal poaching which reduces their numbers and threatens the Kenyan economy and jobs. The decline of wildlife in the country has been accelerating in recent years and has resulted in population declines of many species (Ogutu, 2009).

Elephant and rhino poaching in particular feeds international trade in ivory and rhino horn and Kenya has become renowned as a transit country for trafficking of these products resulting in the listing of Kenya as among the worst 8 countries complicit in the illegal ivory trade (C. Nellemann, 2013). The trafficking in ivory and rhino horn is extremely lucrative, and this international crime may be linked to criminal cartels and terrorism groups including Joseph Kony and Al Shabaab (UNODC, 2013), thus contributing to local conflicts and international insecurity.

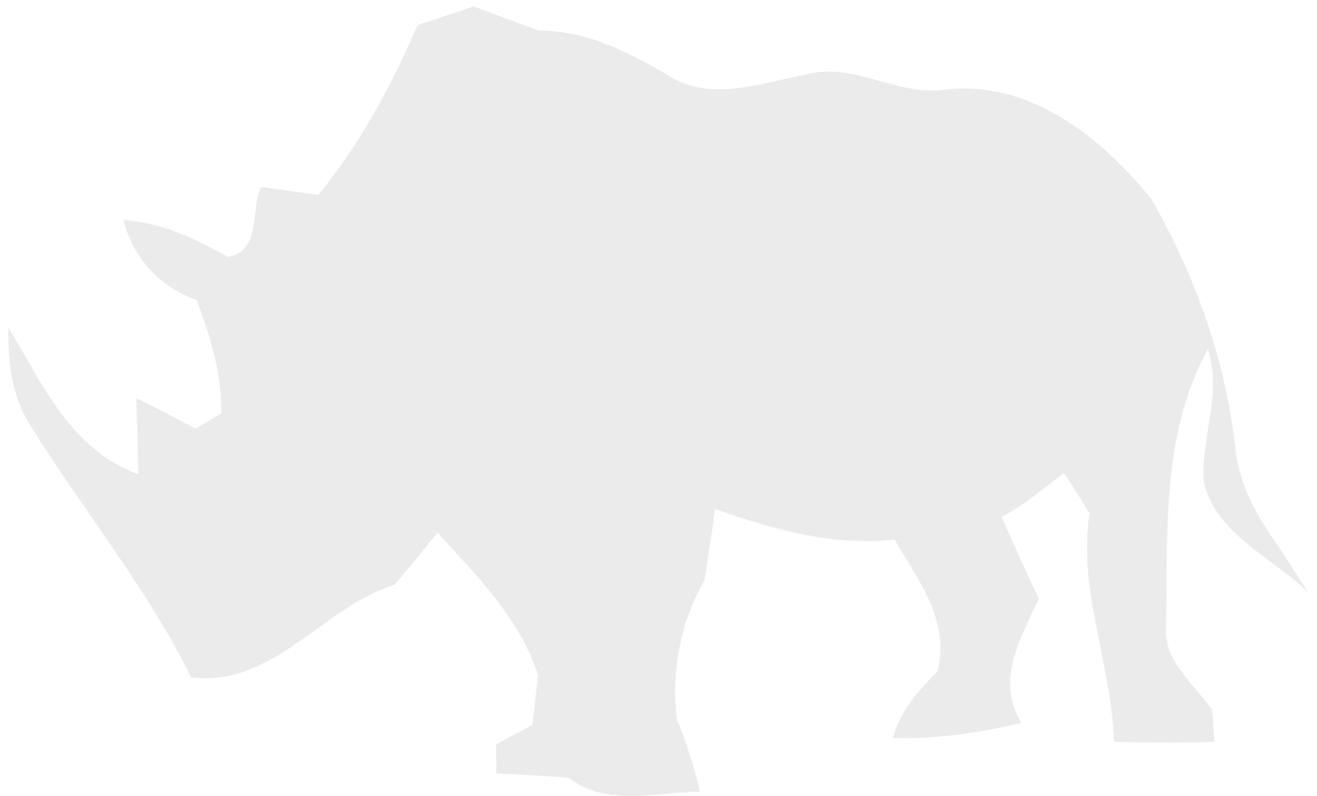
At the time of this study, the management and protection of Kenya's wildlife was regulated by the Wildlife Conservation and Management Act (Cap 376 of 1989) which in Section 56 provides for a maximum of 10 years jail for offences related to lions, elephants, rhinos and leopards (GOK, 1989). Efforts to address poaching and trafficking have focused on reinforcing anti-poaching measures and lobbying

for stiffer penalties in the legislation on the basis that current legislation is inadequate to deter poachers and traffickers. Legal reform with stiffer penalties has been proposed as a remedy for the 8 worst countries complicit in the illegal ivory trade (C. Nellemann, 2013).

Numerous agencies are involved in law enforcement around wildlife crimes due to the nature of the location where offences take place; for example, offences can occur in protected areas, rural locations, on highways, in villages, in towns where trophies are trafficked and sold; at airports, land ports and sea ports where trophies are exported. While the Kenya Wildlife Service (KWS) has the mandate to protect wildlife and is responsible for investigations and arrests, this is often done in collaboration with the National Police Service due to jurisdiction, inadequate capacity at KWS and the nature and location of offences. KWS officers bring offenders to police stations and sometimes take responsibility for the charge sheets. However, in some instances including at ports and opportunistic arrests, the police handle arrests, charge sheets and prosecutions. The Customs Service Department of the Kenya Revenue Authority (KRA) is responsible for the protection of society from illegal entry and exit of prohibited goods in Kenya and plays a key role in seizing illegal trophies and conducting arrests at ports. Prosecutions are handled mostly by the police, although recently, KWS has begun handling prosecutions. The Office of the Director of Public Prosecutions became involved in prosecuting cases involving elephants and rhinos in response to the escalating threats to these two species. Wildlife crimes are criminal offences and are heard in magistrates' courts throughout the country.

This study was commissioned in response to the concerns raised by Kenyan and international conservation organizations like WildlifeDirect, Save the Elephants, the East African Wildlife Society, the David Sheldrick Wildlife Trust etc, to provide a baseline for the status of wildlife crime enforcement in Kenya. While the focus of the study was to consider the judicial outcomes of elephant and rhino related offences, it also touched on other wildlife related crimes. The authors of this study

hope that these findings and recommendations will be considered by the heads of relevant law enforcement agencies involved in combating wildlife crime including the Cabinet Secretary, Ministry of Environment, Water and Natural Resources, Chief Justice, Director of Public Prosecutions, Director KWS, Judiciary Training Institute, Kenya Revenue Authority, Kenya Ports Authority and international law enforcement agencies like the Lusaka Task Force and Interpol.



