REPUBLIC OF KENYA

THE SUPREME COURT JUDICIARY REPUBLIC OF KENYA

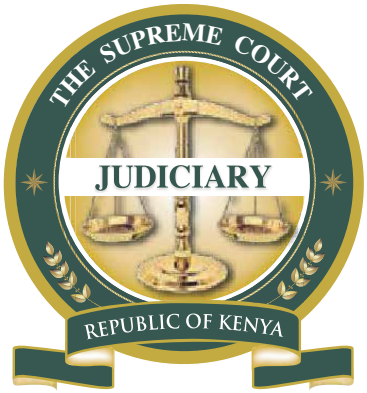
SUPREME COURT OF KENYA

JUDGES' PAPER SERIES

VOLUME 1



2025



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TABLE OF CONTENTS

Foreword by the President of the Supreme Court vii

Message from the Vice President of the Supreme Court viii

Introduction ix

Acknowledgment x

Part A - Supreme Court @ 12 Law Lecture Circuits 1

The Multi Door Approach to the Delivery of Justice: The Kenyan Experience
Hon. Justice Martha K. Koome *3*

Institutional Independence: Reflections on the Supreme Court's Jurisprudence on Devolution, Constitutional Commissions and Independent Offices
Hon. Lady Justice Philomena Mbete Mwilu *11*

Recusal of Judges versus the Duty to Sit: A Kenyan Perspective
Hon. (Mr.) Justice Mohammed K. Ibrahim *21*

Transformative Property Law: Exploring the Emerging Land Law Jurisprudence from the Supreme Court
Hon. Justice (Dr.) Smokin Wanjala *29*

The Supreme Court's Jurisprudence on Family Law
Hon. Lady Justice Njoki Ndungu *42*

Breathing life into the Constitution: The Supreme Court's Jurisprudence on Socio-Economic Rights and its Transformative Effects
Hon. (Mr.) Justice Isaac Lenaola *52*

The Apex Court of the Land: Exploring the Supreme Court's Jurisprudence on its Jurisdiction
Hon. (Mr.) Justice William Ouko *64*

Part B – Jurisprudence 75

Social Transformation through Access to Justice: The Jurisprudence of the Supreme Court of Kenya
Hon. Justice Martha K. Koome *77*

Supreme Court of Kenya's Journey and its Experience in Determining Presidential Election Petitions
Hon. (Mr.) Justice Mohammed K. Ibrahim *85*

The Threshold for Leave to Appeal to the Supreme Court & its Jurisdiction
Hon. Justice (Dr.) Smokin Wanjala *94*

The Role of the Judiciary in *Developing* Public Interest Litigation
Hon. Justice (Dr.) Smokin Wanjala *108*

A Critique of the Judicial Approach on Sexual Offences and the Age of Consent
Hon. Lady Justice Njoki Ndungu *112*

Judicial Protection of Human Dignity: Insights from Kenyan Jurisprudence
Hon. Lady Justice Njoki Ndungu *124*

Threshold of Standard of Proof in Election Dispute Resolution
Hon. (Mr.) Justice William Ouko *132*

Part C - Access and Administration of Justice 139

Judicial Independence and Integrity: The Kenyan Experience
Hon. Justice Martha K. Koome *141*

Management Culture: Towards a More Efficient, Effective and Accountable Judiciary
Hon. Lady Justice Philomena Mbete Mwilu *149*

Enhancing Good Governance: The Institutional Relationship Between the Judiciary and the Legislature
Hon. Lady Justice Philomena Mbete Mwilu *157*

The Judiciary Perspective on Leadership: Behaviour, Ethics and Standards
Hon. (Mr.) Justice Mohammed K. Ibrahim 164

Technology as a Tool for Access to Justice
Hon. (Mr.) Justice Isaac Lenaola *174*

Crisis and Forced Migration in the Horn of Africa
Hon. (Mr.) Justice Isaac Lenaola *182*

"Nuts and Bolts" of Working in a Multi-Member Bench: Best Practices
Hon. (Mr.) Justice William Ouko 191

Foreword by the President of the Supreme Court



It gives me great pleasure to present the inaugural volume of the *Supreme Court of Kenya Judges' Paper Series*. This collection represents a significant step in the Supreme Court's efforts to foster intellectual engagement, transparency, and accessibility in its work, while contributing to the broader discourse on critical themes of jurisprudence, access to justice, and the administration of justice.

As the apex court of the land, the Supreme Court is entrusted with the solemn responsibility of interpreting the Constitution and guiding the development of Kenya's jurisprudence. Beyond this core mandate, the Court recognizes its duty to engage with its audiences—practitioners, scholars, policymakers, and the general public—to deepen understanding and appreciation of the principles underpinning our legal system. This series exemplifies our commitment to that engagement.

Contained within these pages are a series of thought-provoking papers presented by Judges of the Supreme Court in various lecture circuits and conferences, both locally and internationally. These contributions reflect the breadth and depth of the issues that the Court grapples with in its day-to-day work and its broader reflections on the justice system. Topics range from the interpretation of constitutional principles to innovative approaches to enhancing access to justice, as well as emerging challenges in the administration of justice in a rapidly evolving world.

This publication seeks to achieve several objectives. First, it avails to a wider audience the insights and perspectives of the Judges of the Supreme Court, fostering transparency and enriching public discourse. Second, it provides a resource for academics, practitioners, and students of law who wish to engage with the ideas shaping Kenya's legal landscape. Lastly, it reinforces the Supreme Court's commitment to thought leadership, ensuring that the Court's role extends beyond adjudication to contributing meaningfully to the intellectual and practical development of the rule of law.

I commend my fellow Judges for their invaluable contributions to this publication. Their scholarship and reflections affirm the Supreme Court's position as not only a guardian of the Constitution but also a beacon of thought leadership in Kenya's justice sector.

As you peruse this volume, I invite you to reflect on the themes explored and their implications for our shared quest for good governance and social justice. Let this publication be a catalyst for meaningful dialogue and action, further strengthening our collective commitment to justice and the rule of law.

Hon. Justice Martha K. Koome, FCIArb, EGH
Chief Justice and President of the Supreme Court of Kenya

Message from the Vice President of the Supreme Court



The publication of the inaugural edition of the *Supreme Court of Kenya Judges' Paper Series* marks an important milestone in furtherance of the Court's commitment to transparency, intellectual engagement, and the advancement of jurisprudence in Kenya. These papers are not only a reflection of our individual and collective commitment to the rule of law and constitutionalism but also a testament to our dedication to fostering a deeper understanding of the law among the public, legal practitioners, and scholars. By sharing these perspectives, we aim to contribute to informed discourse on critical issues affecting our society and promote a more inclusive, accessible, and responsive justice system.

This publication further aligns with the Court's broader mandate to defend and develop Kenya's constitutional democracy through thoughtful and well-reasoned jurisprudence. The topics addressed in these papers span a wide array of pressing legal and societal issues, underscoring the Supreme Court's role as a catalyst for social transformation and justice.

As Vice President of the Supreme Court, I commend my fellow Justices for their scholarly contributions to this series and for their dedication to enriching our collective understanding of the law. It is my hope that this paper series will inspire robust discussions, critical analysis, and meaningful engagement among all stakeholders in the justice sector. Let us continue to build on this foundation to shape a future where the rule of law remains the cornerstone of our democratic ideals.

Hon. Lady Justice Philomena Mbete Mwilu, FCIArb, EGH
Deputy Chief Justice and Vice President of the Supreme Court of Kenya

Introduction



This inaugural edition of the *Supreme Court of Kenya Judges' Paper Series* brings together a rich collection of papers authored by the Justices of the Supreme Court of Kenya. Organized into three distinct parts, the publication showcases the intellectual contributions of the Justices to critical discourses on jurisprudence, access to justice, and the administration of justice.

The first part comprises papers delivered as part of the Supreme Court @ 12 Law Lecture Circuits. These lectures were presented at various universities, focusing on themes that engage with the emerging jurisprudence of the Supreme Court. Through these engagements, the Judges have provided profound insights into the evolving role of the Supreme Court in interpreting and shaping the Constitution of Kenya, 2010 and the law.

The second part features papers delivered by the Judges in diverse forums, including international conferences and public lectures. Covering a wide spectrum of jurisprudential issues, these contributions address both local and global jurisprudential issues, offering critical reflections that are relevant to practitioners, academics, and policymakers alike.

The third part of this publication addresses issues relating to access to justice and the administration of justice. These papers highlight pressing challenges and emerging opportunities to enhance the accessibility, efficiency, transparency, independence, and accountability of Kenya's justice system. The Judges' reflections in this section provide valuable perspectives on how to advance a justice system that is responsive to the justice needs of citizens.

This publication is a testament to the Supreme Court's commitment to intellectual engagement, and the dissemination of knowledge. I extend my heartfelt gratitude to the Honourable Justices of the Supreme Court for making these papers available to a wider audience. Their scholarly contributions underscore the Court's role not only as a guardian of the Constitution but also as an active participant in the intellectual and practical development of the rule of law.

Hon. Lady Justice Njoki Ndung'u, FCIArb, CBS, SCJ
Chairperson, Supreme Court Publications Committee

Acknowledgment



I commend and appreciate the Justices of the Supreme Court for availing the papers from their lectures for publication, thereby ensuring their accessibility to a wider audience. The *Supreme Court Judges' Paper Series* represents an invaluable contribution to the jurisprudential leadership of the apex court in our nation.

This publication owes its existence to the invaluable support of the Konrad Adenauer Stiftung (KAS) Foundation, which provided the essential financial resources that facilitated its preparation and publication. We are deeply grateful to KAS for its enduring partnership with the Supreme Court in advancing the promotion of the rule of law.

I also express my sincere gratitude to the Supreme Court's Publications Committee. Their meticulous efforts in curating, reviewing, and overseeing the production of this volume have been remarkable. Their dedication to excellence has ensured that this publication meets the highest standards of scholarship and professionalism, making it an invaluable resource for practitioners, academics, and the public alike.

Hon. Letizia M. Wachira, MBS
Registrar, Supreme Court

PART A
SUPREME COURT @ 12 LAW LECTURE CIRCUITS

The Multi Door Approach to the Delivery of Justice: The Kenyan Experience

Hon. Justice Martha K. Koome, FCIArb, EGH[1]

(*This paper was delivered at the African Nazarene University on 18th November 2024 as part of the Supreme Court @ 12 Law Lecture Circuits, an occasion that also marked the launch of the ANU Young Arbitrators Society*)

1.1 Introduction

1. The 2010 Constitution of Kenya fundamentally transformed the approach to delivering justice. Article 159(2)(c) explicitly mandates that courts and tribunals promote alternative dispute resolution mechanisms, including reconciliation, mediation, arbitration, and traditional methods. This directive underscores that the delivery of justice extends beyond courtroom litigation, embracing a holistic, people-centered framework—what we now refer to as the *multi-door approach to justice delivery*.[2]

2. This multi-door approach acknowledges that formal court litigation is but one among many avenues for resolving disputes.[3] The Judiciary, once perceived as the sole forum for justice, now champions the recognition that access to justice need not be confined within the rigid boundaries of courtrooms except in exceptional circumstances prescribed by law. This paradigm shift ensures that justice is accessible, inclusive, and responsive to the diverse needs of society.

3. A 2017 Judiciary-led *Justice Needs and Satisfaction Survey (JNSS)* revealed crucial insights into how Kenyans experience justice[4]. The survey assessed the legal problems faced by citizens, their efforts to resolve these issues, and their satisfaction with the outcomes. Key findings included:
   a. Only 10% of Kenyans with disputes sought court-based solutions.
   b. 19% took no action to resolve their issues, citing cost, complexity, and time as barriers.
   c. 71% of Kenyans turned to alternative mechanisms or endured their grievances without redress.

   These findings reflect the alienation many citizens feel from the formal judicial system. Importantly, they validate the alternative dispute resolution mechanisms enshrined in Article 159(2)(c) and affirmed in the Judiciary's *Social Transformation through Access to Justice (STAJ)* blueprint as part of the multi-door approach.

4. The multi-door approach under the STAJ blueprint has two critical dimensions:
   a. It affirms the legitimacy of various justice mechanisms chosen by the people, aligning them with constitutional principles.
   b. It positions these alternatives as equal to, rather than inferior to, formal court-based mechanisms. While citizens must have unfettered access to the Judiciary, the Judiciary is equally responsible for ensuring that alternative mechanisms meet the required standards of fairness and justice.

5. The STAJ blueprint operationalizes the multi-door approach by promoting alternative forums, such as Alternative Justice Systems (AJS) and mechanisms like Mediation, Arbitration, Conciliation and Alternative (Traditional) Justice Systems (AJS). As one scholar, Marc Galanter, has aptly noted, "*Just as health is not found primarily in hospitals or knowledge in schools, so justice is not primarily to be found in official justice-dispensing institutions*".[5] The Judiciary, therefore, aims to enhance the quality of justice in everyday relations and transactions rather than limiting it to formal court proceedings.

6. This approach offers significant benefits, including enhanced access to justice, cost-effectiveness, and timeliness in resolving disputes.[6] By diverting suitable cases to alternative mechanisms, the Judiciary alleviates the overwhelming caseload on courts, enabling more efficient operations. Additionally, alternative mechanisms often foster more conciliatory and consensual dispute resolution processes, which help restore peaceful co-existence within communities.[7]

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1 Chief Justice and President of the Supreme Court of Kenya.
2 See the Judiciary, *A Blueprint for Social Transformation through Access to Justice: 2023-2033* (2023) 12.
3 See Frank E.A. Sander, 'Varieties of Dispute Processing' in Art Hinshaw, et al, (eds) *Discussions in Dispute Resolution: The Foundational* Articles (Oxford University Press, 2021) 321- 326.
4 Hiil and the Judiciary, *Justice Needs and Satisfaction in Kenya 2017* (the Judiciary, 2018).
5 See Marc Galanter, 'Justice in Many Rooms' in Mauro Cappelletti, (ed.) *Access to Justice and the Welfare State* (Sijthoff and Noordhoff, 1981) pp 147, 161–162.
6 See in this regard, Office of the Attorney General and Department of Justice, *Sessional Paper No. 4 of 2024 on the National Alternative Dispute Resolution Policy* (the Government Printer, 2024) vii- viii.
7 See Sally Engle Merry, 'Popular Justice and the Ideology of Social Transformation' (1992) 1 (2) *Social & Legal Studies* 161, 168.

7. In the rest of this lecture, I will proceed to discuss three alternative forms of disputes resolution, being Mediation, Arbitration, and Alternative (Traditional) Justice System (AJS) and how they work within the Kenyan justice system.

1.2 Mediation

8. Mediation is an intervention process where a neutral third party, known as the mediator, assists disputing parties in negotiating solutions to the issues dividing them.[8] Rule 2 of the Civil Procedure (Court -Annexed Mediation) Rules, 2022 define mediation as follows:

> "means the informal and non-adversarial process conducted physically or virtually where a mediator encourages and facilitates the resolution of a dispute between two or more parties but does not include any attempt by a judge or magistrate to settle a dispute within the course of judicial proceedings"

9. Unlike other dispute resolution methods, for example arbitration and court adjudication, the mediator lacks the authority to impose a settlement; decision-making power rests entirely with the parties involved.

10. The role of the mediator is to support and enhance the negotiation process by facilitating communication between the parties. In effect, the mediator helps clarify issues, focus discussions, and identify potential areas of agreement. The mediator's objective is not to direct outcomes but to create an environment where parties can collaboratively resolve their differences.

11. The salient principles of mediation are confidentiality, voluntariness, neutrality. It is people-centred and it encourages parties to come together and have a dialogue about resolving the dispute in question. It follows therefore, that where parties own the process, it is unlikely that they will be dissatisfied with the outcome, the outcome will be tailored to suit the parties and it follows, that the parties' relationship will, in most cases, be preserved.

12. Mediation offers several advantages over conventional legal processes, particularly in family disputes involving children. Mediation recognizes the ongoing relationship between parents bound by shared responsibilities for their children, offering a constructive platform for resolving conflicts in a manner that prioritizes the well-being of all involved.[9]

13. During my tenure as Chairperson of FIDA-Kenya between 1999 and 2001, I first came to appreciate the importance of mediation. FIDA-Kenya handled numerous family-related disputes, including marriage issues, divorce and separation cases, child custody and maintenance, as well as inheritance and succession matters. Recognizing the overwhelming demand for legal assistance and our limited capacity to take every case to court, we established what may have been Kenya's first mediation practice.

14. If a woman approached FIDA-Kenya with a complaint, such as her husband neglecting their family, a lawyer or counselor would engage the husband in negotiations to reach a mutually acceptable settlement. This approach proved highly effective, with many couples opting for mediation over the time-consuming and adversarial court process. As a result, FIDA-Kenya resolved numerous disputes through this innovative mechanism.

15. Later, as a trial judge at the High Court, I encountered cases involving young families who had taken loans to secure housing, only to find themselves in protracted legal battles due to the backlog of cases in our courts. Despite the dedicated efforts of judges and magistrates, it became evident that delayed resolution of disputes would persist unless alternative solutions were explored. Mediation offered a practical and efficient way to address this challenge, reaffirming my belief in its transformative potential. However, during this period in the pre-2010 era, there was no firm legal basis for the practice of mediation within our jurisdiction.

1.2.1 The Evolving Legal Landscape for Mediation in the Post-2010 Era

16. The post-2010 constitutional framework has significantly enhanced the legal environment for mediation in Kenya. In addition to Article 159(2)(c) of the Constitution, which mandates the Judiciary to promote alternative dispute resolution (ADR) mechanisms, including mediation, several other constitutional provisions encourage its use:

8 Tony Allen, *Mediation Law and Civil Practice* (Bloomsbury, 2019) 29.
9 Marian Roberts, *Mediation in Family Disputes* (Ashgate, 2008) 35.

- Article 113 provides for the establishment of a mediation committee composed of equal members from both Houses of Parliament to reconcile differences over contentious bills.
- Article 189(4) requires national legislation to establish procedures for resolving intergovernmental disputes through mechanisms like negotiation, mediation, and arbitration.
- Article 252(1)(b) empowers constitutional commissions and independent offices to engage in conciliation, mediation, and negotiation.

17. On the legislative front, the Civil Procedure Act and Civil Procedure Rules further embed mediation in Kenya's legal framework. Sections 59A, 59B, and 59D of the Civil Procedure Act empower courts to refer parties to mediation, arbitration, or any other agreed ADR method. Additionally, Order 46 Rule 20 grants courts discretionary power to employ ADR mechanisms where appropriate. Moreover, section 15 of the of the Employment and Labour Relations Court Act, Kenya expressly allows the ELRC to accommodate, allow the use of alternative dispute resolution like internal methods, conciliation, mediation and traditional dispute resolution mechanisms in dispute resolution.

18. These legislative provisions led to the establishment of the Court-Annexed Mediation (CAM) programme and the establishment of the Mediation Accreditation Committee (MAC).

19. The Kenyan Judiciary has made remarkable strides in institutionalizing mediation. In 2016, the Judiciary piloted the Court-Annexed Mediation (CAM) programme at the Family and Commercial Divisions of the High Court in Milimani. By July 2017, the pilot phase concluded successfully, paving the way for nationwide expansion.

20. The Judiciary has put in place the Court Annexed Mediation Committee which is tasked with spearheading the roll out of CAM in our court stations. By the close of the 2023/24 financial year, the CAM programme had[10]:
- Established 63 Mediation Registries nationwide; and
- Operated in 94 court stations across 41 counties.

21. From its inception to the end of the FY 2023/24, the CAM programme had referred 23,260 cases, of which 21,451 have been resolved. This initiative has released approximately Kshs. 61.1 billion back into the economy, while fostering the restoration of business and family relationships, reducing litigation costs, and empowering parties to resolve their disputes collaboratively.

22. We have also established the Mediation Accreditation Committee to accredit and oversee the training of mediators. The Mediation Accreditation Committee ensures that mediators are held to high standards of professionalism and ethics. As at the end of the Financial Year 2023/24, the Committee had accredited 1,664 mediators, with 995 active practitioners and 311 undergoing mentorship.[11] This accreditation framework is vital for enhancing public trust in the mediation process, as standardization is crucial for building confidence in mediation as an avenue for disputes resolution.

23. Under Rule 39 of the Civil Procedure (Court-Annexed Mediation) Rules, an order or decree based on a settlement agreement from court-annexed mediation can be set aside on the following grounds: Mediator misconduct or error - misconduct, fraud, or a fundamental mistake by the mediator, unknown to the applicant at the time of executing the agreement; fraud or misrepresentation - fraud, collusion, or misrepresentation by any party to the mediation, including their witnesses; mistake regarding subject matter -Mistake concerning the existence or condition of the subject matter that influenced a party's decision to enter the agreement; legal incapacity- a party's lack of legal capacity to participate in the proceedings or to execute a binding settlement at the time the agreement was made; and, invalidity or unenforceability -the agreement is invalid under Kenyan or international law or has become unenforceable under Kenyan law.

24. In 2022, Kenya marked a milestone by introducing Private Mediation Agreements. Under Section 59D of the Civil Procedure Act, agreements facilitated by qualified mediators can now be registered and enforced by the court. This provision was operationalized through Part 3 of the Civil Procedure (Court-Annexed Mediation) Rules, 2022, allowing disputes to be resolved through private mediation without initiating formal court proceedings. Unlike CAM, where parties must first file a case in court before being referred to mediation, private mediation allows disputes to be negotiated and resolved entirely outside court. Once an agreement is reached, it can be

10 See The Judiciary, *The State of the Judiciary and Administration of Justice Report, FY 2023/24* (the Judiciary, 2024) 30.
11 Report on file with the author.

registered and adopted as a court order, ensuring enforceability without requiring prior litigation.

25. The Judiciary, under the STAJ blueprint, has embraced the concept of multi-use court facilities. New court buildings now include Mediation Suites to house both mediation registries and suites for mediation hearings, reflecting the Judiciary's commitment to making mediation a core part of the justice system beyond traditional courtroom functions.

1.3 Arbitration

26. Arbitration is a private dispute resolution mechanism where parties to a disagreement agree to submit their dispute to a neutral third party, the arbitrator, who renders a binding decision, known as an arbitral award.[12]

27. Unlike mediation, where the mediator facilitates negotiations and helps the parties reach a mutually agreeable settlement, the arbitrator has the authority to impose a decision based on the evidence and arguments presented.[13]This makes arbitration closer to court adjudication, where a judge delivers a binding verdict. However, unlike court adjudication, arbitration is less formal, allows parties to select their arbitrator, and is designed to be faster and more flexible.

28. Arbitration, as an alternative dispute resolution (ADR) mechanism, has long been practiced in Kenya. This tradition gained a formal legal framework with Kenya's accession to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards on February 10, 1989. Kenya further strengthened this framework by enacting the Arbitration Act of 1995, modeled on the UNCITRAL Model Law on Arbitration, and the Arbitration Rules of 1997**.**

29. The legislative framework for Arbitration in Kenya consists of:
    - The Arbitration Act of 1995**:** This is the principal legislation governing arbitration in Kenya. It emphasizes party autonomy, limits court intervention, and facilitates the enforceability of arbitral awards.
    - Recognition of Foreign Arbitral Awards**:** As a signatory to the New York Convention, Kenya's courts are obligated to recognize and enforce foreign arbitral awards unless specific exceptions outlined in the Convention apply.

30. The key principles that underlie the Arbitration Act include[14]: Party autonomy – arbitration is a consensual process hence parties have to agree to refer their dispute to arbitration; non-intervention by the courts – section 10 of the stature bars court intervention in arbitration except on stipulated grounds; neutrality and equality – participation of both parties in the appointment of an arbitrator promote equality and neutrality of arbitrators; flexibility -parties agree on time, place and manner of conducting arbitral proceedings; finality of awards – An award is final and binding upon the parties; and, enforceability – the High Court is vested with jurisdiction to recognize and enforce awards.

31. Kenya's legal framework demonstrates a pro-arbitration stance**,** mandating courts to uphold arbitral awards unless compelling reasons exist to overturn them. Section 36 of the Arbitration Act, provides that both domestic and international arbitration awards shall be recognised as binding and enforced by the High Court upon application.

32. Section 35 of the Arbitration Act, provides for limited circumstances when the High Court can set aside an arbitral award. Similarly, Section 37 of the Arbitration Act provides for limited circumstances under which a Kenyan court may refuse to recognize or enforce an arbitral award. These include: Incapacity of a party -one of the parties to the arbitration agreement was under some legal incapacity; invalid arbitration agreement -the arbitration agreement is not valid under the applicable law; lack of proper notice - A party was not given proper notice of the appointment of the arbitrator or the arbitral proceedings, preventing them from presenting their case; exceeding the scope of arbitration -The arbitral award deals with matters outside the terms of reference

12 See Anurag K. Agarwal, *Contracts and Arbitration for Managers* (Sage Publications, 2016) 47. See also Peter B. Rutledge, *Arbitration and the Constitution* (Cambridge University Press, 2013) 6.

13 Sundra Rajoo, *Law, Practice and Procedure of Arbitration* (LexisNexis, 2016) 4.

14 See Githu Muigai, & Jacqueline Kamau, 'The Legal Framework of Arbitration in Kenya' in Githu Muigai, (ed.) *Arbitration Law & Practice in Kenya* (Law Africa, 2013) 4-7. See also generally Neil Andrews, *Arbitration and Contract Law* (Springer, 2016) 3-8 on arbitration's perceived advantages.

or arbitration agreement or includes decisions beyond the arbitrator's scope; improper tribunal composition or procedure -The tribunal's composition or the arbitral procedure did not comply with the parties' agreement or the Act; fraud, corruption, or undue influence -the award was influenced by fraud, bribery, or corruption; unarbitrable subject matter - The dispute involves a matter that, under Kenyan law, cannot be resolved through arbitration; and, public policy violation -the award conflicts with public policy, such as being contrary to the Constitution, laws, or societal moral standards.

33. The Judiciary has played a pivotal role in fostering an arbitration-friendly environment. The establishment of the Commercial and Tax Division of the High Court is a clear example. This specialized division expedites arbitration-related matters, ensuring swift adoption and enforcement of arbitral awards. Statistics from the Commercial and Tax Division underscore the Judiciary's commitment to arbitration. In 2022**,** 88 arbitration-related matters were handled, increasing to 95 in 2023**.**[15]

34. Kenya's Judiciary, particularly the Supreme Court, has rendered landmark decisions that shape and strengthen arbitration practices. These cases demonstrate the Judiciary's commitment to minimizing judicial interference, thereby reinforcing arbitration as a reliable dispute resolution mechanism.

(a) **Nyutu Agrovet Limited v Airtel Networks Kenya Limited [2019] eKLR**

This landmark Supreme Court decision clarified the right to appeal High Court rulings under Section 35 of the Arbitration Act**,** which permits the High Court to set aside arbitral awards on specific grounds, such as incapacity, invalid arbitration agreements, procedural irregularities, decisions beyond the scope of arbitration, or awards conflicting with public policy. The Supreme Court determined that while Section 35 does not explicitly bar appeals to the Court of Appeal, such appeals should be highly restricted. It held that the Court of Appeal has residual jurisdiction to review High Court decisions only in exceptional cases, such as when the High Court exceeds the prescribed grounds for setting aside an award or bases its decision on constitutional grounds. The Court emphasized the need to protect arbitration from excessive judicial interference while ensuring fairness. It ruled that appeals under Section 35 should be exercised sparingly and only in the clearest cases of manifest unfairness or procedural overreach.[16]

(b) **Synergy Industrial Credit Limited v Cape Holdings Limited [2019] eKLR**

The Supreme Court reiterated that purpose of section 35 of the Act is to ensure that Courts are able to correct specific errors of law which, if left unchallenged, would lead to a miscarriage of justice. Therefore, in the interest of safeguarding the integrity of the administration of justice and particularly in the absence of an express bar, the Court of Appeal should have residual jurisdiction but only in exceptional and limited circumstances.

(c) **Geo Chem Middle East v Kenya Bureau of Standards [2020] eKLR**

The Supreme Court reaffirmed the principle that arbitration aims to resolve disputes efficiently, with minimal court intervention. It emphasized that the roles of courts are limited under Sections 35 and 39 of the Arbitration Act to ensure arbitration remains an expedited process. Allowing arbitration disputes to follow the full judicial appeal process would undermine this objective. The Court clarified that its earlier decisions in *Nyutu* and *Synergy* do not contradict this principle. Furthermore, the Supreme Court held that no further appeals lie to it from the Court of Appeal's determinations in arbitration matters, provided the Court of Appeal exercised jurisdiction in line with the principles established in the *Nyutu* and *Synergy* cases.

35. These decisions by the Supreme Court illustrate the Judiciary's role in fostering arbitration by:

- Limiting Judicial Interference**:** Ensuring courts respect the finality of arbitral awards, intervening only when statutory exceptions like public policy violations arise**.**
- Reinforcing Party Autonomy**:** Allowing parties to structure their dispute resolution mechanisms and minimizing unwarranted judicial scrutiny.

15 Report on file with the author.

16 For critique see Vianney Sebayiga, 'The Right of Appeal under Section 35 of the Arbitration Act of Kenya: A Critique of the Supreme Court Decision in Nyutu Agrovet v Airtel Networks Limited (2019) eKLR' (2021) 6(1) *Strathmore Law Review* 137- 166. See also Wilfred Mutubwa, 'Is Nairobi a Safe Seat for International Arbitration? A Review of the Latest Decision from the Supreme Court of Kenya and Its Possible Effects' (2020) 8(1) *Alternative Dispute Resolution Journal* 55 -65; John Miles, & John Nyanje, 'Swimming Against the Current: The Emerging Jurisprudence as Regards Right to Appeals of Arbitration Awards in Kenya' (2020) *LACIAC Dispute Resolution Update* 6-13; and Peter M. Muriithi, 'Ramifications of the Decision of the Supreme Court In the case of; Nyutu Agrovet Limited (Petition No. 12 of 2016)' 2020) 8(1) *Alternative Dispute Resolution Journal* 175-191.

1.4 Alternative (Traditional) Justice Systems

36. Traditional dispute resolution systems in Kenya date back to pre-colonial times and varied based on community and cultural practices. Even after the introduction of the British court system, these traditional mechanisms remained active. As society evolved, these systems continued to play a vital role in resolving disputes, reflecting their deep-rooted significance among communities.[17]

37. Beyond Article 159(2)(c), it is notable that Article 67(2)(f) of the Constitution instructs the National Land Commission "*to encourage the application of traditional dispute resolution mechanisms in land conflicts*". Moreover, Section 20 of the Environment and Land Court Act, encourages the ELC to promote appropriate means of alternative dispute resolution including conciliation, mediation and traditional dispute resolution mechanisms in accordance with Article 159(2)(c) of the Constitution.

38. It is important to appreciate that Article 159 (3) of the Constitution qualifies the promotion of traditional dispute resolution by providing that: '*Traditional dispute resolution mechanisms shall not be used in a way that: contravenes the Bill of Rights; is repugnant to justice and morality or results in outcomes that are repugnant to justice or morality; or is inconsistent with this Constitution or any written law.*'

39. On 4th March 2016, then-Chief Justice Dr. Willy Mutunga established a Taskforce on Alternative Justice Systems (AJS). The Taskforce was tasked with studying traditional dispute resolution mechanisms and formulating a judicial policy to incorporate them into the formal justice system. Its mandate included understanding why many Kenyans opt for these methods and how they can be leveraged to enhance justice delivery.

40. According to the results of the field case studies conducted by the Taskforce, it was evident that the Kenyan communities had over time, protected, preserved and promoted their cultures and these traditional justice systems were present and in use in urban and rural settings.

41. After extensive research and consultations, the AJS Policy was launched in August 2020 under Chief Justice David Maraga. This policy recognizes, regulates, and enhances the use of alternative justice systems in line with constitutional principles, international human rights standards, and Kenya's socio-cultural diversity. It ensures that traditional mechanisms complement formal justice processes.[18]

42. In 2021, I become Chief Justice and formed a National Steering Committee for the Implementation of the AJS Policy. This Committee, composed of both state and non-state actors, is responsible for rolling out the AJS policy across the country. It focuses on promoting the policy through stakeholder engagement, capacity building, and creating frameworks for integration with the formal court system.

43. A critical component of the AJS Policy is ensuring alignment with human rights and gender rights. It emphasizes the need for AJS practitioners to be familiar with constitutional rights and the potential conflicts between customary practices and constitutional values. The policy also includes a selection process to ensure that AJS practitioners are knowledgeable about human rights and dignity.

44. In Kenya, for a dispute to be resolved through AJS, parties must voluntarily and consensually submit to the process. The *agency theory of jurisdiction* governs this submission, ensuring that parties have the capacity to make informed decisions. However, in cases like defilement, where minors are involved, the AJS mechanism cannot be used, as minors lack the legal capacity/agency to make such decisions.

45. There are four principal models of AJS mechanisms in Kenya:
    - Autonomous AJS Institutions: Community-driven processes, independent of state mechanisms.
    - Third-Party Institution-Annexed AJS Institutions: Includes state and non-state actors like chiefs, religious leaders, and civil society groups.
    - Court-Annexed AJS Institutions: AJS processes linked to the court system, often referred through Court Users Committees (CUCs).
    - Regulated AJS Institutions: These are guided by statutory regulation, though this model is not widely encouraged in Kenya.

17 See Susan Lee, *Multiple Doors to Justice in Kenya: Engaging Alternative Justice Systems* (Pathfinders, 2023) 12-13.
18 The Judiciary of Kenya, *Alternative Justice Systems Baseline Policy* (the Judiciary, 2020); see also The Judiciary of Kenya, *Alternative Justice Systems Framework Policy* (the Judiciary, 2020).

46. The relationship between AJS and the formal court system is evolving. The Judiciary has identified several *doctrines of interaction,* such as:

- Deference: Courts review AJS decisions for procedural correctness.
- Recognition and Enforcement: Courts treat AJS awards similarly to their decrees, with limited grounds for challenging them.
- Facilitative Interaction: AJS outcomes may be used as evidence in ongoing court cases.
- Monism: Treating AJS decisions as the first step in a process where the courts conduct reviews.

47. To illustrate from some of the decisions that show the interaction of the Judiciary and the AJS Mechanisms[19]:

(a) **Kitur & Another v Kitur (ELC Case 68 of 2021) [2023] KEELC 17253 (KLR)**

This dispute concerned land ownership between siblings, where the land was allegedly registered in the elder brother's name as a trustee. The court recognised a series of meetings convened by the area chief and family members as a traditional dispute resolution mechanism. In its ruling, the court adopted the decision reached through this traditional process and implemented it as its judgment.

(b) **Keter v Seurei (Environment & Land Case 8 of 2021) [2023] KEELC 16131 (KLR)**

This case involved a boundary dispute between owners of adjacent parcels of land. The parties disagreed on the exact location of the general boundary. The court referred the matter to a clan-based AJS for resolution. Subsequently, the court adopted the decision made by the clan members.

(c) **Bor v Ngisirei (Environment & Land Case 103 of 2021) [2023] KEELC 443**

The issue in this case was whether the plaintiff's late husband had been adopted as a son or merely served as a herd boy. Evidence was presented regarding a 1994 meeting held by village elders, where they granted 4 acres of the disputed land to the plaintiff's late husband's family. The court found that the 1994 meeting and its decision were not repugnant to justice and morality and subsequently adopted the elders' decision as a judgment of the court.

(d) **LWG v GBG (Matrimonial Case 6 of 2015) [2023] KEHC 26305 (KLR)**

In this matrimonial dispute, the parties had resolved their matrimonial issues through AJS sessions. However, the applicant later filed an Originating Summons seeking a fresh hearing, which the respondent challenged, arguing that the matter was res judicata, as it had already been determined through AJS and the outcome had been complied with. The court dismissed the Originating Summons, holding that the AJS agreement made on July 5, 2022 was valid since neither party had challenged it.

(e) **Republic v Dennis Kiprotich Chepkwony, Criminal Case No. 61 of 2014**

The accused was charged with murder under Section 203, as read with Section 204 of the Penal Code, for allegedly killing David Kipyegon Chirchir on May 7, 2014 in Timbwalo Village, Tinet Location, Kuresoi South District, Nakuru County. After a full trial, the court convicted him of manslaughter under Section 202, as read with Section 205 of the Penal Code. In sentencing the accused to serve a probation sentence, the court directed that the Probation and Aftercare Service work in collaboration with AJS mechanisms to restore and maintain peaceful neighbourly relations and prevent further conflict.

48. The AJS Policy outlines the Judiciary's obligations under three categories:

- Duty to Respect: Ensure minimal interference by the state in AJS processes.
- Duty to Protect: Safeguard AJS systems from external interference and ensure compliance with human rights standards.
- Duty to Transform: Support the transformation of AJS systems to reflect constitutional values, particularly regarding compliance with human rights standards.

49. The Steering Committee has been proactive in promoting the policy through awareness campaigns, training sessions, and conferences. The Steering Committee has hosted annual AJS Conferences and developed County Action Plans to tailor AJS systems to local needs.[20] Additionally, AJS ukumbi (suites) have been established in court stations across Kenya to integrate AJS into formal judicial processes.

50. As at the end of the Financial Year 2023/24, County Action Plans had been developed and were being implemented in 6 counties, and 12 AJS Suites had been operationalized.[21] In the counties with County Action Plans, and where the Steering Committee is actively monitoring referrals, a total of 1,256 cases were referred to AJS with 1,073

19 See The Judiciary, *The State of the Judiciary and Administration of Justice Report, FY 2023/24* (the Judiciary, 2024) 112.
20 A collection of the AJS County Action Plans are available at: https://ajskenya.or.ke/county-action-plans/
21 See The Judiciary, *The State of the Judiciary and Administration of Justice Report, FY 2023/24* (the Judiciary, 2024) 30.

cases being successfully resolved. This is a noteworthy success rate of settlement of 85 per cent of referred cases.[22]

51. It would be remiss of me to imply that AJS has no challenges. It is expected that AJS will have challenges especially relating to upholding of human rights, gender rights, and even potential for abuse in form of corrupt practices.

52. In Response to these challenges, in September of 2024, we launched the Code of Conduct for AJS Practitioners[23] and the Guidelines for the Use of AJS Suites.[24]

53. The Code of Conduct for AJS Practitioners ensures that all AJS practitioners maintain the highest standards of honesty, integrity, and impartiality. It reinforces their obligation to uphold the values and principles enshrined in our Constitution, including respect for human rights and non-discrimination. The Code also ensures that practitioners avoid conflicts of interest in their roles as mediators of justice. This Code of Conduct should reassure all Kenyans that the AJS practitioners have standards of conduct that they must abide by. This ensures that there is no misconduct or abuse of authority by the elders who will be hearing and resolving disputes in the AJS panels.

54. Similarly, the Guidelines for the Use of AJS Suites provide a clear framework for how the AJS Ukumbi suites should be utilized. These guidelines will enhance the transparency and credibility of AJS proceedings, making them more accessible to all. The suites will serve not only as venues for hearing AJS cases but also as centers for documenting AJS outcomes and preserving the cultural heritage of the communities involved.

55. However, the most important effort geared towards ensuring that AJS Practitioners, uphold human rights and gender rights standards has been through the training and skills-building for AJS justice practitioners conducted by the National Steering Committee on the Implementation of the AJS Policy.

1.5 Conclusion

56. In conclusion, the Kenyan Judiciary's commitment to fostering Alternative Dispute Resolution (ADR) methods such as mediation, arbitration, and Alternative (traditional) Justice Systems reflects our dedication to broadening access to justice. Through the multi-door approach, we have reaffirmed the legitimacy of these avenues as effective mechanisms for resolving disputes, reducing case backlogs, and ensuring outcomes that are fair, timely, and build social harmony in our communities.

57. To the law students present here today, I encourage you to embrace this exciting journey of legal education with passion and purpose. You are the future custodians of justice, and your role in shaping a fairer, more equitable society cannot be overstated. As you hone your skills, be open to innovation and embrace the evolving landscape of dispute resolution, including mediation, arbitration, and alternative justice systems. These tools will empower you to serve society in transformative ways. Remember, the law is not just a profession—it is a calling to be agents of change, defenders of justice, and champions of the rule of law. Stay curious, committed, and courageous in pursuing this noble path.

58. I am also delighted to launch the ANU Young Arbitrators Society, a remarkable initiative that positions Africa Nazarene University at the forefront of fostering a culture of the multi-door approach to justice.[25] By establishing this society, the university is not only providing a platform for students to engage with arbitration, but also instilling in them the values of alternative dispute resolution as legitimate and effective avenues for resolving conflicts. This forward-thinking step will undoubtedly shape the next generation of skilled arbitrators, who will play a key role in promoting access to justice, reducing case backlogs, and enhancing the efficiency of our legal system. I commend Africa Nazarene University for its leadership in this regard and encourage the students to embrace this opportunity to deepen their understanding and practice of arbitration as a vital component of our justice system.