Research Methodology⁷

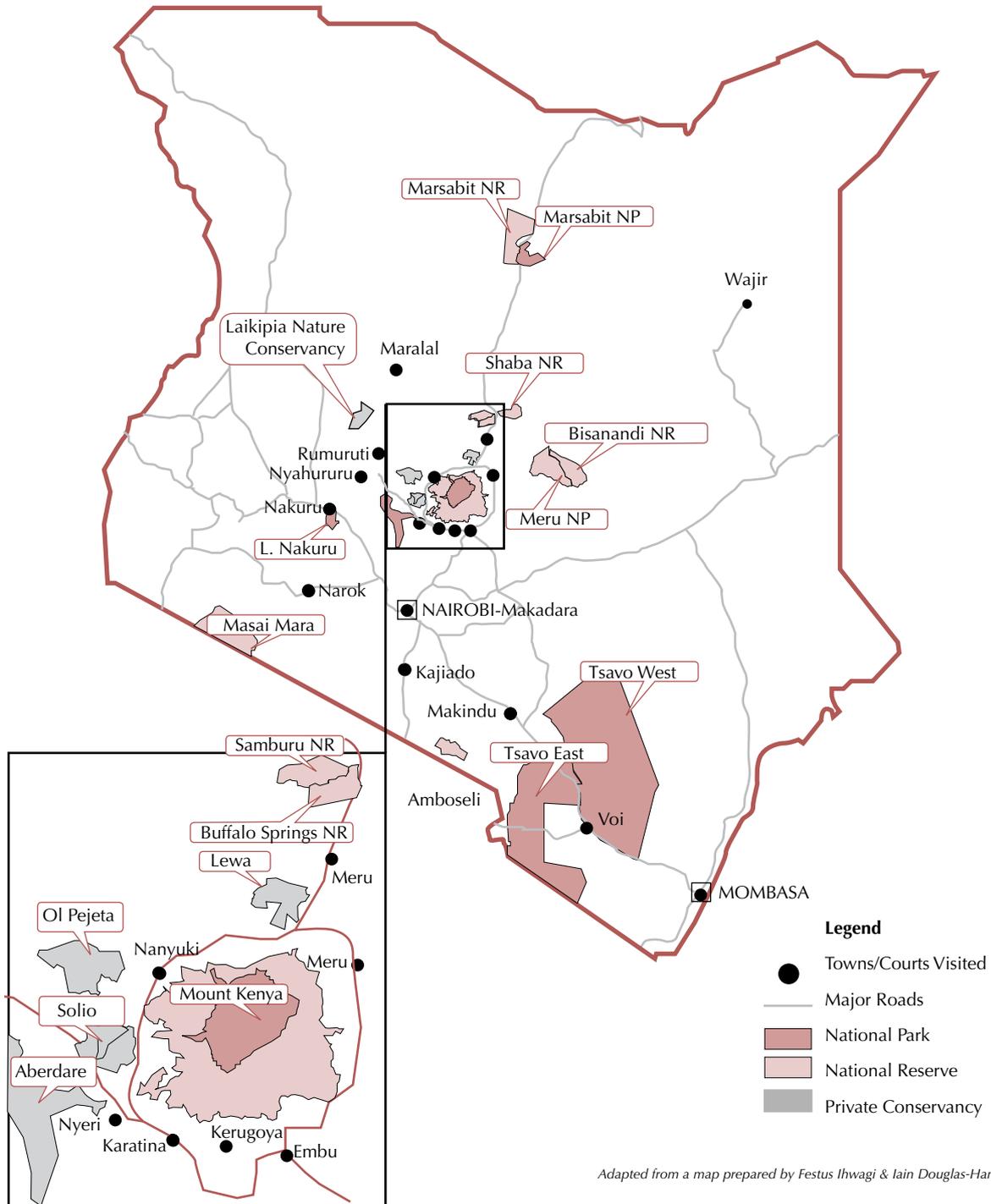
In May and June 2013, a desktop study was used to gather and analyse existing data of wildlife related crimes committed between 2008 and 2013, filed in county magistrate's courts. The objective was to obtain baseline data from case files on all wildlife related crime in key biodiversity areas near major conservation areas including Amboseli, Isiolo, Laikipia, Maasai Mara, Samburu and Tsavo. This involved field visits to criminal registries of magistrates law courts in Embu, Isiolo, Kajiado, Karatina, Kerugoya, Makadara (Nairobi), Makindu, Maralal, Meru, Mombasa, Nakuru, Nanyuki, Narok, Nyahururu, Nyeri, Rumuruti, Voi, and Wajir towns. These towns fall within the aforementioned key ecosystems and the magistrates' courts placed in these towns have jurisdiction falling within the target ecosystems. **Map 1** shows the towns visited and national parks/ reserves bordering them.

Both closed and pending wildlife relates court cases were perused from January 2008 to June 2013. Case numbers were recorded and the list presented to the registry officials for the retrieval of the court files. The files were then availed to the team and those that could not be traced were listed.

The team examined how existing legislation is applied for wildlife crime with the aim of informing a review of the legislation and judicial processes to deter wildlife related crimes and to protect an important economic asset - and the heritage of Kenya. The sentences for guilty verdicts were examined vis-à-vis the available penalties provided in wildlife legislation existing at that time which

allows for various options of fines and jail sentences for different charges. The Wildlife (Conservation and Management) Act, Cap 376 of the Laws of Kenya (GOK, 1989) outlines charges and relevant penalties to wildlife related crimes. Data extracted from files included:

- Court case number
- Names of the defendant(s)
- Charge(s) as drawn in the charge sheet
- Particulars of the charges and place of arrest
- Date of arrest and occurrence book (OB) number
- Court dates (plea, mention, hearing, ruling and judgment)
- The name of the presiding magistrate throughout the entire trial process
- Bail and bond amounts given
- Sentencing (non-custodial, prison and/ or fines)
- If accused persons paid up the fines or served jail terms

Map 1. Location of magistrates courts visited in Kenya

Adapted from a map prepared by Festus Ihwagi & Iain Douglas-Hamilton

Results

General findings

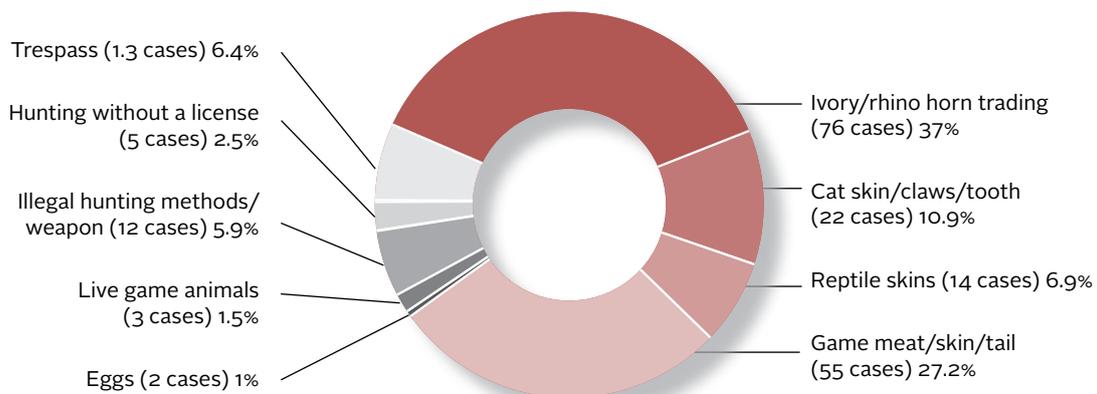
Eighteen courts were visited by the survey team and a total of 743 cases involving wildlife crimes committed between 2008 and 2013 were discovered. Offences included illegal hunting, illegal possessions of weapons with intent to kill animals, trespassing, illegal possession of wildlife trophies, dealing in wildlife etc. (**Graph 1**). Offenders were often charged with multiple offences and sometimes cases involved multiple species. Prosecutions were generally handled by the National Police Service though it was not clear how closely they collaborated with the Kenya Wildlife Service on the setting of charges.