22 See The Judiciary, *The State of the Judiciary and Administration of Justice Report, FY 2023/24* (the Judiciary, 2024) 31.
23 NaSCI-AJS, *Code of Conduct AJS Practitioners* (2024).
24 NaSCI-AJS, *Guidelines for the Use of The AJS Suite* (2024).
25 See Won L. Kidane, *The Culture of International Arbitration* (Oxford University Press, 2017) 3-176 on the role of culture in maintaining successful relations, managing conflicts, and resolving disputes whenever and wherever they arise.

Institutional Independence: Reflections on the Supreme Court's Jurisprudence on Devolution, Constitutional Commissions and Independent Offices

Hon. Lady Justice Philomena Mbete Mwilu, FCIArb, EGH[26]

(*This paper was delivered at Daystar University on 2nd December 2024 as part of the Supreme Court@12 Law Lecture Circuits*)

2.1 Introduction

1. I am elated to join the Daystar University fraternity today. We have witnessed with satisfaction that, over 40 years of existence as a chartered University in Kenya, Daystar University has continued to strengthen its academic offerings, research and extension services in response to emerging societal needs. As a Christian myself, I find it particularly encouraging that institutions of higher learning that holistically equip our future leaders towards transformation of our institutions and our society exist. Arguably, this is of even more critical importance for future lawyers, who must be imbued with a commitment to service and with the principles and values that underpin the dispensation of justice.

2. I am excited and honoured to speak to you today. This engagement is among the raft of activities lined up in commemoration thereof culminating in a conference under the theme *'Introspecting and Reflecting on the Supreme Court's Jurisprudence: 12 Years of Defending the Constitution'*. When we were conceptualising the activities to commemorate twelve years of the country's apex court, it was an immediate imperative to robustly engage with students of law and academia to discuss the work of the court, reflect on its achievements and challenges, and discuss ideas and strategies for improvement. My colleagues on the bench shall also be speaking at law schools on a variety of germane topics relating to the work of the court. The purpose of this coordinated lecture series is to afford opportunity for introspection and retrospection on the Court's exercise of its mandate through, importantly, getting your invaluable perspectives and feedback.

3. I will be speaking to you today on the topic *"Institutional Independence: Reflections on the Supreme Court's Jurisprudence on Devolution, Constitutional Commissions and Independent Offices."*

4. It is deliberate and apposite that the prism through which we consider the jurisprudence of the Supreme Court vis-à-vis devolution, Chapter 15 commissions, and independent offices, is that of institutional independence. The reason is that it speaks to the two most important aspects of these governance paradigms and structures: the rationale for their establishment, and their position within our constitutional architecture.

5. The manner in which devolution, constitutional commissions, and independent offices are entrenched within the Constitution 2010 is a product of a particular history and governance experience and the outcome of a desire to address the same. Prior to 2010, the realities of ethnic and ethnisised conflicts, underdevelopment, and corruption were largely accredited to the centralization of power in the Executive with the simultaneous weakening of state institutions such as Parliament and the Judiciary. The governance situation was considered unaccountable, lacking transparency, and not reflective of the desires and aspirations of the citizens of Kenya.

6. Judicial reform was one of the most significant issues framing the constitutional reform journey that culminated in the promulgation of the Constitution 2010. Amongst the key features of the new judicial structure was the establishment of the Supreme Court (Art. 163), the apex juridical body in the land which, by providing authoritative and impartial interpretation of the Constitution through the provided jurisdictional avenues in Article 163 (3) and (6), was to play a critical role in the realisation of the aspirations of all Kenyans for a government based on the essential values of human rights, equality, freedom, democracy, social justice and the rule of law. Operationalised on 23rd June 2012, the Supreme Court has played a crucial role in upholding the supremacy of the Constitution and, simultaneously, reinforcing institutional independence. Its jurisprudence not only clarifies constitutional provisions but also cultivates a rich body of case law on critical issues among them on devolution, constitutional commissions, and independent offices.

7. Of necessity, our reflections on the jurisprudence of the Supreme Court will begin from the constitutional and statutory objectives of the Court. In particular, for today's lecture, I would like to focus on two objectives under

26 Deputy Chief Justice and Vice President of the Supreme Court of Kenya.

section 3 of the Supreme Court Act: asserting the supremacy of the Constitution and the sovereignty of the people of Kenya; and, developing rich jurisprudence that respects Kenya's history and traditions and facilitates its social, economic and political growth. It is apparent the jurisprudence from the Court in this regard is sensitive to both the letter and the spirit of the Constitution; the former speaking to the Court's holistic and purposive approach to constitutional interpretation and the latter to the historical and contextual rationale for enactment and the aspirations of Kenyans that can be identified therefrom.

8. This approach is summed up well in the words of Mutunga CJ & P *In the Matter of the Principle of Gender Representation in the National Assembly and the Senate*[27]:

> "The obligation of the Supreme Court is...to cultivate progressive indigenous jurisprudence...By indigenous jurisprudence, I do not mean insular and inward looking...My concern, when I emphasize indigenous is simply that we should grow our jurisprudence out of our own needs...This Court, and the Judiciary at large has, therefore, a great opportunity to develop a robust, indigenous, patriotic and progressive jurisprudence that will give our country direction in its democratic development."[28]

9. With these principles in mind, allow me to proceed to highlight some of the key decisions of the Supreme Court regarding devolution, Chapter 15 commissions and independent offices and assess their import on the constitutional structure of institutional independence.

2.2 Devolution

10. In our context, devolution means the decentralization of functions and responsibilities from the national (central) government to the 47 counties as set out in the First Schedule to the Constitution. In addition to the establishment of the county governments, a key aspect of devolution is the establishment of a bicameral Parliament with the Senate being responsible for representing and protecting the interests of counties and their governments, considering, debating and approving Bills concerning counties, determining the allocation of national revenue among counties, and exercising oversight over national revenue allocated to the county governments. Article 174 of the Constitution articulates the objects of devolution of government as:

(a) to promote democratic and accountable exercise of power;
(b) to foster national unity by recognising diversity;
(c) to give powers of self-governance to the people and enhance the participation of the people in the exercise of the powers of the State and in making decisions affecting them;
(d) to recognise the right of communities to manage their own affairs and to further their development;
(e) to protect and promote the interests and rights of minorities and marginalised communities;
(f) to promote social and economic development and the provision of proximate, easily accessible services throughout Kenya;
(g) to ensure equitable sharing of national and local resources throughout Kenya;
(h) to facilitate the decentralisation of State organs, their functions and services, from the capital of Kenya; and
(i) to enhance checks and balances and the separation of powers.

11. The Supreme Court has played a key role in supporting the devolution process towards the achievement of these objectives. The jurisprudence of the Court evinces clarity at the apex court on the constitutional architecture of devolution and the institutional interdependence and independence that the drafters envisaged at all levels of government in order to enable the system achieve its objectives. Broad areas of contribution include:

a) The nature of the devolution model under the Constitution: unitary or federal systems;
b) Interpretation of the constitutional provision that governments at the national and county levels are distinct and inter-dependent and the requirement that they conduct their mutual relations on the basis of consultation and cooperation;
c) The relationship between the National Assembly and the Senate in regard to legislative processes that affect counties;
d) The Court's exclusive jurisdiction to render advisory opinions as sought by state organs on matters concerning counties;

27 *In the Matter of the Principle of Gender Representation in the National Assembly and the Senate*, [2012] KESC 5 (KLR).
28 Ibid.

e) The supremacy of the Constitution in the context of separation of powers by emphasising comity between the arms of government and the extent of court intervention in matters otherwise reserved for other state organs;
f) The role of the Senate in oversight over counties and the attendant relationship between senator and governor;
g) The role of the Senate in the revenue sharing processes between the National Government and County Governments;
h) The law in relation to the filling a vacancy in the Office of the Deputy Governor
i) The process for the of impeachment of a governor;
j) The gender representation principle at both levels of government;
k) The locus of the umbrella bodies such as the Counties Assemblies Forum and Council of Governors in approaching the Court and the extent of their involvement in litigation concerning counties.

12. Let us now reflect on some of the matters handled by the Supreme Court on these areas and thereafter assess their contribution towards realisation of institutional independence and the objects of devolution of government.

13. The Supreme Court has settled the question on the nature of devolution under the Constitution; the positions in regard to which were between federal and unitary systems of devolution. *In the Matter of Interim Independent Electoral Commission*[29], the Court held:

> "...we have taken a broader view of the institutional arrangements under the Constitution as a whole; and it is clear to us that an independence of national and county governments is provided for through a devolution-model that rests upon a unitary, rather than a federal system of government....[We] have taken note too that the Senate (which brings together County interests at the national level) and the National Assembly (a typical organ of national government), deal expressly with matters affecting county government; and that certain crucial governance functions at both the national and county levels... dovetail into each other and operate in unity."[30]

14. Further, in *Matter of the Speaker of the Senate & Another*[31], the court reiterated that:

> "...It is important from the onset to put into context, the structure of the county unit within the model of devolution crafted under the Constitution. The devolved system in Kenya is based on a unitary system of Government that decentralizes key functions and services to the county unit. The Kenyan State model is not federal in nature and does not envisage the workings of a county as a politically and financially independent state."[32]

The clarity in these decisions on the nature of devolution under the Constitution 2010 enables more effective implementation of the devolution project.

15. In *Senate & 2 others v Council of County Governors & 8 others,*[33] the Supreme Court addressed issues concerning the establishment of a County Development Board under the County Governments (Amendment) Act No. 13 of 2014 and further laid down principles in regard to the institutional independence and interdependence of structures at national and county levels. The Supreme Court upheld the findings in the High Court and Court of Appeal that the proposed amendments were unconstitutional as they were antithetical to the oversight role of the Senate, interfered with the legislative power of the county assembly, violated the functional integrity of county governments and introduced unnecessary penal sanctions. The Supreme Court emphasised the principles of *independence, interdependence, consultation* and *cooperation* between governments at national and county levels as espoused in Articles 6(2), 10, 174, 220(2)(c) and 232 of the Constitution. The Court stated that:

> "...there is nothing irregular in the members of parliament and national executive engaging, consulting, cooperating and coordinating with the devolved units for the sake of protecting devolution and achieving its objects...But we stress that the engagement, consultation, cooperation and coordination envisaged must be done "in a manner that respects the functional and institutional integrity...the constitutional

29 *In the Matter of Interim Independent Electoral Commission,* [2011] eKLR.
30 Ibid.
31 *Speaker of the Senate & Another v Attorney-General & another; Law Society of Kenya & 2 others (Amicus Curiae) (Advisory Opinion Reference 2 of 2013),* [2013] KESC 7 (KLR) (1 November 2013) (Advisory Opinion) (with dissent - NS Ndungu, SCJ).
32 Ibid.
33 *In Senate & 2 others v Council of County Governors & 8 others,* (Petition 25 of 2019) [2022] KESC 7 (KLR) (Constitutional and Human Rights) (17 February 2022) (Judgment).

status and institutions of the county government", as decreed by article 189(1) of the Constitution."[34]

16. The Supreme Court found that whilst the establishment of the County Development Boards was driven by the 'honest and noble purpose' to provide a forum, at the county level, for engagement, consultation and coordination of national and county governments' development programs, its implementation is bound to produce an unconstitutional effect. The Supreme Court found that if the presence of members of parliament and representatives of the national executive in the County Development Boards was merely to contribute by way of public participation in matters affecting counties, there would be no concern; however, in its assessment the court found the proposed amendments donated excessive powers to the Board beyond what the Constitution permits and thereby subordinated county organs. The Court stated:
"The two levels must embrace devolution architecture by displaying collaborative coexistence and interdependence so as to avoid any possible constitutional discord. At all times, we emphasize, this arrangement must maintain a balanced structure, where national government does not usurp, undermine or interfere with the mandate of or with matters which exclusively fall within the domain of county governments."[35]

17. The Supreme Court was emphatic that the independence between devolution institutions must be maintained. On the proposed mandate of the County Development Board the Court stated that:

> "...the Senate is not expected to relocate to the counties to exercise supervisory powers at that level. That would be intrusive into the functional and institutional integrity of the county government and unacceptable overreach. It must not be involved in the administrative nitty-gritty details of the counties. Its oversight as indeed its legislative roles, are to be exercised in accordance with the Constitution and the law."[36]

20. The Supreme Court also clarified the roles between senators and governors through considering the proposal for the county senator to chair the County Development Board and deputised by the county governor. the Supreme Court found that:

> "The Constitution does not contemplate a situation where the chief executives of the counties, the Governors are inferior in rank to Senators in the execution of county functions. For this reason, section 91A(1)(a) and (d) is antithetical to articles 179(4)(5) and (6) of the Constitution to the extent that it alters the hierarchical structure of the county government...it is inconceivable as it is absurd to have a Senator whose functions are clearly delineated by the Constitution, and who is expected to provide oversight of the county government, to at the same time take charge of a Board which is essentially a county organ. This is legislative overreach that does not honour the constitutional guardrails that donates specific and distinct powers to the Senate and to the devolved units...[t]he amendment, in purporting to impose on the Governor a principal, fails to meet the test of cooperation, coordination and consultation. It fails to respect the functional and institutional integrity of the county government, its institutions and its constitutional status, as stipulated in article 189."[37]

21. One of the early cases in which the Supreme Court provided clarity in the relationships between the two levels of government was in *Speaker of the Senate & another v Attorney-General & another.*[38] In this matter, the Speaker of the Senate sought an advisory opinion on the role of the National Assembly vis-à-vis the Senate in the origination, consideration and enactment of the Division and Allocation of Revenue Bills. By a majority, this is what the Supreme Court had to say:

> "It is clear to us that the Senate had a clear role to play, in the processing of the Division of Revenue Bill. The Speaker of the National Assembly should have complied with the terms of Article 112 of the Constitution; and the National Assembly should have considered the deliberations of the Senate on record and, failing concurrence on legislative choices, the matter should have been brought before a mediation committee, in accordance with the terms of Article 113 of the Constitution."[39]

34 Ibid.
35 Ibid
36 Ibid.
37 Ibid
38 *In Speaker of the Senate & another v Attorney-General & another; Law Society of Kenya & 2 others (Amicus Curiae)* (Advisory Opinion Reference 2 of 2013) [2013] KESC 7 (KLR).
39 Ibid.

22. This matter was again canvassed by the Supreme Court over five years later when another impasse arose on the Division of Revenue Bill between the National Assembly and the Senate. Once again, the Supreme Court was approached to proffer an advisory opinion on, inter alia, the effect of a failure between the Senate and the National Assembly to agree on a Division of Revenue Bill. The Court in *Matter of Council of Governors & 47 Others*[40] advised:

> "...that should an impasse occur due to the failure of the mediation process, occasioned by the lack of concurrence between the two Houses over the Division of Revenue Bill, the National Assembly shall, for the purpose of meeting the expenditure necessary to carry on the services of the County Government during that year until such time as the Division of Revenue Act is assented to, authorize the withdrawal of money from the Consolidated Fund. The monies so withdrawn shall be included, under separate vote(s) for the several services in respect of which they were withdrawn."[41]

23. The Supreme Court has also provided clarity and guidance on the constitutional oversight roles of the Senate and county assemblies over county governments. In *Senate v Council of County Governors & 6 others*[42] the Court found that the Senate is constitutionally mandated to summon County Governors in exercise of its oversight role pursuant to article 96(3) of the Constitution and that the oversight role of both the Senate and the County Assembly is not limited to the counties' nationally allocated revenue or locally generated revenue respectively. The Court held:

> "The foregoing constitutional provisions as read together with articles 110 to 112, leave no doubt that the Senate is established to perform fundamental roles of governance concerning Counties. These are legislative, budgetary, and oversight. It has been granted considerable latitude in ensuring that County Governments operate at optimal and within accountability standards, if the objectives of devolution are to be realized. There is no way by which the Senate can perform such an important role without having the powers to summon a Governor and to require him/her to provide answers and offer explanations regarding the management of the County finances and related affairs. Without such power, the Senate would not be able to "protect the interests of the Counties", nor would it be able to exercise effective oversight over national revenue allocated to Counties".[43]

24. Further the Court emphasised that the purpose of the Constitution is to entrench good governance, the rule of law, accountability, transparency, and prudent management of public finances at both levels of Government and such grand purpose cannot be served if either the Senate or County Assemblies begin to develop "centres of oversight/influence". The Court thus identified the County Assemblies as providing the first tier of oversight while the Senate provided the second and final tier of oversight.

25. The manner of election, appointment and removal of county officials is central to the institutional independence of these entities. Through the determination of election petitions, the Supreme Court has strengthened the electoral system thereby ensuring that senators and governors are duly elected to serve. The Supreme Court has had opportunity to provide lucidity on matters concerning institutional independence (separation of powers) when considering the impeachment of a County Governor via a decision of a County Assembly and the Senate in *Justus Kariuki Mate & another v Martin Nyaga Wambora & another*.[44] Emphasising that by the doctrine of separation of powers, the limits on judicial authority, and the Constitution's design of entrusting certain issues to other organs of Government, are vital principles, the Supreme Court reasserted its previous decision in *Judicial Service Commission v. Speaker of the National Assembly & 8 others*[45], where it had stated:

> "The Constitution disperses powers among various constitutional organs. Where it is alleged that any of these organs has failed to act in accordance with the Constitution, then the Courts are empowered by article 165 (3)(d)(ii) to determine whether anything said to be done under the authority of the Constitution or of any law is inconsistent with, or in contravention of the Constitution"[46]

40 In *the Matter of Council of Governors & 47 Others* (Reference 3 of 2019) [2020] KESC 65 (KLR)
41 Ibid.
42 *Senate v Council of County Governors & 6 others* (Petition 24 & 27 of 2019 (Consolidated)) [2022] KESC 57 (KLR).
43 Ibid.
44 *Justus Kariuki Mate & another v Martin Nyaga Wambora & another*, SC Petition No. 32 of 2014 [2017] eKLR.
45 In *Judicial Service Commission v. Speaker of the National Assembly & 8 others,* [2014] eKLR.
46 Ibid.

26. The Court developed a number of principles relating to the separation of powers:

> "(a) each arm of Government has an obligation to recognize the independence of other arms of Government;
> (b) each arm of Government is under duty to refrain from directing another Organ on how to exercise its mandate;
> (c) the Courts of law are the proper judge of compliance with constitutional edict, for all public agencies; but this is attended with the duty of objectivity and specificity, in the exercise of judgment;
> (d) for the due functioning of constitutional governance, the Courts be guided by restraint, limiting themselves to intervention in requisite instances, upon appreciating the prevailing circumstances, and the objective needs and public interests attending each case;
> (e) in the performance of the respective functions, every arm of Government is subject to the law."[47]

27. The Supreme Court also settled the question on when a court may interfere with legislatorial processes that are in actual progress, such as impeachment of a governor. Recognising the jurisdiction of the courts whilst urging judicial restraint, the Supreme Court found:

> "...the County Assembly to have been operating quite properly, within the constitutional scheme of devolution, and running its legislative processes within the ordinary safeguards of the separation of powers – and consequently, quite legitimately outside the path of the ordinary motions of the judicial arm of State. On that basis, there would have been hardly any scope for the deployment of the Court's conservatory orders..."[48]

28. In *Sonko v County Assembly of Nairobi City & 11 others*[49] the appellant challenged his impeachment, questioning whether due process was followed. The Supreme Court determined that the impeachment proceedings before the County Assembly and Senate were properly conducted in accordance with the Constitution, the County Governments Act and Standing Orders of both the Assembly and the Senate. In *Re Speaker, County Assembly of Embu*[50] the Speaker of the County Assembly of Embu sought an advisory opinion from the Court regarding the process of filling the position of Deputy Governor, upon a vacancy arising as a result of the removal of a County Governor through impeachment proceedings. The Supreme Court, acknowledging that existence of a lacuna in law, stated as follows:

> "From the signal embodied in article 149 of the Constitution, and in the absence of any applicable legislative provision, we hold that, where a vacancy occurs in the Office of the Deputy County Governor, the Governor shall within fourteen days, nominate a person to fill such vacancy. The County Assembly shall vote on the nomination within sixty days after receiving it. Where a vacancy occurs in both the offices of County Governor and Deputy County Governor at the same time, the office of the Deputy County Governor shall remain vacant until the election of a new Governor. The new Governor shall nominate a person to fill the vacancy within fourteen days after assuming office. The County Assembly shall vote on the nomination within sixty days after receiving it. For the avoidance of doubt, we hereby state that this holding shall obtain in all circumstances pursuant to which the Office of the Deputy Governor may become vacant as contemplated by the Constitution, i.e. death, resignation or impeachment."[51]

This decision formed the basis for the enactment of a statutory process for filling a vacancy in the Office of a Deputy Governor.

29. The Supreme Court has also provided guidance on the participation of the Senate in the law-making function of Parliament by considering, debating and approving Bills concerning counties. In *Institute for Social Accountability & Another v. National Assembly & Others*[52], the Court held that the Constituency Development Fund Act and the Constituency Development Fund (Amendment) Act, 2013 concerned county governments, and failure to involve the Senate in the enactment process offended Article 96 of the Constitution rendering them unconstitutional. Similarly, that the CDF Act 2013 violated the division of functions between the national and county levels of government for reasons that under the Constitution, the decentralization of service must be undertaken within

47 *Justus Kariuki Mate & another v Martin Nyaga Wambora & another*, SC Petition No. 32 of 2014 [2017] eKLR.
48 *Justus Kariuki Mate & another v Martin Nyaga Wambora & another*, SC Petition No. 32 of 2014 [2017] eKLR.
49 *Sonko v County Assembly of Nairobi City & 11 others* (Petition 11 (E008) of 2022) [2022] KESC 76 (KLR).
50 In *Re Speaker, County Assembly of Embu*, (Reference 1 of 2015) [2018] KESC 49 (KLR).
51 Ibid.
52 *Institute for Social Accountability & Another v. National Assembly & Others*, SC Petition No.1 of 2018; [2022] KESC 39 (KLR).

the confines of the structures of the national government or county governments, not parallel to the two levels of government.

30. As the above jurisprudence shows, the Supreme Court has played a central and critical role in strengthening the devolution process in Kenya. The jurisprudence of the Court has promoted the purposes, values and principles of the Constitution, marrying principle, with history and context to ensure outcomes that positively develop the law and have a positive impact at a county and national level. There is a thread that runs through the Court's jurisprudence on devolution that I would say is characterised by six markers: independence, interdependence, social and institutional cohesion, participatory democracy, accountability and constitutionalism. Returning to the assessment markers I referred to in the introduction, one, asserting the supremacy of the Constitution and the sovereignty of the people of Kenya; and, two, developing rich jurisprudence that respects Kenya's history and traditions and facilitates its social, economic and political growth, I would say that in regard to devolution, the Supreme Court scores well.

2.3 Constitutional Commissions and Independent Offices

31. As was the case with devolution, the constitutional commissions and independent offices established under the Constitution 2010 were a response to a governance context seen as lacking transparency and accountability. Whilst some of the commissions existed under the previous constitutional dispensation, many were largely devoid of any independence in execution of their duties and subject to interference and control of the Executive. It was strongly felt that there was need for independent bodies that would provide oversight over, secure the proper functioning of, and effective public service delivery through, key state organs including the Judiciary, Parliament and those within the Executive. Chapter 15 Commissions and the independent offices were established to provide these crucial functions in a number of key areas seen as historically problematic and crucial to the nation building project under the new constitutional dispensation. These included land administration, election regulation, human rights enforcement, salaries in the public sphere; appointments and disciplinary action for the police, public service, judiciary, parliament, teachers; and allocation of county revenue, and public finance management.

32. Chapter Fifteen of the Constitution 2010, anchors the independent offices and constitutional commissions. Article 248 identifies the following Commissions:
    1. The Kenya National Human Rights and Equality Commission;
    2. the National Land Commission;
    3. the Independent Electoral and Boundaries Commission;
    4. the Parliamentary Service Commission;
    5. the Judicial Service Commission;
    6. the Commission on Revenue Allocation;
    7. the Public Service Commission;
    8. the Salaries and Remuneration Commission;
    9. the Teachers Service Commission; and
    10. the National Police Service Commission.

33. The Article further identifies the two independent offices: that of the Auditor General and that of the Controller of Budget. The objects of these commissions and independent offices are threefold: to protect the sovereignty of the people; to secure the observance by all State organs of democratic values and principles; and to promote constitutionalism. The independence of the commissions and the holders of independent offices is constitutionally entrenched under Article 249(2) & (3) that provide that they are subject only to the Constitution and the law; are independent and not subject to direction or control by any person or authority; and that Parliament must allocate adequate funds to enable each commission and independent office to perform its functions.

34. Decisions from the Supreme Court have recognised the importance of these commissions and independent offices, ensured their autonomy and independence, and strengthened their ability to undertake their respective functions in the manner envisaged under the Constitution.

35. We have, above, discussed how the Supreme Court developed the principles of devolution and clarified the

Court's exclusive jurisdiction to issue advisory opinions as sought by state organs in matters related to county governments in the *Matter of the Interim Independent Electoral Commission*[53]. In this seminal case, the Court also elucidated in detail on the institutional independence of Chapter 15 commissions and independent offices. This was in regard to the provision in the Supreme Court Rules that requires that before a reference for an advisory opinion can be sought, if the matter, in the opinion of the Court, can be resolved by the advice of the Attorney-General, then such advice should first have been sought. It was argued that, in regard to the then Interim Independent Electoral Commission, such a requirement was unconstitutional as it interfered with the independence of a constitutional commission. The Supreme Court stated:

> "...the real purpose of the "independence clause", with regard to Commissions and independent offices established under the Constitution, was to provide a safeguard against undue interference with such Commissions or offices, by other persons, or other institutions of government. Such a provision was incorporated in the Constitution as an antidote, in the light of regrettable memories of an all-powerful Presidency that, since Independence in 1963, had emasculated other arms of government, even as it irreparably trespassed upon the fundamental rights and freedoms of the individual. The Constitution established the several independent Commissions, alongside the Judicial Branch, entrusting to them special governance-mandates of critical importance in the new dispensation; they are the custodians of the fundamental ingredients of democracy, such as rule of law, integrity, transparency, human rights, and public participation. The several independent Commissions and offices are intended to serve as 'people's watchdogs' and, to perform this role effectively, they must operate without improper influences, fear or favour: this, indeed, is the purpose of the "independence clause".

59. While bearing in mind that the various Commissions and independent offices are required to function free of subjection to "direction or control by any person or authority", we hold that this expression is to be accorded its ordinary and natural meaning; and it means that the Commissions and independent offices, in carrying out their functions, are not to take orders or instructions from organs or persons outside their ambit. These Commissions or independent offices must, however, operate within the terms of the Constitution and the law: the "independence clause" does not accord them carte blanche to act or conduct themselves on whim; their independence is, by design, configured to the execution of their mandate, and performance of their functions as prescribed in the Constitution and the law. For due operation in the matrix, "independence" does not mean "detachment", "isolation" or "disengagement" from other players in public governance. Indeed, for practical purposes, an independent Commission will often find it necessary to co-ordinate and harmonize its activities with those of other institutions of government, or other Commissions, so as to maximize results, in the public interest. Constant consultation and co-ordination with other organs of government, and with civil society as may be necessary, will ensure a seamless, and an efficient and effective rendering of service to the people in whose name the Constitution has instituted the safeguards in question. The moral of this recognition is that Commissions and independent offices are not to plead "independence" as an end in itself; for public-governance tasks are apt to be severely strained by possible 'clashes of independences'."[54]

36. This position was also articulated by the Supreme Court in the matter of *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others*[55] where the Court stated that:

> "...'independence' is a shield against influence or interference from external forces. In this case, such forces are the Government, political interests, and commercial interests. The body in question must be seen to be carrying out its functions free of orders, instructions, or any other intrusions from those forces. However, such a body cannot disengage from other players in public governance...How is the shield of independence to be attained? In a number of ways. The main safeguard is the Constitution and the law. Once the law, more so the Constitution, decrees that such a body shall operate independently, then any attempt by other forces to interfere must be resisted on the basis of what the law says. Operationally however, it may be necessary to put other safeguards in place, in order to attain "independence" in reality. Such safeguards could range from the manner in which members of the said body are appointed, to the operational procedures of the body, and even the composition of the body. However, none of these "other safeguards" can singly guarantee "independence". It takes a combination of these, and the

53 *In the Matter of the Interim Independent Electoral Commission (Applicant)* (Constitutional Application 2 of 2011) [2011] KESC 1 (KLR).
54 Ibid.
55 *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others*, [2014] KESC 53 (KLR).

fortitude of the men and women who occupy office in the said body, to attain independence."[56]

37. In *National Land Commission v Attorney-General & 5 Others*[57] the Supreme Court further detailed the elements of such independence:

1. Functional / administrative independence: this entails commissions exercising their autonomy through carrying out their functions, without receiving any instructions or orders from other State organs or bodies.
2. Operational independence: this includes functional independence, and is a safeguard or shield for independence, manifested through the procedure of the appointments of commissioners; composition of the commission; and procedures of the commission. Article 255(1)(g) of the Constitution provides an elaborate procedure for the amendment of the Constitution in matters dealing with the independence of the Judiciary, as well as commissions and independent offices to which Chapter 15 applies.
3. Financial Independence: means that a commission has the autonomy to access funds which it reasonably requires for the conduct of its functions. However, according to Article 249(3) of the Constitution, Parliament is mandated to set for the commission the budget considered adequate for its functions.
4. Perception of independence: means the commissions must be seen to be carrying out their functions free from external interferences.
5. Collaboration and consultation with other State Organs: independence of commissions and independent offices does not, perforce, entail a splendid isolation from other State organs. For example, Article 249(1) of the Constitution expressly entrusts the National Land Commission with the duty to "protect the sovereignty of the people", "secure the observance by all State organs of democratic values and principles", and "promote constitutionalism.

38. The crux of these decisions is to emphasise the independence of Commissions and Independent Offices whilst at the same time recognising their own accountability and interdependence with other state organs within the constitutional design. Article 249(1) of the Constitution signals the checks that the commissions have on other arms of Government; whilst, simultaneously, Article 254 provides for the accountability of these independent entities to the Executive and the Legislature. Article 254 (1) requires commissions to file annual reports to the President and to Parliament; and by Article 254 (2), the President and the National Assembly may require a commission to submit a report on a particular issue. The Supreme Court in *Kenya Vision 2030 Delivery Board v Commission on Administrative Justice & 2 Others*[58] emphasised that Commissions are supposed to act as watchdogs and co-operate and work with government arms. It also reasserted the duty of Parliament to implement reports from commissions pursuant to article 254(1) of the Constitution. It however held that Commissions cannot implement their own recommendations nor force a recommendation on a public body lest they usurp the role of the organ vested with the mandate to enforce implementation. The Court further developed guiding principles to assist courts when considering matters concerning the binding nature of recommendations from Commissions. These are that:

1. Any power to make a recommendation ought to be specifically provided for in the Constitution or in law;
2. Recommendations do not necessarily bind the person to whom, or entity to which, it is addressed;
3. A recommendation from a Commission is only binding upon a public entity where it has been specifically provided for in the Constitution or in law;
4. The manner in which a recommendation is to be implemented by a public entity is discretionary;
5. Exercise of discretion in implementing a recommendation may only be interfered with where there is gross abuse of discretion, manifest injustice or palpable excess of authority
6. Any recommendation by a Commission which is not implemented may be reported to Parliament for any further action, if necessary.

39. Similarly, in *Matter of Council of Governors & 47 Others*[59] the Supreme Court considered whether the recommendations of the Commission on Revenue Allocation were binding on both Senate and the National Assembly when they deliberated on the Division of Revenue Bill and the Appropriation Bill. The Supreme Court emphasised the importance of place the Constitution places in Chapter 15 Commissions. It asserted that, in the instant case, the Constitution placed a very high premium on the recommendations by the Commission

56 Ibid.
57 *National Land Commission v Attorney-General & 5 Others; Kituo Cha Sheria & Another* (Amicus Curiae) (Advisory Opinion Reference 2 Of 2014) [2015] KESC 3 (KLR).
58 *Kenya Vision 2030 Delivery Board v Commission on Administrative Justice & 2 Others,* (Petition 42 Of 2019) [2021] KESC 35 (KLR).
59 *In the Matter of Council of Governors & 47 Others*, (Reference 3 of 2019) [2020] KESC 65 (KLR).

for Revenue Allocation, and such recommendations once tabled in Parliament, must be accorded due consideration before a vote takes place in either of the Houses, on the Division of Revenue Bill and the County Allocation of Revenue Bill. Whilst stating that if either of the two Houses passed a Bill under Article 205 without considering the recommendations of the Commission, the resultant legislation would be unconstitutional; the Court nevertheless found that recommendations by the Commission on Revenue Allocation were not binding upon either the National Assembly, or the Senate. The Court stated that to opine otherwise would be to "... elevate the Commission above Parliament in the legislative chain...it could not have been the intention of the makers of Constitution to supplant the legislative authority of Parliament in matters Finance, by establishing the Commission on Revenue Allocation."[60] The Court stated that "...not every deviation from the Commission's recommendations is to be explained away in a memorandum, only a significant deviation. What constitutes a significant deviation is a matter to be determined on a case-to-case basis."[61]

40. The Supreme Court's jurisprudence on the subject emphasises the indispensable and important role of constitutional commissions and independent offices in upholding democratic governance and the rule of law. The Court has unequivocally asserted their independence stating that these entities must function free from external influence, thereby ensuring impartiality in their operations. By safeguarding the autonomy of these commissions and offices, the Supreme Court not only reinforces their effective functioning but also strengthens the framework of accountability within the government. This commitment to independence is vital for maintaining public trust in democratic institutions, as it ensures that these bodies can carry out their mandates without fear of reprisal or interference.

2.4 Conclusion

41. It is clear that the Supreme Court has asserted the institutional independence of Chapter 15 Commissions and Independent Offices whilst placing them within the wider framework of transparency, accountability and mutual interdependence with other state organs within our constitutional architecture. At the beginning, I placed two important parameters through which the substantive effectiveness of the Supreme Court's jurisprudence can be assessed. Given the key highlights I have laid out above, I look forward to hearing some of your insights into whether you concur with my positive assessment. I have had occasion to peruse the content and materials in your Constitutional Theory course LLB 109; considering its breadth and depth, with specific lectures on devolution, chapter 15 commissions and independent offices, separation of powers and constitutionalism, I am sure you may have a lot to say on the contributions of the Court to constitutionalism with particular focus on the subject area at hand. I look forward to that engagement and feedback.

42. I thank you most sincerely for your gracious invitation to speak to you today and for listening to me. I cannot overemphasise the importance of law students and academia in improving and securing the effectiveness, not just of the Supreme Court, but the entire edifice of justice provision. As we commemorate 12 years of the Supreme Court, I hope we can strengthen and expand all avenues of engagement and interaction between law in instruction, law in academia and law in praxis. There is so much to learn and so much to gain through such interaction; I am sure our discussions today will have a positive impact on the development of the Court and in shaping future jurisprudence.

60 Ibid.
61 Ibid.

Recusal of Judges versus the Duty to Sit: A Kenyan Perspective

Hon. (Mr.) Justice Mohammed K. Ibrahim, CBS[62]

(*This paper was delivered at the Kenya School of Law on 7th March, 2025 as part of the Supreme Court @ 12 Law Lecture Circuits*)

"It is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done."

~Lord Hewart CJ

R vs Sussex ex parte McCarthy[63]~

3.1 Introduction

1. Recusal is rooted in the principle of natural justice, particularly the maxim *nemo judex in causa sua* (no one should be a judge in their own cause). It ensures that a judge does not preside over a matter where they have a personal interest, bias, or where their impartiality could reasonably be questioned.

2. The principle of judicial recusal addresses the need for impartiality in judicial proceedings, ensuring that justice is not only done but is also seen to be done. However, there is an equally compelling doctrine known as the duty to sit, which obligates judges, particularly in collegiate courts like the Supreme Court of Kenya that often sit as a bench, to adjudicate cases unless compelling reasons necessitate recusal.

3. This paper examines the question of judicial recusal versus the duty to sit in the Kenyan context, specifically at the Supreme Court of Kenya, using landmark decisions to highlight how courts, especially those sitting as benches like the Supreme Court, balance these competing considerations.

3.2 Judges as arbiters of justice

4. Recusal is thus defined in Black's Law Dictionary, 8th ed. (2004) [p.1303]:
"Removal of oneself as judge or policy maker in a particular matter, [especially] because of a conflict of interest."

5. The Constitution guarantees that every litigant will have a fair hearing before an independent and impartial court[64]. Impartial and independent judges are essential to that fair trial. The Courts are expected to be independent from undue influence, trustworthy, and with authority over all the parties to solve disputes peacefully. Judicial discretion, with its nuanced and careful application, plays a vital role in ensuring fair and equitable outcomes. The common law tradition astutely recognizes that justice in a case isn't always determined strictly by the rigid boundaries of statutory rules.

6. As part of the oath of office, the Chief Justice, Deputy Chief Justice and each Judge of the Supreme Court, Court of Appeal and High Court pledge that:

> ".....In the exercise of the judicial functions entrusted to me, I will at all times, and to the best of my knowledge and ability, *protect, administer and defend this Constitution with a view to upholding the dignity and the respect for the judiciary and the judicial system of Kenya and promoting fairness, independence, competence and integrity within it.*"

7. We must always be alive to the fact that Judges are first and foremost human beings coexisting with others within society. Upon appointment to the bench, they take an oath of office to be independent and impartial in their work. During their tenure on the bench, they straddle the space of being human existing within a community, while continuously setting aside personal opinions, biases and circumstances to ensure every decision serves the ends of justice for the parties. This was well articulated by the Court of Appeal in the case of *Kaplan & Stratton v. Z. Engineering Construction Ltd & 2 Others [2000] KLR,* where the Court of Appeal acknowledged this fact but went on to find that such coexistence does not preclude them from hearing matters. Court stated thus: "If disqualification issues were to be raised, say, because a Judge and a member of the Bar belong to the same Rotary Club or the same Lions Club or the same Sports Club, there could be no end to such applications. *When a member of the Bar is elevated to the bench his oath of office tells him enough to do what is right. Judges are*

62 Justice of the Supreme Court of Kenya.
63 [1924] 1 K.B. 256.
64 Articles 50, 159 and 160 of the Constitution of Kenya, 2010.

human beings. They have their predilections and prejudices. They are a complex of instincts, which make the man. For instance, therefore, it is no ground to seek disqualification by saying that the Judge does not like a particular member of the Bar.
The converse is also true."

8. The essence of recusal was well captured by a five Judge bench of the Court of Appeal in the matter of *Rawal v Judicial Service Commission & another; Okoiti (Interested Party); International Commission of Jurists & another (Amicus Curiae)* (Civil Appeal (Application) 1 of 2016) [2016] KECA 717 (KLR). The court held that a recusal application, though unpleasant, is sometimes a necessary step in safeguarding justice. Though such applications challenge the judge's independence, the reality is that judges, being human, may not always appear impartial. When there is a reasonable basis to suspect bias, recusal becomes essential to prevent the greater harm of violating this fundamental right, which underpins the entire judicial system. The Court held as follows:

"An application for recusal of a judge is a necessary evil. On the one hand it calls into question the fairness of a judge who has sworn to do justice impartially, in accordance with the Constitution without any fear, favour, bias, affection, ill-will, prejudice, political, religious, or other influence. In such applications, the impartiality of the judge is called into question and his independence is impugned. On the other hand, the oath of office notwithstanding, the judge is all too human and above all the Constitution does guarantee all litigants the right to a fair hearing by an independent and impartial judge. When reasonable basis for requesting a judge to recuse himself or herself exists, the application has to be made, unpleasant as it may be. That is the lesser of two evils. The alternative is to risk violating a cardinal guarantee of the Constitution, namely the right to fair trial, upon which the entire judicial edifice is built. Allowing a judge who is reasonably suspected of bias to sit in a matter would be in violation of the constitutional guarantee of a trial by an independent and impartial court."

9. The issue of judicial recusal versus the duty to sit has posed significant challenges to courts worldwide, including the Supreme Court of Kenya where recusal could impact the quorum necessary to decide critical national matters. Striking a balance between these two obligations, ensuring fairness through recusal while also maintaining the functionality of the court, is a delicate and vital aspect of judicial integrity.

3.3 What is the law on recusal?

10. Fair hearing is a fundamental right that is recognized and protected under the Constitution of Kenya which provides that every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body[65].

11. In exercising their mandate of adjudication, Judges are required to observe certain fundamental principles some of which have been codified under the Judicial Service (Code of Conduct and Ethics) Regulations, 2020[66] under the Judicial Service Act[67].