303 offenders were charged under the Wildlife Conservation and Management Act Cap 376 of the laws of Kenya (GOK, 1989), ten under the Meat Control Act (Cap 356) for selling uninspected meat, eight under the penal code, three under the Firearms Act (Cap 114) for illegal possession of

ammunition, one each under the Kenya Citizenship and Immigration Act (Cap 172), The Forest Act (Cap 385) and the Fisheries Act (Cap 378) respectively. In addition, two offenders were charged under the “Wild Animals Protection Act” which does not appear in Kenya’s list of existing legislation.

Only 202 files of registered cases were availed for the team’s perusal; over 70 percent of court files were reported missing or had been misplaced. These 202 cases represented 314 offenders and the analysis in this report was based on the outcomes of cases against individual offenders.

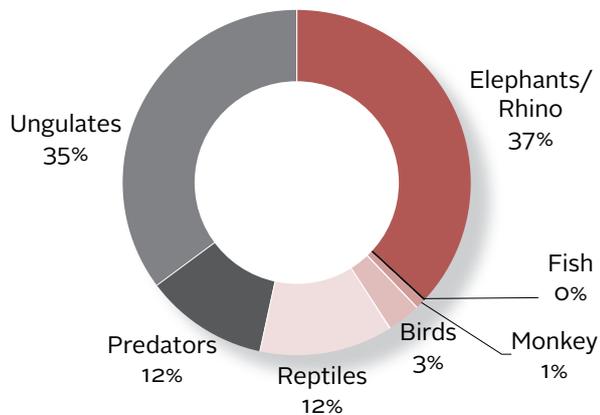
Of the files examined, 187 cases representing 314 offenders were concluded and 27 offenders were still facing charges in court. Multiple cases were often brought against some offenders with 58 cases concerning 2 people, and 22 cases with 3 or more offenders. The largest case examined had 6 offenders.



Graph 1: Overall wildlife related crimes trend

Types of crimes

The study found that the main crimes charged in court involved killing of wild animals and/or trading in their products. Offences were committed against wild animals by 314 offenders. Of these, elephants and rhinos represented 120 offences in which offenders were charged with illegally killing the animal or illegal possession and/or trading in ivory or horn. In 115 cases, offenders were involved in bushmeat (killing or illegal possession or trading in wildlife meat). These cases involved fourteen species including impala, dik-dik, giraffe, zebra, warthog, eland and buffalo. **Graph 2** illustrates the composition of species for which charges were brought against offenders.



Graph 2: Composition of species for which charges were brought against offenders

A further 38 offences involved illegal possession and trading in teeth, skin or claws of predators including lion, leopard, serval cats and cheetah. Offenders were charged with illegal trade in reptiles in 40 cases, primarily representing python skins and live snakes, lizards, tortoises and chameleons. Cases involving pythons and puff adders were almost exclusively in relation to skins. Cases involving predators were often associated with skins. Offences against birds were found in 10 cases primarily involving live possession and eggs of ostrich, owls, love birds and parrots. Two men were charged with illegal possession of colobus monkey skins.

2.5% of cases primarily involved use of illegal hunting methods and weapons (snare, torches mounted on a horn, vehicles, bows, poisoned arrows, wires and spears).

Though not analyzed in detail, regional differences in offending behaviour were observed. For example, offending in areas around Mount Kenya consisted mainly of trespassing, illegal hunting and ivory related crimes. In areas around Tsavo and Amboseli, there was a prevalence of ivory related crimes and offences relating to bushmeat trafficking. In Narok, the offending was seasonal in nature with a spike in April, August and December. Embu and Mombasa offenders showed a particular affinity to cat and reptile related crimes. Makadara Court handled mainly trafficking cases, indicative of the fact that most cases are apprehended at Jomo Kenyatta International Airport with the offenders being primarily of Asian descent.

Analysis of concluded cases

Of 202 concluded cases against 314 offenders, 205 offenders pleaded guilty (65%). This includes 36 individuals who changed their original pleas of not guilty to guilty. In total, 103 (33%) offenders pleaded not guilty. Pleas of 6 offenders were not available as files were incomplete. In total 224 offenders were found guilty (78%) - including the offenders who pleaded guilty plus those who pleaded not-guilty but were subsequently found guilty.

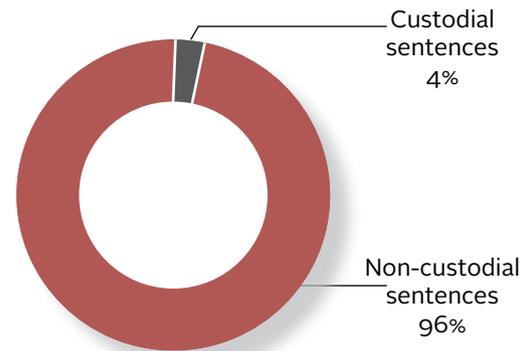
Table 1: Wildlife crime pleas and verdicts

	Plea	Verdict
Not Guilty (in verdict = acquitted)	103	17
Guilty	205	224
Closed	0	1
Discharged	0	15
Dismissed by Magistrate	0	3
Withdrawn by Prosecutor	0	23
Unknown	6	4
Total	314	287

Just over 15% of offenders had their cases withdrawn or dismissed as a result of inconclusive investigations, missing police files, incomplete case files, missing evidence, failure of the prosecution to prove a tangible case or the accused person absconded while released on cash bail/ bond. Prosecutors often fail to prove their case against accused persons beyond reasonable doubt because of poor case prosecution.

Overall conviction patterns

Only 8 out of 224 persons convicted of wildlife crimes went to jail - 4% of all convictions!



Graph 3: Number of convicted offenders that served a jail sentence

The Wildlife Conservation and Management Act Cap 376 of the laws of Kenya (GOK, 1989) allows for a variety of penalties for wildlife related offences including custodial sentences with and/or without an option of fines, or non-custodial sentences such as community service (GOK, 1989). The survey found that all options were used in the various courts but in some cases offenders were discharged without explanation. In total, 224 out of 314 offenders (78%) were found guilty and 32 offenders (11%) were found not guilty and were acquitted or had their cases discharged. See **Table 2**.

Of the 224 convictions, only 7 resulted in sentences without an option of a fine. The other 165 offenders (75%) were given an option of a fine, 164 paid, i.e. almost all of offenders (99.4%) could afford the fine and only one offender could not pay the fine and went to jail. In total, 4% of those convicted went to jail. Another 39 offenders served community service ranging from 1 day to 1 month, while 12 offenders went on probation (5%). A suspended sentence of 2 years jail was given in one case.

Table 2: Penalties for wildlife related offences

Sentences	Number	%	Actual	%
Prison (without option of fine)	7	3.1	8	3.6
Fine (Failure to pay resulting in prison)	165	73.7	164	73.2
Community Service	39	17.4	39	17.4
Probation	12	5.4	12	5.4
Suspended prison sentence	1	0.4	1	0.4
Total	224	100	224	100

**In one case an offender was unable to pay the fine and went to jail therefore 8 offenders were jailed in total.*

Rhino and elephant related crimes

A total of 120 individuals were charged with offences against elephants and rhinos, and cases against 21 offenders were pending at the time of the study. In total, 53 of individuals charged pleaded guilty while 64 pleaded not guilty. The outcomes of the cases are in **Table 3**.