12. Just to give a highlight of the provisions of the Code of Conduct see the following:
    i. Moral and Ethical Requirements (Section 6): These align with Article 166(2) of the Constitution and Section 13 of the Leadership and Integrity Act[68]. Judges must demonstrate honesty in public affairs and refrain from actions that constitute abuse of office including not falsifying records, discriminating against any persons, engaging in actions that would lead to removal from membership of a professional body.
    ii. Independence (Section 7): Judges are required to uphold the independence and integrity of the Judiciary, maintaining impartiality in the performance of their judicial duties.
    iii. Impartiality (Section 9): Judges must carry out their duties with objectivity, in line with Articles 10, 27, 73(2)(b), and 232 of the Constitution. They are prohibited from engaging in favouritism, nepotism, tribalism, cronyism, and any corrupt or unethical practices. Additionally, Additionally, in the discharge of their duties, Judges are expected to uphold and apply the law; observe fairness and impartiality;

65 Article 50 (1) of the Constitution of Kenya.
66 Legal Notice 102 of 2020.
67 Cap. 8A Laws of Kenya.
68 Cap.185C Laws of Kenya.

and perform the duties of judicial office, including administrative duties impartially, competently, and diligently, without bias.

iv. Integrity (Section 11): Judges are required to act with honour and integrity in discharging their duties. They must avoid accepting gifts, personal loans, or benefits that may compromise their impartiality. Judges are also restricted from delivering oral decisions or altering the substance of a decision after its delivery. Furthermore, they must ensure any extra-judicial activities minimize potential conflicts of interest.

v. Propriety (Section 14): Judges must avoid both actual impropriety and the appearance of impropriety, steering clear of improper influences or activities that could diminish the dignity of the court. They are prohibited from serving as executors or personal representatives.

vi. Professionalism (Section 16): Judges must conduct themselves in a way that fosters public confidence in their integrity, maintaining high standards of performance and professionalism. They are also expected to cooperate with other judges and court officials in the administration of court affairs.

vii. The Act also imposes additional restrictions, such as emphasizes that judges are responsible for their social media activities (Section 12), advising them to avoid activities that could negatively impact their impartiality.

13. While at the High Court, I had occasion to render some decisions on this issue of recusal. One decision I recall to date is the case of *Trust Bank Ltd v Midco International (K) Ltd & 4 others [2004] eKLR* where I was to determine an application seeking setting aside of a ruling on grounds that the Judge who had rendered had previously represented the respondent bank in a different case involving the same property at issue in the instant matter.

14. What was peculiar about the matter, was that I too had to disclose to the parties that while in practice and before appointment to the bench, I had represented plaintiff Bank while it was under Central Bank Statutory Management. Further, that in the course of such instructions, I did meet and deal with the 5th defendant who was a former director of the Bank. Both Counsel who were before me requested that I hear the application and waived any objections they may have had.

15. While determining that matter, I relied on an article by Priscilla Nyokabi titled *"Disqualification of Judges and the Right to a Fair Trial"* published in *ICJ legal newsletter (Issue 4 – 5, June – August, 2004).* I found the article to be quite useful and persuasive due its relevance and currency to the issues before the Court. The words still ring true nearly two decades later. I reproduce her words as follows:

"..... Under section 77 of the Constitution persons are accorded the right to fair trial by an independent and impartial court established by law. In enjoyment of this right parties should be satisfied as to the independence and impartiality of the judges sitting in determination of the suit. To give credence to this right judges should disqualify themselves if good reasons for such application are shown. However, we hasten to add that this does not give the litigants and their advocates an avenue to shop for judges they think may be more sympathetic to their cases. Suffice to note that though section 77 relates to criminal trials the arguments raised here below for disqualification of judges apply similarly to civil proceedings. *Reasons for seeking disqualification of judges should be cogent and sufficient. There should be evidence of resultant miscarriage of justice as in the case where a judge's position on an issue is known say from earlier comments or conduct.* Conflict of interest is an obvious reason for disqualification of a judge even where parties do not raise the issue. *Parties can apply for the disqualification of certain judges on the basis of apprehension of bias. The rule is that bias does not have to be real or proved the test is merely possibility of bias ie perceived bias whether it influences the judge or not."*

Suffice to say, I allowed the application and set aside the ruling given together with the consequential orders.

16. It is instructive to note that due to recusal having its roots in common law, several English decisions as well as from other commonwealth jurisdictions are still relevant to our jurisdiction to date. For instance the English case of *Metropolitan Properties (Fg-C) Ltd Vs. Lannon & Others [1969] 1 QB 577* set down the threshold for recusal as follows:

"Disqualification was imperative even in the absence of a real likelihood of bias if a reasonable man would reasonably suspect bias."

17. The House of Lords in the case of *Porter Vs. Magill*[69] set the test for recusal as follows**:**

69 [2002] 1 All ER 465.

"The question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased."

18. Back home, the Supreme Court of Kenya in the case of *Rai & 3 others v Rai & 4 others* (Petition 4 of 2012) [2013] KESC 20 (KLR) stated that recusal aims to ensure that justice between the parties is not compromised, that due process is followed, and that the rule of law remains visibly intact throughout the proceedings. The key test for a judge's recusal is the perception of fairness, moral authority, and impartiality in hearing the case. The Court held as follows:

"Perception of fairness, of conviction, of moral authority to hear the matter, is the proper test of whether or not the non-participation of the judicial officer is called for. The object in view, in the recusal of a judicial officer, is that justice as between the parties be uncompromised; that the due process of law be realized, and be seen to have had its role; that the profile of the rule of law in the matter in question, be seen to have remained uncompromised."

19. Recusal in Kenya is now codified in statute. The *Judicial Service (Code of Conduct and Ethics) Regulations* sets out extensively the parameters for the recusal of a Judge. A judge may recuse themselves from hearing a matter where their impartiality may be reasonably questioned and this includes scenarios where the Judge:

a. is a party to the proceedings;
b. was, or is a material witness in the matter in controversy;
c. has personal knowledge of disputed evidentiary facts concerning the proceedings;
d. has actual bias or prejudice concerning a party;
e. has a personal interest or is in a relationship with a person who has a personal interest in the outcome of the matter;
f. had previously acted as a counsel for a party in the same matter;
g. is precluded from hearing the matter on account of any other sufficient reason; or
h. or a member of the judge's family has economic or other interest in the outcome of the matter in question.[70]

20. Recusal by a judge shall be based on specific grounds to be recorded in writing as part of the proceedings[71]. While in the case of a collegiate bench, the decision to dispense with the disqualification of any judge shall be made by the bench[72].

21. The Court of Appeal in the case of *Rawal v Judicial Service Commission & another; Okoiti (Interested Party); International Commission of Jurists & another (Amicus Curiae)* (Civil Appeal (Application) 1 of 2016) [2016] KECA 717 (KLR) cited with approval the decision from the Supreme Court of Canada *R. v. S. (R.D.)[1977] 3 SCR 484* where the Court held that the apprehension of bias must be a reasonable one held by a reasonable minded person applying themselves to the question and obtaining thereon the required information. The Court went on to hold as follows:

"The test is what would an informed person, viewing the matter realistically and practically — and having thought the matter through — conclude. This test contains a two-fold objective element: the person considering the alleged bias must be reasonable and the apprehension of bias itself must also be reasonable in the circumstances of the case. Further the reasonable person must be an informed person, with knowledge of all the relevant circumstances, including the traditions of integrity and impartiality that form a part of the background and apprised also of the fact that impartiality is one of the duties the judges swear to uphold..."

22. Similarly, the East Africa Court of Justice adopted the same test in *Attorney General of Kenya v Prof Anyang' Nyong'o & 10 Others* EACJ Application No. 5 of 2007 when it stated:

"We think that the objective test of "reasonable apprehension of bias" is good law. The test is stated variously, but amounts to this: do the circumstances give rise to a reasonable apprehension, in the mind of the reasonable, fair minded and informed member of the public that the judge did not (will not) apply his mind to the case impartially. Needless to say, (a) litigant who seeks disqualification of a judge comes

70 Rule 21(1) of the Judicial Service (Code of Conduct and Ethics) Regulations.
71 Rule 21 (2) ibid.
72 Rule 21(4) ibid.

to court because of his own perception that there is appearance of bias on the part of the judge. The court however, has to envisage what would be the perception of a member of the public who is not only reasonable but also fair minded and informed about all the circumstances of the case."

23. However, I must clarify that requesting recusal does not provide litigants and their advocates with an opportunity to select judges they believe may be more sympathetic to their cases.

24. Further, a judge is precluded from recusing themselves where there is no other judge who can deal with the case, due to urgent circumstances and the failure to act could lead to a serious miscarriage of justice and the merits of an application for recusal have been considered by a plural bench of Judges and the recusal has been held to be unnecessary.[73]

25. From the foregoing, the guiding principles for recusal in collegial courts i.e. courts that sit as a Bench, can be distilled as follows:

a) Reasonableness of Apprehension of Bias: Kenyan courts have established that the test for recusal is whether a reasonable person, with full knowledge of the facts, would have a legitimate reason to doubt the impartiality of the judge.

b) Impact on Quorum: In courts like the Supreme Court, which require a specific number of judges to hear a case, the duty to sit becomes more pronounced. A judge should not recuse themselves unless there is compelling evidence of bias or conflict, as their absence could compromise the court's ability to deliver justice.

c) Public Confidence in the Judiciary: Recusal should not be used to shield judges from difficult cases. Judges have a duty to sit unless there is a clear reason for recusal, as frequent recusals could undermine public trust in the judiciary's ability to function effectively.

3.4 Recusal at the Supreme Court of Kenya

26. For context, the Supreme Court comprises of seven Judges: the Chief Justice who is the President of the Court, the Deputy Chief Justice who is the Vice President of the Court and five other Judges[74]. While quorum for purposes of the Court's proceedings is five judges[75].

27. It is for this reason that in the *Rai case* the Court found that recusal applies rather differently to collegial courts. The Court stated as follows: "State that It follows that the Supreme Court concept, as it stands in the Constitution, and as a symbol of ultimate juristic authority, imports a varying set of rules of recusal, in relation to the practice in other superior Courts."

28. The Supreme Court due to its limited number of Judges must always carefully balance allowing recusal applications and the duty to sit. In the *Rai Case*, the Court sitting as a bench of six (*Hon. Justices P. K. Tunoi, J. B. Ojwang, N. S. Ndungu, M. K. Ibrahim* and *S. Wanjala (JJSC)* had this to say;

"... The recusal principle, therefore, with regard to the Supreme Court, must not be invoked but for good cause; and neither is it to be invoked without weighing the merits of such invocation against the constitutional burdens of the Court, and the public interest....

Even as this Court takes cognizance of the merits of the individual Judge's personal convictions, and of matters of ethics, in such a situation, it is inclined in favour of a choice which begins with the Judge's commitment to the protection of the Constitution, as the basis of the oath of office. The shifting scenarios of personal inclination should, in principle, be harmonized with the incomparable public interest of upholding the Constitution, and the immense public interest which it bears for the people, whose sovereignty is declared in Article 1(1).

3.4.1 The Supreme Court and the Controversy of Judicial Retirement Age

29. A prime example of how recusal can severely impact quorum at the Supreme Court occurred in the year 2016 when the Supreme Court of Kenya faced a constitutional crisis surrounding the retirement age of judges following the promulgation of the 2010 Constitution. Under Article 167(1) of the Constitution, the retirement age for judges was

73 Rule 21(3) of the Judicial Service (Code of Conduct and Ethics) Regulations.
74 Article 163(1) of the Constitution of Kenya.
75 Article 163(2) of the Constitution of Kenya.

set at 70 years. However, the previous Constitution provided for a retirement age of 74 years. This raised a critical question: Should judges appointed under the old constitutional framework continue serving until they reached 74 years of age, or should the new Constitution's stipulation of 70 years apply universally to all sitting judges?

30. This legal and constitutional issue became especially contentious as it directly affected two Supreme Court judges, Justice Phillip Tunoi and Deputy Chief Justice Kalpana Rawal, who had reached the age of 70 but were appointed under the previous regime.

31. On 11th December, 2015 the High Court unanimously decided that Justices Rawal and Tunoi should retire at 70 – a judgment affirmed by a seven-judge bench of the Court of Appeal on 28th May, 2016[76]. On the same day, Justice Rawal sent an application to the Supreme Court seeking the decision's suspension. The matter was certified urgent and a date set.

32. The case soon led to a deadlock as four of the Supreme Court judges recused themselves, to avoid the appearance of bias or conflict of interest due to their personal stake in the decision on retirement age. This left the Court without the necessary quorum to adjudicate the matter. Under the Constitution, the quorum for the Supreme Court to hear a case is five judges, but with four recusals, only three judges remained. The inability to form a quorum not only delayed the resolution of the matter but also halted the Court's regular functions, resulting in an unprecedented period of judicial inactivity at the highest level of Kenya's judiciary.

33. In effect, the Court of Appeal's judgment on the matter became the final decision on the issue of the retirement age[77]. Rawal and Tunoi retired. Dr Mutunga, too, retired as Chief Justice two days later, thus opening up three vacancies in the top court.

34. The recusal of these judges triggered significant consequences for the Court's operations. Two judges, including Deputy Chief Justice Kalpana Rawal, retired upon reaching the age of 70, while Chief Justice Emeritus Dr. Willy Mutunga had already announced his intention to retire one year earlier than his constitutional retirement age. This led to a quorum crisis, rendering the Court unable to conduct any business, as the remaining four judges could not meet the constitutional threshold for quorum.

35. In this vacuum, I was appointed as Acting President of the Supreme Court, a position I held for six to seven months until the appointment of Chief Justice Emeritus David Maraga on 4th October 2016. During this transitional period, the Supreme Court was largely inactive due to the quorum hitch, illustrating the profound impact that recusal decisions can have on the Court's ability to function.

36. The case regarding the retirement age was eventually overtaken by events, with the retirement of the affected judges and the appointment of new justices. However, it left a lasting impression on the judiciary, highlighting the tension between a judge's responsibility to recuse themselves when fairness is in question and their duty to sit to ensure the smooth functioning of the judicial system.

37. In such cases, courts must strike a balance. While recusal is necessary to maintain public confidence in judicial neutrality, the duty to sit is also crucial to prevent institutional paralysis. In courts like the Supreme Court of Kenya, which sits as a bench, multiple recusals can cripple the Court's ability to hear cases and deliver justice.

3.4.2 The doctrine of the duty to sit

38. The duty to sit compels judges to hear and decide cases unless there is a valid reason for recusal. This doctrine is vital to maintaining judicial efficiency, especially in courts with fixed membership like the Supreme Court of Kenya. If judges recuse themselves too readily, it could disrupt the administration of justice and lead to delays or the inability to constitute a full bench.

39. The Supreme Court of Kenya has addressed the balance between recusal and the duty to sit in several important cases, particularly given the public interest in maintaining the court's functionality in critical constitutional matters.

Gladys Boss Shollei v. Judicial Service Commission (2014)

40. In this case, the issue of judicial recusal arose when the petitioner sought the removal of Supreme Court judges

76 *Justice Kalpana H. Rawal v Judicial Service Commission & 3 Others* [2016] eKLR.

77 *Rawal v Judicial Service Commission & another; Okoiti (Interested Party); International Commission of Jurists & another (Amicus Curiae)* (Civil Appeal 1 of 2016) [2016] KECA 534 (KLR).

who had previously served on the Judicial Service Commission (JSC) during her dismissal as Chief Registrar. The petitioner claimed that their involvement in the disciplinary process created a conflict of interest.

41. The Supreme Court ruled that past involvement in administrative functions did not automatically disqualify the judges from hearing the case unless it could be shown that they had prejudged the matter. The court held that it is important not to overly restrict judges from sitting on cases, especially in courts like the Supreme Court, where the number of justices is limited and any undue recusal could impair the court's functionality.

42. The Court held that:

> "The Supreme Court has a special constitutional mandate which cannot be delegated to any other forum in the entire governance set-up. The Court is firmly guided by certain precious values, which provide the context within which it takes ultimate responsibility for matters of dispute settlement, in accordance with the law. This scenario is objectively depicted by the late Lord Denning (1899-1999) of England who thus spoke of the candour and trust associated with the judicial appointment:
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> > "[E]very Judge on his appointment discards all politics and all prejudices. Someone must be trusted. Let it be the Judges" [see Allan C. Hutchinson, Laughing at the Gods: Great Judges and How they made the Common Law (Cambridge: University Press, 2012), p.156."

43. In that matter, the Court emphasized that the preamble of the Kenyan Constitution clearly states that the Constitution is granted by the People of Kenya to themselves. This includes the creation of the Supreme Court under Article 163, composed of seven Justices, and the establishment of the Judicial Service Commission (JSC) under Article 171(2), with defined membership. The Court also pointed out that, by design, two members of the Supreme Court will always be JSC Commissioners, and in the course of time, some of the Supreme Court judges may be former JSC Commissioners.

44. It was for those reasons that the Court held that it cannot be assumed that any Supreme Court judge who has served or is serving on the JSC will automatically be disqualified from adjudicating cases involving the JSC. Such a blanket assertion would undermine the constitutional framework established by the People of Kenya, which mandates that both the Supreme Court and the JSC carry out their distinct roles concurrently.

45. Another key issue raised was that some judges have ongoing cases in the High Court against the JSC. The speaker highlighted that, like all citizens, judges are entitled to the rights enshrined in the Bill of Rights and retain the right to seek redress in the courts if they believe their rights have been violated. Article 22(1) affirms the right of every person to bring claims when fundamental freedoms are infringed, and judges do not lose this protection upon assuming office. Therefore, a judge exercising their constitutional rights cannot be disqualified from presiding over cases involving the JSC solely on that basis.

46. Lastly, the Court reiterated that membership in the JSC by Supreme Court judges is constitutionally mandated, and this fact alone cannot be a valid reason to exclude them from hearing matters involving the JSC unless compelling grounds for recusal are presented.

47. I had occasion to add my voice through a concurring opinion whereby I stated where judiciously invoked, this doctrine of the duty to sit is a key component of Constitutionalism. I stated this for the reason that it would be oof utmost importance that the judges of the Supreme Court sparingly and cautiously allow disqualification in order to ensure that the Court is not at any time incapacitated due to lack of quorum. Indeed the Court should consider the high likelihood that several judges may be required to recuse themselves in the same case. Take for instance two judges recuse themselves at a time when there is a vacancy in one of the positions of a judge of the Court. The Court will become paralyzed and administration of justice will not be as expeditious as envisioned in the Constitution.

48. Even more recently in the case of *Dari Limited & 5 others v East African Development Bank* (Petition (Application) E012 of 2023) [2024] KESC 58 (KLR) the Court was confronted with an application seeking stay of this Court's proceedings pending the determination of the complaint lodged before the Judicial Service Commission against a Bench of the Court (Mwilu, DCJ & VP; Ibrahim, Wanjala, Njoki, & Ouko, SCJJ that had heard and determined. The gist of their complaint is that the Court has dealt with applications filed before it and issued case management directions in a manner that disregards the appellants/applicants' rights to fair hearing and access to justice. Further, that the

Court has been working towards a pre-determined goal in the matter. It was the case of the applicants that once their complaint at the JSC is heard and determined, the Judges will have a chance to introspect, recalibrate and appreciate the impact of their decisions and the JSC will give proper directions on the hearing of the main appeal. In the foregoing, it is only fair first to allow the complaint before the JSC to run its course, and as such, it is just and equitable that the instant application be determined on a priority basis.

49. First, the Court noted that from the application it was clear that the appellants/applicants were not seeking a stay of the Judgment of the Court of Appeal. Instead, they are seeking a stay of their appeal pending the determination of a complaint they have filed against the five of us at the JSC. Second, instead of applying for the Judges' recusal, the applicants sought stay of the proceedings until the JSC determined their complaint.

50. The Court thereby concluded that in the face of the accusations of impropriety and bias, levelled against an entire Bench of the Court, even the doctrine of necessity was not available to the applicants. Standing accused of bias and working towards an undisclosed predetermined outcome, the Court stated that it was strongly persuaded that its further participation in these proceedings would not serve the ends of justice, at least in the eyes and perception of the appellants/applicants. Consequently, and inevitably, each of the Judges on the Bench recused themselves from further participation in the hearing and determination of the appeal.

3.5 Conclusion

51. In Kenya, the tension between judicial recusal and the duty to sit is a nuanced issue that the courts have navigated with care. While the right to an impartial judge is fundamental, the duty to sit ensures that courts, particularly those with limited membership like the Supreme Court, can effectively discharge their mandate. The Kenyan Judiciary has established that recusal must be based on objective and reasonable grounds, and judges have a responsibility to sit unless clear evidence of bias exists. This balance ensures that justice is both done and seen to be done, while also maintaining the functionality of the court system.

Transformative Property Law: Exploring the Emerging Land Law Jurisprudence from the Supreme Court

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3.1 Introduction

1. Land has long been at the heart of Kenya's socio-economic and political struggles. Historically, land conflicts have driven much of the country's colonial, post-colonial, and contemporary tensions. The promulgation of the Constitution 2010 marked a significant shift in the legal framework governing property rights, emphasizing equitable access to land, security of tenure, and social justice. Towards that end, new land laws were enacted to align with the Constitution to reform the country's land governance and address historical injustices while promoting equitable access, transparency, and sustainable land use. These reforms include the following laws and amendments that shape land ownership, administration, and dispute resolution:

a) Land Act (Cap. 280)

2. This Act gives effect to Article 68 of the Constitution, revising, consolidating, and streamlining land laws to ensure sustainable administration and management of land and related resources. It establishes frameworks for land registration, management, and acquisition, including provisions for leasehold interests, compulsory land acquisition for public use, and guidelines on evictions and resettlement. The 2016 amendments strengthened protections for squatters' rights and communities affected by land acquisition.

b) National Land Commission Act (Cap. 281)

3. This Act of Parliament defines the functions and powers of the National Land Commission (NLC), including the qualifications and procedures for appointments to the Commission. It gives the NLC power to manage public land, recommend policies for land administration, and address historical land injustices. Additionally, the Act clarifies the roles and relationship between the NLC and the Ministry of Lands, particularly concerning land registration and administration, aligning with the principles of devolved government in land management.

c) Community Land Act (Cap. 287)

4. This Act gives effect to Article 63(5) of the Constitution, establishing the recognition, protection, and registration of community land rights, as well as the management and administration of such land. It defines the role of county governments in relation to unregistered community land and grants legal recognition to communal ownership, particularly benefiting marginalized and pastoralist communities. By outlining procedures for communities to register their land, obtain secure titles, and manage it through governance structures, this law is essential for addressing land tenure issues previously governed by customary law.

d) Land Registration Act (Cap. 300)

5. This Act revised and streamlined the registration of land titles, aligning with the principles of devolved government in land registration. Replacing previous laws governing the registration of titles, it simplified registration procedures and introduced a unified register for all land in Kenya. By requiring all land transactions to be recorded, the Act enhances transparency, helping to reduce fraud and ownership disputes.

e) Physical and Land Use Planning Act (Cap. 303)

6. This Act of Parliament provides for the planning, regulation, and development of land, governing land use and zoning in both urban and rural areas. It promotes sustainable and orderly development, requiring landowners to adhere to local zoning regulations and ensuring that land use considers environmental conservation, infrastructure needs, and public health.

7. This transformation in Kenya's legal landscape is epitomized by the emerging jurisprudence of the Supreme Court of Kenya, which has played a crucial role in interpreting and enforcing land laws under the Constitution.

78 Justice of the Supreme Court of Kenya and the Director General of the Kenya Judiciary Academy.

8. This lecture therefore explores the concept of transformative property law by examining the Supreme Court's evolving land law jurisprudence. The Court has been at the forefront of reimagining land ownership, access, and use in ways that seek to address historical injustices, enhance equitable distribution, and reconcile private property rights with public interest. In this paper, we will examine the jurisdiction of the Court, consider key constitutional provisions, analyse landmark judgments, and explore how the Court has navigated competing land interests in Kenya.

3.2 Conceptualizing Transformative Property Law

9. It is against this backdrop that we explore the concept of transformative property law and the emerging jurisdiction of the Supreme Court in realizing this concept. Transformative property law refers to the restructuring of land and property laws to address historical injustices, promote equitable access to land, and align land ownership with constitutional values. Rooted in the Constitution of Kenya which introduced principles of social justice, sustainability, and inclusivity, this approach seeks to move beyond traditional notions of property ownership. It incorporates progressive reforms aimed at rectifying historical land injustices, securing community land rights, and ensuring that marginalized communities have legal access to land resources.

10. Some of the key aspects of transformative property law include:
    a) Community Land Rights: Recognizing and protecting community ownership, particularly for pastoralist and marginalized communities, allowing for the registration and governance of communal lands.
    b) Historical Injustices: Addressing past grievances, including displacement and land dispossession, by empowering the National Land Commission (NLC) to investigate and provide redress.
    c) Environmental Stewardship: Mandating sustainable land use and conservation practices to safeguard land and natural resources for future generations.
    d) Equitable Access: Ensuring fair land distribution and accessibility, aiming to provide all citizens with secure land tenure, especially women and historically disadvantaged groups.
    e) Devolved Land Management: Supporting devolved governance to allow county governments greater control over land matters, fostering local accountability and tailored land management solutions.

11. Transformative property law therefore seeks to foster a more inclusive, transparent, and just land tenure system, addressing inequalities rooted in colonial land policies and providing a foundation for social and economic empowerment.

12. Kenya's transformative property law is codified in several constitutional provisions, including Articles 40, 60, 61, 62, 63, 64, 65, 66, 67, and 68, which outline the protection of property rights, the principles of land policy, classification of land and mechanisms for addressing historical land injustices.

13. The Supreme Court, as the apex Court in Kenya, has a critical role in interpreting the Constitution and developing land law jurisprudence. It has been tasked with ensuring that property law reflects the transformative aspirations of the Constitution. Key judgments from the Court have addressed complex issues, including the tension between private property rights and public interest, historical land injustices, community land rights, and the protection of marginalized groups.

3.3 Emerging Land Law Jurisprudence from the Supreme Court

14. The cases discussed below highlight the Supreme Court's efforts to shape transformative property law and have established important legal principles that have far-reaching implications for property law in Kenya. They include:

    a) *Power to render Advisory opinions*

National Land Commission v Attorney-General & 5 others; Kituo Cha Sheria & another (Amicus Curiae) [2015] KESC 3 (KLR)

15. The NLC sought the Court's advisory opinion pursuant to Article 163(6) of the Constitution regarding the NLC's functions and powers, on the one hand, and the functions and powers of the Ministry of Land, Housing and

Urban Development (the Ministry), on the other hand. Specifically, the NLC sought to have this Court delineate the respective functions of the NLC and the Ministry of Land. However, the Supreme Court limited its advisory to *"what is the proper relationship between the mandate of the National Land Commission, on the one hand, and the Ministry of Land, Housing and Urban Development, on the other hand– in the context of Chapter Five of the Constitution; the principles of governance (Article 10 of the Constitution); and the relevant legislation?"* The Court's opinion emphasized the need for cooperation between the two bodies in the management of land resources while affirming the NLC's role as an independent constitutional commission. The decision was transformative in its recognition of the NLC's mandate to champion equitable land reforms. In rendering its opinion, the Court made the following determination:

"[306] It emerges from the foregoing account that the NLC's mandate, which is required to function in a collaborative and consultative constitutional and legal setting, belongs squarely to the mechanism of checks-and-balances, rather than that of an isolated fourth arm of government, entrusted with tasks unrelated to those falling under the dockets of other State organs. .....
[307] The Constitution's mandate falls to the three State organs, in an operational context of check-and-balances: and the various Commissions act as oversight and watchdog mechanisms. Hence, each of the functions of the NLC and the Ministry stands to be checked by the one or the other, in order to avoid abuse of power in matters relating to land. The unchanging theme throughout the Constitution, is that the relationship between these two bodies is inter-dependent, and based upon co-operation; it is not an agency relationship. As the Ministry conducts its functions, the NLC acts as a watchdog, to ensure compliance with the Constitution, and with legislation. Likewise, the NLC as an oversight body, maintains its functional, financial and operational independence, while still being overseen and checked by the public, by other independent offices, and by the three arms of government."

b) *The juridical status of customary trust*

Kiebia v M'lintari & another [2018] KESC 22 (KLR)

16. The Court while exercising its appellate jurisdiction under Article 163(4)(b) of the Constitution was called upon to give clarity on the issue of whether a claimant of a trust in customary law needs to prove actual physical possession or occupation. According to the claimant despite the parcel being registered in favour of some of the members of the clan, they held the same in trust for the other unregistered members. The High Court and the Court of Appeal agreed with the claimant. Of significance is that the Court of Appeal in arriving in its decision found that to prove a trust in land (read customary trust), one need not be in actual physical possession and occupation of the land. However, there were other decisions both in the High Court and the Court of Appeal to the contrary.

17. The Court appreciated that land in a traditional African setting, is always the subject of many interests and derivative rights; and that such rights could be vested in individuals or group units. Therefore, the Court held thus:
"52. Flowing from this analysis, we now declare that a customary trust, as long as the same can be proved to subsist, upon a first registration, is one of the trusts to which a registered proprietor, is subject under the proviso to Section 28 of the Registered Land Act. Under this legal regime, (now repealed), the content of such a trust can take several forms. For example, it may emerge through evidence, that part of the land, now registered, was always reserved for family or clan uses, such as burials, and other traditional rites. It could also be that other parts of the land, depending on the specific group or family setting, were reserved for various future uses, such as construction of houses and other amenities by youths graduating into manhood. The categories of a customary trust are therefore not closed. It is for the court to make a determination, on the basis of evidence, as to which category of such a trust subsists as to bind the registered proprietor. Each case has to be determined on its own merits and quality of evidence. It is not every claim of a right to land that will qualify as a customary trust. In this regard, we agree with the High Court in Kiarie v. Kinuthia, that what is essential is the nature of the holding of the land and intention of the parties. If the said holding is for the benefit of other members of the family, then a customary trust would be presumed to have been created in favour of such other members, whether or not they are in possession or actual occupation of the land. Some of the elements that would qualify a claimant as a trustee are:

1. The land in question was before registration, family, clan or group land
2. The claimant belongs to such family, clan, or group
3. The relationship of the claimant to such family, clan or group is not so remote or tenuous as to

make his/her claim idle or adventurous.

4. The claimant could have been entitled to be registered as an owner or other beneficiary of the land but for some intervening circumstances.
5. The claim is directed against the registered proprietor who is a member of the family, clan or group.

We also declare that, rights of a person in possession or actual occupation under Section 30(g) of the Registered Land Act, are customary rights. This statement of legal principle, therefore reverses the age-old pronouncements to the contrary in Obiero v. Opiyo and Esiroyo v. Esiroyo. Once it is concluded, that such rights subsist, a court need not fall back upon a customary trust to accord them legal sanctity, since they are already recognized by statute as overriding interests."

19. In the foregoing premises, it follows that we agree with the Court of Appeal's assertion that "to prove a trust in land; one need not be in actual physical possession and occupation of the land." A customary trust falls within the ambit of the proviso to Section 28 of the Registered Land Act, while the rights of a person in possession or actual occupation, are overriding interests and fall within the ambit of Section 30(g) of the Registered Land Act. Although the Respondents herein were not in possession or actual occupation of Parcel No. Njia/Kiegoi Scheme 70, both the High Court and Court of Appeal were entitled to enquire into the circumstances of registration, to establish whether a trust was envisaged. Since the two superior courts were satisfied that indeed elements of a customary trust in favour of the Respondents pertaining to the parcel existed, we see no reason to interfere with their conclusions."

a) *Distinction between pre-emptive right and reversionary interest over compulsorily acquired land*

Town Council of Awendo v Onyango & 13 others; Mohamed & 178 others (Interested Parties) [2019] KESC 38 (KLR)

20. Sometime in 1976, in the exercise of its powers of Eminent Domain, the Government of Kenya issued two Gazette Notices informing the public of its intention to acquire privately owned parcels of land in the then South Nyanza District. In doing so, the Government was acting pursuant to the provisions of section 75 of the retired Constitution and section 6(2) of the Land Acquisition Act of 1968 (now repealed). The Government then proceeded to compulsorily acquire, various privately owned parcels of land, some of which had been owned by the 1st to 13th respondents. Thus far, there was no legal dispute, until the year 2005, when the respondents herein filed suit in the High Court at Kisumu, in Civil Case No 133 of 2005; challenging the process of compulsory acquisition of the suit land and the allocation of unutilized portions to third parties by the appellant.

21. The appeal turned on whether a proprietor, whose land has been compulsorily acquired by the state, for a public purpose, in accordance with the Constitution and the Law, retains a reversionary interest in, or a pre-emptive right over any un-utilized portion of such land, should the public purpose for which it was acquired become spent.

22. While allowing the appeal, the Court determined as follows:

"52. The public purpose, for which the land was compulsorily acquired, may have been spent, but the un-utilized portions thereof, remain public land. It is therefore our view, that such land as remains un-utilized can only be applied to a public purpose, or be utilized to promote the public interest, even if the said interest is not such as had been originally envisaged. Un-utilized portions of land, may in this instance, be allocated to private entities, including those from whom the land was acquired, at a price, provided that, the land is to be put to such use as will promote the public interest.....

59. Section 110(2) of the Land Act introduces the concept of "Pre-Emptive Rights" over compulsorily acquired land. Where the purpose justifying the compulsory acquisition fails or ceases, then the original owners or their successors in title have the pre-emptive rights to re-acquire the land upon payment of the full amount received as compensation. In view of our analysis however, a pre-emptive right is not the same as "a reversionary interest." The former arises, consequent upon the failure or cessation of the purpose justifying the compulsory acquisition; while the latter reposes in the holder of a superior title and becomes exercisable upon the expiry of an estate.

60.By the same token, it cannot be said that the land over which the pre-emptive right of re-acquisition arises upon failure or cessation of the public purpose, is the same as un-utilized land or portion of land that remains once the public purpose becomes spent. In the former case, there is a total failure of the

public purpose, meaning that the acquired land cannot be used as earlier envisaged. The wording of section 110(2) of the Land Act is permissive ("the Commission may offer") in the sense that the acquiring authority, is not necessarily barred from applying the land to another public purpose. However, should it decide to abandon the land to private purchase, then the original owners have the pre-emptive rights to re-acquire the land upon restitution of the full sum that was paid in compensation. The land to be re-acquired in this case is the "whole" as opposed to "a portion thereof". This explains why the sum of money to be restituted by the original owners is "the full amount paid in compensation." In the latter case, the public purpose has been realized, but the acquired land has not been utilized in full, leaving a portion thereof. In this instance, neither the original owners, nor their successors in title have pre-emptive rights to re-acquire the un-utilized portions."

23. In conclusion, the Court issued the following guiding principles:

"1. Where the Government, pursuant to the relevant constitutional and legal provisions, compulsorily acquires land, such land, shall only be used for the purpose for which it was compulsorily acquired.
2. The allocation of compulsorily acquired land, to private individuals or entities, for their private benefit, in total disregard of the public purpose or interest for which it was compulsorily acquired, shall be incapable of conferring title to that land in favour of the allottees.
3. A person whose land has been compulsorily acquired in accordance with the relevant constitutional and legal provisions does not retain any reversionary interest in the said land.
4. Un-utilized portions of compulsorily acquired land may be used for a different public purpose, or in furtherance of a different public interest, including the allocation of such portions to private individuals or entities, at the market price, in furtherance of such public interest."

b) *Right to housing and eviction of squatters from public land*

Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others; Initiative for Strategic Litigation in Africa (Amicus Curiae) [2021] KESC 34 (KLR)

24. The appellant was a registered society comprised of residents of Mitumba Village. Mitumba Village and the Mitumba Village Primary School were situated near Wilson Airport. A notice published in the newspapers on 15th September 2011 by the Attorney General gave the residents of Mitumba Village seven days within which to vacate the premises. Despite the appellant obtaining conservatory orders from the High Court to restrain the demolition of Mitumba Village, the premises were demolished on 19th November 2011. The respondent on the other hand explained that Mitumba Village was situated on property belonging to the Kenya Airports Authority and that the 1st respondent was under a statutory duty to ensure air safety by removing any informal settlement which was on a flight path and that given the war in Somalia, the village posed a threat.

25. The appellant sought various declaratory reliefs at the High Court including those that asserted their ownership of the premises and also stated that the forceful eviction and demolition without a relocation option was illegal, oppressive, and violative of the appellant's rights.

26. The High Court determined that the right to property included the protection of goods and personal property and it extended to goods and building materials that had been destroyed during the demolition. The High Court also found that the eviction and demolition of the premises pursuant to a seven-day notice and the failure to provide alternative accommodation was a violation of the appellant's rights to housing and other socio-economic rights recognized under the Constitution of Kenya, 2010 (Constitution). Further, the High Court found that evictions could be necessary but the due process had to be followed.

27. The Court of Appeal overturned the decision of the High Court and held *inter alia,* that: the concept of partial judgment or interim judgment was unknown to Kenyan law; a court had to finally determine all the issues before it and it would then become *functus officio*; allowing parties to file affidavits and reports after the judgment introduced secondary litigation of issues that were not raised in the original pleadings; there was no legislation in Kenya meant to regulate forcible eviction and resettlement of persons occupying public or private land and before the enactment of such legislation courts had to interpret and apply the law as it was; the court should not act in vain or issue orders it could not implement and policy formulation was not within the mandate of the

courts; and the enforcement and implementation of socio-economic rights could not confer propriety rights in the land of another and the realization of socio-economic rights did not override the provisions of the Limitation of Actions Act.

28. While partially allowing the appeal, the Court addressed the place of structural interdicts (if any) as forms of relief in human rights litigation under the Constitution; and the effect of Article 2 (5) and (6) of the Constitution regarding the applicability of international law in general and international human rights. In particular, the relevance and applicability of Guidelines by UN bodies in the interpretation and application of Socio-Economic Rights by Kenyan Courts under the Constitution. Lastly, the circumstances under which a Right to Housing may accrue (if at all) in accordance with the provisions of Article 43 (1) (b) of the Constitution.

29. In addressing the place of structural interdicts (if any) as forms of relief in human rights litigation under the Constitution, the Court held as follows:

> "121.We are however, in agreement with the submissions of the appellant and amicus curiae, to the effect that article 23(3) of the Constitution empowers the High Court to fashion appropriate reliefs, even of an interim nature, in specific cases, so as to redress the violation of a fundamental right. As this court has already made an authoritative pronouncement on this matter, we shall say no more. While we acknowledge the fact that the functus-officio doctrine retains its validity, even vitality, in the majority of cases, both criminal and civil, it is our view that in certain situations, this doctrine ought to give way, albeit on a case by case basis. To subject article 23 of the Constitution to the limitations of order 21 of the Civil Procedure Rules, would stifle the development of court-sanctioned enforcement of human rights as envisaged in the Bill of Rights. Where a court of law issues an order, whose objective is to enforce a right, or to redress the violation of such a right, it cannot be said to have abdicated its judicial function as long as the said orders are carefully and judicially crafted.
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> 122.Having stated thus, we hasten to add that, interim reliefs, structural interdicts, supervisory orders or any other orders that may be issued by the courts, have to be specific, appropriate, clear, effective, and directed at the parties to the suit or any other State Agency vested with a constitutional or statutory mandate to enforce the order. Most importantly, the court in issuing such orders, must be realistic, and avoid the temptation of judicial overreach, especially in matters policy. The orders should not be couched in general terms, nor should they be addressed to third parties who have no constitutional or statutory mandate to enforce them. Where necessary, a court of law may indicate that the orders it is issuing, are interim in nature, and that the final judgment shall await the crystallization of certain actions."

30. On the applicability of international law in general and international human rights under Articles 2(5) and 2(6) of the Constitution, the Court held that:

> "133.Having dealt with this issue, we must conclude by stating that article 2(5) and (6) of the Constitution has nothing or little of significance to do with the monist-dualist categorization. Most importantly, the expression "shall form part of the law of Kenya" as used in the article does not transform Kenya from a dualist to a monist state as understood in international discourse. As already demonstrated, the phrase was in fact first embraced by the pioneer dualist states, i.e. the United Kingdom and the United States. At any rate, given the developments in contemporary treaty making, the argument about whether a state is monist or dualist, is increasingly becoming sterile, given the fact that, a large number of modern-day treaties, conventions, and protocols are Non-Self Executing, which means that, they cannot be directly applicable in the legal systems of states parities, without further legislative and administrative action."

31. On the Role of UN Guidelines in the Interpretation and Clarification of the Bill of Rights, the Court held the view that:

> "142. The UN Guidelines, General Comment No 7 do not in our view qualify as general rules of international law, which have a binding effect on members of the international community. However, the Guidelines are intended to breathe life into the Right to Dignity and the Right to Housing under the ICCPRand the ICESCR respectively. They therefore constitute soft law in the language of international jurisprudence. In the instant case, while the trial Judge cannot be faulted for having referred to the Guidelines per se, being soft law, as opposed to general rules of international law, the learned Judge ought not to have elevated them to the status of article 2(5) of the Constitution. However, given the fact that the learned Judge, was interpreting and giving life to the Bill of Rights, specifically the Rights to Dignity, Property, and Housing under the Constitution, she could have been in order to refer to the Guidelines as an aid in fashioning appropriate reliefs during the eviction of the appellants. Rather than offending

the Constitution, the Guidelines actually do fill the existing lacuna as to how the Government ought to carry out evictions."