Table 3: Conclusions in cases involving elephants and rhino

Elephant and Rhino Cases	Number of Offenders	% of Offenders
Guilty	72	60
Not Guilty	12	10
Unknown	2	1.7
Pending	21	17.5
Withdrawn	13	10.8
Total	120	100

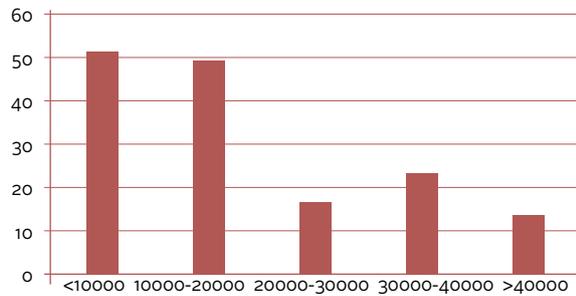
Seventy two offenders were found guilty and twelve offenders were acquitted or discharged. An additional 13 offenders had their cases withdrawn or closed. For the 72 guilty verdicts, prison sentences without an option of fines were given in 4 instances. One additional person could not pay his fine and was jailed, thus 5 out of 72 offenders or 6.9% of offenders were jailed. Fines were paid by 62 offenders, community service awarded to 2 offenders and probation and suspended custodial sentences were given to one person each.

Bail and fines in elephant ivory and rhino horn cases

In the study period, a total of 1,543 kg of ivory and rhino horn valued at KES 44.5 million was seized from wildlife related crimes. The total value of fines received on prosecution and conviction of these crimes was KES 1.17 million or 2.7% of the total estimated street value. In only 30% of the cases against offenders of elephants and rhino, was bail set at a value higher than the value of the ivory or rhino horn. In 20% of cases, the fine was equal to or greater than the value of the horn or ivory.

General Observations

Though the maximum fine for elephant and rhino cases is KES 40,000/=, ninety one percent of all fines were below KES 40,000/= (**Graph 4**).



Graph 4. Number of cases vs. size of fines

Wildlife related crimes are categorized as petty offences resulting in lenient sentences and failure to capture biometrics of offenders. This prevents detection of repeat offenders.

While hundreds of wildlife crimes are brought to court, the cases appearing in court reflect mainly poachers, while no backers of wildlife related crimes faced charges.

In cases where offenders plead not guilty, trials often take months and presiding judges frequently change, plus the presiding judge may not hear the same cases to sentencing.

Records of confiscated wildlife trophies are often not kept and trophies sometimes 'disappear' from exhibit rooms.

Charges do not always reflect the seriousness of the crimes - for example, hunters inside parks may be charged with trespass even though they may be suspected of poaching. As a result they often receive a light sentence such as probation or community service.



Discussion

The study sought to find out how wildlife crimes are handled in Kenyan courts with the intention of exploring opportunities to strengthen deterrent measures. With only 4% of convictions resulting in prison sentences, we conclude that the full force of the law is not being currently implemented. Several findings point to this conclusion.

Lenient penalties issued by magistrates

The Wildlife Conservation and Management Act (Cap 376) of the Laws of Kenya makes provision for financial penalties as well as sentences as high as ten years imprisonment for elephant and rhino related offences. Section 56 provides for a maximum of 10 years jail for offences related to lions, elephants, rhinos and leopards (GOK, 1989). However, despite the poaching crisis facing Kenya, the study did not find evidence that custodial sentencing was used, and in no case was the maximum sentence applied. It is clear that the full might of the existing law is not being brought to bear upon offenders. This leniency in the majority of sentencing encourages suspects to plead guilty at first appearance while a significant proportion of offenders change their plea to guilty after first appearance but before or even during trial. This is particularly so for those who engage in the trafficking of ivory and rhino where the value of the trophy greatly exceeds the fines prescribed.

In one exceptional case in Narok the offenders were charged with 3 counts and given fines of KES 50,000/= on each count. They paid the fines even though they exceeded the maximum allowed under law for those particular offences. It is clear that offenders are fully aware that the fines imposed were a tiny fraction of what their criminal enterprise was worth. This in effect makes it worth taking the risk of arrest and conviction when weighed against the profits to be made from this illegal trade and this has led to a culture of impunity within the criminal fraternity. In a few cases, magistrates in Narok, Makadara, Nyahururu and Maralal Law Courts utilized the sentencing powers available and imposed, in some cases, terms of imprisonment.

It is also evident that the cash bail and bonds being issued by courts were not set at a high enough level. The majority of offenders are able to pay the bond, sometimes using land titles as securities and are released accordingly. Records show that repeat offenders are not easily detected. In Embu Law Courts, the same person was arraigned in court on wildlife related matters on two separate occasions in a span of less than a year. On both occasions lenient sentences were handed out as a 'first' offense. With poor tracking of previous convictions and little exchange of information between courts, it is challenging to identify repeat offenders, so their sentencing in subsequent cases does not reflect the extent of repeated criminal activities.

Poor case management

The law under the Criminal Procedure Code allows for withdrawal of cases by the prosecution at any time before judgment is pronounced in subordinate courts under Section 87 (a) (GOK, 1989). In this study, the most common reasons cited for case withdrawal included missing police files, inconclusive investigations, and wrongful case registration. A recent Independent Police Oversight Authority (IPOA) survey suggests that this problem is not unique to wildlife crimes. 64% of cases being forwarded for prosecution in court do not meet the minimum evidentiary threshold to sustain convictions (IPOA, 2013).

Many case files could not be traced and exhibits were frequently missing. Recycling of exhibits was also noted in Makindu Law Courts. A number of observations were made. They include:

- the lack of any active case management system in trafficking cases evidenced by the culture of adjournments prevalent in the court system;
- the lack of continuity in trials that are frequently not heard on consecutive days;
- the failings in the court system to ensure that case files are made available to judges in a timely way so they might familiarize themselves with the case;
- the lack of resources such as law books so that judges might know the powers available to them;
- the lack of cooperation, oversight and quality assurance between investigators and prosecutors regarding the preparation of a case for a plea and trial.

It was also noted that despite wildlife related impounds being reported regularly in the Port of Mombasa, no single case could be found in the court records. The same was observed in Wajir and other areas of the country. A majority of the relevant files connected to wildlife related impounds are untraceable, and there is no accountability for the disposal of exhibits.

Failure to use the full force of the law

Powers of prosecution are clearly not being fully utilized. This is in part due to the fact that the Kenya Wildlife Service (KWS) is only mandated to prosecute under the Wildlife Conservation and Management Act (Cap 376) of the Laws of Kenya. If cases relating to ivory and horn trafficking were to be prosecuted within the remit of the ODPP, then the full range of legislative powers would become available such as the Organized Crime Act, Proceeds of Organized Crime Act and the Economic Crimes Act. Furthermore, as the IPOA baseline survey revealed, there are significant failings, not only at the investigations side, but also with the prosecution (IPOA, 2013). This is in part due to the failure of the prosecution to analyse the evidence appropriately in determining charge, and more significantly, the lack of inter-agency cooperation between investigators and prosecutors. Where there are evidential gaps, there is no mechanism in place for investigators to 'plug' those gaps nor is there any mechanism for escalation to superiors where investigators fail to adhere to prosecution requests.

Kenyans, especially the communities living within and around parks and game reserves seem disconnected to wildlife and are often taken advantage of by poachers. They need to be exposed to the benefits of having wildlife so that they can appreciate, respect and develop connections with wildlife and nature enabling them to be advocates for its protection.

Conclusions

This study reveals that despite the enormous economic and security threats caused by rampant poaching and trafficking of wildlife products in Kenya, and the international nature of the crimes being committed, the investigation, prosecution and adjudication of such offences are failing to adequately deter offenders. Over 70% of bails issued were set at below the stated value of the wildlife trophy for ivory or rhino horn and in only 26% of cases, did fines exceed the value of the trophies.

Based on provisions in the then existing Kenyan legislation related to wildlife crime, it is clear that the full might of the available law was not being brought to bear upon offenders. Even when convictions were reached, magistrates were unwilling to apply maximum sentences or jail terms for offenders. Unless the perception by magistrates that wildlife related crimes are petty offences is reversed, the situation is unlikely to change even under new legislation. This leniency in the majority of sentencing in the past has led to a culture of impunity within the criminal fraternity who engage in the trafficking of ivory and rhino horn and in effect led to a situation where there was a huge financial incentive for non-compliance. Despite numerous seizures of ivory in Kenyan ports, no case has been brought to court against the most serious perpetrators – i.e. those that finance the poachers and those that oversee the trafficking of wildlife products.

The Transnational Organized Crime in Eastern Africa: A Threat Assessment. report suggests that ivory and rhino horn trafficking is a symptom if not a cause of a much larger criminal network

(UNODC, 2013). The level of organization necessary to ensure the international nature of trafficking, the sophistication in methodology employed, the use of ‘mules’ to transfer trophies across borders, the killing of rangers in pursuit of these trophies and the fact that these organized crime networks likely employ the same routes used to traffic humans, firearms and drugs and may directly or indirectly finance terrorist groups, all speak of a level of offending that transcends any notion of ivory and rhino horn trafficking being a misdemeanour or petty crime. The same cannot be said of those who might kill other critically endangered animals such as lion or roan antelopes. Accordingly, sentencing and legislation on any offence relating to ivory or rhino horn ought to reflect the degree of criminality involved in this particular arena.

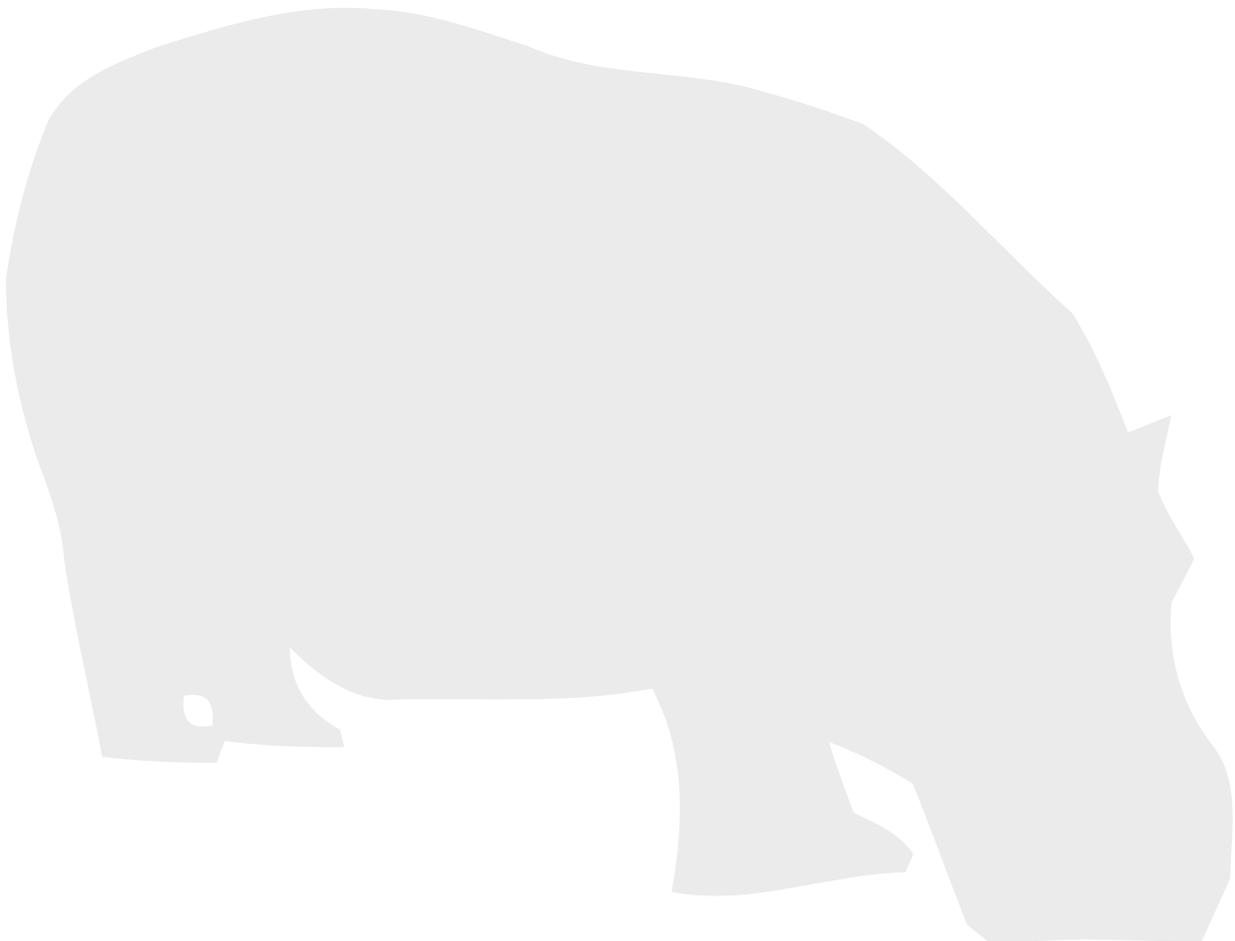
Until the trafficking in ivory and rhino horn is treated with the seriousness it deserves, Kenya will reach her vision in 2030 with two of the big five missing from her landscape. The economic impact of this in a country where 12% of GDP comes from the tourism sector which employs about 300,000 people at the time of writing would be devastating. And the threat to those trying to battle this crime and those who are killed in the process should not be overlooked.

Despite media reports of corruption in wildlife crimes, no single case against a government officer could be found in the court records. Corruption is only one head of this multi-faceted issue. Allegations of corruption within KWS e.g. interdiction of 32 officers in 2013 (Koross, 2013) has severely damaged public confidence in this

institution whose only real mandate is to protect and conserve the wildlife in Kenya. Corruption at ports and borders that allows for the flow of trophies across borders will not be adequately addressed as long as prosecutions focus on poachers (often young men lured into this enterprise for a small amount of cash) or those that are caught transporting small amounts of trophies through the airports. The backers of wildlife related crimes often fall through the cracks of law enforcement and the legal system, and unless the real drivers of these operations are caught, the crisis will continue. Perhaps law enforcement officers and prosecutors could offer

plea bargains to low-level offenders in exchange for information leading to capture of higher-up offenders and backers of wildlife crimes. Eighty percent of all cases representing airport apprehension comprise persons of Asian origin from China (40%), Vietnam (30%) and Thailand (10%). In virtually all cases, suspects pleaded guilty and were fined punitively within 24 hours. In being so lenient to traffickers of foreign origin, Kenya may inadvertently be enabling international criminals to operate with impunity.

Key recommendations on reforms suggested after this scoping study follow.



Key Recommendations on Reforms

Office of the Director of Public Prosecutions (ODPP) to develop and/or adopt Standard Operating Procedures to allow sufficient time for investigation and application of appropriate laws associated with endangered species like elephants and rhino.