32. On the right to Housing under Article 43(1) of the Constitution, the Court made the following determination:

"149.From the foregoing, the question as to when the right to housing accrues, in our view, is not dependent upon its progressive realization. The right accrues to every individual or family, by virtue of being a citizen of this Country. It is an entitlement guaranteed by the Constitution under the Bill of rights. The persistent problem is that its realization depends on the availability of land and other material resources. Given the fact that our society is incredulously unequal, with the majority of the population condemned to grinding poverty, the right to accessible and adequate housing remains but a pipe-dream for many. What with each successive government erecting the defence of "lack of resources? The situation is compounded by the fact that, for reasons incomprehensible, the right to housing in Kenya is predicated upon one's ability to "own" land. In other words, unless one has "title" to land under our land laws, he/she will find it almost impossible to mount a claim of a right to housing, even when faced with the grim possibility of eviction.

.....

152.The right to housing over public land crystallizes by virtue of a long period of occupation by people who have established homes and raised families on the land. This right derives from the principle of equitable access to land under article 60 (1)(a) of the Constitution. Faced with an eviction on grounds of public interest, such potential evictees have a right to petition the court for protection. The protection, need not necessarily be in the form of an order restraining the State agency from evicting the occupants, given the fact that, the eviction may be entirely justifiable in the public interest. But, under article 23(3) of the Constitution, the court may craft orders aimed at protecting that right, such as compensation, the requirement of adequate notice before eviction, the observance of humane conditions during eviction (UN Guidelines), the provision of alternative land for settlement, etc."

c) *Eviction of squatters on private land*

Musembi & 13 others v Moi Educational Centre Co. Ltd & 3 others [2021] KESC 50 (KLR)

33. The crux of the dispute revolved around the alleged forceful and illegal eviction of persons, who were inhabitants of informal settlements which were on private land. The Court was called upon to interrogate and contrast the obligations of the State and that of private citizens to observe, respect, protect, promote or fulfill constitutional rights. In particular, the right to dignity under Article 28 of the Constitution, the right to adequate housing in Article 43 of the Constitution, the rights of children pursuant to Article 53 of the Constitution and of older persons under Article 57 of the Constitution.

34. The Court held that an evicting party must carry out evictions in a manner that respects the dignity, right to life and security of those affected including protecting the rights of women, the elderly, children and persons with disabilities as well as according such persons, the first priority to salvage their property.

35. The Court also clarified that the progressive realization of Article 43 rights (economic and social rights including accessible and adequate housing) lies with the State, and does not extend horizontally to private entities. However, the Court held that private entities have the obligation, under Article 20(1) of the Constitution, not to violate Article 43 rights since the Bill of Rights applies and binds both the State and all persons (horizontal and vertical application).

36. With regard to realization of the rights under Article 43 of the Constitution, the Court held thus:

"74. Before we render our final determination in the instant matter, we must revisit the pronouncement made by Mutunga, CJ (as he then was) in Re the Matter of the Principle of Gender Representation in the National Assembly and the Senate SC Advisory Opinion No. 2 of 2012; [2012] eKLR where he stated that; "It is true the Constitution will present the Courts with inconsistencies, grey areas, contradictions, vagueness, bad grammar and syntax, legal jargon, all hallmarks of a negotiated document that took decades to complete. It reflects contested terrains, vested interested that are sought to be harmonized, and a status quo to be mitigated. These features in our constitution should not surprise anybody, not the bench, or the bar or the academia. *What cannot be denied, however, is we have a working formula, approach and guidelines to unravel these problems as we interpret the Constitution. We owe that interpretative*

framework of its interpretation to the Constitution itself." [Para. 9.2, dissenting opinion, emphasis added]
75.We completely agree and it is indeed a sad state of affairs that ten (10) years into the promulgation of the Constitution in 2010, the State still seeks to rid itself of its mandate and obligations by hiding behind the perceived inconsistencies sometimes presented in the Constitution, and in the present context, the provisions of Article 21(2) of the Constitution, and to abdicate its role in ensuring that Article 43 rights are realized. Article 21(2) does not protect the State from realizing these rights, but rather seeks to ensure that even though these rights are not immediately achieved, there is at least some modicum of effort by the State to realize those rights. There should be continued concerted efforts by the State in the progressive realization of these rights and therefore, the State should take deliberate steps, both immediately and in the future, towards the full realization of the rights."

d) *Allocation of Trust Land*

Pati Limited v Funzi Island Development Limited & 4 others [2021] KESC 29 (KLR)

37. A dispute arose when the Commissioner of Lands, for and on behalf of the County Council of Kwale allocated land to the appellant while the 1st to 3rd respondents contended that it was forest and public land. The 4th and 5th respondents argued that the land was trust land and the legal procedures relating to its allotment under the Trust Land Act had been complied with.

38. The High Court declined to issue the orders sought and dismissed the application with costs. Regarding the issue as to whether the suit land was forest land, falling under the provisions of the Forest Land Act, the court opined that no conclusive evidence had been tendered in support of such claim. The court held that Proclamation No. 44/32 and Legal Notice No. 174 of 1964 referred to by the 1st to 3rd respondents, were not adduced in evidence. The High Court held that the land had been legally transferred and hence dismissed the suit.

39. At the Court of Appeal, the learned judges held that the suit land was forest land. It was neither trust land, nor had it been properly allocated. The appeal at the Court of Appeal was allowed and an order quashing the allocation of the suit land to the appellant was granted. Aggrieved, the appellant appealed to the Supreme Court.

40. The main contention before the Supreme Court was the status of the suit land which the Court held thus:
"58. The status of the suit land is first and foremost a matter of law and as declared in Proclamation No 44 of 1932, and subsequently in Legal Notice No 174 of 1964, the said land is situated between the high and low water-mark on the Coast of Kenya. The inescapable conclusion is that the suit land falls within the frontiers of what constitutes a mangrove forest as per the Proclamation. The same could therefore, not have been available for allocation within the meaning of the retired Constitution or the Trust land Act. This was a mangrove forest which has never ceased to be such, not because (as submitted by the first respondent, and wrongly so in our view) the Ordinance under which the Proclamation creating it is still part of the Law of Kenya, but because its status as a forest was saved by the 20 of 2016 Forest Conservation and Management Act."

41. Supposing the suit land was Trust Land and if so, whether it was legally set apart, the Court reasoned as follows:
"63. Having set out the law regulating the setting aside of trust land, and supposing the suit land in this matter was trust land, was the setting aside in accordance with the law in place at the time? The answer to this question is in the negative, due to the following uncontroverted findings of law and fact. Firstly, the gazette notice No 3831 of 1994 specified the size of the land set apart as comprising approximately 0.7 of a hectare. However, the land ultimately set apart and allocated to the appellant was 3.126 hectares. There is no further notice on record in respect of the change of size of the suit land. By the same token, the Msambweni Land Control Board, gave consent to set apart 0.7 of an hectare of land, yet there is no further consent from that Board, for the change of the acreage to 3.126 hectares. Thirdly, contrary to the requirement under section 7(3) of the Trust Land Act (repealed), Gazette Notice No 3831 of 1994 did not specify a date before which applications for compensation were to be made to the District Commissioner. Fourthly, the suit land was set apart for use as a boat landing base, (a purpose that would have benefitted the local communities ordinarily resident in the area) yet the appellant has constructed a five-star hotel on it. There is no further notice on record for change of purpose of setting aside. This is in contravention of the provisions of section 117 of the former Constitution and section 7(3) of the Trust

Land Act (repealed), which required the notice of an intended alienation to specify the purpose for which the land is required to be set apart.

64.The entire process and notice for setting apart, fell far short of the requirements of the Constitution and the law. In view of these shortcomings and our conclusion regarding the legal status of the suit land, we find no reason to upset the judgment of the Court of Appeal."

42. The Court therefore upheld the judgment of the Court of Appeal.

e) *What amounts to public land?*

Kiluwa Limited & another v Business Liaison Company Limited & 3 others [2021] KESC 37 (KLR)

43. The dispute revolved around three first-row beach adjoining pieces of land (the suit properties). The appellant claimed that initially between the first-row beach plots and the Indian Ocean's high-water mark, there was a strip of land that was reserved for public use (reserve land). The appellant further claimed that the 3rd respondent illegally demarcated from the reserve land and granted title to the 1st respondent as a first allottee for a term of 99 years. In the process of consolidating various parcels of land owned by the 2nd respondent, the boundary of the consolidated plot was extended from its original location which resulted in the encroachment of a portion of the reserve land. The appellants claimed that such actions were unlawful and a violation of their right to property and unrestricted access to the Indian Ocean sandy beach through the reserve land.

44. The main contention before the Court was whether the portion of land that was the subject matter of the dispute was public land, and if so, whether it was available for allocation. In allowing the appeal, the Court made the following determination:

"55. A number of conclusions can be derived from the foregoing provisions as quoted. Firstly, un-alienated government land is public land within the context of article 62 of the Constitution and the Government Lands Act (repealed). This notwithstanding the fact that, the expression "Public Land" only came to the fore with the promulgation of the 2010 Constitution. What article 62 of the Constitution does is to clearly delimit the frontiers of public land by identifying and consolidating all areas of land that were regarded as falling under the province of "public tenure". The retired constitution used the term "government" instead of "public" to define such lands. Therefore, it is incorrect for the respondents to assert that the lands in question were un-alienated government land but not public land. It is even more inaccurate to argue that the said parcels had never been public land. Un-alienated government land remains public until it is privatized through allocation to individuals or other private entities.

56.Secondly, to the extent that this assertion by the appellants remains un-controverted, the additional portion of land (6.0 Ha. thereof), which land is comprised within Plots MN/1/5901 and MN/1/5902 (allocated to the 2nd and 1st respondents respectively) was hived off the coastal foreshore by the 3rd respondent. Such foreshore consists of land lying between the Low-Water Mark and the High-Water Mark plus an additional 60 metres above the High-Water Mark within the meaning of regulation 110(1) of the Survey Regulations of 1994. Such land is reserved for Government/Public use.

57.Although article 62(1)(l) of the Constitution makes no reference to the 60 metres above the High-Water Mark (only limiting itself to the language of "the high and low water mark") sub-article (1)(n) provides for another category of public land as being any other land declared to be public land by an Act of Parliament in force at the effective date; or enacted after the effective date; hence the relevance of regulation 110(1) which was enacted before the effective date pursuant to section 45 of the Survey Act. Furthermore, section 82 of the Government Lands Act (repealed) which predates the Survey Act, and under which the lands herein fell as un-alienated government land, out-rightly forbids the conferment of any right to the foreshore by a conveyance, lease or license.

58.Thirdly, the right of access to the Ocean through the foreshore by members of the public or any other owner of land along the coast (ie, the appellants) whether for economic, recreational or aesthetic reasons, is a public right secured by a public easement. Such right is not acquired through a private treaty. It follows that a person or private entity who has encroached on the foreshore cannot interfere with or limit the enjoyment of a public easement through acts of commission or omission. On the other hand, the Government may interfere with or limit such easement only in promotion or protection of the Public Interest as guaranteed by the Constitution and the law."

f) *Indefeasibility of title*

Dina Management Limited v County Government of Mombasa & 5 others [2023] KESC 30 (KLR)

45. The appellant's grievance was that on various dates in September 2017, the 1st respondent, the County Government of Mombasa, without prior notice forcefully entered the suit property registered to the appellant and demolished the entire perimeter wall facing the beachfront. The 1st respondent claimed that the entry and demolition was an enforcement action to create a thoroughfare to the beach as the suit property was public land and not private. The Court identified five issues for determination. However, for purposes of this discussion, the main issue for contention was whether the appellate court's interpretation of *bona fide* purchaser amounted to unjustifiable and unreasonable limitation of the right to property under Article 40 in violation of Articles 19(3)(c), 20(1), 21(3) and article 23 of the Constitution. The Court held thus:

> "111. Article 40 of the Constitution entitles every person to the right to property, subject to the limitations set out therein. Article 40(6) limits the rights as not extending them to any property that has been found to have been unlawfully acquired. Having found that the 1st registered owner did not acquire title regularly, the ownership of the suit property by the appellant thereafter cannot therefore be protected under article 40 of the Constitution. The root of the title having been challenged, as we already noted above the appellant could not benefit from the doctrine of bona fide purchaser.
>
> 112.We therefore agree with the appellate court that the appellant's title is not protected under article 40 of the Constitution and the land automatically vests to the 1st respondent pursuant to article 62(2) of the Constitution. We hasten to add that, the suit property, by its very nature being a beach property, was always bound to be attractive and lucrative. The appellant ought to have been more cautious in undertaking its due diligence."

46. The Court also detailed the procedure for the allocation of unalienated land as follows:

> "104. The procedure for the allocation of unalienated land is laid out by the Environment and Land Court in Nelson Kazungu Chai & 9 others v Pwani University [2014] eKLR as follows:"...It is trite law that under the repealed Government Lands Act, a Part Development Plan must be drawn and approved by the Commissioner of Lands or the Minister for lands before any un-alienated Government land could be allocated. After a Part Development Plan (PDP) has been drawn, a letter of allotment based on the approved PDP is then issued to the allotees.
>
> 131.It is only after the issuance of the letter of allotment, and the compliance of the terms therein, that a cadastral survey can be conducted for the purpose of issuance of a certificate of lease. This procedural requirement was confirmed by the surveyor, PW3. The process was also reinstated in the case of African Line Transport Co Ltd v Attorney General, Mombasa HCCC No 276 of 2013 where Njagi J held as follows: "Secondly, all the defence witnesses were unanimous that in the normal course of events, planning comes first, then surveying follows. A letter of allotment is invariably accompanied by a PDP with a definite number. These are then taken to the department of survey, who undertake the surveying. Once the surveying is complete, it is then referred to the Director of Surveys for authentication and approval. Thereafter, a land reference number is issued in respect of the plot 132. A part development plan (PDP) can only be prepared in respect to Government land that has not been alienated or surveyed..."

g) *Legal implication of a letter of allotment on property rights*

Torino Enterprises Limited v Attorney General [2023] KESC 79 (KLR)

47. On 21st February 1964, a freehold title in Embakasi, measuring 5639 acres was alienated and granted to Kayole Estates Ltd. Thereafter, this parcel of land was transferred to the defunct Nairobi City Council (NCC) for valuable consideration. A transfer was duly registered on 22nd November 1971. In 1973, the parcel of land was subdivided into eight parcels. One such parcel is LR No. 22524, Grant No. IR 85966 measuring 83.910 Hectares (Suit Property).

48. At the High Court, Torino Enterprises Limited (the appellant), claimed that it acquired the suit property from Renton Company Ltd, a company it claimed had acquired the property from NCC through an allotment letter dated 19th December 1999. It also argued that the Department of Defence (DoD) had encroached, fenced off 90 acres, and unlawfully trespassed on its property. Accordingly, it sought various declarations, orders, and damages for violation of its rights to property. The trial Court held that DoD was in contravention of Article 40 (3) of the Constitution and its occupation, retention, and continued occupation of a portion of the suit property

amounted to an illegal compulsory acquisition.

49. On the first appeal, the Court of Appeal overturned the High Court and dismissed the appeal on the grounds that the suit property was not unalienated government land within the meaning of Section 2 of the Government Lands Act (now repealed), but was private property and as a result the Commissioner of Lands lacked the power to alienate or allocate it. Consequently, the court concluded that neither Renton Company Ltd, nor the appellant had acquired a valid interest in or over the suit property.

50. Among the issues before the Supreme Court was whether the appellant had a valid title to the suit property. The Court also distinguished alienated and unalienated land government land and clarified that once an individual acquires unalienated government land, or other land, subject to following the proper registration channels, the subject land changes from 'public' to 'private.' Further, the Supreme Court held that an allotment letter cannot confer any interest in land, and in determining this issue, the Court held as follows:

> "63. While the allotment letter is dated December 19, 1999, Renton Company limited made the specified payments on April 24, 2001, one hundred and twenty- seven (127) days from the date of the offer. It is not in question that Renton had not complied with the terms and conditions of the allotment letter. Therefore, the letter ought to have been deemed as lapsed at the time it purported to transfer the same to the appellant. The respondent submitted that a letter of allotment does not confer any property rights unless it is perfected, failure to which it is rendered inoperative and of no legal import. We have already declared that *an allotment letter, even if perfected, cannot by and in itself confer transferable title to the Allottee, unless the latter completes the process by registration.* Therefore, the grim reality is that all transactions between Renton Company limited and the appellant were a nullity in law." Emphasis mine

51. The Court also held that an innocent purchaser for value denotes a purchaser who exercised due diligence, which would include, but is not limited to, inspecting the premises which would have led to the inescapable conclusion that the DoD was in occupation of a portion of the premises. It held thus:

> "64.....Therefore, if the appellant was a diligent purchaser, it ought to have at least known of this fact. An innocent purchaser for value would also denote one was aware of what they are purchasing by inspecting the suit premises. This takes us to the question of whether the appellant had visited the suit premises and if so, what was its impression of the military installations on the suit premises? The fact that the suit land was occupied must have sounded a warning of "buyer be aware" to the appellant. We therefore find that it was not an innocent purchaser for value entitled to orders for restoration or compensation."

52. On admissibility of evidence, the Court held that while information held by the State or State organs should be shared freely with the public, the same should follow the recognized channels of such dissemination. Anything contrary to this would naturally mean that such evidence cannot be admitted by the Court under Sections 68(1)(e)(f) 92)(c), 79 and 80 of the Evidence Act.

h) *Rights of squatters on private land*

Fanikiwa Limited & 3 others v Sirikwa Squatters Group & 17 others [2023] KESC 105 (KLR)

53. The dispute concerned ownership of several parcels of land in Uasin Gishu, originally leased to Plateau Wattle Company Ltd and later transferred to East Africa Tanning Extract Company (now Lonrho Agribusiness). In 2000, Lonrho Agribusiness surrendered the leasehold titles to the government, and the land was subsequently re-registered as freehold. Sirikwa Squatters Group (Sirikwa) filed a petition, claiming that the subdivision and transfer of these parcels violated their right to property, as they believed the land should have been allocated to them. The Environment and Land Court (ELC) ruled that the land should have reverted to the government upon surrender and that Sirikwa members had a legitimate expectation to be registered as owners, leading to the cancellation of titles granted to Lonrho Agribusiness and third parties. Mark Too, however, retained 27 hectares. On appeal, the Court of Appeal upheld the cancellation for Fanikiwa Limited and the late Mark Too but preserved the titles held by 78 individuals and charged in favour of 7 financial institutions.

54. The appeal before the Supreme Court was filed on grounds that the superior courts below misapplied the law in that the leasehold title had been surrendered for conversion to a freehold title and that the President had no

power to allocate private land as the suit land had already been converted from public land to private land at the time of the allocation. The appeal also challenged the position of the 1st respondent as squatters.

55. Several issues arose for determination. However, for purposes of our discussion, we shall delve into only two. On the issue whether Sirikwa had a legitimate expectation to acquire and be allocated the suit parcels, the Court made the following determination:

> "97. Further this court in Torino Enterprises Limited v hon Attorney General, SC Petition No 5(E006) of 2022; [2023] KESC 79 (KLR) pronounced itself on what constitutes public and private land. We held at paragraph 55 of that judgment that, once an individual or entity acquires any unalienated government land, or other land for that matter, consequent upon registration of title, in accordance with the provisions of the applicable law, such land transmutes from public to private land. We also noted that such land is as a consequence, removed from the ambit and confines of the GLA to the new legal regime conferring title to an entity other than the government and on such terms as shall be inscribed on the new title. It follows therefore that the subject suit parcels, being land that was at the time private property vested in Lonrho Agribusiness did not fall within the category of 'unalienated government land' envisaged under the GLA and former President Moi had no legal capacity and authority to allocate or confer any legitimate interest in the subject suit parcels to members of Sirikwa or any other entity.
>
> 98.In addition, it is noteworthy that the application by Sirikwa for allocation of the suit parcels was made to the 4th respondent, the Director of Land Adjudication, who did not have the capacity or mandate to allocate government land, if any. Only the 2nd respondent, the Commissioner of Lands, had the mandate to allocate government land and this is the import of our decision in Dina Management Limited at paragraph 104.
>
> 99.In the end, we uphold this limb of the consolidated appeal and find that there was no legitimate expectation for Sirikwa's members to be allocated the suit parcels. We reiterate our stance in Communications Commission of Kenya that in determining whether legitimate expectation has been established, primacy must always be given to the requirement of legality which flows from the constitutional principle and value of the rule of law, as articulated in article 10(2)(a) of the Constitution. Legality dictates that an action can only be undertaken if it is authorized by the law. Therefore, a representation, promise, practice, conduct or an action outside the prescription of the law or undertaken by a person or entity without competent authority is illegal and cannot give rise to legitimate expectation."

56. Secondly, on whether Sirikwa has a right to the suit parcels on account of being squatters on the suit parcels, the Court held thus:

> "104.The evidence on record further shows that no member of Sirikwa ever took actual physical possession of the suit parcels. They have never occupied it. The failure to take possession and occupy the land means that Sirikwa were not squatters on the suit parcels. What is deducible from the evidence is that their claim is based on heritage from their forefathers who became dispossessed of their land by the colonialists and subsequently became workers. This evidence as compelling as it might seem, cannot support the claim by Sirikwa that they were squatters in the absence of occupation of the suit land. Also, the allegations of lineage (where no evidence was adduced) in our view is a complex web. We say so because in the absence of evidence to show who was the child of whom? Who exactly should be compensated by whom? Which proprietor? The record shows there were many proprietors as the suit parcels changed ownership severally. As claimed by Sirikwa, upon the forceful eviction of its members' forefathers from the suit parcels in the 1920s, the said forefathers and their lineage worked on the suit parcels as farm hands. By then the parcels had since been adjudicated and titles issued. This begs the question, whose workers were they? Didn't the farm owner own the land in question? Can workers then turn around and invoke the right to their place of work as squatters and if so, can they do so over 70 years later? So, who should shoulder the responsibility of compensating the claim? Was it a form of reparations to be paid on behalf of the colonialists? All these pertinent questions were not asked and we are therefore of the view that members of Sirikwa were not squatters on the suit parcels and have no legal basis to bring a claim asserting a right to the suit parcels."

56. The Court also determined that fraud had not been proven regarding the late Mark Too's title, and the matter required *viva voce* evidence to clarify the allegations made in affidavits. The Supreme Court also affirmed that the leasehold-to-freehold conversion process was legal and consistent with the law. Consequently, the Court allowed the appeal.

4.3 Challenges in developing Emerging Jurisprudence

57. While the Supreme Court has made significant strides in developing transformative land law jurisprudence, several challenges remain. One of the most prominent tensions is between private property rights and public interest as can be seen above. The Court's jurisprudence often requires a delicate balancing act, as it must protect individual landowners while also ensuring that land is used in a manner that serves the broader interests of society.

58. Moreover, the question of historical land injustices remains complex. Addressing these injustices requires not only legal remedies but also political will and societal consensus. The Supreme Court's role in interpreting laws related to historical land injustices, such as the Community Land Act, is crucial, but its impact will depend on the implementation of its decisions.

3.4 Conclusion

60. The Supreme Court of Kenya has played a pivotal role in developing transformative property law jurisprudence, driven by the principles enshrined in the Constitution. Through its judgments, the Court has redefined land ownership and access, emphasizing social justice, equity, and public interest. While challenges remain, particularly in balancing individual property rights with societal needs and addressing historical injustices, the Court's jurisprudence continues to push Kenya towards a more inclusive and equitable land regime.

61. The emerging land law jurisprudence from the Supreme Court highlights the potential of transformative property law to address long-standing land issues in Kenya, providing a framework for more equitable, just, and sustainable land use in the future.

The Supreme Court's Jurisprudence on Family Law

Hon. Lady Justice *Njoki Ndungu*, FCIArb, *CBS, SCJ*[79]

(*This paper was delivered at Jomo Kenyatta University of Agriculture and Technology, Karen Campus on 12th February 2025 as part of the Supreme Court @ 12 Law Lecture Circuits*)

4.1 Introduction

1. Family law touches on the most private aspects of citizen's lives covering disputes in relation to personal law that regulate marriage, divorce, adoption, paternity, child maintenance, custody, inheritance, succession and related matters. For this reason, Family law in Kenya reflects a complex interplay of cultural traditions, colonial legal legacies, gender inequality and modern constitutional principles. Historically, the legal framework governing family relations was deeply fragmented, with colonial laws imposing a rigid structure that failed to accommodate Kenya's diverse cultural and customary practices. This fragmentation entrenched systemic gender disparities as gender relations treated male dominance as legitimate and created a social power hierarchy that reduced women and children to economic marginalization and social vulnerability[80]. This had the effect of leaving left critical aspects of family life inadequately regulated.

2. Recognizing these gaps, the Taskforce on Laws Relating to Women (1994–1998) was established, marking a pivotal moment in the history of family law reform in Kenya. The Taskforce's mandate was threefold: to examine the laws affecting women, particularly in the realms of marriage, divorce, inheritance, and property ownership; make recommendations to modify, amend or abolish laws which constituted discrimination against women; and recommend a comprehensive Bill which would render unlawful any discrimination on the basis of sex and promote equality of opportunity between all persons.

3. The Task Force findings painted a stark picture of inequality and neglect: customary marriages often went unregistered, leaving women without legal protection; divorce laws under customary practices disproportionately favored men; and spousal rights in property ownership and inheritance were inconsistently recognized. Furthermore, the lack of a unified legal framework for marriage created confusion, as parties had to navigate conflicting statutory, customary, Islamic, Hindu and Christian marriage laws. Furthermore, marriage did not have to be registered to be valid, a wife's approval for a man to take on another wife was not mandatory; the age of consent was not standardized; and many marriages were arranged by parents without consulting the minors involved.

4. Its key recommendations included a review of the Constitution of Kenya to address matters of unequal citizenship and customary practices; the enactment of legislation guaranteeing equality in marriage; the improvement of working conditions for women, and the introduction of legal protections from domestic violence. The work by the Task Force led to several progressive changes in the legislation including the adoption of the Children's Act in 2001, the establishment of the National Commission on Gender and Development in 2003, proposals on equality on women's rights which were incorporated into the Bomas Draft Constitution in 2004, the first draft of the Domestic Violence (Family Protection) Bill, and memorandum on women's inclusion in employment planning (Republic of Kenya 2004).

5. The Taskforce also called for the recognition of women's rights in matrimonial property, enhanced access to justice for marginalized groups, and modernization of family law administration to reflect the realities of contemporary Kenyan society. These recommendations laid the groundwork for significant legislative milestones, including a consolidated Marriage Act to harmonize Kenya's pluralistic legal framework and ensure equal protection for all forms of marriage.

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79 Justice of the Supreme Court of Kenya. I acknowledge the research contributions to this paper by Ann Wanjiku Ngugi and Nancy Njeri Macharia.

80 Athena D. Mutua, 'Gender Equality and Women's Solidarity across Religious, Ethnic, and Class Differences in the Kenyan Constitutional Re- view Process' (2006) 13 *William & Mary Journal of Race, Gender, and Social Justice* 1.

6. A key result of the Taskforce was the enactment of the Marriage Act 2014 and the Matrimonial Property Act 2013. Later in time, the Sexual Offences Act (SOA) of 2006 and the new Employment Act of 2007 also addressed the rights and protection for women in the workplace. Specifically, the SOA contains protections for women from sexual harassment in workplace, while the Employment Act provides for maternity and paternity leave and ensures equal compensation and women's ability to return to work after childbirth.

7. This historical journey reflects Kenya's ongoing efforts to align its family law with constitutional values and international human rights standards. Since the promulgation of the Constitution of Kenya 2010 and enactment of the Marriage Act 2014 and Matrimonial Property Act 2013, the role of the Judiciary in interpreting those laws within the context of Family law is developing a jurisprudential framework that meets the evolving needs of society. Family law is a field in which there is extensive litigation in both the superior and lower courts. By settling these family oriented disputes the Courts have ensured the reinforcement of constitutional guarantees of equality and non-discrimination while balancing these principles with cultural and religious diversity. The Supreme Court has contributed to the development of a progressive jurisprudence on family law as illustrated in judgments discussed in this paper. Each case offers unique insights into the evolving standards and legal principles impacting family law.

3.2 Equal Rights in Marriage and Distribution of Matrimonial Property

The Law

8. The Constitution of Kenya recognizes the union of a man and a woman based on their free consent[81]. Section 3 of the Marriage Act[82] on its part is a derivative of the Constitution and sets out the salient features of a marriage as follows:
   (1) Marriage is the voluntary union of a man and a woman whether in a monogamous or polygamous union and registered in accordance with this Act.
   (2) Parties to a marriage have equal rights and obligations at the time of the marriage, during the marriage and at the dissolution of the marriage.
   (3) All marriages registered under this Act have the same legal status.
   (4) Subject to subsection (2), the parties to an Islamic marriage shall only have the rights granted under Islamic law.

9. The division of property in the event of dissolution of marriage, has generated controversy regarding the extent, proportion and provisions of the law on how the property should be settled between the parties after the dissolution of a marriage. On the one hand, there is a school of thought that believes that division of matrimonial property should take the 50:50 division ratio route, and have based this argument on Article 45(3) of the Constitution, that provides for equal rights, even at dissolution of marriage. The other school of thought, takes the stand that a party should obtain an equivalent of what one contributes, monetarily or otherwise during the subsistence of the marriage.

10. It is important to note that registration of property in the name of one party, in a marriage, is not conclusive proof that the other party, whose name is not registered on the property, has no interest in that property and therefore, evidence of registration is not necessarily evidence of intention to own the property exclusively at the expense of the other party. A court must therefore be satisfied in order to determine what portion of the property a party is entitled to is, whether a party has an interest in the property either through monetary or non-monetary contributions and whether the contribution was direct/indirect. This position can be traced to the decision in *Echaria vs Echaria* [2007] eKLR where the Courts have restated the position that where the disputed property is not registered in the joint names of the parties to the marriage, but is registered in the name of one spouse, the beneficial share of each spouse would ultimately depend on their proven respective financial contributions, either directly or indirectly in the acquisition of the property. Therefore, one must prove contribution towards acquisition of that property.

81 Article 45(2) of the Constitution of Kenya.
82 Cap 150 of the Laws of Kenya.

The Case

11. ***JOO v MBO; Federation of Women Lawyers (Intended Interested Party); Law Society of Kenya & 3 others (Intended Amicus Curiae)*** (Petition (Application) 11 of 2020) [2021] KESC 48 (KLR).

Brief facts of the case

12. The Appellant and Respondent, were married under Abagusii customary law in 1990 and on 30th August 1995, their union was formalized under the repealed Marriage Act. During the subsistence of the marriage, the Appellant and Respondent acquired their matrimonial home and constructed rental units on the property. In 2008, the marriage irrevocably broke down and the marriage was therefore dissolved. Subsequently, the Respondent filed before the High Court, *Civil Case No. 18 of 2010* seeking to have the matrimonial property divided. The High Court, guided by the principles in *Echaria v Echaria [2007] eKLR* awarded the Respondent 30% of the share in the matrimonial home and a 20% share on the rental units. The Respondent aggrieved by the Orders, appealed to the Court of Appeal, which allowed the appeal. The Court of Appeal while taking note of the provisions Article 45(3) of the Constitution, found that the Respondent had acquired beneficial interest in the matrimonial property, having been married to the Appellant for 18 years and therefore ordered that the matrimonial property and the rental units in the property be shared equally between the Appellant and Respondent.

13. In the appeal before the Supreme Court by the Appellant following certification of the matter as one of general public importance, under Article 163(4)(b), the Court listed four issues for determination:
    i) *The applicable law in the division of matrimonial property for causes filed prior to the current matrimonial property regime being the Constitution and the Matrimonial Property Act?*
    ii) *Whether matrimonial causes filed prior to the promulgation of the Constitution be determined under Section 17 of the Married Women Property Act, 1882 and the principles set out in Echaria v Echaria [2017] eKLR or by applying the provisions of Article 45(3) of the Constitution and the Matrimonial Property Act?*
    iii) *Whether Article 45(3) of the Constitution provides for proprietary rights and whether the Article can be a basis for apportionment and division of property on a 50/50 basis without parties fulfilling their obligation of proving what they are entitled to by way of contribution?*

The Judgment of the Court

14. Upon consideration of the Appeal, the Supreme Court dismissed the appeal holding:
    i. There is no retrospective application of the Matrimonial Property Act and that the applicable law to claims filed before the commencement of the Matrimonial Property Act 2014 is the Married Women Property Act, 1882. However, there is nothing that bars the provisions of Article 45(3) of the Constitution from being applied retrospectively.
    ii. The principles in *Echaria v Echaria [2007] eKLR* are good law and remain the basis within which matrimonial property should be distributed for matters filed before the commencement of the Matrimonial Property Act.
    iii. The provisions of Article 45(3) on equality do not entitle any court to vary existing proprietary rights of parties but only act as a means of providing for equality at the time of dissolution of marriage with each party being entitled to their fair share of matrimonial property.
    iv. A party must prove contribution to enable a court to determine the percentage available to it at distribution of matrimonial property and that the test to determine the extent of contribution is one of a case to case basis.
    v. While Article 45(3) of the Constitution deals with equality of the fundamental rights of spouses during dissolution of marriage, such equality does not mean the re-distribution of proprietary rights or an assumption that spouses are automatically entitled to a 50% share by fact of being married.
    vi. What amounts to a fair and equitable legal formula for the reallocation of matrimonial property rights

at dissolution of marriage and whether the same can be achieved by a fixed means of apportionment at a 50:50 ratio should be done in light of the circumstances of each individual case and is best answered by the finding in *Echaria v Echaria [2017] eKLR*.

4.3 Presumption of Marriages and Distribution of property where no marriage exists

The Law

15. The Marriage Act recognizes the following types of marriages:
    a. Christian marriage.
    b. Civil marriage.
    c. Customary marriage (which is potentially polygamous).
    d. Hindu marriage.
    e. Islamic marriage (which is potentially polygamous).[83]

16. However, there are unions not recognized by Statute. There is the situation of persons living together for a long time in apparent matrimony, and while holding themselves as husband and wife which have been presumed, in the past and by courts, to be in fact married. The principle of presumption of marriage was first applied in Kenya in the case of *Hortensia Wanjiku Yawe vs The Public Trustee Nairobi* [1976] eKLR. The principles were set out as follows:
    i. The onus of proving customary law marriage is generally on the party who claims it;
    ii. The standard of proof is the usual one for a civil action, namely, 'on the balance of probabilities;
    iii. Evidence as to the formalities required for a customary law marriage must be proved to that standard; (Mwagiru v Mumbi, [1967] EA 639, 642)
    iv. Long cohabitation as a man and a wife gives rise to a presumption of marriage in favour of the party asserting it;
    v. Only cogent evidence to the contrary can rebut the presumption (Toplin Watson v Tate [1937] 3 All ER 105
    vi. If specific ceremonies and rituals are not fully accomplished this does not invalidate such a marriage. (Sastry Veliader Aronegary v Sembecutty Vaigalie (1880-1) 6 AC 364; Shepherd George v Thye, [1904] 1 Ch 456).

17. The parties are considered married despite the absence of a formal marriage ceremony if certain conditions are met. The rationale for the presumption of marriage is equity and fairness to protect parties who might be unfairly deprived of rights and benefits solely because they did not formalize their union.

18. Distribution of property where no marriage can be proved or shown to exist, will be ascertained by considering the intention of the parties in that regard, as well as the contribution to acquisition of said property creating a beneficial interest in the property. Whether or not in any particular case, property is to be shared by the two parties in the dissolved marriage is a matter of fact, and will depend on the circumstances of the case, including the conduct and intention of the parties in relation to the acquisition of the property.

19. Having laid that foundation, is the doctrine of presumption of marriage still applicable in Kenya? If so, are the parameters for such a union?

The Case

20. ***MNK vs POM; Initiative for Strategic Litigation in Africa (ISLA) (Amicus Curiae)*** SC Petition No. 9 of 2021; [2023] KESC 2 (KLR)

83 Section 6 Cap 150.

Brief Facts

This case originated in the High Court where the Respondent invoked section 17 of the repealed Married Women's Property Act of 1882 and sought for division of matrimonial property. He claimed he had acquired and maintained the property with the Appellant during the purported subsistence of their long cohabitation from the year 1986 to 2011. The High Court held that the relationship between the Appellant and the Respondent and the resulting cohabitation could not be presumed to be a marriage and dismissed the claim for division of the suit property. On Appeal, the Court of Appeal held that there was a presumption of marriage between the two parties and proceeded to apportion the suit property into two halves, a share for each party.

Judgment of the Court

21. Upon consideration of the Appeal, the Supreme Court allowed the appeal, in part, holding:

(i) The Marriage Act, 2014 and the Matrimonial Property Act, Act No. 49 of 2013 were not applicable in this matter, as the cause of action arose before the statutes were enacted into law. However, the now-repealed Married Women's Property Act may apply to all marriages recognized and unrecognized in law. The Court set the parameters within which a presumption of marriage could be made:

1. *The parties must have lived together for a long period of time.*
2. *The parties must have the legal right or capacity to marry.*
3. *The parties must have intended to marry.*
4. *There must be consent by both parties.*
5. *The parties must have held themselves out to the outside world as being a married couple.*
6. *The onus of proving the presumption is on the party who alleges it.*
7. *The evidence to rebut the presumption has to be strong, distinct, satisfactory and conclusive.*
8. *The standard of proof is on a balance of probabilities.*

Therefore, any union that falls short of these parameters, should not and cannot be considered a marriage.

(ii) Presumption of a marriage is the *exception* rather than the rule, and that the circumstances in which a presumption of marriage can be upheld, are limited. The Court has found there exists relationships where couples cohabit with *no* intention whatsoever of contracting a marriage; and that a marriage is a voluntary union and that courts cannot *impose* 'a marriage' on unwilling persons.

(iii) Going by the evidence on record; that is the Appellant's baptism card which bore her father's name as her surname and her identity card which bore KM's name, the Appellant was indeed married to one KM. Therefore, the Appellant could only enter a marriage in 2011 after the death of KM, and not in 1986 as claimed by the Respondent. As such, she did not have the capacity to enter a marriage in 1986.

(iv) Upon finding that the parties in the *MNK Case* were not in a marriage**,** the other issue for determination was what remedies were available to the parties. Notably, it was established that both parties contributed towards the acquisition and development of the suit property.

(v) Although the property was registered solely in the Appellant's name, both parties contributed to its acquisition and development. Those facts gave rise to a constructive trust. This means that the registered owner holds the property in trust for both parties. A claim that the property is the sole property of the registered party would amount to unconscionable conduct, where a party reaps where they have not sown.

(vi) It followed that both parties ought to have a beneficial ownership of the property, which ownership was dependent on the parties' individual direct and indirect contributions. In the *JOO case*, there was evidence that the Respondent maintained and improved the properties. Applying the test to the facts of the case, the Court awarded the Appellant 70% of the suit property and the Respondent 30%.

4.4 A Child's best interests vis-à-vis the enforcement of parental rights and responsibilities

The Law

22. The Constitution of Kenya[84], the Children Act[85] and the United Nations Convention on the Rights of the Child (UNCRC)[86] all recognize that a child is a human being who has not attained the age of 18 years. Various statutes and instruments in Kenya speak to the rights of children: Article 53 of the Constitution and the Children Act Cap 141 of the Laws of Kenya. Notably, Section 8 of the Children Act[87] is a developed version of Article 53(2) of the Constitution. The First Schedule of the Children Act[88] provides for the various elements of the best interest considerations of a child. The best interest of a child derives in the U.N Convention on Right of the Child under Article 3. Putting the child's best interest means considering the child before a decision affecting them is made.

23. There is no standard definition of the best interest of a child, however, it is what courts /any person must undertake when dealing with children issues. Best interest determinations, are generally made by considering several factors related to the child's circumstance and the parents' circumstances.

The Case

MAK v RMAA & 4 others (Petition 2 (E003) of 2022) [2023] KESC 21 (KLR).

Brief Facts

24. The Appellant MAK sought for legal and actual custody of her child FKA and alleged that her constitutional rights and that of her child had been violated. The Appellant contended that the 1st respondent had violated the child's rights to compulsory basic education, basic nutrition, shelter, healthcare, protection from abuse and inhuman treatment, parental care and protection as guaranteed by Article 53 of the Constitution. The 1st Respondent opposed the Appellant's petition and stated that it contained blatant lies, contradictions, fabrications and material non-disclosure aimed at misleading the court. He also averred that the Appellant was cruel and excessively abusive towards the minor resulting in child cruelty allegations being levelled against her in the United Kingdom.