Charging decisions in the majority of cases are made by the Officer Commanding Station (OCS) police or by the KWS prosecutors. The IPOA study found that in 64% of cases filed, people were arrested and forwarded to the courts and charged where investigations were incomplete and there was insufficient evidence. Currently, prosecutions of wildlife related offences are not always reported to KWS or the ODPP in time for first appearance. The case is charged and disposed of by police prosecutors. As a result, poor charging decisions are rife, ancillary orders such as forfeiture are rarely applied for and sentencing powers are not fully utilized possibly through lack of awareness by police prosecutors of what is available. In order to allow time for proper investigation and evidence gathering and to ensure that the full range of legislation available can be considered and applied to the circumstances of a particular case, the recommendation is that charges are not laid at the first appearance (within 24 hours of arrest as demanded by the Constitution) but rather, as a matter of course. A minimum of 5 days for further investigations should be requested by any prosecutor receiving the file. The DPP who is responsible for all prosecutions in Kenya, must issue a circular to all gazette prosecutors and those within the ODPP around the country that every time an ivory or rhino case arrives to a prosecutor for first appearance, a

request must be made for further time before the charge is laid, and the file to be returned by the court prosecutor to the police for further investigations, and with immediate notification by that court prosecutor to the ODPP with 1) Name of suspect 2) Case number and court registry number 3) Name and contact details of investigating officer, 4) Proposed charge under consideration 5) Police station where the file and the suspect will be held, and 6) Date of next appearance.

Office of the Director of Public Prosecutions (ODPP) to be responsible for charging decisions on all elephant, rhino, rhino horn and ivory cases.

KWS prosecutors are only gazetted to prosecute under the Wildlife Conservation and Management Act (Cap 376 of 1989). Increasing the number of KWS prosecutors is a positive move in enabling the service to cope with the rising number of wildlife offences. However their role is restricted to prosecutions under the Wildlife Act and cannot join offences associated with the same incident. For example they cannot prosecute under the Firearms Act, the Proceeds of Crime and Anti-Money Laundering Act of 2009 (POCAML), or Money Laundering Act. Accordingly the full criminality of a particular incident is not always fully represented to the court.

Therefore, the ODPP must be seized with the charging decision on offences related to crimes involving elephants and rhino following any investigation. By referring these charging decisions to the ODPP, the full range of laws such as the Proceeds of Organized Crime Act (POCA) and POCAML, Firearms Act, Penal code can be considered and applied as

appropriate. By adopting this measure, the full range of laws can be utilized to reflect the criminality involved and it should increase the quality of the file which will improve the chances of conviction which is currently only 25% for felonies (IPOA, 2013). Decisions can be made on ancillary powers at an early stage such as property tracing, asset restraint and seizure. These are vital tools not yet fully employed in the fight against this type of organized criminal offending.

3 Chief Justice (CJ) to assign a dedicated judge and court in each of the conservation areas.

Given the escalation of poaching of elephants and rhinos and the subsequent threat to local and international security, economy and heritage, it is recommended that wildlife crimes be given special consideration. The creation of specialized wildlife courts will allow the effective training and monitoring of wildlife trials. It is also recommended that the AG, CJ and DPP together seek agreement to take judicial notice that poaching offences are 'organised criminal activities', and support ODPP with adequate capacity to prosecute these under the full range of laws.

4 The National Council of the Administration of Justice (NCAJ) to adopt and implement rules for streamlining wildlife trials to achieve interagency cooperation.

The National Council for Administration of Justice (NCAJ) comprises the Attorney General, the Director of Public Prosecutions, the Chief Justice and the Inspector General and the head of prisons. Kenya Wildlife Service has also asked to be part of this forum.

In anticipation of the new Wildlife Act with stiffer penalties, it is foreseeable that there will be an

increase in the number of trials relating to wildlife offences. The court system in Kenya is currently subject to massive delay and both defendants and prosecutions teams can abuse the system – defense by seeking adjournments for a variety of reasons, and prosecutions teams able to leave a case adrift with no impetus to fill any gaps in the evidence in advance of trial which may be many months away.

The NCAJ should agree upon and implement rules for streamlining the progress between first appearance and the conclusion of the case and avoid unnecessary delays. This will involve an agreement that parties to a trial must narrow the issues in dispute, identify witness requirements at an early stage, with a view of shortening the length of trial and shifting the culture of adjournments that currently exists in the justice system. If properly adopted this would reduce the cost to the prosecution, the judiciary and the prison services who currently may be holding people in remand for years before their trials start.

5 Chief Justice to issue Sentencing Guidelines.

Sentencing patterns are haphazard across the country. There is currently no consistency between courts. In anticipation of the new law, and if the above recommendation are adopted, the increase in prosecutions under other legislation, the magistrates will need sentencing guidelines.

Aggravating and mitigation features can be categorized to guide magistrates in the task of sentencing in such cases. e.g. aggravating features: value and quantity of the trophy; whether the defendant was in a position of authority e.g. immigration authority or KWS ranger; whether more than one was involved in the allegation; a 'starting point' for sentences can be prescribed. This will improve consistency in sentencing.

6 Chief Justice to issue a practice direction to the judiciary identifying compelling reasons for withholding bail in offences associated with endangered species like elephants and rhino.

Bail is currently issued on a haphazard basis across the country and is hampering wildlife prosecutions. The Constitution stipulates the right to bail subject to “compelling reasons”. In wildlife crime related to rhinos and elephants, those compelling reasons are:

- i) Trafficking in ivory and horn is now widely recognized as an international organized crime phenomenon (UNODC, 2013). Accordingly, one must assume connections within an international network giving rise to the means of fleeing the country particularly where the suspect is higher up the chain of the network or is a foreign national.
- ii) Severity of the penalties available is an incentive to abscond and also interfere with witnesses.
- iii) There should be a presumption that a suspect holds unseized stocks of wildlife contraband and his liberty will be used to commit further offences.
- iv) There is a significant risk that the liberty of the suspect will result in the interference of ongoing investigations of others in that network which may have been triggered by his arrest.

7 An NGO structure to support wildlife investigations and prosecutions needs to be established.

In order to address the gap between law and implementation, a NGO structure can be modelled after experiences in other countries where a specialized NGO structure collaborates closely with governments on investigations, arrest operations and prosecutions of wildlife traffickers. The aim would be arrest and quick prosecution and imprisonment of wildlife traffickers.

In order to achieve these goals, the NGO structure will be set up:

- To identify major wildlife traffickers, and provide evidence to support action against them.
- To bring about the arrest of major wildlife traffickers.
- To ensure the prosecution of major wildlife traffickers, and that deterring sentences are handed down and served.
- To raise public awareness of the increased enforcement of wildlife law and the risks and penalties for wildlife criminals thereby deterring potential poachers and traffickers from engaging in illegal activities.

This NGO structure will assist government in fighting corruption within the enforcement and justice system, ensuring good governance and transparency.

8 Government to authorise an independent annual stock take and audit of all ivory and rhino horn stockpiles, exhibits and movement of exhibits currently in government custody.

Wildlife trophies that have been confiscated are handed over to the Kenya Wildlife Service. In Makindu law courts, an elephant tusk was recycled as evidence in two different cases. Loss of exhibits is a recurrent problem. Allowing an independent body to undertake a stock take and audit of the same would mitigate against these occurrences.

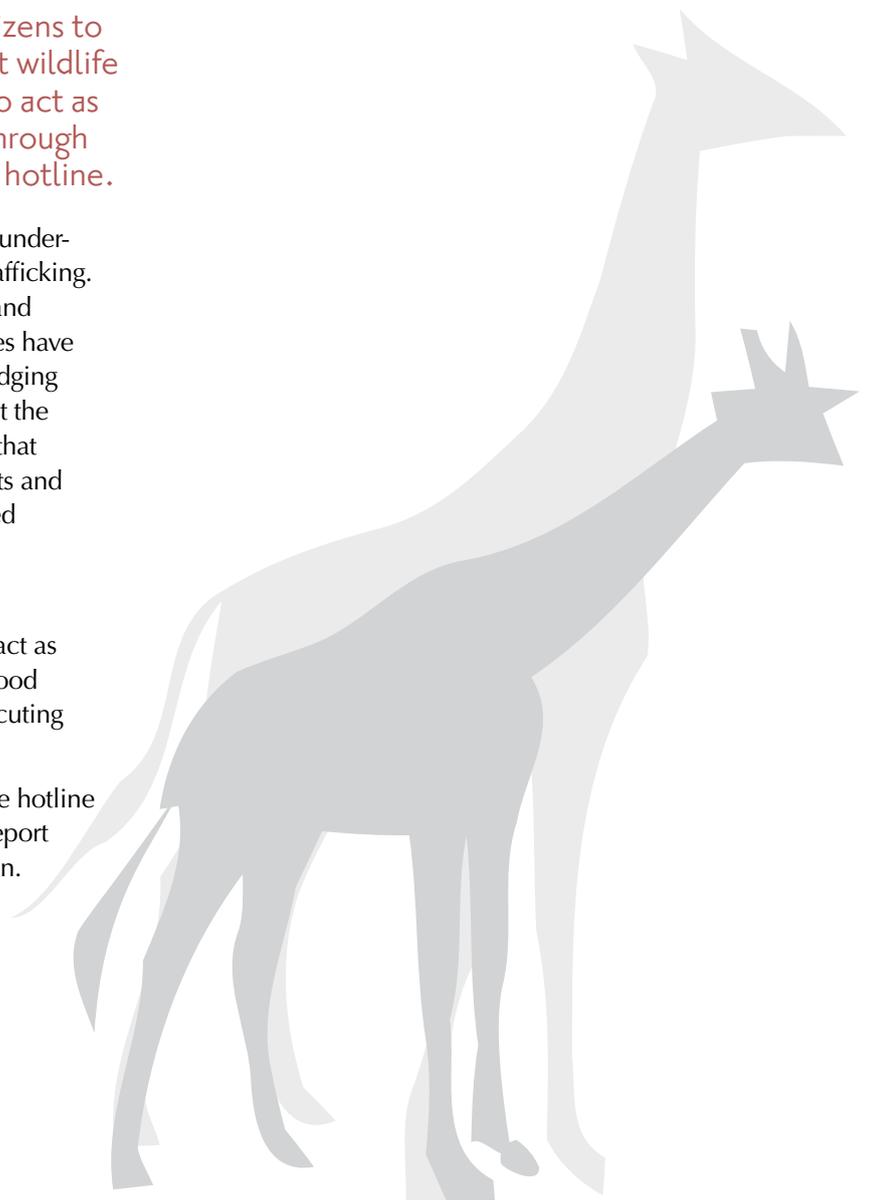
9 Government to empower citizens to participate in the fight against wildlife crime by encouraging them to act as independent court monitors and through the creation of a wildlife reporting hotline.

The role of ordinary Kenyans is crucial and under-utilized in the fight against poaching and trafficking. Communities offer a wealth of knowledge and information of illegal activities. Communities have their own interests to protect and acknowledging the potential that communities have to assist the government in tackling the complex issues that surround this vice can have multiple benefits and huge impact. Two methods can be employed at relatively little cost to start this process of empowerment.

- a) Allowing and encouraging citizens to act as recognized court monitors to ensure good governance and transparency in prosecuting wildlife criminals.
- b) Establish an independent wildlife crime hotline where concerned citizens can safely report without fear of harassment or retaliation.

10 Chief Justice should fast track reforms in court registries on the establishment of an efficient and effective standardized case file management with rapid file call-up system (preferably digitized).

Most courts in Kenya still manage their files and court filings with paper and a digitized system might improve on case file management and ensure timely and controlled access and reduce misplacement of records.



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Appendix I: Species affected by wildlife related crimes in Kenya and their global status (IUCN)

Common name	Scientific name	No of offences	IUCN status
Bongo	<i>Tragelaphus eurycerus</i>	2	Critically endangered
Buffalo	<i>Syncerus caffer</i>	8	Least concern
Bushbuck	<i>Tragelaphus scriptus</i>	4	Least concern
Cheetah	<i>Acinonyx jubatus</i>	8	Critical
Colobus Monkey	<i>Colobus guereza</i>	2	Vulnerable
Dik-dik	<i>Madoqua guentheri</i>	20	Least concern
Eland	<i>Taurotragus oryx</i>	9	Least concern
Elephant	<i>Loxodonta africana</i>	109	Endangered
Fish		1	Least concern
Gazelle (Thompsons)	<i>Gazella thomsonii</i>	5	Least concern
Giraffe	<i>Giraffa camelopardalis</i>	16	Least concern
Hippo	<i>Hippopotamus amphibius</i>	2	Least concern
Impala	<i>Aepyceros melampus</i>	22	Least concern
Leopard	<i>Panthera pardus</i>	19	Vulnerable
Lesser Kudu	<i>Tragelaphus strepsiceros</i>	2	Least concern
Lion	<i>Panthera leo</i>	5	Vulnerable
Lizards		1	Least concern
Love Birds	<i>Agapornis sp</i>	1	Least concern
Ostrich	<i>Struthio camelus</i>	7	Least concern
Owl	<i>Strigiforme sp</i>	1	Least concern
Puff Adder	<i>Bitis arietans</i>	1	Least concern
Python	<i>Pythonidae sp</i>	18	Least concern
Rhino	<i>Diceros bicornis</i> (black) <i>Ceratotherium simum</i> (white)	11	Critically endangered
Serval Cat	<i>Leptailurus serval</i>	6	Least concern
Snakes		2	Least concern
Tortoises	<i>Testudinidae</i>	1	Least concern
Unknown Antelope		2	Least concern
Warthog	<i>Phacochoerus africanus</i>	10	Least concern
Waterbuck	<i>Kobus ellipsiprymnus</i>	2	Least concern
Zebra	<i>Equus quagga</i>	11	Least concern

Appendix II: Terms of reference for study on wildlife crime



1. Project Background and Context

WildlifeDirect is a Kenyan based NGO registered in Kenya and USA. It is launching a major campaign to halt the dramatic decline of Africa's elephants due to poaching to illegally supply Asian ivory markets. At the current rate of poaching, African elephants will be reduced to tiny pockets within 15 to 20 years.

The failure of the Kenyan authorities to halt the poaching stems from two key problems. First Kenyan authorities have failed to prosecute wildlife offences robustly with penalties that are severe enough to act as a deterrent. Secondly, most wildlife conservation laws in Kenya have minimal fines and penalties which deter few people and just become a tolerable cost of doing business as a poacher or a smuggler. Wildlife crimes are also associated with corruption, fire arms and other weapons, and are generally organized in nature. The laxity in penalties and prosecutions is causing poaching to be conducted with impunity across the country.