This protracted matter saw numerous court proceedings in 3 different countries, where the Appellant sought to assert her parental rights and the rights of her child. The courts in the UK and Tanzania declined to take cognizance of an order issued by the High Court in Kenya in the year 2015 which adopted a Parental Responsibility Agreement which had been signed by the parties in the year 2008. The UK Court also declined the appellant parental access and custody and allowed the 1st Respondent's application for wardship and made

84 Article 239 of the Constitution of Kenya

85 Section 2 Cap 141

86 Article 1 Kenya ratified the United Nations Convention on the Rights of the Child ("UNCRC") on 2nd September 1990.

87 Best interests of the child
(1) In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies—
(a) the best interests of the child shall be the primary consideration;
(b) the best interests of the child shall include, but shall not be limited to the considerations set out in the First Schedule.
(2) All judicial and administrative institutions, and all persons acting in the name of such institutions, when exercising any powers conferred under this Act or any other written law, shall treat the interests of the child as the first and paramount consideration to the extent that this is consistent with adopting a course of action calculated to—
(a) safeguard and promote the rights and welfare of the child;
(b) conserve and promote the welfare of the child; and
(c) secure for the child such guidance and correction as is necessary for the welfare of the child, and in the public interest.
(3) In any matters affecting a child, the child shall be accorded an opportunity to express their opinion, and that opinion shall be taken into account in appropriate cases, having regard to the child's age and degree of maturity.
(4) The Cabinet Secretary shall issue guidelines to give effect to this section.

88 1.The age, maturity, stage of development, gender, background and any other relevant characteristic of the child.
2.Distinct special needs (if any) arising from chronic ailment or disability.

an order that no important steps in the minor's life, including travel, consent to medical treatment or education, would be taken without permission being granted by the court until he attained the age of eighteen (18) years. Here in Kenya, both the High Court and the Court of Appeal dismissed the Appellants petition finding that the determination by the Family Court in the United Kingdom, to the effect that the Appellant had lost the right to actual custody provided for in the parental responsibility agreement, was proper.

25. The Appellant filed an appeal before the Supreme Court which considered the following legal issues:
    (i) Whether the High Court and Court of Appeal properly applied the decisions issued by the Family Court in the United Kingdom?
    (ii) What is the status of the parental responsibility agreement?
    (iii) Whether parental rights and responsibilities could be extinguished?

Judgment of the Court

26. In allowing the appeal, the Supreme Court has made a finding that the High Court and Court of Appeal improperly relied on the determination of the UK court without consideration of the Constitution and the Children Act, 2001 (now repealed), the Convention on the Rights of a Child and the African Charter on the Rights and Welfare of the Child.

27. The Court has faulted the UK Court's determination which had declared that the child was habitually resident in England and Wales while ignoring that he was first and foremost a Kenyan National with attendant rights of his protection and support, both socially and culturally.

28. The Court also affirmed what parental responsibility is citing that it is a mandatory ongoing obligation and that it attaches to the rights of the child as it is the parent who has the responsibility to ensure that the needs of the child are catered for.

29. The Court stated that the best interest of a child is paramount and that a child needs both parents, as it is their right, especially where a parent's incapacity has not been proven, and that both parents provide the child with significant social, psychological and health benefits.

30. The Court noted that in circumstances which may warrant limited access to a parent, a Court should order supervised access. In allowing the appeal, the court noted that the minor has since turned eighteen (18) years old and was at liberty to choose which parent to live with.

31. Further, the Court established the following guidelines to be considered by courts when balancing a child's best interests and parental rights and responsibility:
    1. *The existence of a PRA between the parties.*
    2. *The past performance of each parent.*
    3. *Each parent's presence including his or her ability to guide the child and provide for the child's overall well-being.*
    4. *The ascertainable wishes of a child who is capable of giving / expressing his/her opinion.*
    5. *The financial status of each parent.*
    6. *The individual needs of each child.*
    7. *The quality of the available home environment.*
    8. *Need to preserve personal relations and direct contact with the child by both parents unless it is not in the best interests of the child in which case supervised access to the child must be granted.*
    9. *Need to ensure that children are not placed in alternative care unnecessarily.*
    10. *The mental health of the parents and*
    11. *The totality of the circumstances.*

4.5 Children in Conflict with the Law

The Law

32. Children in conflict with the law are especially vulnerable due to their age and level of maturity. Several legislative instruments speak to how to handle them: *Children in Conflict with the Law (Practice and Procedure) Rules 2020*), the *Bench Book for Magistrates in Criminal Proceedings, 2004*, *the National Children Policy, 2010* and *the Framework for The National Child Protection System for Kenya, 2011*. Others subsequently developed include the *Sentencing Policy Guidelines, 2016*, *the Criminal Procedure Bench Book, 2018*, *the Guidelines for Child Protection Case Management and Referral in Kenya, 2018*, *the Plea-Bargaining Guidelines 2019*, and the *Prosecutor's Guide to Children in the Criminal Justice System, 2020*, international instruments.

33. The Children Act particularly provides for the rights, measures, safeguards and considerations for children in conflict with the law[89], to further promote the concept of the child's best interests.

The Case

CMM (Suing as the Next of Friend of and on Behalf of CWM) & 6 Others vs Standard Group & 4 Others[90],

Brief facts

34. The Appellants, who were minors and students were presented before the magistrates' court in Murang'a to answer arson-related charges. On the same day, or subsequent to that day, the 1st to 4th respondents, all media houses, published and/or televised images of the students appearing before the court in print, online and visual media. The respondents published various stories in which full identities and descriptions of the seven minors; their names and images were disclosed, and detailed accounts of their alleged participation in the attempted burning of the school were given. Aggrieved by the publication, the Appellants, suing as the next friend of and on behalf of the seven (7) minors filed a petition before the High Court in which they complained that in publishing the details in the manner they did, the respondents ignored the minors' right to privacy and the best interest of the child. Accordingly, they sought various declarations, orders and damages for violation of their fundamental rights and freedoms by the Respondents.

35. The High Court found that although the law provides for the imposition of extra-judicial sanctions to protect minor offenders from unwarranted publicity, this right is not absolute and can be limited under Article 24 of the Constitution. Further, that the publication of the story and corresponding photographs were a matter of public interest, and therefore the question of violating the appellants' rights did not arise; thirdly, that the stories as published were factual and published without malice; and finally, that the Appellants had failed to prove any loss or damage suffered as a result of the alleged breaches thereby failing to discharge the burden of proof.

36. Consequently, the court dismissed the petition with costs to the respondents. On the first appeal, the Court of Appeal agreed with the High Court and dismissed the appeal. There were no orders on costs. The appellants, once again being aggrieved, have filed this second appeal. In the appeal before the Supreme Court, the Court framed the following issues for determination:
    i) Whether the Court of Appeal erred in placing public interest in the of the images and identities of children in a criminal trial over and above the children's best interest; whether upon proof of violation of the minors' fundamental rights and freedoms, the appellants were required to go further and prove damage or injury suffered as would be the case in normal civil litigation; and
    ii) Whether the High Court was right to award costs against children in public interest litigation.

89 Part XV Cap 141.

90 SC Petition No. 13 (E015) of 2022; [2023] KESC 68 (KLR).
In this case, the appellants, who were minors, were arraigned before the Magistrate's Court in Murang'a on arson-related charges. The 1st -4th respondents, media houses, published the images, full identities and descriptions of the appellants in print, online and visual media, including detailed accounts of how they (the appellants) participated in the crimes.

Judgement

37. The Supreme Court allowed the appeal for the following reasons:

1. Both superior courts below erred in raising the status of public interest over the protection and the best interest of the children without properly subjecting the limitation to Article 24 of the Constitution. The 1st to 4th media houses would have achieved the same goal of keeping the public informed by running the story without the children's names, photographs or identities. The combined respondents' actions were in violation of Articles 50(8), Article 31 and Article 53(2) of the Constitution. Consequently, the Appellants proved a violation of the minors' constitutional rights.

2. An injured party is entitled to damages for the loss and injury suffered under private law causes of action, such as tort. In situations like those, compensation for personal loss may be granted upon proof of such loss or damage. However, arising out of the violation of constitutional rights and fundamental freedoms of an individual under public law, the nature of the damages awarded may broadly be compensatory or vindicatory. The test, therefore is not what would alleviate the hurt that the victim alleges but what is an appropriate relief to protect the rights that have been infringed. Once a petitioner has presented proof on a balance of probabilities that his or her rights were violated, the court must vindicate and affirm the significance of the violated rights, even though the Petitioner may not present evidence to demonstrate the loss suffered as a result of the violation.

37. In view of the public interest and nature of this case and the broad interests of the parties, the Court issued guidelines aimed at assisting all agencies in the child justice system to navigate the delicate contours of promoting, safeguarding, and fulfilling children's rights as follows:

i) At all times and in every circumstance, the child's dignity, rights and well- being must be respected. A child in conflict with the law has the right to privacy during arrest, detention and appearance in court.

ii) In reporting cases concerning children in conflict with the law, the child's image and identity, including the name, the parents, school and residence shall not be revealed either directly or indirectly.

iii) It is the duty of the presiding officer to ensure that only those permitted by Section 93(4) of the Children Act, 2022 are allowed in the courtroom where proceedings involving a child are held. Depending on the circumstances, the presiding officer may resort to Section 93(5) of the Children Act and adjourn to an in-camera hearing. The prosecution and defence counsel as officers of the court are equally duty-bound to assist the court to comply with this requirement.

iv) The court, where proceedings concerning a child are being conducted, shall not be used at the same time for adults. Children's Courts should be exclusively for children.

v) Presiding officers can secure the privacy and confidentiality of a child in conflict with the law, a victim of physical or sexual abuse, or a child witness in court by designing an obscured or blurred screen between the child and the rest of those who are permitted to be in open court by Section 93(4) of the Children Act.

vi) Code names, pseudo names, or initials of their names must be used to describe children in all children's cases.

vii) The provisions of Article 50 of the Constitution and Section 235(c) of the Children Act must be adhered to in order to conclude cases involving children expeditiously.

4.6 Conclusion

38. In conclusion, while a few family law cases have reached the Supreme Court, the Court has played a crucial and continuous role in both settling and developing jurisprudence in this area, as outlined in this paper.

39. As our society continues to evolve, so too does the nature of family relationships. The Supreme Court's decisions have reflected this evolution, balancing the respect for tradition with recognition of contemporary shifts, including those in marital and familial arrangements. By interpreting the law with sensitivity to these changes, the Court has continued to uphold the principle that Family Law must adapt to reflect society's dynamic character, safeguarding the rights of all parties involved.

40. While Kenya has made remarkable strides in family law reform, several issues remain unresolved, casting a

shadow on the quest for an equitable legal system. One persistent challenge is the registration of customary marriages, a process plagued by inconsistency, lack of awareness, and logistical hurdles. Once a couple completes customary rituals, they ought within six months to apply to the registrar of marriages for registration of the marriage. Customary unions, though widely practiced, are often excluded from formal legal protections due to the hurdles of registration, leaving parties, particularly women, vulnerable in disputes over property and inheritance. Further, strict adherence to the law would mean that most unions would not be recognized[91]. Some courts elect to recognize customary marriages without registration while others do not. This has left the matter unsettled.

41. Moreover, the continued reliance on the archaic, paper-based Register of Marriages exemplifies the lag in technological integration within family law administration. Unlike the digitized registries for births and deaths, the marriage registration process has yet to embrace modernization, impeding efficiency and accessibility. These deficiencies not only burden citizens but also hinder the courts' ability to effectively adjudicate family law cases.

42. Moving forward requires deliberate investment in technology, public sensitization on customary marriage registration, and continued judicial interpretation to harmonize Kenya's pluralistic legal traditions with constitutional ideals. As the Supreme Court navigates these controversies, its decisions will undoubtedly leave a profound mark on the nation's legal and social landscape, shaping a family law framework that is both just and inclusive.

91 *Ambiyo v Muhinja* (Civil Case 4 of 2023) [2023] KEHC 21865 (KLR); *DMK v IL* (Civil Appeal 45 of 2019) [2021] KEHC 8611 (KLR).

Breathing life into the Constitution: The Supreme Court's Jurisprudence on Socio-Economic Rights and its Transformative Effects

Hon. Justice (Mr.) Isaac Lenaola, FCIArb, CBS, SCJ[92]

(*This paper was delivered at Strathmore University on 3rd December 2024 as part of the Supreme Court @ 12 Law Lecture Circuits*)

6.1 Introduction

1. Poverty, inequality, socio-economic marginalisation and poor human development, are challenges that have bedeviled Kenya for a long time. Inequality is also highly entrenched in Kenya, with poverty and inequality forming a vicious cycle, ensuring that poor and marginalised families and groups are unable to break away from their dire situations.[93]

2. The 2010 Kenyan Constitution was a significant milestone in addressing the long-standing issues of poverty, inequality, socio-economic marginalization, and poor human development. The inclusion of economic and social rights in the Bill of Rights was a key tool designed to address these issues. Article 43 of the Constitution explicitly recognizes these rights, which include the right to healthcare, education, adequate housing, food, water, social security, and other essential services.[94] These provisions are meant to empower the government and its institutions to create a more equitable society by reducing the socio-economic disparities that have historically disadvantaged many Kenyans.

3. The Constitution provides mechanisms for accountability, including judicial recourse for individuals whose rights have been violated. Devolution, another key feature of the Constitution, also aims to distribute resources more equitably across Kenya's counties, giving local communities more control over their development and ensuring that marginalized areas receive a fair share of national resources.

4. The challenge, however, lies in the implementation of these constitutional provisions. While the legal framework is progressive, the practical realization of economic and social rights depends on sustained political will, effective governance, and sufficient resource allocation. Overcoming historical injustices and deeply entrenched inequality requires consistent efforts to translate the promises of the Constitution into real improvements in people's lives.

5. This paper provides an in-depth analysis of the Supreme Court of Kenya's role in advancing socio-economic rights through its jurisprudence. It is structured as follows; Part 1 examines how the Supreme Court has interpreted the state's obligations in the progressive realization of socio-economic rights, focusing on the principles guiding the state in fulfilling these obligations over time. Part 2 discusses the interrelated nature of socio-economic rights, highlighting how rights such as health, housing, and education are interconnected and reinforce each other. Part 3 addresses the relief and remedies available under Article 23 of the Constitution, analyzing the Court's approach to providing effective remedies for rights violations. Part 4 reviews landmark cases in which the Supreme Court has interpreted and applied socio-economic rights provisions, detailing how these decisions have set precedents for future jurisprudence. Part 5 concludes with an assessment of the progress made by the Supreme Court, evaluating its impact on the realization of socio-economic rights and identifying areas for further development.

6.2 Progressive Realisation of Rights

6. The standard of progressive realisation can be divided into four parts:

   i. the obligation to take steps;
   ii. the use of maximum available resources;
   iii. the prohibition of retrogressive measures; and

92 Justice of the Supreme Court of Kenya.

93 The East African Centre for Human Rights, *A Compendium on Economic and Social Rights Cases under the Constitution of Kenya 2010*, (EACHR, 2015) 4.

94 See *John Kabui Mwai & 3 Others v Kenya National Examination Council & 2 Others*, High Court of Kenya at Nairobi, Petition No. 15 of 2011.

iv. the obligation of international cooperation and assistance.[95]

7. This framework ensures that states are continuously working towards full realization of rights, while also acknowledging practical limitations such as financial constraints or development levels.

8. Article 2 of the International Covenant on Economic, Social and Cultural Rights (ICESR) provides that each state party to the covenant to undertake steps, individually and through international assistance and cooperation, especially economic and technical to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the convention by all appropriate means, including particularly the adoption of legislative measures. In General Comment No. 3 of the CESCR, the term progressive realization is defined thus;

> "The concept of progressive realization constitutes recognition of the fact that full realization of economic, social and cultural rights will generally not be able to be achieved in a short period of time. In this sense the obligation differs significantly from that contained in article 2 of the International Covenant on Civil and Political Rights which embodies an immediate obligation to respect and ensure all of the relevant rights. Nevertheless, the fact that realization over time, or in other words progressively, is foreseen under the Covenant should not be misinterpreted as depriving the obligation of all meaningful content. It is on the one hand a necessary flexibility device, reflecting the realities of the real world and the difficulties involved for any country in ensuring full realization of economic, social and cultural rights. On the other hand, the phrase must be read in the light of the overall objective, indeed the raison d'être, of the Covenant which is to establish clear obligations for States parties in respect of the full realization of the rights in question. It thus imposes an obligation to move as expeditiously and effectively as possible towards that goal. Moreover, any deliberately retrogressive measures in that regard would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources...."

9. Socio-economic rights have long been regarded as secondary rights. Civil and political rights are thought to be absolute and immediate whereas economic, social and cultural rights are held to be programmatic to be realized gradually and therefore not to be real rights. The new Constitutional dispensation put the economic, social and cultural rights at par with other rights.[96]

10. It must be understood that human rights are interrelated and indivisible. The interconnected nature of human rights, emphasizes that economic and social rights should not be viewed as secondary or less enforceable than civil and political rights. This is a fundamental point in human rights theory: the idea that all rights—whether they pertain to civil, political, economic, social, or cultural aspects—are interdependent and indivisible. To prioritize one over the other undermines the holistic conception of human dignity.

11. Similarly, the view that socio-economic rights are non-justiciable due to their resource-intensive nature ignores the fact that rights can be progressively realized. In this sense, states are expected to take concrete steps within their means, and not all of these steps require vast resources. For instance, many socio-economic rights, such as the right to education or health, can begin with policy reforms or legal frameworks that don't necessarily entail huge immediate expenditures but gradually build towards full implementation. The right to life, for example, imposes an obligation on the state to provide security to its citizens. But this does not mean that murders are not committed. It is impracticable to provide every citizen with a police officer at his or her guard.[97]

12. In Kenya socio-economic rights have a firm foundation under Article 43 of the Constitution. It provides *inter alia*, that:

> "Economic and social rights.
> 43. (1) Every person has the right—
> (a) to the highest attainable standard of health, which includes the right to health care services, including reproductive health care;

95 The East African Centre for Human Rights, *A Compendium on Economic and Social Rights Cases under the Constitution of Kenya 2010*, (As above) 4.

96 See Christopher Mbariza 'A Path to Realising Economic, Social and Cultural Rights in Africa? A Critique of the New Partnership for Africa's Development' (2004) 4 *Africa Human Rights Journal* 36. See also, Asbjɯrn Eide 'Economic, Social and Cultural Rights as Human Rights' in Asbjɯrn Eide, et al, (eds) *Economic Social and Cultural Rights: A Text Book* (Brill, 2001) 9 -10.

97 See Morris Kiwinda & John Ambani, *The New Constitutional Law of Kenya: Principles, Government and Human Rights* (Law Africa, 2012) 208. See also Isaac Lenaola & Ochieng Oginga, *Constitutional Law, Doctrines and the Litigation of Fundamental Rights and Freedoms* (Law Africa, 2023) 415.

(b) to accessible and adequate housing, and to reasonable standards of sanitation;
(c) to be free from hunger, and to have adequate food of acceptable quality;
(d) to clean and safe water in adequate quantities;
(e) to social security; and
(f) to education.
(2) A person shall not be denied emergency medical treatment.
(3) The State shall provide appropriate social security to persons who are unable to support themselves and their dependants."

13. Article 20 (5) provides that:

"(5) In applying any right under Article 43, if the State claims that it does not have the resources to implement the right, a court, tribunal or other authority shall be guided by the following principles—
(a) it is the responsibility of the State to show that the resources are not available;
(b) in allocating resources, the State shall give priority to ensuring the widest possible enjoyment of the right or fundamental freedom having regard to prevailing circumstances, including the vulnerability of particular groups or individuals; and
(c) the court, tribunal or other authority may not interfere with a decision by a State organ concerning the allocation of available resources, solely on the basis that it would have reached a different conclusion."

14. Article 19(1) of the Constitution of Kenya 2010 expressly states that the Bill of Rights is an integral part of Kenya's democratic state and is the framework for social, economic and cultural policies. Article 19 (3)(b) provides that the rights and fundamental freedoms do not exclude other rights and fundamental freedoms not in the Bill of Rights, but recognised or conferred by law, except to the extent that they are inconsistent with this chapter.

15. By specifically directing the court to adopt an interpretation that favours the enforcement of socio-economic rights the Constitution expressly directs the court to always seek to hold that socio-economic rights given in any given circumstances are justiciable except in very extreme situations.[98]

16. The Supreme Court has addressed its mind to the principle of progressive realization of rights. In *Re the Matter of the Principle of Gender Representation in the National Assembly and the Senate* SC Advisory Opinion No.2 of 2012; [2012] eKLR, it made a distinction between progressive and immediately realizable rights, the Court emphasized the context in which the rights are pronounced within the Constitution and stated thus, inter alia;

"We believe that the expression "progressive realization" is neither a stand-alone nor a technical phrase. It simply refers to the gradual or phased-out attainment of a goal – a human rights goal which by its very nature, cannot be achieved on its own, unless first, a certain set of supportive measures are taken by the State. The exact shape of such measures will vary, depending on the nature of the right in question, as well as the prevailing social, economic, cultural and political environment. Such supportive measures may involve legislative, policy or programme initiatives including affirmative action...." [par. 53]
"This leads us to the inference that whether a right is to be realized "progressively" or "immediately" is not a self-evident question: it depends on factors such as the language used in the normative safeguard, or in the expression of principle; ...it depends on the nature of the right in question ..." [Para. 59]

17. In *Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others; Initiative for Strategic Litigation in Africa (Amicus Curiae)* [2021] eKLR the Court held that the under Article 20, the Constitution empowers the Courts and tribunals to apply the provisions of the Bill of Rights effectively by developing the law and adopting the interpretation that most favours the enforcement of the right. It further held that the right to housing accrues to every individual by virtue of being a citizen of the county;

"149.From the foregoing, the question as to when *the right to housing accrues, in our view, is not dependent upon its progressive realization. The right accrues to every individual or family, by virtue of being a citizen of this Country. It is an entitlement guaranteed by the Constitution under the Bill of rights. The persistent problem is that its realization depends on the availability of land and other material resources.* Given the fact that our society is incredulously unequal, with the majority of the population condemned to grinding poverty, the right to accessible and adequate housing remains but a pipe-dream for many. What with

98 Jotham O. Arwa, 'Litigating Socio-economic Rights in Domestic Courts: The Kenyan Experience' (2013) 17 *Law Democracy & Development* 425.

each successive government erecting the defence of "lack of resources? The situation is compounded by the fact that, for reasons incomprehensible, the right to housing in Kenya is predicated upon one's ability to "own" land. In other words, unless one has "title" to land under our land laws, he/she will find it almost impossible to mount a claim of a right to housing, even when faced with the grim possibility of eviction.

The right to housing in its base form (shelter) need not be predicated upon "title to land". Indeed, it is the inability of many citizens to acquire private title to land, that condemns them to the indignity of "informal settlement". *Where the Government fails to provide accessible and adequate housing to all the people, the very least it must do, is to protect the rights and dignity of those in the informal settlements. The courts are there to ensure that such protection is realized, otherwise these citizens, must forever, wander the corners of their country, in the grim reality of "the wretched of the earth". [Emphasis Added]*

17. In *William Musembi 13 others v Moi Educational Centre Co. Ltd & 3 others* [2021] eKLR the Court held that that private entities have the obligation under Article 20 (1) not to violate Article 43 rights as non-violation of all rights in the Bill of Rights applies both horizontally and vertically and binds both the State and all persons.

18. The above interpretation of the Supreme Court on progressive realisation of human rights clearly depicts how the Court has championed the immediate realisation of socio-economic rights while at the same time appreciating that there are some rights that cannot be readily realized.

19. The Court's recognition of this distinction allows for a flexible, yet accountable framework. It ensures that the legislature and executive cannot hide behind resource limitations to neglect socio-economic rights while also acknowledging the reality that not all rights can be fully implemented at once. This approach maintains the indivisibility of human rights by ensuring that socio-economic rights are not relegated to a secondary status but are treated with the same urgency and importance as civil and political rights. In this way, the Court champions a balanced interpretation—demanding immediate action where feasible and requiring ongoing efforts for the progressive realization of more resource-intensive rights.

6.3 Interrelated Nature of Socio-Economic Rights

20. To give effect to the concept of interdependence and interrelatedness of rights, the Kenyan Courts have adopted the rule of constitutional harmony, completeness, exhaustiveness and paramountcy which requires that the Constitution be interpreted as an integrated whole with no any particular provision destroying the other, but each provision sustaining the other provisions in the Constitution.[99]

21. Article 259 (1) provides that the Constitution shall be interpreted in a manner that—

"(a) promotes its purposes, values and principles;
(b) advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights;
(c) permits the development of the law; and
(d) contributes to good governance."

22. *In the Matter of the Kenya National Human Rights Commission*[100] the Court made the following determination of a holistic interpretation of the Constitution;

> "But what is meant by a holistic interpretation of the Constitution? It must mean interpreting the Constitution in context. It is the contextual analysis of a constitutional provision, reading it alongside and against other provisions, so as to maintain a rational explication of what the Constitution must be taken to mean in light of its history, of the issues in dispute, and of the prevailing circumstances. Such scheme of interpretation does not mean an unbridled extrapolation of discrete constitutional provisions into each other, so as to arrive at a desired result....."

23. In *Mwau & 2 others v Independent Electoral & Boundaries Commission & 2 others; Aukot & another*[101] the Court

99 The East African Centre for Human Rights *A compendium on Economic and social rights cases under the Constitution of Kenya 2010* (As above).

100 *In the Matter of the Kenya National Human Rights Commission*, Advisory Opinion Reference No. 1 of 2012 [2014] eKLR.

101 *Mwau & 2 others v Independent Electoral & Boundaries Commission & 2 others; Aukot & another* (Interested Parties) (Election Petition 2 & 4 of 2017) [2017] KESC 54 (KLR) (11 December 2017) (Judgment)

equally expressed itself as follows;

> "It is not apparent, either from the case by the Petitioners by way of rebuttal of the presumption of constitutionality or following the application of the law, that the same violates the Constitution and more specifically, fundamental rights and freedoms. As such the constitutional qualification against this presumption, in the strict terms of Article 24 (2)(4) of the Constitution, does not arise. I must however add that the finality of the Supreme Court as a judicial agency, and its role as the custodian of the Constitution militates, save for rare instances dictated by the circumstances of each case, against the blanket presumption of constitutionality without delving into a holistic interpretation of the constitutional vis-a-vis, the impugned law or conduct. The Judiciary in general and the Supreme Court in particular retains control over interpretation of the Constitution...."

(See also; the *Judges and Magistrate's Vetting Board* decision, The Chief Justice (Emeritus) Willy Mutunga in his concurring opinion in *Peter Gatirau Munya case).*

24. Taking the above rule of harmony into consideration, the courts have had to balance competing rights taking into account the specific context of each particular case. This balance has especially been exercised in harmonising the right to property vis-à-vis the right to housing in the context of forced evictions was first affirmed by the High Court in the *Satrose Ayuma* case. [102]

> "..It is instructive that article 43 of our Constitution uses the words "accessible and adequate housing" similar to section 26(1) of the South African Constitution which uses the words "access to adequate housing" and so I adopt the above words in that context and as if they were my own. In addition to General Comment 4, the CESCR has also adopted General Comment 7 and noted that forced evictions frequently violate other human rights such as the right to life, the right to security of the person, the right to non-interference with privacy, family and home and the right to the peaceful enjoyment of possessions. Clearly, the CESCR authoritative comments have made the right to adequate housing and housing security fundamental preconditions to exercising and enjoying other civil, political, social, economic and cultural rights. Without housing, security and other fundamental rights cannot be enjoyed. Sadly, the current economic and fiscal policies of the Government of Kenya are not designed to secure this right for the overwhelming majority of the population. How else would one explain the notorious and widespread practices of forced evictions without consultation, compensation or adequate resettlement particularly in Nairobi? I digressed."

25. The same approach was consequently adopted by the Supreme Court in the *Mitubell* and *William Musembi* cases. The right to education and right to human dignity was the focus in the *Martin Wanderi* & *Moi University v Zaippeline* cases as we shall see below.

5.4 Reliefs and Remedies under Article 23

26. In proceedings brought by any person claiming that a right or fundamental freedom has been denied, violated or infringed, or is threatened, the court may, under article 23 grant appropriate relief, including:

> "(a) a declaration of rights
> b. an injunction
> c. a conservatory order
> d. a declaration of invalidity of any law that denies, violates, infringes, or threatens aright or fundamental freedom in the Bill of Rights and is not justified under article 24.
> e. an order for compensation
> f. an order of judicial review."

27. The Supreme court in the case of *Gitobu Imanyara & 2 others v Attorney General*[103], described article 23 as "the

102 *Ayuma & 11 others (Suing on their own Behalf and on Behalf of Muthurwa Residents) v Registered Trustees of the Kenya Railways Staff Retirement Benefits Scheme & 2 others; Kothari* (Interested Party) (Petition 65 of 2010) [2013] KEHC 6003 (KLR) (Constitutional and Human Rights) (30 August 2013) (Judgment)

103 *Imanyara & 2 others v Attorney General* (Petition 15 of 2017) [2022] KESC 78 (KLR) (Constitutional and Human Rights) (17 February 2022) (Judgment)

launching pad of any analysis on remedies for Constitutional violations". As a launching pad, it is acknowledged that the list of six remedies in article 23(3) is not closed; that the court can grant any other appropriate relief not included in the list; that whether or not to grant a constitutional relief is an act of judicial discretion which must be exercised upon known legal principles and not arbitrarily, whimsically or capriciously.[104]

28. In *Communication Commission of Kenya & 5 others v Royal Media Services Limited & 5 Others*[105] the Supreme Court of Kenya while discussing the provisions of Article 23 of the Constitution noted:

> ".....a close examination of these provisions (Article 23 (3) and 165 (3) (d) of the Constitution requires the court to go even further than the US Supreme Court did in the Marbury and that article 23 (3) grants the High Court powers to grant appropriate relief "including" meaning that this is not an exhaustive list."

29. In *William Musembi* the Supreme Court addressed what should be considered in evaluating the appropriate award for compensation in constitutional violation when it held;

> " ....that the questions and issues that a court has to consider in order to make an award of damages with regards to constitutional violation is manifestly different to what the court would consider in say, tortious or civil liability claim. In the latter, the issues are clear cut and quantification of the appropriate award is in most instances, straight forward. The same, however, is not true of constitutional violation matters, such as the instant one. Quantification of damages in such matters does not present an explicit consideration of the issues; other issues such as public policy considerations also come into play. A court obligated and mandated in evaluating the appropriate awards for compensation in constitutional violations does not have an easy task; there is no adequate damage standard that has been developed in our jurisprudence that recognizes that an award for damages in constitutional violations is quite separate and distinct from other injuries."

30. In *Wamwere & 5 others v Attorney General,* SC Petition 26, 34 & 35 of 2019 (Consolidated); [2023] KESC 3 (KLR) the Supreme Court noted that:

> ".....Crafting of remedies in human rights adjudication goes beyond the realm of compensating for loss as it is principally about vindicating rights. Though the appellants did not lead any evidence of the loss they may have suffered due to the violation of their right and freedom from inhuman treatment, it is important for the court to vindicate and affirm the importance of the violated rights." [Par. 91]

31. In *CMM (Suing as the Next of Friend of and on Behalf of CWM) & 6 others v Standard Group & 4 others*[106] the court equally held that;

> ".....arising out of the violation of constitutional rights and fundamental freedoms of an individual under public law, the nature of the damages awardable are broadly compensatory or vindicatory, as should be apparent from the list of examples of reliefs in article 23.While it is not necessary to prove loss or damage in cases of constitutional rights violations, the court may consider the extent, nature, gravity and immensity of harm suffered by the aggrieved party when determining the appropriate remedy. In deserving cases, the redress may be in the form of an award of damages to compensate the victim. In some cases, a suitable declaration, an injunctive or conservatory order, or an order of judicial review will suffice to vindicate the right.
> 95. In assessing the appropriate sum to be awarded as compensation, the court must feel satisfied that the sum will afford the victim adequate redress to vindicate the victim's constitutional right. Assessment of the right quantum for compensation will take into account all the relevant facts and circumstances of the violation and the victim in the particular case, bearing in mind any aggravating features. We stress that the purpose of constitutional relief of an award of compensation is not necessarily intended to punish the violator, but only to vindicate the right of the victim....."

104 See also *CMM (Suing as the Next of Friend of and on Behalf of CWM) & 6 others v Standard Group & 4 others* (Petition 13 (E015) of 2022) [2023] KESC 68 (KLR) (8 September 2023) (Judgment)

105 *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* (Petition 14, 14A, 14B & 14C of 2014 (Consolidated)) [2014] KESC 53 (KLR) (29 September 2014) (Judgment)

106 Ibid.

5.5 Structural interdicts

32. One of the remedies which is now recognized in jurisdictions with similar constitutional provisions as Article 23 of the Kenyan Constitution is structural interdicts. In essence, structural interdicts (also known as supervised interdicts) require the violator to rectify the breach of fundamental rights under court supervision.

33. Five elements common to structural interdicts have been isolated in this respect:

> "i) First, the court issues a declaration identifying how the respondent has infringed an individual or group's constitutional rights or otherwise failed to comply with its constitutional obligations.
> ii) Second the court mandates the respondent's compliance with constitutional responsibilities.
> iii) Third, the respondent is ordered to prepare and submit a comprehensive report, usually under oath, to the court on a pre-set date. This report, which should explicate the respondent's action plan for remedying the challenged violations, give the responsible agency the opportunity to choose the means of compliance with the constitutional rights in question, rather than the court itself developing or dictating a solution. The submitted plan is typically expected to be tied to a period within which it is to be implemented or a series of deadlines by which identified milestones have to be reached.
> iv) Fourth, once the required report is presented, the court evaluates whether the proposed plan in fact remedies the constitutional infringement and whether it brings the government into compliance with its constitutional obligations. The government' failure to adhere to its plan (or any other associated requirements) essentially amount[s] to contempt of court.[107]

34. Structural interdicts provide more fundamentally fair outcome than other remedies in economic and social rights litigation. By requiring responsible government officials to formulate a plan designed to operationalize the right in general, rather than just to remedy an individual violation thereof, structural interdicts can provide relief to all members of a similarly situated class, whether or not any given individual has the resources to litigate his or her own case. As such, structural interdicts do not privilege those who can afford to litigate over those who cannot, and can prevent "queue jumping" in access to economic and social rights.[108]

5.6 Notable decisions by the Supreme Court on Socio-Economic Rights

a. Evictions and Right to Housing

Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others; Initiative for Strategic Litigation in Africa (Amicus Curiae) [2021] eKLR

36. The issue of appropriate remedy was central in the case because the Court of Appeal had relied heavily on the doctrine of *functus officio* to rule a court became *functus officio* once it had handed down its judgment and thus supervisory orders were not available as a remedy. The Supreme Court found that structural interdicts were part of the remedies that a court could fashion to remedy a violation of fundamental rights and freedoms. The court highlighted the nature of interim reliefs, structural interdicts, supervisory orders or any other orders that could be issued by the courts.

37. Second, the Supreme Court discussed the effects of the international law provisions within the Constitution. Article 2 of the Constitution recognizes international law and treaty law as forming part of the law of Kenya. The court held that the meaning to be attributed to the phrase "shall form part of the law of Kenya" in articles 2(5) and 2(6) of the Constitution was that in determining a dispute, a domestic court of law had to take cognizance of rules of international law to the extent that the same were relevant and not in conflict with the Constitution, statutes or a final pronouncement.

38. The court also found that the right to housing over public land crystallized by virtue of a long period of occupation by people who had established homes and raised families on the land. The Supreme Court ordered the respondents to compensate the more than 3,000 families forcefully evicted from the land near the Wilson airport in September 2011. They remitted the case to the trial court to determine appropriate remedies in line with the Supreme Court judgment and the pleadings which the parties had placed before the trial court.

107 Lenaola & Oginga, (As above) 171.
108 Ibid 173.

Significance of the Case

39. The case recognized the non-exhaustive list of remedies which a trial court can use to vindicate violation of human rights; international law which Kenya has ratified and its assisting documents such as UN Guidelines, General Comments or even foreign case law can be applied by Kenyan courts as long as it is consistent with the Constitution and that the right to dignity and housing for those living in informal settlements must be protected, especially where they reside on public land for several years as a result of poverty and other circumstances.

***Musembi & 10 Others (Suing on their Own Behalf and on Behalf of 326 Persons Formerly Residing in City Cotton Village and Upendo City Cotton Village and their 90 School-Going Children) & Margaret Kanini Keli & 2 Others (Suing on Their own Behalf and on Behalf of 15 Residents of Upendo City Cotton Village at South C Ward, Nairobi vs. Moi Educational Centre Co. Ltd. & 4 Others,* SC Petition No. 2 of 2018; [2021] KESC 50 (KLR)**

40. The primary question before the Court was whether, in carrying out the eviction of the petitioners from land which admittedly the petitioners had no legal title to, the respondents violated the petitioners' rights to human dignity and security, and the rights to housing and health under Article 43, when read with Articles 28, 29, 53 and 57 of the Constitution as the High Court had found.

41. In agreement with the High Court, the Supreme Court found that "forced evictions generally constitute a violation of fundamental rights and freedoms and an abuse of inherent human rights and dignity under Article 43 of the Constitution, including, but not limited to, the right to the highest attainable standards of health and healthcare services, accessible and adequate housing, freedom from hunger and to adequate food, clean and safe water, social security and education." Not only was the eviction of the petitioners violent, but it also did not accord with the respondents' constitutional obligation to ensure that those in informal settlements are treated with dignity. Additionally, the Respondents were obligated to give notice in writing, carry out the eviction in a respectful manner, and protect the rights of vulnerable people.

42. After finding that the respondents violated the petitioners' constitutional rights, the Court upheld the lower court's finding on damages requiring the first respondent to pay a sum of Kshs 150,000 to each of the petitioners, and the State to pay each of the petitions Kshs 100,000.

Significance of the Case

43. This case importantly upholds the right to housing as a human right, directly tied to human dignity. The case equally affirmed that an evicting party must carry out evictions in a manner that respects the dignity, right to life and security of those affected including protecting the rights of women, the elderly, children and persons with disabilities as well as according such persons, the first priority to salvage their property. The Court also clarified that the progressive realization of Article 43 rights lies with the State, and does not extend horizontally to private entities. However, the Court held that private entities have the obligation, under Article 20(1) of the Constitution, not to violate Article 43 rights since the Bill of Rights applies and binds both the State and all persons (horizontal and vertical application).

b. Progressive Realization of Rights

Chief Justice's advice to the President on dissolution of parliament for failure to enact the gender rule[109]

44. Six petitions were filed based on the ground that, despite four Court orders compelling Parliament to enact the legislation required to implement the two thirds gender rule in accordance with Article 27(3) read together with Articles 81(b) and 100 of the Constitution, Parliament has blatantly failed, refused and/or neglected to do so.

45. The Chief Justice in discharging his obligations under Article 261 (7) of the Constitution gave advice to the effect that Parliament had not enacted the legislation required to implement the two-thirds gender rule which is clear testimony of Parliament's lackadaisical attitude and conduct in the matter. Consequently, the Chief Justice advised Parliament to dissolve Parliament under Article 261(7) of the Constitution.

109 https://kenyalaw.org/kenyalawblog/chief-justices-advice-to-the-president-on-dissolution-of-parliament/

Significance of the Case

46. The Case is a significant step towards implementing the two-thirds gender rule which prohibits any form of discrimination in the appointive and elective positions in our country on the basis of one's gender. It is grounded on the declaration in Article 27(3) of the Constitution that "Women and men have, the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres."

47. The advice further reflects on the progressive realisation of rights under the Constitution.
Communications Commission of Kenya & 5 Others v. Royal Media Services Limited & 5 Others, Petition No. 14 of 2014 as consolidated with Petition Nos. 14 A, 14B & 14C of 2014

48. The Country, at the time. was transiting from analogue to the digital era of television transmission. The core of the dispute was whether the Communications Commission of Kenya (CCK) lawfully and constitutionally allocated a Broadcast Signal Distribution to Pan African Network Group Kenya Limited, wholly owned by foreigners. Conversely, the Court was also to determine whether CCK infringed on the fundamental rights of local media houses being Royal Media Services Limited, Nation Media Group Limited and Standard Media Group Limited. The Court found that although CCK deployed the procurement procedure in the Public Procurement & Disposal Act, in granting a BSD license to Pan African Network Group Kenya, Limited and denying the same to the local media houses, that decision was not informed by the imperatives of the national values and principles pursuant to Article 10 of Constitution. Given the fact that the subject matter of the license was a critical public resource and whose capitalization the Kenyan public had an interest in, the Court found that CCK was bound to conduct its affairs more responsibly & transparently.

49. The Court found that CCK had instead opted to be hamstrung by the technicalities of procedure as if it were an ordinary procurement of goods and services and the Constitution did not exist. In the Court's conclusion, it recommended inter alia that Communications Authority of Kenya re-align its operations and licensing procedures so as to be in tune with Articles 10, 34 and 227 of the Constitution. In its final orders, it restored the BSD licence issued to Pan African Network Group Kenya Limited but directed the regulator to consider the merits of applications for a BSD licence by the local media houses, and of any other local private sector actors in the broadcast industry, whether singularly or jointly. The Court directed the regulator, in exercise of its statutory authority, in consultation with all the parties to this suit, to set the timelines for the digital migration, pending the international Analogue Switch off date of 17th June, 2015.

Significance of the case

50. The case is significant since it found that there ought to be no vacuum occasioned by failure or delay on the part of the legislature. All existing laws were given the leeway to continue operating, on condition that they would be construed with necessary alterations, adaptations, qualifications and exceptions to bring them into conformity with the Constitution. All laws in force immediately before the promulgation of the Constitution remain in force, but subject to Section 7(1) of the Sixth Schedule. In construing any pre-Constitution legislation, a Court of law must do so considering necessary alterations, adaptations, qualifications and exceptions, to bring it into conformity with the Constitution. Where it is not possible to construe an existing law in accordance with (iv) above, so as to bring it into conformity with the Constitution, that is to say, where a law cannot be conditioned through judicial intervention without usurping the role of Parliament, such a law is invalid for all purposes.

51. The Court similarly set principles for legitimate expectation and held that in proceedings for judicial review, legitimate expectation applies the principles of fairness and reasonableness, to the situation in which a person has an expectation, or interest in a public body retaining a long-standing practice, or keeping a promise.

c. **Health Rights**

Nairobi Bottlers Limited v Ndung'u & another **(Application E030, E034 & E038 of 2023 (Consolidated)) [2023] KESC 96 (KLR) (10 November 2023) (Ruling)**

52. The applicant filed a notice of motion seeking a stay of execution of the Court of Appeal decision seeking extension of time to file its appeal.

53. The applicant argued that compliance with the impugned judgment would entail incurring astronomical costs

approximated at Kshs 8 billion. This is because, as per the applicant, a new glass bottle design would have to be produced. The applicant, in addition, stated that the prohibitive costs coupled with the 6months' time frame for compliance with the impugned judgment would impede its competitive advantage; it would also permanently cripple its business and affect its ability to meet wages for its workforce of over 3000 people. Besides, the applicant urged that approval of a new bottle design/mould by the Coca Cola company is a rigorous and lengthy process.

54. The Court held that the applicant had not given formidable reasons to warrant extension of time to file the appeal. The Court similarly dismissed the prayer for stay of execution.

Significance of the Case

55. The case in the High Court and Court of Appeal brought out the interrelatedness of other fundamental rights to the right to health. The realisation of the rights to consumer protection and the right to information toenable the realisation of the right to health. Part of the core obligations of State Parties in the realisation of the right to health entails the provision of food which is nutritionally adequate and safe. The right to health therefore cannot be realised without the provision of nutritionally safe consumable products, and the right of consumers to know what is contained in those products.[110]

57. The Supreme Court in turn despite the astronomical amount stated by the applicant still found that sufficient reasons were not afforded to warrant extension of time to file the appeal. The Court therefore struck out the appeal filed.

d. **Right to Education**

***Wanderi & 106 others v Engineers Registration Board & 7 others; Egerton University & another* (Interested Parties) (Petition 19 of 2015 & 4 of 2016 (Consolidated)) [2018] KESC 54 (KLR) (17 July 2018) (Judgment) (with dissent - NS Ndungu, SCJ)**

58. The Supreme Court found that the accreditation of universities and their courses offered was within the purview of other bodies. Purporting' to interrogate the degrees held by the petitioners so as to establish whether they were from universities duly accredited to offer engineering courses, at the time, the Board acted ultra vires its mandate and the Honourable Court of Appeal erred in its finding that the Board acted within its mandate.

59. The Court determined that the Board that failed to register them in sheer overstepping and misinterpretation of its mandate, and hence found the Board liable for violation of the petitioners' human dignity. Consequently, it directed the Board to register the applicants as engineers in light of the unique circumstances of the petitioners and 2nd interested parties in Petition No.19 of 2015 and for it to pay general damages assessed at Kshs.200,000/- to each of the Petitioners and 2nd Interested Parties.

Significance of the Case

60. The Case is significant since it highlights the profound connection between the right to human dignity and the right to education under Article 43 (f). It emphasizes how access to education is crucial for maintaining human dignity. Education empowers individuals, enabling them to lead more informed and fulfilling lives, thus upholding their inherent dignity. This interrelationship also suggests that depriving individuals of education not only limits their personal and professional development but also undermines their dignity.

110 *Right to Health Bench Book: Select Decisions, Issues and Themes* The Kenyan Section of the International Commission of Jurists (ICJ Kenya), https://icj-kenya.org/news/sdm_downloads/right-to-health-bench-book-select-decisions-issues-and-themes/

***Moi University v Zaippeline & another* (Petition 43 of 2018) [2022] KESC 29 (KLR) (Civ) (17 June 2022) (Judgment)**

61. The Supreme Court distinguished this case from the position in *Martin Wanderi & 106 others v Engineers Registration Board & 10 others* [2018] eKLR finding that in *Martin Wanderi* the issue of ordering the award of Moi University degrees to the petitioners was not properly before the court for consideration.

62. The Court held that greater good is served by upholding the sanctity of the appellant as weighed against condoning an academic status founded on unsound legal basis. The fact that the 2nd respondent had already issued the degree certificate to the 1st respondent does not automatically validate the same. The 1st respondent is entitled to a degree from his contracted university, to *wit*, the appellant herein. In the absence of a proper mechanism set out in the transition legislation to specifically address the fate of the students in a campus of an existing public university which transformed to a constituent college and eventually granted a charter to a fully-fledged university, the students who were initially admitted by a university and posted to its campus remained the students of that university and entitled to be graduated by that university. The degree awarded to the 1st respondent by the 2nd respondent and issued on November 21, 2014 was nullified. The appellant was to award the 1st respondent the degree for which he was admitted to study, was trained on and qualified in.

Significance of the case

63. Similar to the *Martin Wanderi case*, this case protects the right to education and exemplifies its relatedness to the right to human dignity. By protecting the right to education, courts effectively protect an individual's dignity, as education is seen as a pathway to realizing one's full potential.

e. Indirect Discrimination & Labour Rights

***Gichuru v Package Insurance Brokers Ltd* (Petition 36 of 2019) [2021] KESC 12 (KLR) (22 October 2021) (Judgment)**

64. The appellant was employed by the respondent on a permanent and pensionable basis as the operations manager. The appellant was diagnosed with a tumour upon which his doctor recommended that he seeks medical attention in India. The appellant proceeded to India for a spinal cord surgery where he underwent successful treatment until January 17, 2014 during which period he continued to receive his full salary. The respondent suspended the appellant and later summarily dismissed the appellant for gross incompetence because of improprieties that arose when the respondent conducted an audit on the appellant's accounts that revealed a cover up for non-performing accounts contrary to company policy and that the appellant had failed to reconcile underwriter accounts in clear violation of his employment contract.

65. The Supreme Court in reversing the decision of the Court of Appeal found that the respondent expected the appellant to continue working in the same conditions as the rest of employees was outrightly unreasonable. The respondent arbitrarily resolved that the appellant was no longer productive by virtue of his inability to walk unaided when in fact they failed to demonstrate what steps they took to accommodate him in his state.

66. It also found that it was not disputed that the respondent catered for the medical expenses of the appellant through the medical cover and even continued to pay his salary for the period he was away for treatment. The Court inclined with the trial court's finding that the Respondent exhibited indirect discrimination towards the appellant. The issue of gross incompetence was an afterthought. As such, it reiterated that the respondent's action to dismiss the appellant was extremely harsh when in fact they had not reasonably demonstrated what measures they took to accommodate the appellant's condition.

Significance of the Case

67. This case is significant as it reinforces two essential principles in employment law and human rights: indirect discrimination and reasonable accommodation for disabled individuals. By affirming that indirect discrimination is just as serious as direct discrimination, it expands protection for individuals whose needs might otherwise be overlooked in workplace policies that, while seemingly neutral, disproportionately impact them.

68. Moreover, the decision on reasonable accommodation underscores an employer's duty to adjust work conditions or environments to support individuals with disabilities, promoting equality. This legal perspective strengthens protections for workers and asserts that health status or disability should never be a basis for unfair treatment or exclusion in the workplace.

5.7 **Conclusion**

69. The Kenyan Courts in interpretation of Article 2 (5) & (6) of the Constitution have held that the same is outward and inward looking.[111] Outward in respect to Kenya's International relations and obligations and inward in respect to Kenyan Courts application of International Law in resolving disputes before them. The Supreme Court has applied International Law in various cases[112] finding that general rules of international law are not limited to peremptory norms; general comments speak to/explain already existing articles in the various international instruments so they need not be ratified.

70. The Supreme Court has similarly held that the Constitution should be interpreted in a holistic manner and given interpretation to holistic interpretation of the constitution. Article 19(3)(b) provides that the rights and fundamental freedoms do not exclude other rights and fundamental freedoms not in the Bill of Rights, but recognised or conferred by law, except to the extent that they are inconsistent with this chapter.

71. The Supreme Court has also provided guidance in interpretation of Article 23 of the Constitution noting that the court can grant any other appropriate relief not included in the list; that whether or not to grant a constitutional relief is an act of judicial discretion which must be exercised upon known legal principles and not arbitrarily, whimsically or capriciously. The Supreme Court has equally provided interpretation in apportioning compensation as a remedy.

72. Judicial intervention can lead to legal reforms. The case is *Satrose Ayuma & Others v The Registered Trustees of the Kenya Railways Staff Retirement Benefits Scheme & Others* Nairobi High Court Petition No. 65 of 2010 led to formulation of laws to guide any evictions of persons. The Kenyan Legislature amended the land Act to introduce the Land Laws (Amendment) Act, 2016 which extensively makes provisions pertaining to evictions in Kenya.

73. The Supreme Court's decisions on socio-economic rights reflect a deep commitment to the *progressive realization* of these rights as outlined in Article 43 of the Kenyan Constitution. Through its rulings, the Court has consistently emphasized the need for a structured legislative, policy, and programmatic framework to ensure these rights are accessible to all Kenyans.

74. By interpreting and upholding the progressive realization of socio-economic rights, the Court promotes the development of legal and institutional mechanisms that address fundamental needs—such as housing, healthcare, and social security. This approach not only aligns with constitutional mandates but also reinforces the importance of an inclusive legal framework that supports the vulnerable and advances human dignity and equality in a tangible way.

111 See *Rono vs Rono*

112 *Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others; Initiative for Strategic Litigation in Africa (Amicus Curiae) (Petition 3 of 2018) [2021] KESC 34 (KLR) (11 January 2021) (Judgment), NGO Coordination Board vs. EG, MAK vs. RMAA (Right of the Child, see par. 85 on general comment No. 14 [2013]), Charles Muturi Macharia vs. RMS Pet. No. 13 [E015] of 2022*

The Apex Court of the Land: Exploring the Supreme Court's Jurisprudence on its Jurisdiction

Hon. (Mr.) Justice William Ouko, FCIArb, CBS, SCJ[113]

(*This paper was delivered at the University of Nairobi, Parklands Campus on 12th March 2025 as part of the Supreme Court @ 12 Law Lecture circuits*)

7.1 Background to Establishment of the Supreme Court

1. The establishment of the Supreme Court of Kenya, which is today the highest court in the land, can be traced to the highly contested Presidential election of 2007. The Kreigler Commission which was established thereafter to look into the unprecedented electoral violence that occurred, as well as allegations of electoral irregularities, concluded that there were legitimate concerns relating to the Electoral Commission and the Judiciary which needed to be addressed. In particular, there was lack of faith and confidence in the processes that arbitrated election outcomes. There were serious allegations against the Judiciary, which was accused of inefficiency, incompetence and corruption. It was fairly evident that the people had lost faith in the Judiciary's ability to dispense justice fairly, impartially and without fear.

2. Kenyans also raised concerns about the generally restrictive approach to constitutional interpretation that the High Court had adopted, especially in the area of human rights litigation. Complaints were also raised about the lack of consistency in the decisions of the courts over the right of appeal from a High Court decision on constitutional matters; this was seen as a denial of the right of appeal of the aggrieved party. Some High Court decisions were further criticized for being made against the public interest and being influenced by factors outside the law. The people were of the view that a Supreme Court should be created and that such a court should have power to issue Advisory Opinions.

3. As a result, the Constitution of Kenya 2010, popularly supported through a referendum, established the Supreme Court as the highest court in the land, a final arbiter on interpreting the Constitution; and with exclusive original jurisdiction in respect of presidential election petitions. Since its establishment, the Court has been instrumental in asserting the supremacy of the Constitution and sovereignty of the people of Kenya; developing rich jurisprudence which not only settles legal issues but also guides the courts below it, and enhancing access to justice in line with its objectives.

6.2 Jurisdiction of the Supreme Court

4. I commence this discussion with the famous dictum based on the celebrated case of *The Owners of the Motor Vessel "Lillian S" v. Caltex Oil Kenya Limited* [1989] KLR 1, that; ..."jurisdiction is everything. Without it a court has no power to make one more step..... A court of law downs its tools".

5. The Supreme Court has;
   (a) exclusive original jurisdiction to hear and determine disputes relating to the elections to the office of President arising under Article 140; and
   (b) appellate jurisdiction to hear and determine appeals from the Court of Appeal; and any other court or tribunal as prescribed by national legislation.
   (c) The Supreme Court may give an advisory opinion at the request of the national government, any State organ, or any county government with respect to any matter concerning county government [47 counties].
   (d) The Supreme Court may decide on the validity of a declaration of a state of emergency; any extension; and any legislation enacted, or other action taken, in consequence of a declaration of a state of emergency.
   (e) A judge whose removal has been recommended by a tribunal and who is aggrieved may appeal against that decision to the Supreme Court.

6. All courts, other than the Supreme Court, are bound by the decisions of the Supreme Court.

7. The Court has over the years streamlined the procedure on how to invoke its various jurisdictions and delimited

113 Justice of the Supreme Court of Kenya.

the contours of each of those jurisdictions. This paper briefly outlines some of the notable cases the Court has determined under its various jurisdictions. This discussion is presented in two parts:

(i) Cases in which the Court has pronounced itself on jurisdictional and procedural matters concerning its mandate; and

(ii) Some of the key decisions under each jurisdiction that the Court has rendered.

6.3 Jurisprudence on the Court's Jurisdiction

A. Exclusive Original Jurisdiction

8. There is a general misconception that the Court only sits once in every five years to determine presidential election petitions and nothing else. This is perhaps because of public interest and emotive nature of such disputes.

9. The Supreme Court plays a pivotal role in electoral dispute resolution, particularly in cases involving declaration of presidential election results. However, as the apex Court, the Supreme Court may be called upon to interpret constitutional provisions related to elections and electoral processes of other elections. Through its decisions, the Supreme Court provides guidance to the courts below and ensures that the electoral processes adhere to the principles of transparency, fairness, and credibility.

10. This jurisdiction has been invoked three times since the Court was established, in the 2013, 2017 and 2022 General Election cycles. Notably, this is a jurisdiction that is unique with its own Rules being the Supreme Court (Presidential Election Petition) Rules, 2017.

11. The cases determined under this jurisdiction are:

i. Odinga & 5 others vs. Independent Electoral and Boundaries Commission & 3 others *(Petition 5, 3 & 4 of 2013 (Consolidated)) [2013] KESC 6 (KLR) (Raila 2013)*, where the Court in a unanimous decision upheld the presidential elections. It was the first Petition to be heard by the Supreme Court under the 2010 Constitution. While the Court's decision received praise and criticism in equal measure, the case is significant as it helped quell the anxiety in the Country at the time and confirmed the renewed trust that the People could now use the Courts to solve election disputes.

ii. Odinga & another v Independent Electoral and Boundaries Commission & 2 others; Aukot & another (Interested Parties); Attorney General & another (Amicus Curiae) (Presidential Election Petition 1 of 2017) [2017] KESC 42 (KLR) *(Raila 2017).* In **Raila 2017**, the Court by a majority, annulled the election. This case is significant for the fact that by a majority, the Supreme Court of Kenya became the first apex Court in Africa and fourth in the world to annul a presidential election.

iii. Mwau & 2 others vs. Independent Electoral & Boundaries Commission & 2 others; Aukot & another (Interested Parties) (Election Petition 2 & 4 of 2017) [2017] KESC 54 (KLR) *(Harun Mwau Case).* The Case emanated from the fresh elections that were conducted following the nullification of the 2017 Presidential elections. The Court dismissed the consolidated petitions that challenged the results of the fresh election, holding that they were conducted in accordance with the Constitution and electoral laws.

iv. Odinga & 16 others vs. Ruto & 10 others; Law Society of Kenya & 4 others (Amicus Curiae), Presidential Election Petition No. E005, E001, E002, E003, E004, E007 & E008 of 2022(Consolidated) [2022] KESC 54 (KLR) *(Raila 2022).* The Court received the highest number of petitions, nine, challenging a presidential election. The Court dismissed two at an interlocutory stage as they were not challenging the presidential election results, and the remaining seven were dismissed after hearing.

7.4 Settled Jurisprudence on Electoral Matters

i. The Standard and Burden of Proof

12. Since its first Presidential Election Petition in 2013, the Court has settled the law around the burden and standard of proof in election petitions. The legal burden in an electoral cause is established much in the same way as a civil cause: the legal burden rests on the petitioner, but, depending on the effectiveness with which he or she discharges this, the evidential burden keeps shifting. See *Raila* 2013.

13. On the standard of proof in election petitions, a higher standard of proof is required, where the allegations are of a criminal nature. Where an election offence is alleged in an election petition the standard of proof is beyond reasonable doubt similar to that in criminal matters due to the quasi-criminal nature of the allegations. See *Raila 2013 and Wetangula & another vs. Kombo & 5 others* (Petition 12 of 2014) [2015] KESC 12 (KLR).

14. Where there are no allegations of criminal or quasi criminal acts, an intermediate standard of proof, one beyond the ordinary civil litigation standard of "on a balance of probabilities" but below the criminal standard of "beyond reasonable doubt" is applied. [intermediate standard] See *Raila 2017; Harun Mwau; and Raila 2022.*

ii. Scrutiny and Recount of Votes

15. The Court has established the criteria that should be applied by courts in determining applications for scrutiny and recount of votes. The request for scrutiny has to be made for a sufficient reason. Any request that would in effect be a fishing exercise to procure fresh evidence not already contained in the petition would be rejected. Any prayer couched in general terms, not pleaded with specificity or where the request is impracticable in terms of scope and time it would be declined. In respect of the Presidential election dispute, the narrow timelines granted by the Constitution means that only reasonable, practical and helpful orders should be issued in applications for scrutiny and recount of votes. See *Youth Advocacy for Africa (YAA) & 7 others vs. Independent Electoral and Boundaries Commission & 17 others*, (Election Petition E002, E003 & E005 of 2022 (Consolidated)) [2022] KESC 42 (KLR).

iii. Elections technology

16. The test for determining whether the technology deployed by the electoral management body guaranteed accurate and verifiable results is settled. In *Raila 2013,* the Court took judicial notice that, as with all technologies, so it is with electoral technology: it is rarely perfect, and those employing it must remain open to the coming of new and improved technologies. It noted that (due to undependability of technology), the applicable law has entrusted a discretion to IEBC on the application of such technology as may be found appropriate. Since election technology had not achieved a level of reliability, it could not as yet be considered a permanent or irreversible foundation for the conduct of the electoral process. The test for technology deployed in a general election is that it must meet the standards of integrity, verifiability, security, and transparency to guarantee accurate and verifiable results. Technology employed must be simple, accurate, verifiable, secure, accountable and transparent. However, electronic transmission is limited to a Presidential Election. See *Raila 2022.*

iv. Second appeals to the Court of Appeal

17. In *Nuri vs. Kombe & 2 others* (Petition 38 of 2018) [2019] KESC 6 (KLR) the Court settled that no second appeal could lie to the Court of Appeal from the High Court from an election petition of a Member of the County Assembly.

6.5 Appellate Jurisdiction of the Supreme Court

- ***The distinct nature of the two appellate Jurisdictions under Articles 163(4)(a) and (b)***

18. One of the foremost issues the Court settled was the distinct nature of the two appellate jurisdictions; appeals to the Court as of right; and appeals upon certification that the appeal involves matters of general public importance. These jurisdictions are separate and cannot be jointly invoked in the same proceedings.

19. This distinction was first pronounced in the case of *Nduttu & 6000 others vs. Kenya Breweries Ltd & another* (Petition 3 of 2012) [2012] KESC 9 (KLR) as follows:

> "(20) ... At the outset, we consider it crucial to lay down once again the principle that only two types of appeal lie to the Supreme Court from the Court of Appeal. The first type of appeal lies as of right if it is from a case involving the interpretation or application of the Constitution. In such a case, no prior leave is required from this Court or Court of Appeal. (21) The second type of appeal lies to the Supreme Court not as of right but only if it has been certified as involving a matter of general public importance. It is the certification by either Court which constitutes leave. This means that where a party wishes to invoke the appellate jurisdiction of this Court on grounds other than that the case is one which involves the interpretation or application of the Constitution, then such intending appellant must convince the Court that the case is one involving a matter of general public importance. If the Court of Appeal is convinced that such is the case and the certification is affirmed by the Supreme Court, then the intending appellant may proceed and file the substantive appeal."

20. The distinction was subsequently restated in the case of *Hassan Nyanje Charo vs. Khatib Mwashetani, Independent Electoral and Boundaries Commission, Juma Musa & Gideon Mwangangi Wambua* (Election Petition 15 of 2014) [2014] KESC 47 (KLR), where the Court disallowed counsel's argument that an intended appeal comprised a blend of "appeal-as-of-right" matters on the one hand, and "appeal-by-certification" matters on the other hand. In *Fahim Yasin Twaha vs. Timamy Issa Abdalla, Independent Electoral and Boundaries Commission & Silvano Buko Bonaya* (Civil Application 35 of 2014) [2015] KESC 20 (KLR) the Court stated that even where a matter raises issues that invoked both jurisdictions, a litigant has to choose which jurisdiction he/she intends to pursue.

21. This pronouncement was applied more recently, in the case of *Sonko vs. Clerk, County Assembly of Nairobi City & 11 others*, SC Petition 11 (E008) of 2022) [2022] KESC 26 (KLR), where the Court in its judgment stated as follows:

> "In view of the nature of its jurisdiction as far as appeals from the Court of Appeal are concerned, a party moving this Court must bear in mind the limits of its jurisdiction and must decide either to seek a certification as a matter of general public importance (GPI) under Article 163 (4)(b) of the Constitution or come as a matter of right under Article 163 (4)(a) thereof. Even when a party invokes the latter, it is upon the party to identify and specify how the appeal concerns interpretation and application of the Constitution. It can never be the role of the Court to wander around in the maze of pleadings and averments in order to assume jurisdiction by way of elimination".

This was also reiterated in the case of *Wanjigi vs. Chebukati & 2 others*, SC. Appl. No. 6 (E012) of 2022) [2022] KESC 40 (KLR).

- ***Invoking the Court's appellate Jurisdiction as of Right under Article 163(4)(a)***

22. This appellate jurisdiction of the Court is the most frequently invoked. It is emphasized that there is no automatic right of appeal to the Supreme Court from a decision rendered by the Court of Appeal. Not every decision of the Court of Appeal is appealable to the Supreme Court. The appeal must relate to the interpretation and application of the Constitution. Only cardinal issues of law, or of jurisprudential moment, deserve the further input of the Supreme Court. For an appeal to lie to the Supreme Court from the Court of Appeal under Article 163(4)(a), the constitutional issue must have first been in issue at both the High Court and then the Court of Appeal for determination**.** That is, the Supreme Court recognizes and respects the constitutional competence of courts in the judicial hierarchy to resolve disputes before them. This principle was stated in the cases of *Ngoge vs. Kaparo & 5 others* [2012] KESC 7 (KLR) and *Erad Suppliers & General Contractors Limited vs. National Cereals & Produce Board*, [2012] KESC 6 (KLR). It was subsequently summed up in *Gladys Wanjiru Munyi vs. Diana Wanjiru Munyi* [2015] KESC 9 (KLR) thus:

> "In *Peter Ngoge v. Francis Ole Kaparo & 5 Others*, Sup. Ct. Petition No. 2 of 2012 [2012] eKLR, we signalled the guiding principle that the chain of Courts in the constitutional set-up, running up to the Court of Appeal, do indeed have the competence to resolve all matters turning on the technical complexities of the law, and that only cardinal issues of law, or of jurisprudential moment, deserve the further input of the Supreme Court."

- ***There must be a substantive decision with reasons to anchor the appeal***

23. The urgency surrounding the determination of election-related disputes and the impending elections that were to be held on 9th August 2022, constrained the Court of Appeal to issue brief judgments made without any reasons, the reasons for judgment having been reserved for a later date. This caused parties to seek to appeal to the Supreme Court before the reasons had been rendered. In the case of ***Wanjigi vs. Chebukati & 2 others***, SC. Application No. 6 (E012) of 2022 [2022] KESC 40 (KLR) the Court dismissed the appeal for *inter alia*, lack of reasons for the judgment. In doing so the Court held as follows:

> "An appeal must of necessity be against the outcome of a case based on the reasons for such outcome. In the instant case, the reasons for the judgment are awaited. There can be no basis, we think, upon which the petition as currently drawn can be jurisprudentially determined in the absence of reasons for judgment. This then renders any hearing of the petition before the 29th July 2022 and/or in the absence of the reasons for the judgment untenable."

- ***Definition of what amounts to an appeal under Article 163(4)(a) of the Constitution.***

24. The Court has had several instances in which it has delimited the contours of its jurisdiction under Article 163(4)(a) of the Constitution. Some of these cases include: *Joho & another vs. Shahbal & 2 others* [2014] KESC 34 (KLR); *Munya vs. Kithinji & 2 others* [2014] KESC 30 (KLR); *Teachers Service Commission vs. Kenya National Union of Teachers & 3 others*, [2015] KESC 29 (KLR), among other cases.

25. From an evaluation of all these cases, the following can be gleaned as the principles that this Court has developed as regards appeals under Article 163(4)(a) raising issues involving the interpretation and application of the Constitution:

(i) The appellate jurisdiction under Article 163(4)(a) is prospective in nature and not retrospective. It cannot be invoked to re-open matters at the Supreme Court that had been determined and finalised either by the High Court or the Court of Appeal before the promulgation of the Constitution 2010. The jurisdiction is not a panacea for re-opening closed proceedings but it yields credence to the doctrine of finality of litigation in time.

(ii) The jurisdiction upholds judicial hierarchy and the constitutional issues raised on appeal before the Supreme Court for interpretation must have been first raised and determined by the High Court in the first instance with a further determination on the same issues on appeal at the Court of Appeal.

(iii) The jurisdiction is discretionary in nature at the instance of the Court. It does not guarantee a blanket route to appeal. A party has to categorically state to the satisfaction of the Court and with precision those aspects/ issues of his matter which in his opinion falls for determination on appeal in the Supreme Court as of right. It is not enough for one to generally plead that his case involves issues of constitutional interpretation and application.

(iv) Matters that involve direct interpretation and/or application of express provisions of the Constitution fall for appeal under this jurisdiction.

(v) A mere allegation(s) of Constitutional violations or citation of Constitutional provisions, or issues on appeal which involves little or nothing to do with the application or interpretation of the Constitution does not bring an appeal within the Jurisdiction of the Supreme Court under Article 163(4)(a).

(vi) Only cardinal issues of constitutional law or of jurisprudential moment, and legal issues founded on cogent constitutional controversies deserve the further input of the Supreme Court under Article 163(4)(a).

(vii) Challenges of findings or conclusions on matters of fact by the trial court of competent jurisdiction after receiving, testing and evaluation of evidence does not bring up an appeal within the ambit of Article 163(4)(a).

(viii) Decisions of the Court of Appeal made in exercise of discretion under Rule 5(2)(b) of the Court of Appeal Rules 2010 are not appealable to the Supreme Court in invocation of Article 163(4)(a) of the Constitution.

26. Despite the Court issuing several decisions guiding litigants on how to invoke its appellate jurisdiction under Articles 163(4)(a) and (b), parties still get it wrong by failing to properly invoke the Court's jurisdiction. Parties have suffered from inelegant drafting which has been frowned upon by the Court eliciting either reprimand or in some circumstances the error has been fatal leading to the dismissal of their appeals. For instance, in *National Rainbow Coalition Kenya (NARC Kenya) vs. Independent Electoral & Boundaries Commission; Tharaka Nithi County Assembly & 5 others (Interested Parties)* (Petition 1 of 2021) [2022] KESC 6 (KLR) the Court expressed:

> "It is therefore a matter of concern to us that having expressed discontent at the inelegant drafting of the appeal in *Martha Wangari Karua v Independent Electoral and Boundaries Commission & 3 others,* ***(supra)*** where counsel for the appellant in this appeal also represented the appellant in that appeal, that a similar mistake would be repeated. In the previous matter, the appeal was stated to have been brought pursuant to rules 9 and 33 of the Supreme Court Rules, 2012 (repealed), which clearly did not deal with the court's jurisdiction, but with the contents of a petition and the manner of instituting appeals, respectively. Reference to article 163(4)(a) of the Constitution was only made in the body of the Petition. While excusing this infraction, distinguishing the case from Suleiman Mwamlole Warrakah (supra) and being satisfied that the infraction was not fatal, the court warned that inelegance drafting will not be countenanced in the court."

See also *Sonko vs. County Assembly of Nairobi City & 11 others* (supra) where the Court reiterated its concern over inelegant drafting reminding litigants and counsel that high standards are expected in the apex court.

- ***The Court's Jurisdiction beyond "Lillian S"***

27. The Court's authority has occasionally needed to be broadened by the Court where it would have otherwise downed its tools in accordance with the decision of the *Lillian S* Case. The Supreme Court in the case of *Aramat & another vs. Lempaka & 3 others* [2014] KESC 21 (KLR) recognized and acknowledged that the Supreme Court's new functions such as its exclusive original mandate to determine presidential petitions or issuing advisory opinions, were not in contemplation at the time *"Lillian S"* case was decided. The Court stated *inter alia* as follows:

> *"*[89] Such are new functions, that were not in contemplation at the time of the decision of the *"Lillian S"* case. The Supreme Court is, besides, not in the more constrained position in which the Court of Appeal had been, at the time of *"Lillian S".*
> ....
> [101] We would make it clear in the instant case that, it is a responsibility vested in the Supreme Court to interpret the Constitution with finality: and this remit entails that this Court determines appropriately those situations in which it ought to resolve questions coming up before it, in particular, where these have a direct bearing on the interpretation and application of the Constitution. Besides, as the Supreme Court carries the overall responsibility [The Constitution of Kenya, 2010, Article 163(7)] for providing guidance on matters of law for the State's judicial branch, it follows that its jurisdiction is an enlarged one, enabling it in all situations in which it has been duly moved, to settle the law for the guidance of other Courts."

28. This pronouncement was reiterated more recently in the case of *Sonko vs. Clerk, County Assembly of Nairobi City & 11 others,* SC. Pet. No. 11 (E008) of 2022) [2022] KESC 26 where the Court stated as follows:

> "That conclusion would have been sufficient to dispose of this appeal in its entirety, as with it we would have been expected to down tools, but in view of the public interest nature of the dispute, the broad interests of both the parties, the need for due guidance to the judicial process and to the courts below and in terms of the Court's decision in Lemanken Aramat v. Harun Meitamei Lempaka & 2 others [2014] eKLR, we are minded, for the sake of posterity and development of jurisprudence to settle all the pertinent questions the appeal raises."

Notably, in the *Sonko Case*, the Court, instead of downing its tools after finding that it had no jurisdiction, went ahead to set out the principles governing the process of impeachment or removal of a county Governor.

29. Though there has been numerous jurisprudence by the Court under Article 163(4)(a), I wish to highlight three landmark cases. First, *Attorney-General & 2 others vs. Ndii & 79 others; Dixon & 7 others (Amicus Curiae)* [2022] KESC 8 (KLR) *(BBI Case)* which concerned the proposed constitutional amendments under the Constitution of Kenya (Amendment) Bill 2020. The Court found that the basic structure doctrine that posited that there was an unamendable core of the Constitution was inapplicable to Kenya. The majority holding of the court was also that the President could not initiate constitutional amendments through a popular initiative as provided for in article 257 of the Constitution and that the Constitution of Kenya (Amendment) Bill 2020 was unconstitutional for reasons of being initiated by the President.

30. Second is *NGOs Co-ordination Board v EG & 4 others; Katiba Institute (Amicus Curiae)* [2023] KESC 17 (KLR) which has widely been misunderstood. The issue before the court was not about the decriminalization of LGBTQI, or the constitutionality of sections 162, 163 and 165 of the Penal Code. The controversy had nothing to do with morality or same sex relationships. The central issue in the appeal was about the reservation of a name and whether the appellant's decision in rejecting the names proposed was lawful, reasonable, proportionate and procedurally fair. The majority of the Court held that the 1st **respondent's rights were violated by the appellant's failure to register the proposed organization. It was unconstitutional to limit the right to associate, through denial of registration of an association, purely on the basis of the sexual orientation of the applicants. Therefore, the appellant's decision was unreasonable and unjustified.**

31. Third is *Muruatetu & another vs. Republic; Katiba Institute & 5 others (Amicus Curiae)* [2017] KESC 2 (KLR) on the constitutionality of the mandatory nature of the death sentence provided under Section 204 of the Penal Code. The Court held that Section 204 of the Penal Code deprived the court of the use of judicial discretion in a matter of life and death. Such a law could only be regarded as harsh, unjust and unfair. The mandatory nature of the death sentence deprived the courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in appropriate cases. Where a court listened to mitigating circumstances but had, nonetheless, to impose a set sentence, the sentence imposed failed to conform to the tenets of fair trial that accrued to accused persons under Article 25 of the Constitution which was an absolute right. With regard to murder convicts, mitigation was an important facet of a fair trial. The mandatory nature of the death sentence as provided for under section 204 of the Penal Code was declared unconstitutional. For the avoidance of doubt, the validity of the death sentence as contemplated under Article 26(3) of the Constitution was not disturbed.

7.6 Jurisdiction under Article 163(4)(b) of the Constitution (Matters of General Public Importance- GPI)

a) Certification applications for leave to Appeal under Article 163(4)(b) to be first made at the Court of Appeal

32. Upon the establishment of the Court, it was common to find applications seeking certification that the intended appeals involved matters of general public importance being filed directly to the Supreme Court. This was informed by the fact that Article 163(4)(b) clothes both the Supreme Court and the Court of Appeal with jurisdiction to certify appeals as involving matters of general public importance, hence grant leave to appeal.

33. While acknowledging this constitutional dual allocation of certification mandate, the Court in *Sum Model Industries Ltd vs. Industrial & Commercial Development Corporation,* [2011] KESC 5 (KLR), guided that, it is good practice for such an application to be made first in the Court of Appeal where the proceedings originated, and only move to the Supreme Court with an application for review of the decision of the Court of Appeal. The Court stated:

> "This being an application for leave to appeal against a decision of the Court of Appeal, it would be good practice to originate the application in the Court of Appeal which would be better placed to certify whether a matter of general public importance is involved. It is the Court of Appeal which has all along been seized of the matter on appeal before it. That Court has had the advantage of assessing the facts and legal arguments placed and advanced before it by the parties. Accordingly, that Court should ideally be afforded the first opportunity to express an opinion as to whether an appeal should lie to the Supreme Court or not. If the applicant should be dissatisfied with the Court of Appeal's decision in this regard, it is at liberty to seek a review of that decision by this Court as provided for by Article 163 (5) of the Constitution. To allow the applicant to disregard the Court of Appeal against whose decision it intends to appeal and come directly to this Court in search of a certificate for leave, would lead to Abuse of the Process of Court."

This was reiterated in the case of *Hassan Nyanje Charo vs. Khatib Mwashetani & 3 others* [2014] KESC 41 (KLR).

(b) Principles for certification of a matter as one of GPI.

34. The question of what amounts to a matter of general public importance was a novel issue upon the promulgation of the Constitution 2010. Therefore, criteria had to be devised on how to make this determination. This was settled, in the case of *Hermanus Steyn vs. Ruscone* [2013] KESC 11 (KLR), the first case heard by the Court in exercise of this jurisdiction and it has come to be regarded as the *locus classicus* as regards principles for certification that an appeal raises a matter of general public importance (GPI). The principles were stated as follows:

> "(i) for a case to be certified as one involving a matter of general public importance, the intending appellant must satisfy the Court that the issue to be canvassed on appeal is one the determination of which transcends the circumstances of the particular case, and has a significant bearing on the public interest;
>
> (ii) where the matter in respect of which certification is sought raises a point of law, the intending appellant must demonstrate that such a point is a substantial one, the determination of which will have a significant bearing on the public interest;
>
> (iii) such question or questions of law must have arisen in the Court or Courts below, and must have been the subject of judicial determination;
>
> (iv) where the application for certification has been occasioned by a state of uncertainty in the law, arising from contradictory precedents, the Supreme Court may either resolve the uncertainty, as it may determine, or refer the matter to the Court of Appeal for its determination;
>
> (v) mere apprehension of miscarriage of justice, a matter most apt for resolution in the lower superior courts, is not a proper basis for granting certification for an appeal to the Supreme Court; the matter to be certified for a final appeal in the Supreme Court, must still fall within the terms of Article 163 (4) (b) of the Constitution;
>
> (vi) the intending applicant has an obligation to identify and concisely set out the specific elements of "general public importance" which he or she attributes to the matter for which certification is sought;
>
> (vii) determinations of fact in contests between parties are not, by themselves, a basis for granting certification for an appeal before the Supreme Court".

35. Other cases where these principles have been applied are *Malcolm Bell vs. Daniel Toroitich Arap Moi & Board of Governors Moi High School Kabarak* [2013] KESC 23 (KLR) and *Town Council of Awendo vs. Nelson Oduor Onyango & 13 Others*, [2015] KESC 24 (KLR).

36. In *Mitu-Bell Welfare Society vs. Kenya Airports Authority & 2 others; Initiative for Strategic Litigation in Africa (Amicus Curiae)* [2021] KESC 34 (KLR) where the appellants had claimed that their rights under Article 43 of the Constitution (the right to housing) had been breached, the Court held that the government could not evict people from public land without granting them an alternative accommodation. This decision is also important for entrenching the concept of structural interdicts as an appropriate relief that may be issued by the courts.

37. In *Nyutu Agrovet Limited vs. Airtel Networks Kenya Limited; Chartered Institute of Arbitrators-Kenya Branch* [2019] KESC 11 (KLR) the crux of this appeal was whether there was a right of appeal, to the Court of Appeal, following a decision by the High Court under Section 35 of the Arbitration Act. The Court held that;

> "the only instance that an appeal may lie from the High Court to the Court of Appeal on a determination made under Section 35 is where the High Court, in setting aside an arbitral award, has stepped outside the grounds set out in the said section and thereby made a decision so grave, so manifestly wrong and which has completely closed the door of justice to either of the parties. This circumscribed and narrow jurisdiction should also be so sparingly exercised that only in the clearest of cases should the Court of Appeal assume jurisdiction".

By this decision, the Supreme Court settled contradicting jurisprudence on jurisdiction of courts in arbitration.

6.7 Advisory Opinion/ Reference Jurisdiction

i) *The Nature of Advisory Opinions and its participants*

38. In the case of *In the Matter of the Interim Independent Electoral Commission (Applicant)* [2011] KESC 1 (KLR), this Court set out the guidelines for the exercise of the its advisory-opinion jurisdiction. They are:

> "(i) For a reference to qualify for the Supreme Court's Advisory-Opinion discretion, it must fall within the four corners of Article 163(6): it must be '*a matter concerning county government.*' The question as to whether a matter is one 'concerning county government', will be determined by the Court on a case-by-case basis.
> (ii) The only parties that can make a request for an Advisory Opinion are the *national government, a State organ, or county government. Any other person or institution may only be enjoined in the proceedings with leave of the Court, either as an intervener (interested party) or as amicus curiae.*
> (iii) The Court will be hesitant to exercise its discretion to render an Advisory Opinion where the matter in respect of which the reference has been made is a subject of proceedings in a lower Court. However, where the Court proceedings in question have been instituted after a request has been made to this Court for an Advisory Opinion, the Court may if satisfied that it is in the public interest to do so, proceed and render an Advisory Opinion.
> (iv) Where a reference has been made to the Court the subject matter of which is also pending in a lower Court, the Court may nonetheless render an Advisory Opinion if the applicant can demonstrate that the issue is of great public importance and requiring urgent resolution through an Advisory Opinion. In addition, the applicant may be required to demonstrate that the matter in question would not be amenable to expeditious resolution through an adversarial Court process."