WildlifeDirect is developing a proposal to strengthen prosecutions of wildlife crimes in Kenya. The purpose of this consultancy is to conduct a baseline study of prosecutions history over the last 5 years in Kenya as a part of the larger body of work to deter poaching in Kenya.

2. Purpose and Objectives of the Report

The aim of this study is to document how wildlife crimes have been prosecuted in Kenya during the last 3 years (January 2010 to March 2013).

- A. How are wildlife crimes handled in Kenya and does the judicial system discourage poachers?
- B. Identify opportunities to improve management of wildlife crimes.

3. Activities

Survey methodology

The consultant will visit key wildlife conservation areas including:

- Samburu, Isiolo, Laikipia region
- Tsavo region
- Maasai Mara region
- Amboseli region

The main focus of this proposed study is to examine the prosecutions of poaching of elephants, amongst other wildlife and environmental related crimes.

The consultant will visit these four major ecosystems and conduct a comprehensive baseline study on wildlife related crimes in the magistrate's courts that surround the said regions. This trip will include visits to courts in Nairobi (Kibera and Makadara), Nyeri, Nyahururu, Nakuru, Nanyuki, Marsabit, Isiolo, Kerugoya, Meru,

Embu, Mwingi (Kyuso), Hola (Tana River), Garsen, Makindu, Narok, Kajiado, Voi, Wundanyi and Mombasa and any towns that the consultant finds necessary to visit in order to ensure a comprehensive coverage.

The consultant will travel, research and record all the key issues and information being sought by the project proponent, and as such the information collected will be documented in the expected comprehensive report.

The consultant will visit magistrates' courts in key wildlife and conservation areas and record the following information about specific wildlife crime cases in a database

- Case Number
 - Identify who handles investigations, arrests, and prosecutions – police or KWS
 - Name of the judge
 - Dates of the case
 - Lawyers representing the suspects and name of their firm
 - Name of prosecutor
 - Profile of the suspect – family, background etc
 - Document what charges levelled against suspects vs. the crime
 - Plea and sentence. If plea is guilty what penalty is given? When is sentence to be done?
 - If the plea is innocent what is bail? Trial dates, any adjournments, and name of judge who heard the trial
- Are the same judges used in the outcome?
 - Was punishment executed – on the spot? Are the sentences really executed? Did they go to jail or do community services
 - Document what happens to exhibits
 - Document any anomalies in prosecutions
 - Document how cases are handled, how much time they take, number of hearings, end, and if a guilty verdict is concluded, document what penalties were given and determine if criminals are facing justice.
 - Identify who represents these suspects, and how the cases are handled.
 - Note if suspects have a history of other crimes.
 - Document any recommendations on how to improve prosecutions

Consultancy estimation period of execution

The consultant will conduct the field survey for a period of four weeks, and compile the interim report in two weeks. On the sixth week the consultant will present an interim report in soft and hard copy. After approval by the project proponent, the consultant will present a final report on the eighth week.

Conclusion

The consultant guarantees a comprehensive, widely diversified and detailed study, with viable recommendations in the report which is to be submitted on time, both in soft and hard copy.

Output

The output of this project is a comprehensive report on wildlife crime in Kenya.

Schedule

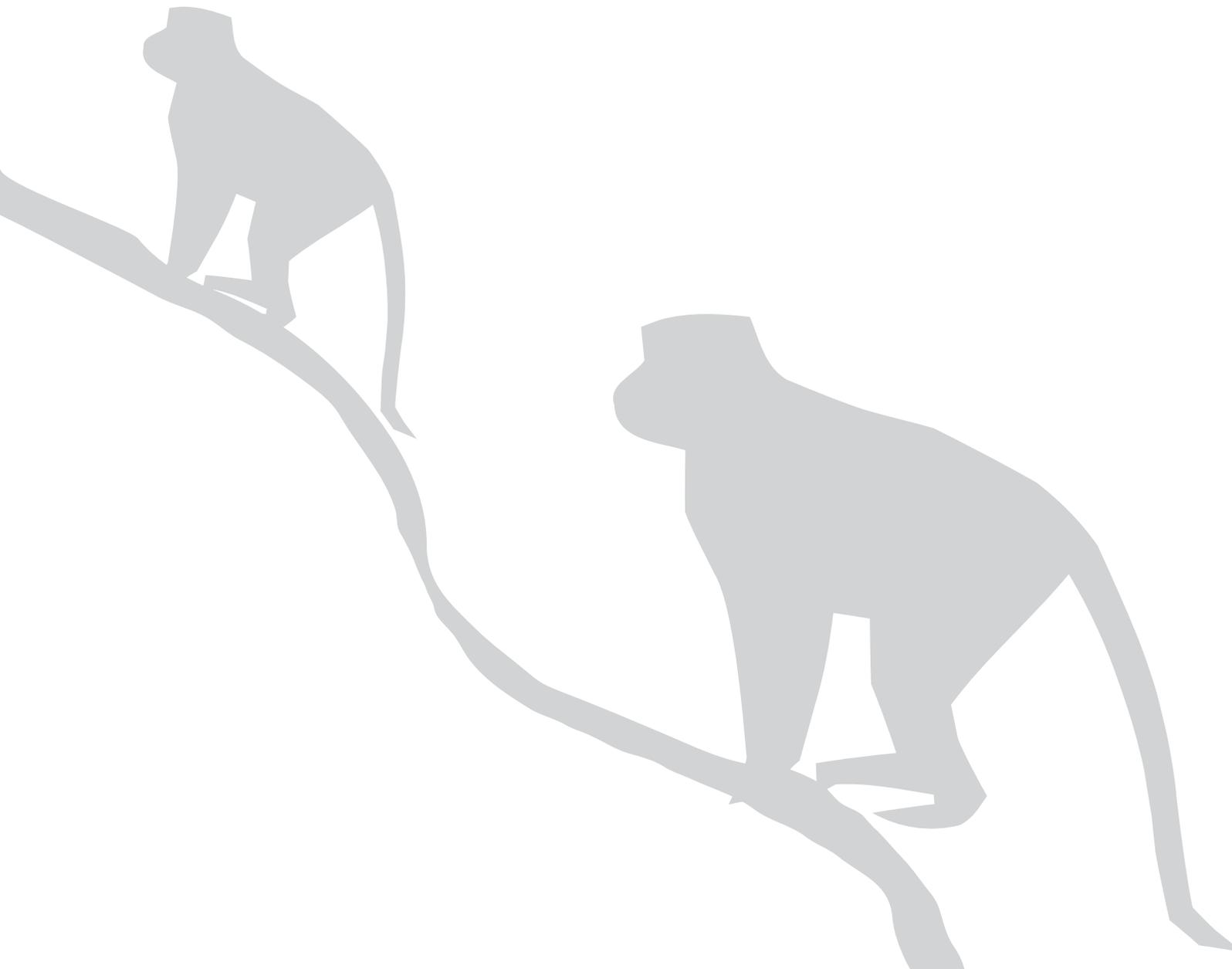
This project will be conducted over a period of 3 months beginning 1st of May 2013. The draft report will be expected on 15th June and final report by 30th June 2013.

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WildlifeDirect, established in 2006, is a Kenya and US registered charitable organization founded and chaired by conservationist Dr Richard Leakey, who is credited with putting an end to the elephant slaughter in Kenya in the 1980s. Its headquarters is located in Nairobi, Kenya.

www.wildlifedirect.org