39. Applying these strictures the Court dismissed the Reference in *Legal Advice Centre t/a Kituo Cha Sheria vs. Attorney General* [2024] KESC 15 (KLR) on the ground that Kituo Cha Sheria lacked the *locus standi* to apply for an advisory opinion as under Article 163(6) of the Constitution, the only parties who may apply for an advisory opinion are, the National Government; a State organ; or any County Government with respect to any matter concerning county government.

ii) *Opinion of the Attorney General and Matters Pending Before other courts*

40. Further to the foregoing considerations, it is a mandatory requirement that before a party seeks the Court's opinion, the opinion of the Attorney General should be first sought; and the party must satisfy the Court that the matter is not active or pending before other courts. These principles were recently pronounced *In re Application by the County Assemblies of Kericho and Nandi Counties for an Advisory Opinion Under Article 163(6) of the Constitution of Kenya & In re Application by the Governor, Makueni County for an Advisory Opinion Under Article 163(6) of the Constitution the Governor, Makueni County* [2021] KESC 61 (KLR), where the Court found that the opinion of the Attorney General had not been sought, sent the parties first to the Attorney General. That notwithstanding, upon getting the Attorney General's opinion, the Court still declined to exercise discretion to render its opinion holding that the issues on which the Court's opinion was sought were pending before the High Court.

iii) *Advisory Opinions are binding*

41. Since its first advisory opinion *In the Matter of the Interim Independent Electoral Commission (Applicant)* [2011] KESC 1 (KLR), the Court has taken every available opportunity to clarify and guide on its jurisdiction and on any procedural matters relating to this jurisdiction. In the case above, the Court held that its advisory opinion is a "decision" of the Court, within the terms of Article 163(7), and is therefore binding, not only on those who seek its opinion, but all including all courts below it. The Court said:

> "While an Advisory Opinion may not be capable of enforcement in the same way as ordinary decisions of the Courts (in the shape of Rulings, Judgments, Decrees or Orders), it must be treated as an authoritative statement of the law. The Opinion must guide the conduct of not just the organ(s) that sought it, but all governmental or public action thereafter. To hold otherwise, would be to reduce Article 163(6) of the Constitution to an 'idle provision', of little juridical value. The binding nature of Advisory Opinions is consistent with the values of the Constitution, particularly the rule of law."

42. This early pronouncement has been instrumental on how the advisory opinions of the Court have been taken subsequently. The Court reiterated its position in the case of *National Land Commission vs. Attorney-General & 5 others; Kituo Cha Sheria & another (Amicus Curiae)* [2015] KESC 3 (KLR). All the opinions so far issued have been followed and complied with fully.

7.8 Removal of a Judge

43. Since its inception, the Court has heard and determined four appeals arising from the recommendation of the tribunals for the removal of judges. The first such case was *Mutava vs. Tribunal Appointed to Investigate the Conduct of Justice Joseph Mbalu Mutava, Judge of the High Court of Kenya* [2019] KESC 49 (KLR) where the tribunal had recommended the removal of Mr Justice Mutava for gross misconduct. The Supreme Court acknowledged its role as the first and only appellate Court from the recommendation of the Tribunal on the removal of a judge from office. Accordingly, it restated its first duty as being the re-evaluation and re-assessment of the evidence on record with a view of establishing whether or not the Tribunal in arriving at its conclusion, misdirected itself and whether or not its conclusion should stand. Further, the Court held that the evidentiary burden to avail all the evidence necessary to establish the allegations against the judge is borne by the Lead Assisting Counsel and that this burden is discharged if the evidence presented is below "beyond reasonable doubt" but above "balance of probabilities."

44. In *Muya vs. Tribunal Appointed to Investigate the Conduct of Justice Martin Mati Muya, Judge of the High Court of Kenya* [2022] KESC 16 (KLR) which was the second instance where the tribunal had recommended the removal from office of Mr Justice Muya for gross misconduct. The Court established the threshold of gross misconduct that would warrant removal of a Judge from Office. The Court clarified that gross misconduct or misbehaviour as grounds of removal of a Judge from office is used in contradistinction to simple misconduct or misbehaviour. Gross was held to be an expression of something very serious. It is a test of whether the Judge, whose conduct is being investigated, could continue to be trusted to carry out his or her role in the administration of justice.

45. The third appeal was the case of *MMG vs. Tribunal Appointed to Investigate the Conduct of Hon. Lady Justice MMG, Judge of the Environment and Land Court of Kenya* [2023] KESC 73 (KLR). This was the first case where the removal of a judge had been recommended on the ground of the judge's inability to perform the functions of her office due to mental incapacity. The Court issued guidelines to be followed in matters which involve an assessment of mental incapacity. The Court established that although the Petitioner was unable to perform the functions of the office of a Judge which require immense alertness, endless concentration, presence, a good frame of mind to observe the demeanour of witnesses, back-breaking research, writing/typing skills, she could undertake other duties pertaining to the legal profession.

46. Very recently, the case of *Chitembwe vs. Tribunal Appointed to Investigate Into the Conduct of the Hon. Justice Said Juma Chitembwe, Judge of the High Court* [2023] KESC 114 (KLR) involving breach of Code of Conduct for Judges and gross misconduct and misbehavior. The Court was satisfied with the Tribunal's conclusion that the evidence presented established that the petitioner's conduct was in breach of the Code of Conduct and Ethics and also amounted to gross misconduct or misbehaviour contrary to Article 168(1)(b) and (e) of the Constitution.

7.9 State of Emergency

47. The Court, pursuant to Article 58(5), has jurisdiction to consider applications emanating from a declaration of a State of Emergency. The jurisdiction of the Court in this regard has not yet been exercised and remains the only untested jurisdiction.

48. As a Court and a country, we pray that there would be no time that this jurisdiction will be invoked. No democracy wishes for and longs for a Declaration of State of Emergency within its borders. However, borrowing from the Great Roman General Vegetius, in time of peace, it is always pragmatic to prepare for war; hence it is good to have the law in place.

7.10 Conclusion

49. In conclusion, it is evident that over the past decade, the Supreme Court has firmly established its jurisdiction on the substance and procedural mandates to fulfill the objectives outlined in Section 3 of the Supreme Court Act. While the Court initially faced challenges in clarifying its jurisdiction, it has progressively gained clarity with each decision rendered.

50. Importantly, the Court has exercised nearly all its constitutional jurisdictions, with the exception of its authority under Article 58(8) of the Constitution, dealing with the determination of the validity of a declaration of a State of Emergency. The Court continues to develop by shaping its jurisprudence and setting precedents for other courts to follow.

PART B
JURISPRUDENCE

Social Transformation through Access to Justice: The Jurisprudence of the Supreme Court of Kenya

Hon. Justice Martha K. Koome, FCIArb, EGH[114]

(This paper was delivered as a Public Lecture at the University of Nairobi, School of Law on 15th November 2023, during the launch of the book 'The Supreme Court Settles the Law' by Canon Dr. Wamuti Ndegwa and Dr. Wyne Mutuma)

8.1 Introduction

1. It is both an honour and a profound pleasure to return to the University of Nairobi, School of Law, a place that holds a special place in my journey as a lawyer and Judge, being my alma mater. I extend my heartfelt gratitude to the Dean, Prof. Winifred Kamau, for extending this gracious invitation, allowing me to share insights and engage with the vibrant intellectual community in this great university.

2. I am particularly delighted to see many students attending this public lecture and book launch event. Your presence here today is a testament to the unquenchable thirst for legal knowledge and the desire by the young generation to engage critically with our emerging indigenous jurisprudence.

3. Law, as a discipline, is richly layered, encompassing theoretical underpinnings with practical realities. This public lecture, coupled with the book launch of '*The Supreme Court Settles the Law'* by Canon Dr. Wamuti Ndegwa and Dr. Wyne Mutuma, marks a significant milestone in bringing together the realms of academia and judicial practice. The development of a distinctive Kenyan jurisprudence, one that resonates with our unique socio-legal fabric, hinges on a symbiotic relationship and collaborative engagement between legal scholarship and judicial interpretation.

4. While we have witnessed the emergence of literature and scholarly articles on Kenyan law, the quantity of such contribution pales in comparison to similar jurisdictions. Given this reality, I want to use this opportunity to make a clarion call to our legal scholars and academicians to increase both the volume and quality of our legal literature. Such scholarly endeavours are not merely academic exercises but pivotal tools that enrich and inform the bench in the course of judicial decision-making, thereby enriching our jurisprudence.

5. In light of this, I commend Dr. Wamuti Ndegwa and Dr. Wyne Mutuma for their trailblazing efforts in authoring this scholarly work on the jurisprudence of the Supreme Court of Kenya, a seminal work emerging twelve years post the establishment of our apex court. Their scholarly contribution is not only a critical study of the jurisprudence from our apex court, but is a challenge that we should have other scholarly works exploring the different aspects of our laws. Indeed, as we celebrate six decades of independence, it is time we had Kenyan-authored legal treatises across all the domains of the law.

6. The theme of this public lecture, that is "*Social Transformation Through Access to Justice: The Jurisprudence of the Supreme Court of Kenya*", is not only central to our judiciary but also speaks to our nation's well-being and future.

7. When we speak of the Constitution of Kenya, we refer to a document that was born out of the tireless struggle of the Kenyan people to create a society anchored on the ideals of democracy, good governance, human rights, equality, and social justice. It is a "*Never-Again*" Constitution that aims to prevent the recurrence of the injustices, inequalities, impunity and rights violations that marred our past.

8. The Preamble of our Constitution, along with Article 10(2) and Article 19(2), articulates a clear vision of social justice as a fundamental objective of our governance and social interactions. It posits that the protection of human rights and freedoms is intrinsically linked to preserving human dignity and promoting social justice and the potential of every individual. In essence, our Constitution is a transformative charter that seeks to institute social change and reform.

9. But what does social justice entail? Social justice means more than just the application of the law. It means the recognition and protection of the dignity, equality and diversity of all people.[115] It means the promotion and

114 Chief Justice and President of the Supreme Court of Kenya.

115 See generally Bruce A. Ackerman, *Social Justice in the Liberal State* (Yale University Press, 1980). See also Behrooz Morvaridi, *Social Justice and Development* (Palgrave Macmillan, 2008).

realization of the social, economic and cultural rights of the people, such as the rights to health, education, food, water, housing, social security, work, and a clean and healthy environment.[116] It means the redistribution of resources and opportunities to address the historical and structural inequalities and injustices that afflict our society. It is notable that during the constitution-making process, Kenyans expressed the desire for the new Constitution to reverse the then prevailing status quo which they described as oppressive and uncaring, distant from them, extractive of the meagre resources they were still able to generate, inefficient, corrupt, and generally incapable of looking after their welfare.[117]

10. Social justice requires, in other words, universal participation that extends to the most vulnerable members of society, for everyone to actively participate in a nation's socio-legal and socio-political life.[118] Social justice also means the inclusion, recognition and empowerment of every person and various groups including the vulnerable and marginalised in our society, such as women, children, persons with disabilities, older persons, minorities, indigent persons, among others.[119]

11. These concerns informed the egalitarian hue of the Constitution. Notably in Article 21(3), the Constitution instructs that all State organs and all public officers have the duty to address the needs of vulnerable groups within society, including women, older members of society, persons with disabilities, children, youth, members of minority or marginalised communities, and members of particular ethnic, religious or cultural communities. Given this concern for the plight of the vulnerable, the courts through their jurisprudence are expected to reconceptualise the relationship between the state and the vulnerable groups, contributing to the emergence of a political and socio-economic framework that promotes the better living standards and opportunities for all.[120]

12. The Judiciary, as one of the three arms of the State, has a critical role to play in advancing the social justice promise of the Constitution.[121] The courts are the guardians of the Constitution and the protectors of the rights and freedoms of the people. This positions them to play a central role in defining, supporting, and advancing social justice by making the law relevant to ameliorating the plight of vulnerable groups. Therefore, in adjudication the court must go beyond resolving the disputes between parties to use adjudication as a route or mechanism to remedy social problems, to implement social change, and also advance the social and economic welfare of all Kenyans.[122]

8.2 Reflections from the Supreme Court's Judgments

13. Over the last twelve years, the Supreme Court has risen to the occasion, as the apex court in the land, to breathe life to the transformative aspirations of the Constitution. In different areas of the law, the Supreme Court has offered guidance to the courts and the public by settling the law. In the process, the Court has developed a rich body of indigenous jurisprudence. I will take your through a tour of a sample of the principles emerging from these landmark decisions.

Devolution and Bicameralism

14. Central to the project of state-building are courts and constitutionalism. To borrow from Yvonne Tew, courts in an emerging constitutional democracy like ours serve both a protective role and a constructive role.[123] In their protective capacity, courts serve to defend fundamental elements of the constitutional order from being altered or destroyed. In such contexts such as ours with a history of authoritarian rule, characteristic of many fragile African

116 See Gwen Brodsky, 'Social Charter Issues' in Joel Bakan, & David Schneiderman, (eds) *Social Justice and the Constitution* (Carleton University Press, 1992) 43.

117 The Constitution of Kenya Review Commission, *The Final Report of the Constitution of Kenya of Kenya Review Commission* (CKRC, 2005) 134.

118 See Gary Craig, 'Introduction to the Handbook on Global Social Justice' in Gary Craig, (ed.) *Handbook on Global Social Justice* (Edward Elgar Publishing, 2018) 1, 6.

119 See generally Kalpana Kannabiran, (ed.) *Routledge Readings on Law and Social Justice* (Routledge, 2022).

120 See for example Roberto Gargarella, *et al*, (eds) *Courts and Social Transformation in New Democracies: An Institutional Voice for the Poor?* (Taylor and Francis, 2006); Daniel Maldonado, (ed.), *Constitutionalism of the Global South: The Activist Tribunals of India, South Africa, and Colombia* (Cambridge University Press, 2018); Varun Gauri, & Daniel Brinks, (eds) *Courting Social Justice: Judicial Enforcement of Social and Economic Rights in the Developing World* (Cambridge University Press, 2010); and Ntandokayise Ndlovu, & Arthur van Coller, 'The Constitutional Court of South Africa as an Agent of Social Justice' in Viljam Engstrɯm, *et al, Social Justice Innovation in Africa* (Routledge, 2024) 149, 151.

121 See Judy Fudge, 'What do we mean by Law and Social Transformation?' (1990) 5 *Canadian Journal of Law and Society* 47-70.

122 See in this respect Eric Kibet & Charles Fombad, 'Transformative Constitutionalism and the Adjudication of Constitutional Rights in Africa' (2017) 17 *African Human Rights Law Journal* 340-366. See also Karl Klare, 'Legal Culture and Transformative Constitutionalism' (1998) 14 (1) *South African Journal on Human Rights* 146.

123 Yvonne Tew, *Constitutional Statecraft in Asian Courts* (Oxford University Press, 2020) 3 for conceptualisation of the protective and constructive roles of courts.

democracies, judicial review reinforces democratic governance by safeguarding core structures of democracy from being eroded.

15. Thus, with respect to the constitutional project of devolution of government and bicameralism in the legislative system, the Courts serve a protective role by guarding the institutions established to engender the project of devolution of governance.

16. The Courts have been the foremost defenders of devolution and bicameralism. In every instance when devolution has been threatened, the courts and specifically the Supreme Court has stepped in to defend the spirit of devolution and bicameralism.[124] I will illustrate this point with two landmark decisions in this regard.

17. In *Council of Governors Advisory Opinion*[125], the Supreme Court rendered an Advisory Opinion on how the recurrent failure between the Senate and the National Assembly to agree on a Division of Revenue Bill would be resolved. The Court directed that funds equivalent to 50% of the previous year's allocation should be disbursed to the counties whenever the legislative chambers have not agreed on division of revenue between the two levels of government despite the commencement of a new financial year. This recurrent stalemate has often led to delayed disbursement of funds to the county governments.

18. In an earlier decision, *In the Matter of the Speaker of Senate & Another v the Attorney General & Another & 4 Others*[126]; in 2013 the Supreme Court opined in an Advisory Opinion that the Senate has a clear role to play, in the processing of the Division of Revenue Bill. This was in the face of assertions by the National Assembly that the Senate should not be involved in the processing of the Division of Revenue Bill which the legislative instrument for budgetary allocation between the National and county governments.

19. In rendering advisory opinions on the aforementioned devolution references, the Court recognised that devolution is intrinsically linked to the social transformation project of the Constitution. In this context the Court protected the spirit of devolution in appreciation that devolution is intended to be remedy to a national history of exclusive economy and development and a legacy of marginalisation of regions that were not politically aligned with the national government.[127]

20. There is also a constructive role for courts which involves building and developing the foundational principles of an emerging constitutional order. In aspiring democracies like ours, judiciaries have the potential to build a culture of constitutionalism. While its protective role focuses on the existing structures of constitutional governance, this facilitative role is explicitly forward-looking: it calls on courts to be conscious about crafting principles of constitutionalism and rights protection.

21. In reaching for judicial tools to employ in discharging this constructive role, courts use an interpretive approach that promotes and gives effect to the foundational values and principles of the Constitution. In addition, the Courts use purposive interpretation to incrementally develop the law over time.

22. In the context of the devolution of governance, the Supreme Court of Kenya has similarly played a constructive role by developing jurisprudence that enables the institutions established under the devolved system of governance to operate effectively.

23. In *Reference Speaker, County Assembly of Embu*[128], Advisory Opinion rendered on what ought to happen when the office of the Deputy Governor becomes vacant in the absence of a legislative framework on filling the vacancy. The Supreme Court adopted the approach that the "law is always speaking" and advised that *where a vacancy occurs in the Office of the Deputy County Governor, the Governor shall within fourteen days, nominate a person to fill such vacancy.* The County Assembly shall vote on the nomination within *sixty days* after receiving it. Where a

124 See for an assessment of the role played by the Supreme Court in safeguarding devolution and bicameralism Walter Khobe Ochieng, 'Constitutional Guardianship in Kenya's Bicameral Legislature: An Assessment of Judicial Intervention in Inter-Cameral Disputes over the Enactment of the Division of Revenue Bill' (2021) 5(1) *Strathmore Law Journal* 115- 144.

125 *In the matter of Council of Governors & 47 others* (Reference 3 of 2019) [2020] KESC 65 (KLR) (Civ) (15 May 2020) (Advisory Opinion) (with dissent - NS Ndungu, SCJ).

126 *Speaker of the Senate & another v Attorney-General & another; Law Society of Kenya & 2 others* (Amicus Curiae) (Advisory Opinion Reference 2 of 2013) [2013] KESC 7 (KLR) (1 November 2013) (Advisory Opinion) (with dissent - NS Ndungu, SCJ).

127 See in this regard John Mutakha Kangu, *Constitutional Law of Kenya on Devolution* (Strathmore University Press, 2015) 46-93.

128 *In re Speaker, County Assembly of Embu* (Reference 1 of 2015) [2018] KESC 49 (KLR) (Civ) (9 March 2018) (Advisory Opinion).

vacancy occurs in *both* the offices of County Governor and Deputy County Governor at the same time, *the office of the Deputy County Governor shall remain vacant until the election of a new Governor*. The new Governor *shall nominate a person to fill the vacancy within fourteen days after assuming office. The County Assembly shall vote on the nomination within sixty days after receiving it.* This holding applies in all circumstances pursuant to which the Office of the Deputy Governor may become vacant as contemplated by the Constitution, i.e., death, resignation, or impeachment.

24. In *Base Titanium Limited v County Government of Mombasa & Another*[129], the Supreme Court delivered a judgment addressing the question whether it is proper for a County Government to levy a charge for a road service for a road that is vested in the National Government. The Court found that there was a distinction between national roads and county roads. National roads were maintained solely by the national government through KeNHA while counties, maintain their roads in collaboration with the other authorities. To access the port, the appellant had to use the Likoni-Ukunda Road which the Kenyan road system identified as an A14 road. That road, A14 fell directly into the category of a national road. That category fell directly under the mandate of KeNHA and the National Government which oversaw its development, rehabilitation, management, and maintenance.

25. It was therefore the decision of the Court that the National Government was the provider of the road service in the instant case. Should an access fee be owing, then the proper entity to which that amount was owed should be the National Government not the county government.

26. These decisions that I have highlighted show that the Supreme Court is developing a rich indigenous jurisprudence that has protected the spirit of devolution and has also enabled the institutions established under our devolved system of government to function through the adoption of purposive approach to constitutional interpretation.

Human Rights Jurisprudence

27. It is notable that the Constitution fashions the Bill of Rights as the standard test for all state and private actions and policies, whether social, economic or cultural.[130] Moreover, in the words of Article 19(2) of the Constitution, the 'purpose of recognising and protecting human rights and fundamental freedoms is to preserve the dignity of individuals and communities and to promote social justice and the realisation of the potential of all human beings'. The implications is that robust enforcement of human rights has implications for the emergence of the socially just state and society envisaged in the Constitution.[131]The Supreme Court has played a crucial role in promoting and advancing human rights in the country.

28. Transitional justice plays a crucial role in recommitting societies that have suffered gross and systemic violations of human rights to break with the past and move forward in a manner consistent with the new democracy envisaged in a new constitutional dispensation.[132] The Court has interrogated *the concept of transitional justice* and held that it requires courts to consider the historical context of Kenya's democratic transition when determining whether there is undue delay in lodging a claim in court for cases of human rights violations that occurred in the past. This principle was developed in *the Mothers' of Political Prisoners Case*[133], where the Court found that the mothers who protested for the release of their children who were detained for political reasons in the 1980s and early 1990s were subjected to cruel and inhumane treatment by the police when they were brutally dispersed from Uhuru park in 1991.[134]

29. On social and economic rights, the Court has addressed the enforcement of the right to housing. The Court has held that the right to housing does not confer title to public land to squatters or landless persons who occupy public land illegally, but grants them a protectable right to housing that requires adequate notice, humane conditions, and alternative land for settlement in case of eviction. This principle was developed in the *Mitu-Bell Welfare Society*

129 *Base Titanium Limited v County Government of Mombasa & another* (Petition 22 of 2018) [2021] KESC 33 (KLR) (16 July 2021) (Judgment).

130 Article 19(1) of the Constitution.

131 See Japhet Biegon, & Godfrey M Musila, 'Introduction: Socio-Economic Rights as One Promise of a New Constitutional Era' in Japhet Biegon, & Godfrey M Musila (eds) *Judicial Enforcement of Socio-Economic Rights Under the New Constitution: Challenges and Opportunities for Kenya* (ICJ-Kenya, 2011) 3,4.

132 See in this regard Ruti Teitel, 'Transitional Jurisprudence: The Role of Law in Political Transformation' (1997) 106 *Yale Law Review* 2009; See also Walter Khobe Ochieng, 'The Retrospective Reach of Transitional Constitutionalism' (2014) 1 *Kabarak Journal of Law and Ethics* 259.

133 *Wamwere & 5 others v Attorney General* (Petition 26, 34 & 35 of 2019 (Consolidated)) [2023] KESC 3 (KLR) (27 January 2023) (Judgment).

134 For critique see Gautam Bhatia, '"The struggle of memory against forgetting": The Kenyan Supreme Court's Judgment on Transitional Justice' available at: https://indconlawphil.wordpress.com/2023/01/30/the-struggle-of-memory-against-forgetting-the-kenyan-supreme-courts-judgment-on-transitional-justice/

Case[135], where the Court also recognized the power of courts to issue structural interdicts to enforce human rights.[136]

30. Moreover, the Court has also held that the right to housing does not extend to squatters or landless persons who occupy private land illegally, but they still have the right to dignity, life and security during eviction. This is the principle developed in the *William Musembi Case*[137]. In effect, the Court has used the transformative impulse of the right to housing to protect the rights of the marginalised and vulnerable land users and occupiers. This approach recognises that the constitutional aspiration for socio-economic justice demands that courts re-consider the established doctrinal and traditional underpinnings of property law and theory and reconstruct our understanding of property rights and interests in land to promote social justice and human dignity for vulnerable land users and occupiers.[138]

31. The Court has also addressed the equality and non-discrimination under the Constitution. In the *Samuel Gitau Gichuru* case[139], the Court held that an employer must provide reasonable accommodation to a sick or incapacitated employee or to demonstrate that they would incur undue hardship in providing such accommodation. The court concluded that the employer's failure to reasonably accommodate the employee amounted to indirect discrimination. Importantly, the Court recognised that constitution prohibits both direct and indirect discrimination. By recognizing indirect discrimination, the Court advanced a substantive conception of equality by recognizing that vulnerable persons often require more than just facially uniform treatment therefore courts have the duty to inquire whether equal treatment in a particular case leads to unequal impact on a person or group based on their particular characteristics.[140]

32. The Court has held that the right to a fair trial includes the right to mitigation before sentencing. This was in the *Francis Karioko Muruatetu Case*[141] where the Court held that the mandatory death sentence for murder is unconstitutional for violating this right.

33. The Court has also affirmed the special place of right to association in a democratic society by protecting the rights of sexual minorities to form and register a Non-Governmental Organisation.[142] The Court affirmed that even unpopular minorities are deserving of protection and must be allowed to organise to advocate for their rights and interests.

34. More recently, in the *CMM v Standard Media Case*[143] the Court distinguished between public law and private law remedies. Under common law principles, it is settled that compensation for personal loss depends on proof of such loss or damage, like in tortious claims. However, arising out of the violation of constitutional rights and fundamental freedoms of an individual under public law, the nature of the damages awardable are broadly compensatory or vindicatory. Once a petitioner has presented proof on a balance of probabilities that his or her rights were violated, the court must vindicate and affirm the significance of the violated rights, even though the petitioner may not present evidence of any loss or damage suffered as a result of the violation.

The Land Question and Land Grabbing

35. The land question was at the forefront of debates during the constitution making process. A key concern related to the issue of 'land grabbing' which involves the grabbing of public lands such as playgrounds, school premises,

135 *Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others; Initiative for Strategic Litigation in Africa (Amicus Curiae)* (Petition 3 of 2018) [2021] KESC 34 (KLR) (11 January 2021) (Judgment).

136 For critique see Ian Mwiti Mathenge, 'A Critique of the Supreme Court's Pronouncements on International Law and the Right to Housing in Kenya in Mitu-Bell Welfare Society' (2022) 6(1) *Kabarak Journal of Law and Ethics* 1-32. See also Victoria Miyandazi, 'Setting the Record Straight in Socio-Economic Adjudication: The Mitu-Bell Welfare Society Supreme Court of Kenya Judgment' (2022) 6(1) *Kabarak Journal of Law and Ethics 33-56.*

137 *Musembi & 13 others v Moi Educational Centre Co. Ltd & 3 others* (Petition 2 of 2018) [2021] KESC 50 (KLR) (16 July 2021) (Judgment).

138 See AJ van der Walt, *Property in the Margins* (Hart Publishing, 2009) 17 for conceptualisation of property theory in contexts of social and political transformation.

139 *Gichuru v Package Insurance Brokers Ltd* (Petition 36 of 2019) [2021] KESC 12 (KLR) (22 October 2021) (Judgment).

140 See in this regard Victoria Miyandazi, *Equality in Kenya's 2010 Constitution: Understanding the Competing and Interrelated Conceptions* (Hart Publishing, 2021) 42-43.

141 *Muruatetu & another v Republic; Katiba Institute & 5 others* (Amicus Curiae) (Petition 15 & 16 of 2015 (Consolidated)) [2017] KESC 2 (KLR) (14 December 2017) (Judgment).

142 *NGOs Co-ordination Board v EG & 4 others; Katiba Institute (Amicus Curiae) (Petition 16 of 2019) [2023] KESC 17 (KLR) (Constitutional and Human Rights)* (24 February 2023) (Judgment) (with dissent - MK Ibrahim & W Ouko, SCJJ).

143 *CMM (Suing as the Next of Friend of and on Behalf of CWM) & 6 others v Standard Group & 4 others* (Petition 13 (E015) of 2022) [2023] KESC 68 (KLR) (8 September 2023) (Judgment).

social halls, forests, amongst other public utilities.[144]This informed the special provision of Article 40(6) of the Constitution that provides that illegally and fraudulently acquired land is not protected under the right to property.

36. The Court applied the principle in Article 40(6) of the Constitution in the *Dina Management Limited Case*[145], where it held that a title or lease that was issued irregularly or unlawfully cannot be held as indefeasible, and that the ownership of such land cannot be protected under Article 40 of the Constitution.[146]The Court also applied this principle in *the Torino Enterprises Limited Case*[147], where it held that an innocent purchaser for value without notice must be a diligent purchaser who inspects the premises before buying. It means that the root of the title is crucial in determining the validity of a title.

37. The implication of this jurisprudence on 'land grabbing' is that innocent purchasers should seek indemnity from land grabbers but illegally and irregularly acquired public land must revert to the state.

38. Beyond land grabbing, the Supreme Court in *Isack M'inanga Kiebia v. Isaaya Theuri M'lintari & Another*[148] determined the juridical status of customary trust in land. The Court appreciated that land in a traditional African setting, is always the subject of many interests and derivative rights; and that such rights could be vested in individuals or group units. Therefore, the Court held that of essence is the nature of the holding of the land and intention of the parties. If the said holding is for the benefit of other members of the family, then a customary trust would be presumed to have been created in favour of such other members, whether or not they are in possession or actual occupation of the land.

Judicial Review Beyond the Frontiers of the Common Law

39. For a long time, Kenya's administrative law principles were founded on the common law. However, with the coming into force of the 2010 Constitution, that entrenches the right to fair administrative action in Article 47 and the enactment of the Fair Administrative Action Act, 2015; Kenya's administrative law received fresh underwriting and therefore is not straight jacketed within the confines of the common law[149].

40. The Court in the *Dande Case*[150], recognized the changed nature of judicial review of administrative action where it held that a judicial review court ought to carry out a merit review of a case when a party approaches it under the provisions of the Constitution, rather than limiting itself to the process and manner of the decision or action as recognized under the common law.

On Separation of Powers

41. Separation of powers is a key aspect of the Constitution that works to avoid the abuse of power. It ensures that there is checks and balances in the exercise of public power. It speaks to the truism that public power is a limited power that ought to be restrained.[151]

42. The Court applied this principle in *the CDF Case*[152], where it held that the Constituencies Development Fund Act, 2013 violated the division of functions between the national and county levels of government, as well as the constitutional revenue-sharing formula. The Court also developed a two-pronged test to determine whether a conferring of mandate violates the doctrine of separation of powers. The two limbs of the test are about whether there is interference in functional autonomy of another arm of government's mandate and the impact this will have

144 See generally Ambreena Manji, *The Struggle for Land and Justice in Kenya* (James Currey, 2020). See also Ambreena Manji, *The Politics of Land Reform in Africa* (2006, Zed Books), and Catherine Boone, *Property and Political Order in Africa: Land Rights and the Structure of Politics* (Cambridge University Press, 2013).

145 *Dina Management Limited v County Government of Mombasa & 5 others* (Petition 8 (E010) of 2021) [2023] KESC 30 (KLR) (Constitutional and Human Rights) (21 April 2023) (Judgment).

146 For critique see Ambreena Manji, & Jill C. Ghai, 'Guest Post: The Long Shadow of Land Grabbing – Analysing the Decision of the Kenya Supreme Court in Petition 8 of 2021' available at: https://indconlawphil.wordpress.com/2023/06/29/the-long-shadow-of-land-grabbing-analysing-the-decision-of-the-kenya-supreme-court-in-petition-8-of-2021/.

147 *Torino Enterprises Limited v Attorney General* (Petition 5 (E006) of 2022) [2023] KESC 79 (KLR) (22 September 2023) (Judgment).

148 *Kiebia v M'lintari & another* (Civil Case 10 of 2015) [2018] KESC 22 (KLR) (5 October 2018) (Judgment).

149 See Migai Aketch, 'Judicial Review in Kenya: The Ambivalent Legacy of English Law' in Swati Jhaveri, & Michael Ramsden, (eds) *Judicial Review of Administrative Action Across the Common Law World* (Cambridge University Press, 2021) 191-212. See also Walter Khobe Ochieng, 'The Architectonics of Administrative Law in Kenya Post-2010' (2016) 2 *Kabarak Journal of Law and Ethics* 1-12.

150 *Dande & 3 others v Inspector General, National Police Service & 5 others* (Petition 6 (E007), 4 (E005) & 8 (E010) of 2022 (Consolidated)) [2023] KESC 40 (KLR) (16 June 2023) (Judgment).

151 See in this regard Charles Fombad, 'An Overview of Separation of Powers under Modern African Constitutions' in Charles Fombad, (ed.) *The Separation of Powers in African Constitutionalism* (Oxford University Press, 2016) 58.

152 *Institute for Social Accountability & another v National Assembly & 3 others & 5 others* (Petition 1 of 2018) [2022] KESC 39 (KLR) (8 August 2022) (Judgment).

on the realization of the values and principles of the Constitution.[153]

On Constitutional amendments

43. Constitutional amendments are crucial to ensure that the Constitution remains a living document that responds to the needs and circumstances of each generation, but also require safeguards against abusive or arbitrary amendments. A constitutional amendment process by its nature often involves political maneuvering, bargaining and negotiations and the political positions, agreements and disagreements between groups and leaders come to the fore.[154] It will always involve the 'inns' who are favoured with the existing state of affairs wanting to keep their advantage; and the 'outs' who feel excluded by the existing constitution trying to get access to the table through new constitutional provisions that reflect their view point.

44. Given these realities, the most important consideration to be taken into account by constitutional drafters, in my view, is to have constitutional amendment provisions that are deeply participatory, deliberative and inclusive as done in Chapter Sixteen of the 2010 Constitution. This ensures that the Constitution always remains the 'people's Constitution', not a constitution for political elites; legal elites; or judicial elites; the point is that the ultimate fate of the Constitution must always lie with citizens.

45. The Court recognized this in the *BBI Case*[155], where it held that the basic structure doctrine does not apply in Kenya, as the Constitution has a self-contained mechanism to deal with any threat of abusive amendments. The Court also recognized that, in light of our history where abusive constitutional amendments were instigated by the President under the previous constitutional dispensation, the President cannot initiate constitutional amendments through a popular initiative, as this is a citizen-driven process. In light of this, the Court found that the Constitution of Kenya (Amendment) Bill, 2020 was unconstitutional, as it was initiated by the President.[156]

Family Law Jurisprudence

46. The family is the fundamental unit of our society and therefore for individuals and communities to thrive and realise their potential we must have peace in our families. This aspiration informs the text of Article 45(1) of the Constitution that the recognises that the family is the natural and fundamental unit of society and the necessary basis for social order. The implication is that the family plays a formative role in society, but law and society also shape families.[157] It is in this context that the Supreme Court has settled jurisprudence in the family context.

47. In *MNK v. POM*[158] the Court recognized the existence of relationships where couples choose to have interdependent relationships without the intention of contracting a marriage. Therefore, in such situations a presumption of marriage cannot arise where the intention for marriage does not exist.

48. In *JOO v. Martha Bosibori Ogentoto*[159] the Court held that entitlement of equal rights between parties to a marriage under the Kenyan Constitution does not automatically grant a 50:50 division of matrimonial property without proof of contribution. The extent of contribution made by each spouse is to be determined on a case-by-case basis including taking into account the non-monetary contribution of a spouse.

49. In sum, these are just but a sample of principles that have emerged from the Supreme Court's decisions. These decisions show how the Court has progressively developed the law to breathe life to aspirations of our transformative Constitution.

153 For an assessment of the Supreme Court's approach to the doctrine of the separation of powers, see Mark L. Gitau, 'Emerging Horizons: Transformative Prudentialism and the Renaissance of Judicial Philosophy in the Supreme Court of Kenya' (2023) 8(1) *Strathmore Law Review* 43-72.

154 See generally Githu Muigai, *Power, Politics & Law: Dynamics of Constitutional Change in Kenya, 1887 – 2022*, (Kabarak University Press, 2022).

155 *Attorney-General & 2 others v Ndii & 79 others; Dixon & 7 others (Amicus Curiae)* (Petition 12, 11 & 13 of 2021 (Consolidated)) [2022] KESC 8 (KLR) (31 March 2022) (Judgment) (with dissent).

156 For critique see Yaniv Roznai, 'We the Limited People? On the People as a Constitutional Organ in Constitutional Amendments' (2023) 110 *Supreme Court Law Review* 103 - 131. see also Catherine O'Regan, 'The Political Paradox of African Constitutionalism Revisited: Kenya's BBI Case' in Madhav Khosla, & Vicki C. Jackson, (eds.) *Redefining Comparative Constitutional Law: Essays for Mark Tushnet* (Oxford University Press, 2024) 224-241; and Gautam Bhatia, 'The Hydra and the Sword: Constitutional Amendments, Political Process, and the BBI Case in Kenya' (2025) *Global Constitutionalism* 1-22.

157 See in this regard Linda C. McCain, 'Family Constitutions and the (New) Constitution of the Family' (2006) 75 *Fordham Law Review* 833.

158 *MNK v POM; Initiative for Strategic Litigation in Africa (ISLA)* (Amicus Curiae) (Petition 9 of 2021) [2023] KESC 2 (KLR) (27 January 2023) (Judgment).

159 *JOO v. Martha Bosibori Ogentoto; Federation of Women Lawyers (FIDA Kenya) & another* (Amicus Curiae), Petition No. 11 of 2020; [2023] KESC 4 (KLR).

8.3 Conclusion

50. To conclude, as we forge ahead, I reiterate the resolve and commitment that the Supreme Court will continue to serve as a pillar of social transformation – upholding the rule of law, protecting human rights, and fostering social justice. I urge you to join the Supreme Court and the Judiciary in living the ideals and dreams embodied in our Constitution. Together, let us build a nation that lives up to the ideals of our Constitution, a nation where justice is a right for all, and not a privilege for a few.

51. Once again, I congratulate and celebrate Canon Dr Wamuti Ndegwa and Dr Kenneth Wyne Mutuma for the publication of the book *"The Supreme Court Settles the Law"*. I urge all of us to read this publication to learn about the jurisprudence that has emerged from the Supreme Court and how the court has played a role in settling the law.

Supreme Court of Kenya's Journey and its Experience in Determining Presidential Election Petitions

Hon. (Mr.) Justice Mohammed K. Ibrahim, CBS, SCJ[160]

(*This paper was delivered on 30th November 2022 at the 2022 Annual Africa Jurists Conference in Arusha-Tanzania*)

9.1 Introduction

1. This presentation discusses the rationale for establishing the Supreme Court and its exclusive mandate to determine election petitions. According to Article 163 of the Constitution, the Supreme Court of Kenya is the apex court of the Country. Article 140 of the Constitution read with Article 163(3)(a), clothes the Supreme Court of Kenya with the exclusive prerogative, as well as the duty, to hear and decide any challenge to a presidential election.
2. This paper is a brief synopsis of the Court's journey from inception to the present day in handling and determining presidential election petitions.

8.2 The Rationale for the Establishment of the Supreme Court and its exclusive mandate in determining presidential election petitions?

3. In democracies, the judiciary's function extends beyond the adjudication of simple legal disputes to include legal matters of a political nature, such as election conflicts. Kenyan elections, like those in many other nations, are incredibly emotional. However, the Kenyan Judiciary has historically been criticized for failing to mediate politico-legal problems in an expedient, effective, and impartial manner. As stated in the Task Force on Judicial Reforms' Final Report published in 2010 and chaired by my Brother Justice William Ouko, the 1980s and 1990s saw the political space expand with the reintroduction of political pluralism and the end of the one-party regime. However, this had the corresponding effect of elections being highly contested and the ensuing election disputes increasingly brought to court for determination.

4. Yet, the resolution of election disputes remained ineffective and sometimes unfair owing to unconscionable delays or dismissal on procedural technicalities. One such case is the well-known decision of the Presidential Petition of 1997 filed by Mwai Kibaki against the then-sitting President Daniel Arap Moi (*Mwai Kibaki vs Daniel Toroitich Arap Moi Civil Appeal No. 172 of 1999) [1999] eKLR)* which was dismissed for lack of personal service on the president.
5. The Report also apportioned some blame to the Judiciary for the Post-election violence that rocked Kenya following the 2007 General Elections The blame was attributed to a lack of confidence and rejection of the Judiciary as an impartial and independent arbiter owing to historical failures in the resolution of election petitions more so presidential election petitions.
6. Kenya's journey of constitutional reform leading to its Constitution promulgated in 2010, was no less than twenty years. Key in this journey were the efforts made by the Constitution of Kenya Review Commission (CKRC) led by Prof. Yash Pal Ghai. The importance and significance of the CKRC Final Report published in February 2005 must be underscored. It was, in my considered opinion, the most monumental and widest exercise of public participation ever carried out in Kenyan history as it ensured a deeply participatory process marked by widespread civic education, deep and wide research as well as widespread public consultations. Key among the views of Kenyans was the need for establishing a Supreme Court. These views are recorded in the CKRC report as follows:
    (a) *The need for a new apex Court that would restore the public confidence in the judiciary;*
    (b) *Have a Court that will determine Presidential Elections Disputes impartially and with finality.*
7. These were taken into consideration and once the Constitution was promulgated, the Supreme Court was established with one of its key mandates being the exclusive and original jurisdiction to determine any challenges to the presidential elections.

8.3 *The legal framework for elections and the determination of presidential election petitions*

8. The Constitution of Kenya through Article 81(e) sets out the standard and quality that elections in Kenya should comply with. Article 81(e) requires that elections in Kenya be free and fair and this is measured by whether the elections are by secret ballot; free from violence, intimidation, improper influence or corruption; conducted by an independent body; transparent; and administered in an impartial, neutral, efficient, accurate and accountable manner. Further Article 86 of the Constitution provides that at every election the Independent Electoral & Boundaries Commission shall ensure that:
    a) Whatever voting method is used, the system is simple, accurate, verifiable, secure, accountable and

160 Justice of the Supreme Court of Kenya and the Chairperson of the Judiciary Committee on Elections.

transparent.

b) *The votes cast are counted, tabulated and the result announced promptly by the presiding officer at each polling station.*

c) *The results from the polling stations are openly and accurately collated and promptly announced by the returning officer, and.*

d) *Appropriate structures and mechanisms to eliminate electoral malpractices are put in place including the safekeeping of electoral materials.*

9. Technology also plays an integral and intricate role in the conduct of elections in Kenya. The Independent Review Commission (IREC), often known as the Kriegler Commission, was established in the wake of the violent events that followed the 2007 general. One of the most important recommendations from the Commission's report was the use of technology in elections to increase the process's transparency, legitimacy, and integrity while minimizing human participation.

10. Section 44 (1) of the Elections Act No. 24 of 2011, establishes an integrated electronic electoral system that enables biometric voter registration, electronic voter identification and electronic transmission of results. The Independent Electoral and Boundaries Commission (IEBC according to Section 44(2) is required to develop a policy on the progressive use of technology in the electoral process. IEBC is required to ensure the technology deployed in the electoral process is *"simple, accurate, verifiable, secure, accountable and transparent."* IEBC is required to procure and put in place the technology necessary at least one hundred and twenty days (120) before an election. Before a General Election, IEBC must test, verify and deploy its technology at least sixty (60) days before.

11. Complementary to those provisions, Section 4 of the Independent Electoral and Boundaries Commission Act No. 9 of 2011, mandates the IEBC to use appropriate technology and approaches in the performance of its functions. This is further elaborated in the Elections (Technology) Regulations 2017 established through Legal Notice No. 68 of 2017.

12. However, recognising that no elections are perfect and no technology is infallible, Section 44A of the Elections Act provides for a complementary mechanism for the identification of voters. The complementary mechanism must also be "*simple, accurate, verifiable, secure, accountable and transparent.*"

13. Pursuant to those provisions, during the 2013 General Elections IEBC used various systems to carry out biometric voter registration, electronic voter verification, electronic voter identification, candidate registration management, and a results transmission system. Since this was IEBC's first time utilizing the system, there were several technical difficulties. The Elections Act was later updated, and Section 44 was changed to require the IEBC to set up an integrated electronic voting system.

14. During the 2017 General Election, IEBC deployed the Kenya Integrated Electoral Management System (KIEMS) which was a new system that unified the various system into one all-encompassing system intended to be used in the biometric voter registration, and, on election day, for voter identification as well as the transmission of election results from polling stations simultaneously to the Constituency Tallying Centre (CTC) and the National Tallying Centre (NTC). Kenya continues to use this system to date.

15. Nevertheless, one of the key components that set the Presidential election apart from the others is the requirement for transmission of results from the polling stations to the National Tallying Centre pursuant to Section 39(1C) of the Elections Act which provides that for purposes of a presidential election, IEBC shall:

"(a) electronically transmit and physically deliver the tabulated results of an election for the President from a polling station to the constituency tallying centre and to the national tallying centre;

(b) tally and verify the results received at the constituency tallying centre and the national tallying centre; and

(c) publish the polling result forms on an online public portal maintained by the Commission."

16. The Presiding Officer then takes the original Form 34A and physically submits it to the Constituency Returning Officer. According to Section 39E of the Elections Act, where there is a discrepancy between the electronically transmitted and the physically delivered original results, the results tallied, verified and declared at the respective polling station captured in the original Form 34A shall prevail.

17. Article 140 of the Constitution provides that any challenge to a presidential election petition must be filed within seven (7) days. The Supreme Court then has only fourteen (14) days to hear the parties and make a determination. On the fourteenth day, the Court issues its determination but may reserve its reasons to a date not later than

twenty-one (21) days from the date the Court determines the petition. In the event the Court nullifies the election of the president-elect, then fresh elections must be held within sixty days. I reproduce the provision as follows:

"140. Questions as to validity of presidential election

(1) A person may file a petition in the Supreme Court to challenge the election of the President-elect within seven days after the date of the declaration of the results of the presidential election.

(2) Within fourteen days after the filing of a petition under clause (1), the Supreme Court shall hear and determine the petition and its decision shall be final.

(3) If the Supreme Court determines the election of the President-elect to be invalid, a fresh election shall be held within sixty days after the determination."

18. Article 163 (3)(a) of the Constitution provides as follows:
"The Supreme Court shall have—
(a) exclusive original jurisdiction to hear and determine disputes relating to the elections to the office of President arising under Article 140;"

19. The Supreme Court (Presidential Election Petition) Rules, 2017, guide the Court on the activities of the 14 days from the time of filing, service, pretrial conference, determination of any interlocutory applications and hearing of the parties. *(See the table below)*

i. ***The first presidential election petition filed in 2013***

Raila Odinga & The Independent Electoral and Boundaries Commission & 3 others, SC Petition Nos. 5, 3 & 4 of 2013 [2013] eKLR (*"Raila 2013")*

20. Kenya held its first general election under the 2010 Constitution on 4th March, 2013. The IEBC's electronic results transmission system failed during the tallying process, leaving it with little choice but to rely on human tallying of results. As a result, the IEBC was unable to announce results as soon as they became available.

21. On 9th March, 2013, Issack Hassan, the chairman of the IEBC (the second respondent), announced that Raila Odinga, the primary petitioner, had received 5,340,546 votes, or 43.31% of the total votes cast, while Uhuru Kenyatta, the third respondent, had received 6,173,433 votes out of a total of 12,338,667. Uhuru Kenyatta was declared the President-elect in accordance with Article 138(4) of the Constitution.

22. Three applications were submitted to the Supreme Court after this declaration. The first petition disputed the final tally's inclusion of invalid votes, which the petitioners said had a distorting effect on the percentage of votes each contender received. In the second petition, the electoral process as it related to the Presidential election was contested by the IEBC. The IEBC's designation of the third respondent and fourth respondent as president-elect and vice president-elect, respectively, was contested in the third petition.

23. The final petition which was filed by Raila which claimed that the election process had been so fundamentally faulty that it was impossible to determine whether the presidential results that had been announced were legitimate, was eventually chosen as the pilot petition in the consolidation of the petitions.

24. Being the first time, the Supreme Court was exercising this mandate, it was an opportunity for the Court to pronounce itself on several fundamental issues regarding presidential election petitions.

a) ***Jurisdiction***

25. The first core issue was on *jurisdiction*. On this, the Court was emphatic that pursuant to the Constitution it had original and exclusive presidential election jurisdiction under the Constitution. No court other than the Supreme Court had the authority to hear cases and make decisions involving presidential election disputes. However, this jurisdiction's reach was limited because it was limited in both space and time. Its scope is constrained because it only pertains to an investigation into the legal, factual, and evidentiary issues crucial to determining whether a presidential election was valid or illegal. The Court had to be careful not to usurp the jurisdiction of the lower courts in electoral disputes, especially when it came to the type of reliefs granted in order to avoid upsetting previous sets of elections that had already taken place using the same voter register. The Court was keen that only those orders pertaining to the Presidential election would be granted.

26. The Supreme Court was keen to point out that in the event of annulment of a presidential election, it would not necessarily vitiate the entire general election. It was also crucial to note that because the Constitution itself grants the right to declare a presidential election illegitimate, annulment does not lead to a constitutional crisis.

27. According to Article 140 of the Constitution, it is clear that expeditious resolution of the presidential election disputes is of the essence. Though not unique to Kenya, the period between voting, declaration of a winner and determination by the Court as to affirmation or cancellation of a presidential election, causes the Country to grind to a halt in a state of anticipation and uncertainty. The Court acknowledged that this does not serve the public interest it is was why the framers of the Constitution were keen to ensure that determination of presidential election petitions in Kenya takes place in a timely manner.

b) ***Burden and standard of proof***

28. With regard to the burden of proof, the Court determined that it is the petitioner's responsibility to make a convincing argument that does not attempt to extend the Supreme Court's authority beyond what is provided for in the Constitution. The onus of establishing this keeps transferring based on how well he or she does it. Of course, the Court must ultimately decide whether a strong and unresolved case has been established. When a party claims that the electoral law has not been followed, the petitioner must not only show that the electoral law has not been followed, but also that the failure to do so did not impact the legality of the elections. Therefore, the petitioner is expected to support his request with concrete, reliable evidence of the public authority's violations of the law.

29. As to the standard of proof, the Court adopted the intermediary test, which places the threshold of proof above the balance of probability though not as high as beyond reasonable doubt save that it would not have affected the normal standards where criminal charges linked to an election were in question. In the case of data specific electoral requirements, such as the threshold specified in Article 138(4)[161] of the Constitution for an outright win in the presidential election, the party that bore the legal burden of proof must have discharged it beyond any reasonable doubt.

30. The Court decided on the intermediary test as the appropriate level of proof, which is higher than the balance of probabilities but lower than beyond a reasonable doubt. The only exceptions being where criminal charges associated with an election were at issue or in the event of data-specific electoral requirements, such as the standard outlined in Article 138(4) of the Constitution for an outright victory in the presidential election. The party that had the burden of evidence under the law has to have satisfied it beyond a reasonable doubt.

31. Article 138 (4) of the Constitution provides that for a candidate to be declared the President elect, the candidate must receive

"(a) more than half of all the votes cast in the election; and

(c) *at least twenty-five per cent of the votes cast in each of more than half of the counties."*

c) ***Rejected votes***

32. The Court was urged to consider rejected votes in computing the final results. On this, the Court took the stance that a ballot paper that had already been cast could not have been added to the election results if it did not meet the legal standards. The progressive nature of the Constitution and the interpretation of Article 138(4) of the Constitution, which provided that a candidate shall be declared elected as president if the candidate receives at least twenty-five percent of the votes cast in each of more than half of the counties and more than half of the votes cast overall, referred only to valid votes cast and did not include ballot papers or votes cast but later rejected for non-compliance with the terms of the governing law.

33. The Court held that rejected votes should not have been included by the 2nd respondent in calculating and determining the final tallies in favour of each of the presidential candidates.

d) ***Nature of reliefs the Court can grant***

34. The Court took the view that as a matter of fundamental principle, it should not be up to the court to choose who holds the office of president. The Supreme Court is instead the supreme court and is charged by the Supreme Court Act, 2011 (Act No. 7 of 2011) with upholding the primacy of the Constitution and the sovereignty of the Kenyan people. As a result, it has a responsibility to protect the electoral process and guarantee that those who win the presidency do so in accordance with the legislation governing elections.

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161 Article 138 (4) of the Constitution of Kenya provides that *"A candidate shall be declared elected as President if the candidate receives—*
(a) more than half of all the votes cast in the election; and
(b) at least twenty-five per cent of the votes cast in each of more than half of the counties."

35. The Supreme Court reaffirmed that it had a responsibility to protect its legitimacy and authority and that it was prepared to rule on the legality of the occupant of that office if there had been a serious violation of the electoral law as specified by the Constitution and the governing law.

36. Ultimately, and unanimously, the Court arrived at the conclusion that there was no evidence to prove that the candidate declared as the president-elect had not obtained the basic vote threshold. The Court held that the presidential election was conducted in a free, fair, transparent and credible manner in compliance with the provisions of the Constitution and all the relevant provisions of the law.

37. The Petition was dismissed and the Presidential election results as declared by IEBC upheld.

ii. ***The second presidential election petition filed in 2017***

Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 2 Others, Presidential Petition No. 1 of 2017; [2017] eKLR (*"Raila 2017")*

38. Kenya held its second general election on 8th August, 2017. The general election was also conducted for the first time in accordance with a complex system of electoral laws regarding the use of technology, including amendments to the Elections Act made to introduce the Kenya Integrated Electoral Management System (KIEMS), a new device intended to be used in the biometric voter registration process as well as voter identification and the simultaneous transmission of election results from polling places to the Constituency (NTC) and the National Tallying Centre (NTC).

39. There were 19,646,673 registered voters in the nation, and on 11th August, 2017, the Chair of the Independent Electoral and Boundaries Commission (IEBC), acting in his capacity as the election's returning officer and in accordance with Article 138(10) of the Constitution, declared Uhuru Kenyatta the election's winner with 8,203,290 votes and Raila Odinga the runner-up with 6,762,224 votes.

40. On 18th August, 2017, Raila Odinga and Stephen Musyoka, the presidential and deputy presidential candidates of the National Super Alliance (NASA) Coalition of parties, running on an Orange Democratic Movement (ODM) party ticket and WIPER Democratic Movement ticket respectively, filed a petition contesting the election's results, claiming that the Independent Electoral and Boundaries Commission (IEBC) conducted the election in such a way that it failed to compile accurate results in accordance Articles 1, 2, 4, 10, 38, 81, 82, 86, 88, 138, 140, 163 and 249 of the Constitution of Kenya and the Elections Act (No. 24 of 2011). This was the first time that technology had been deployed in a massive way during both voter registration before the elections and voter identification on election day. It was a major point of contention more so as regards the security of the IEBC servers and the transparency of the Results Transmission System.

41. While the *Raila 2017* case is significant for the fact that by a majority, the Supreme Court of Kenya became the first apex Court in Africa and fourth in the world to annul a presidential election, as a Court however, our pride is not in being the first or fourth to annul an election, but the fact that the Court was able to follow the Constitution and reach a decision that in its opinion (by a majority (4 -2) was constitutionally sound.

42. The Court upheld its stance on the burden and level of proof. Regarding the burden of proof, the Court went on to say that the reason for the intermediary standard of proof was because election petitions are not typical lawsuits involving two or more individual parties. Instead, they are lawsuits in which every voter in a ward, constituency, county, or, in the case of a presidential petition, the entire country, has a real and tangible interest.

43. The Court also upheld its position regarding the consideration of invalid votes, stating that it did not see how a vote that was invalid, rejected, or gave no advantage to any candidate could be taken into account when calculating the threshold of 50% Plus 1. According to the Court, a literal reading of Article 138(4) of the Constitution in terms of Article 259 of the Constitution can only lead to one logical conclusion: the expression "votes cast" in that section refers to legitimate votes.

44. The Court had also been asked to interpret Section 83 of the Elections Act, the provision that laid out what a petitioner needs to prove in order to get the Court to annul an election. The provision at the time was couched in the following manner:

> "No election shall be declared to be void by reason of non- compliance with any written law relating to that election if it appears that the election was conducted in accordance with the principles laid down in the Constitution or in that written law *or* that the non-compliance did not affect the result of the election."

45. The main point of contention was the conjunction used. The provision used "or" whereas it was argued that the English equivalent Act used the word "and". The Court had to decide whether the two limbs of that provision were disjunctive or conjunctive. Disjunctive, meaning a party had to prove that there was non-compliance with the Constitution and or written law while conjunctive meant that a party had to prove both non-compliance and that the non-compliance affected the results of the election.

46. The Court held that the two limbs of Section 83 of the Elections Act be applied disjunctively.

47. With this in mind, the Court examining the facts and evidence before it, took the position that elections are not events but processes that encompass the preparation stages of an election. It is for this reason that the Court concluded that there was inexcusable contravention of the law as regards the use of technology which was an integral part of the presidential election.

48. It is worthy of note, that in Kenya, in presidential elections, the results from the polling stations are transmitted to the National Tallying Centre upon conclusion of the counting and tallying. This was a measure introduced to secure the integrity of the results from the polling stations. For the people of Kenya, the results from the polling station are considered final. All that is expected to happens at the Constituency and National Tallying Centres is a simple arithmetic exercise of verification, tabulating and tallying. In the event of any uncertainty, the results from the polling station are considered ultimate. This was the precedent set the famed decision of *Independent Electoral & Boundaries Commission v Maina Kiai & 5 Others, Civil Appeal 105 of 2017 [2017] eKLR* famously dubbed the *Maina Kiai decision.* The Court of Appeal held as follows:

> "We are satisfied that with this elaborate system, the electronic transmission of the already tabulated results from the polling stations, contained in the prescribed forms, is a critical way of safeguarding the accuracy of the outcome of elections, and do not see how the appellant or any of its officers (read 1st respondent) can vary or even purport to verify those results…".

Further, it reaffirmed:

> "It is clear …that the polling station is the true locus for the free exercise of the voters' will. The counting of the votes as elaborately set out in the Act and the Regulations, with its open, transparent and participatory character using the ballot as the primary material, means, as it must, that the count there is clothed with a finality not to be exposed to any risk of variation or subversion."

49. The Independent Electoral and Boundaries Commission particularly assured the Court that it had thoroughly analyzed every imaginable scenario involving the problem of the electronic transmission of the presidential election results and had clearly asserted that technology would not let them down. Despite this promise, there was a significant transmission failure at a number of voting places across the nation. It was partly due to this that the Court on 28th August 2017 ordered for comprehensive scrutiny of the IEBC's electoral system which was meant to confirm and verify both the efficiency of the technology and also verify the authenticity of the transmissions allegedly made to the CTC and NTC. IEBC declined to allow full realisation of the orders. The Court noted that the IEBC in particular did not permit access to two crucial portions of its servers: its logs, which could have supported or refuted the petitioners' allegations that someone broke into the system and changed the results of the presidential election, and its servers, which house Forms 34A and 34B that were electronically transmitted from polling places and CTCs. As a result, the Court determined that it was standard practice for the Court to form an adverse conclusion about the party refusing to comply when that party fails to comply with a legitimate demand, let alone a specific court order.

50. The Court concluded that IEBC forced them to accept the petitioners' allegations that either IEBC's IT system was infiltrated and compromised, causing the data therein to be tampered with, or that IEBC's officials themselves tampered with the data, or simply refused to accept that it had bungled the entire transmission system and were unable to verify the data.

51. Consequently, the Court found that the 2017 presidential election was not conducted in accordance with the principles laid down in the Constitution and the written law on elections in that it was, *inter alia*, neither transparent nor verifiable. On that ground alone, and on the basis of the interpretation to Section 83 of the Elections Act, the Court stated that it had no choice but to nullify it. Pursuant to Article 140(3) of the Constitution, the Court directed the Independent Electoral and Boundaries Commission (IEBC) to conduct a fresh Presidential election within 60 days.

52. In light of the fact that the 2017 presidential election, was among other things, neither transparent nor verifiable, the Court determined that the 2017 presidential election was not conducted in conformity with the principles outlined in the Constitution and the statutory legislation on elections. The Court declared that it had no choice but to void it on that ground alone, as well as the interpretation of Section 83 of the Elections Act. The Court ordered the Independent Electoral and Boundaries Commission (IEBC) to hold a new presidential election within 60 days in accordance with Article 140(3) of the Constitution.

iii. ***The third presidential election petition filed in 2017***
John Harun Mwau & 2 others v Independent Electoral and Boundaries Commission & 2 others Petitions Nos. 2 and 4 of 2017 **[**2017]

53. IEBC conducted a fresh Presidential election on 26th October, 2017 and on 30th October, 2017 the Chairperson of IEBC declared Uhuru Kenyatta (3rd respondent) as the winner, having garnered 7,483,895 out of the 7,616,217 valid votes cast.

54. On 6th November, 2017, two challenges contesting that election were filed: Petition No. 2 of 2017 by Mr. John Harun Mwau (hence, referred to as the first petitioner) and Petition No. 4 of 2017 by Mr. Njonjo Mue and Mr. Khelef Khalifa (hereinafter, 2nd and 3rd petitioners).

55. There were several issues that were raised; however, I will highlight two focal issues that I consider unique to the fresh elections. One of the primary issues that the Court was requested to address was whether the IEBC should have held new nominations after the 8th August presidential election was declared invalid and before the 26th October new election.

56. With this in mind, the Court came to the judgment that new nominations would be pointless because the Constitution clearly specifies who the participating candidates must be. For the purposes of the new presidential election held on October 26, 2017, the nominations for candidates for that office made on May 28 and 29 were valid, and no additional nomination was necessary. In light of this, it was appropriate for the second responder to list all of the Presidential candidates on the ballot papers for the election that was place on October 26, 2017, as they were all duly nominated.

57. Another question that the Court was confronted with was the effect of the voluntary withdrawal of a candidate before the fresh election. This was due to Hon. Raila Odinga withdrawing. The Court took the view that such withdrawal would not have occasioned the cancellation of the elections. The Court additionally determined that the election was not invalidated by the name of the withdrawn candidate remaining on the ballot. It argued that it would be very difficult to have a candidate's name removed from the ballot given that they have the freedom to resign from the electoral race even one or two days before the polls.

58. The Court proceeded to dismiss the rest of the claims together with the Petitions.

iv. ***Fourth presidential election petitions filed in 2022***
Odinga & 16 others v Ruto & 10 others; Law Society of Kenya & 4 others (Amicus Curiae) **(**Presidential Election Petition E005, E001, E002, E003, E004, E007 & E008 of 2022 [2022] *KESC 54 (KLR)*

59. The third general election held in Kenya under the 2010 Constitution took place on August 9th, 2022. (Constitution). The Kenya Integrated Electoral Management System (KIEMS), which was utilized for biometric voter registration, voter identification on election day, and the transfer of election results from polling places to the National Tallying Center (NTC), was used to transmit the results of the general election.

60. On 15th August, 2017, the chairperson of the Independent Electoral and Boundaries Commission (IEBC)(4th respondent) declared the 1st respondent, William Samoei Ruto, the Presidential Candidate for the United Democratic Alliance Party, (1st respondent) announced that William Samoei Ruto, the presidential candidate for the United Democratic Alliance Party, was the winner with 7,176,141 votes (50.49% of the total number of votes cast for president), and Raila Amollo Odinga came in second with 6,942,930 votes (48.85% of the total number of votes cast for president).

61. Subsequent to the announcement, nine petitions challenging the results of the Presidential elections were filed at the Supreme Court. The largest number of petitions filed challenging a presidential election. Two were struck out at an interlocutory stage as they were not challenging the presidential election petition. The Court was able to delineate nine issues that were cross-cutting in the seven petitions. I will summarise them and the subsequent finding by the Court.

62. Similar to *Raila 2017*, the Court had to consider whether the technology deployed by the IEBC for the conduct of the 2022 general elections met the standards of integrity, verifiability, security and transparency to guarantee accurate and verifiable results. The Court considered the evidence tendered by both sides as well as the ICT scrutiny and inspection report together with the Tallying and Recount Report by the Registrar. The Court was not convinced that the technology deployed by IEBC failed to meet the standards required by the Constitution. The Court also found that there was no evidence that established that there was any interference with the uploading and transmission of Forms 34A from the polling stations. The Court also found that the forms found on the IEBC public portal, the copies issued to the party agents and the original Forms 34A from the polling station were the same. Despite the allegations by the petitioners, there was no difference.

63. The Court had to consider whether the postponement of Gubernatorial Elections in Kakamega and Mombasa Counties, Parliamentary elections in Kitui Rural, Kacheliba Rongai and Pokot South Constituencies and electoral wards in Nyaki West in North Imenti Constituency and Kwa Njenga in Embakasi South Constituency resulted in voter suppression to the detriment of the Petitioners in Petition No. E005 of 2022. The Court found that by virtue of Section 55B of the Elections Act, 2011, IEBC had the requisite power to postpone the election in question. Further despite the postponement, the Court found that there was no proof of voter suppression to the detriment of Hon. Raila Odinga.

64. The election results were also challenged on the basis of discrepancies between the votes cast for presidential candidates and other elective positions. The Court however found that there were plausible explanations tendered by IEBC for the vote differentials on account of the categories of voters who only vote for the President. These include prisoners from the various prisons nationwide and the Kenyans in the diaspora, as well as stray ballots.

65. There were also allegations that IEBC failed to carry out the verification, tallying, and declaration of results in accordance with Article 138 (3) (c) and 138 (10) of the Constitution. More specifically, the petitioners alleged that it was the Chairman of IEBC who had tallied the results and without the concurrence of all if not a majority of the Commissioners of the IEBC. This was a crucial question for the reason that, hours before the declaration by the Chairperson of IEBC, a section of four Commissioners of IEBC led by the Vice Chairperson, broke away and publicly rejected the final tally due what they termed as 'opaqueness' of the electoral process. This however did not halt the Chairperson from proceeding with the declaration.

66. On this issue, the Court was of the view that pursuant to Article 138(3)(c) of the Constitution, the power to verify and tally the Presidential election results vests not in the Chairperson of IEBC by the Commission itself. The Court further elaborated that IEBC carries out this mandate through its secretariat staff, technical personnel and any other persons hired for that purposed under the oversight and supervision of the Chairperson and other members of the Commission. At the end of the process, the Constitution designates the Chairperson of IEBC as the person to declare the result of the presidential election. The Court however found that this power vests only as a delegate of the Commission.

67. The Court also found that the declared President-elect attained 50%+1 vote of all the votes cast in accordance with Article 138 (4) of the Constitution. Finally, that the irregularities and illegalities pointed out by the petitioners were not of such magnitude as to affect the final result of the Presidential Election. Consequently, the Court dismissed all the petitions upholding the election results declared by IEBC.

9.4 Conclusion

68. These four cases have equipped the Court with sufficient experience on how to handle presidential election petitions despite the various challenges that the Court has to manoeuvre, such as the strict timelines.

69. Another challenge the Court has had to endure is the backlash and criticisms both as a Court and as individual Judges from the general public as well as the political class for its decisions.

70. The Supreme Court, as the ultimate judicial forum of the Country has endeavoured to remain a neutral arbiter despite these challenges. The Court has strived to keep to its obligation under section 3(a) of the Supreme Court Act 2011 (Act No. 7 of 2011) to *"assert the supremacy of the Constitution and the sovereignty of the people of Kenya"* and to provide authoritative and impartial interpretation of the Constitution. Further, Article 259(1) of the Constitution decrees the Court must interpret the Constitution in a manner that *"promotes its purposes, values and principles, advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights, permits the development of law and contributes to good governance."*

The Threshold for Leave to Appeal to the Supreme Court & its Jurisdiction

Hon. Justice (Dr.) Smokin Wanjala, Ph.D, FCIArb, CBS[162]

(This paper was presented during a Law Society of Kenya Continous Professional Development -CPD Webinar on 24th July 2023)

10.1 Introduction

1. On 23rd June 2021, the Supreme Court marked ten (10) years since its inception, after the enactment of the Supreme Court Act, 2011 which was assented to on 22nd June 2011, and commenced on 23rd June 2011. A fundamental provision of the Supreme Court Act is Section 3 which vests the Supreme Court with the final judicial authority to:
   (a) assert the supremacy of the Constitution and the sovereignty of the people of Kenya;
   (b) provide authoritative and impartial interpretation of the Constitution;
   (c) develop rich jurisprudence that respects Kenya's history and traditions and facilitates its social, economic and political growth;
   (d) enable important constitutional and other legal matters, including matters relating to the transition from the former to the present constitutional dispensation, to be determined having due regard to the circumstances, history and cultures of the people of Kenya;
   (e) improve access to justice.

1. These objectives have been the bedrock upon which the Court's operations have been anchored, alongside the doctrine of *stare decisis* as provided in Article 163(7) of the Constitution:

   All courts, other than the Supreme Court, are bound by the decisions of the Supreme Court.

2. Anchored on this firm legal foundation, in its decade-long existence, the Court has endeavored to settle the law on various aspects, including setting precedents for other courts in line with Article 163(7). This paper briefly outlines the jurisdiction of the Supreme Court, including the threshold for leave to appeal to the Court.

10.2 Jurisdiction

3. A Court's jurisdiction flows from either the Constitution or legislation or both. Accordingly, a Court of law can only exercise jurisdiction as conferred by the Constitution or other written laws. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. (*See Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others*, Application No. 2 of 2011; [2012] eKLR).

4. The Supreme Court had occasion at the earliest opportunity to pronounce itself upon the distinct nature of its appellate jurisdictions as of right, and upon grant of leave on certification that the appeal involves matters of general public importance. This distinction was first pronounced in the case of *Lawrence Nduttu & 6000 Others v. Kenya Breweries Ltd & another* [2012] eKLR as follows:

   > *"(20)... At the outset, we consider it crucial to lay down once again the principle that only two types of appeal lie to the Supreme Court from the Court of Appeal. The first type of appeal lies as of right if it is from a case involving the interpretation or application of the Constitution. In such a case, no prior leave is required from this Court or Court of Appeal. (21) The second type of appeal lies to the Supreme Court not as of right but only if it has been certified as involving a matter of general public importance. It is the certification by either Court which constitutes leave. This means that where a party wishes to invoke the appellate jurisdiction of this Court on grounds other than that the case is one which involves the interpretation or application of the Constitution, then such intending appellant must convince the Court that the case is one involving a matter of general public importance. If the Court of Appeal is convinced that such is the case and the certification is affirmed by the Supreme Court, then the intending appellant may proceed and file the substantive appeal."*

162 Justice of the Supreme Court and the Director General of the Kenya Judiciary Academy.

5. This distinction was subsequently restated in the case of *Fahim Yasin Twaha v. Timamy Issa Abdalla & 2 Others* [2015] eKLR when the Court stated that the two jurisdictions were distinct and could not be invoked simultaneously in the same matter. That even where a matter raised issues that invoked both jurisdictions, a litigant had to choose which jurisdiction he/she intends to pursue.

(a) ***Appeals as of Right***

6. This jurisdiction is granted by Article 163 (4) (a) of the Constitution which provides as follows:
163 (4) Appeals shall lie from the Court of Appeal to the Supreme Court –
a) As of right in any case involving the interpretation or application of this Constitution;
This jurisdiction is replicated by Section 15 (2) of the Supreme Court Act, 2011.

i. ***Definition of what amounts to an appeal under Article 163(4)(a) of the Constitution.***

7. The Court has had several instances in which it has delimited the contours of its jurisdiction under Article 163(4)(a). Some of these cases include; *Hassan Ali Joho & another v Suleiman Said Shahbal & 2 others* [2014] eKLR; *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others*, [2014] eKLR; *Teachers Service Commission v Kenya National Union of Teachers & 3 others*, [2015] eKLR, among other cases.

9. As regards invocation of the Court's appellate Jurisdiction under Article 163(4)(a) and deference to other superior courts' competence, the Court has settled that *for an appeal to lie to the Supreme Court from the Court of Appeal under Article 163(4)(a), the constitutional issue must have first been in issue both at the High Court and then the Court of Appeal for determination*. That is, the Supreme Court recognizes and respects the constitutional competence of courts in the judicial hierarchy to resolve matters before them. (*See Peter Oduor Ngoge vs Francis Ole Kaparo & 5 Others*, [2012] eKLR and *Erad Suppliers & General Contractors Limited V National Cereals & Produce Board*, [2012] eKLR).

10. It was subsequently summed up in *Gladys Wanjiru Munyi v Diana Wanjiru Munyi*, [2015] eKLR thus:

> *"In Peter Ngoge v. Francis Ole Kaparo & 5 Others, Sup. Ct. Petition No. 2 of 2012 [2012] eKLR, we signalled the guiding principle that the chain of Courts in the constitutional set-up, running up to the Court of Appeal, do indeed have the competence to resolve all matters turning on the technical complexities of the law, and that only cardinal issues of law, or of jurisprudential moment, deserve the further input of the Supreme Court."*

11. From an evaluation of the Court's jurisprudence, the following are delineated as the settled principles as regards appeals under Article 163 (4)(a):

(i) *The appellate jurisdiction under Article 163(4)(a) is prospective in nature and not retrospective. It cannot be invoked to re-open matters at the Supreme Court that had been determined and finalised either by the High Court or the Court of Appeal before the promulgation of the Constitution 2010. The jurisdiction is not a panacea for re-opening closed proceedings but it yields credence to the doctrine of finality of litigation in time.*

(ii) *The jurisdiction upholds judicial hierarchy and the constitutional issues raised on appeal before the Supreme Court for interpretation must have been first raised and determined by the High Court in the first instance with a further determination on the same issues on appeal at the Court of Appeal.*

(iii) *The jurisdiction is discretionary in nature at the instance of the Court. It does not guarantee a blanket route to appeal. A party has to categorically state to the satisfaction of the Court and with precision those aspects/ issues of his matter which in his opinion falls for determination on appeal in the Supreme Court as of right. It is not enough for one to generally plead that his case involves issues of constitutional interpretation and*

application.

(iv) *Matters that involve direct interpretation and/or application of express provisions of the Constitution fall for appeal under this jurisdiction.*

(v) *Mere allegation(s) of Constitutional violations or citation of Constitutional provisions or issues on appeal which involves little or nothing to do with the application or interpretation of the Constitution does not bring an appeal within the Jurisdiction of the Supreme Court under Article 163(4)(a).*

(vi) *Only cardinal issues of constitutional law or of jurisprudential moment, and legal issues founded on cogent constitutional controversies deserve the further input of the Supreme Court under Article 163(4)(a).*

(vii) *Challenges of findings or conclusions on matters of fact by the trial court of competent jurisdiction after receiving, testing and evaluation of evidence does not bring up an appeal within the ambit of Article 163(4)(a).*

(viii) *Decisions of the Court of Appeal made in exercise of discretion under Rule 5(2)(b) of the Court of Appeal Rules 2010 are not appealable to the Supreme Court in invocation of Article 163(4)(a) of the Constitution.*

(b) ***Appeals under Article 163 (4) (b)***

12. The Court's jurisdiction to hear appeals on matters of general public importance is granted by Article 163 (4) (b) of the Constitution which provides as follows;

163 (4) *Appeals shall lie from the Court of Appeal to the Supreme Court -*

(a) ....

(b) *in any other case in which the Supreme Court, or the Court of Appeal, certifies that a matter of general public importance is involved, subject to clause (5).*

Sub-article (5) provides that;

164 (5) *A certification by the Court of Appeal under clause (4) (b) may be reviewed by the Supreme Court, and either affirmed, varied or overturned.*

13. This provision is mirrored by Section 15 of the Supreme Court Act, 2011 which provides that;

15 *Appeals to be by leave*

(1) Appeals to the Supreme Court shall be heard only with the leave of the Court.

(2) Subsection (1) shall not apply to appeals from the Court of Appeal in respect of matters relating to the interpretation or application of the Constitution.

14. The words "*leave of court*" as used in Section 15(1) of the Supreme Court Act bear the same meaning as the words "*certification by the Court*" as used in Article 163(4)(a) of the Constitution respectively. (See Paragraph 18, *Lawrence Nduttu & 6000 others v Kenya Breweries Ltd & another*, Petition No. 3 of 2012; [2012] eKLR. (Ruling delivered on 4th October 2012, *Tunoi & Wanjala, SCJJ*)

(i) ***Certification applications under Article 163(4)(b) to be first made at the Court of Appeal***

15. In its infancy, litigants moved the Court seeking certification of intended appeals as involving matters of general public importance. This was informed by Article 163(4) (b) which clothes both the Supreme Court and the Court of Appeal with concurrent jurisdiction to certify appeals as involving matters of general public importance.

16. For pragmatism therefore, while acknowledging this concurrent constitutional jurisdiction, the Court in *Sum*

Model Industries Ltd v Industrial & Commercial Development Corporation, SC (Application) No. 1 of 2011; [2011] eKLR**,** guided that for good practice, an application for certification should originate in the Court of Appeal, as the appellate Court was privy to the proceedings and issues before it on first appeal, and would be aptly placed to determine whether the matter is one of general public importance. An applicant dissatisfied with the Court of Appeal's decision in this regard, is at liberty to seek a review of that decision by this Court as provided for by Article 163 (5) of the Constitution.

(ii) ***Principles for certification of a matter as one of GPI/ threshold for leave to appeal to the supreme court.***

17. The question of what amounts to a matter of general public importance (GPI) was a novel issue upon the promulgation of the Constitution 2010. Therefore, the criteria for determination of what amounts to matters of GPI was settled, in the case of *Hermanus Phillipus Steyn v Giovanni Gnecchi-Ruscone*, SC (Application) No 4 of 2012; [2013] eKLR. This is the *locus classica* as regards principles for certification and it was settled as follows:

(i) for a case to be certified as one involving a matter of general public importance, the intending appellant must satisfy the Court that the issue to be canvassed on appeal is one the determination of which transcends the circumstances of the particular case, and has a significant bearing on the public interest;

(ii) where the matter in respect of which certification is sought raises a point of law, the intending appellant must demonstrate that such a point is a substantial one, the determination of which will have a significant bearing on the public interest;

(iii) such question or questions of law must have arisen in the Court or Courts below, and must have been the subject of judicial determination;

(iv) where the application for certification has been occasioned by a state of uncertainty in the law, arising from contradictory precedents, the Supreme Court may either resolve the uncertainty, as it may determine, or refer the matter to the Court of Appeal for its determination;

(v) mere apprehension of miscarriage of justice, a matter most apt for resolution in the lower superior courts, is not a proper basis for granting certification for an appeal to the Supreme Court; the matter to be certified for a final appeal in the Supreme Court, must still fall within the terms of Article 163 (4)(b) of the Constitution;

(vi) the intending applicant has an obligation to identify and concisely set out the specific elements of "general public importance" which he or she attributes to the matter for which certification is sought;

(vii) determinations of fact in contests between parties are not, by themselves, a basis for granting certification for an appeal before the Supreme Court.

18. Other cases in which principles for certification have been collated and formulated are *Malcolm Bell v Daniel Toroitich Arap Moi & another* [2013] eKLR and *Town Council of Awendo V Nelson Oduor Onyango & 13 Others* [2015] eKLR.

(iii) ***Notable Cases determined under Article 163 (4)(b)***

i. ***National Bank of Kenya Limited v Anaj Warehousing Limited*** [2015] eKLR

19. In this case, the Court had to determine the question: *whether a document or instrument of conveyance is null and void for all purposes, on ground that it was prepared, attested and executed by an advocate who did not have a current practising certificate, within the meaning of Section 34 (1) (a) of the Advocates Act. In a landmark decision rendered on 2nd December, 2015 a unanimous Court departed from a long precedent of the Court of Appeal, in the*

case of National Bank of Kenya Limited v. Wilson Ndolo Ayah, Civil Appeal No.119 of 2002, and held that: *"...no instrument or document of conveyance becomes invalid under Section 34(1)(a) of the Advocates Act, only by dint of its having been prepared by an advocate who at the time was not holding a current practising certificate. The contrary effect is that documents prepared by other categories of unqualified persons, such as non-advocates, or advocates whose names have been struck off the roll of advocates, shall be void for all purposes."* This decision had a profound impact on the legal profession and clearly demonstrates what *impact a matter of general public importance can have.*

ii. ***Town Council of Awendo v Nelson O Onyango & 13 others; Abdul Malik Mohamed & 178 others (Interested Parties)*** [2019] eKLR.

20. In this case the Court dealt with what happens to unutilized land compulsorily acquired by the government and formulated general principles on this issue to guide the government and all the stakeholders. These are:

"1. Where the Government, pursuant to the relevant constitutional and legal provisions, compulsorily acquires land, such land, shall only be used for the purpose for which it was compulsorily acquired.

2. The allocation of compulsorily acquired land, to private individuals or entities, for their private benefit, in total disregard of the public purpose or interest for which it was compulsorily acquired, shall be incapable of conferring title to that land in favour of the allottees.

3. A person whose land has been compulsorily acquired in accordance with the relevant constitutional and legal provisions does not retain any reversionary interest in the said land.

4. Un-utilized portions of compulsorily acquired land may be used for a different public purpose, or in furtherance of a different public interest, including the allocation of such portions to private individuals or entities, at the market price, in furtherance of such public interest.

iii. ***Kenya Wildlife Service v Rift Valley Agricultural Contractors Limited*** [2018] eKLR:

20. In this matter of general public importance, the Court held that the Kenya Wildlife Services was liable to pay damages in cases of destruction under the Kenya Wildlife Services by dint of Section 3A of the Wildlife Act.

iv. ***Nyutu Agrovet Limited v Airtel Networks Kenya Limited; Chartered Institute of Arbitrators-Kenya Branch (Interested Party)*** [2019] eKLR

21. In this case, the Court dealt with two fundamental issues - firstly whether sections 10 and 35 of the Arbitration Act hinder a party's right to access justice under Articles 48, 50(1) and 164(3) of the Constitution. Secondly, whether there was a right of appeal, to the Court of Appeal, following a decision by the High Court under Section 35 of the Arbitration Act. The Court affirmed the principle of alternative dispute resolution as per Article 159(2)(c) of the Constitution and held that Sections 10 and 35 of the Act were not unconstitutional. It was stated that, *"the only instance that an appeal may lie from the High Court to the Court of Appeal on a determination made under Section 35 is where the High Court, in setting aside an arbitral award, has stepped outside the grounds set out in the said section and thereby made a decision so grave, so manifestly wrong and which has completely closed the door of justice to either of the parties. This circumscribed and narrow jurisdiction should also be so sparingly exercised that only in the clearest of cases should the Court of Appeal assume jurisdiction".* By this decision, the Supreme Court settled contradicting jurisprudence on arbitration from the superior courts.

(c) ***Article 163(3)(a): Exclusive original jurisdiction to determine Presidential Elections disputes.***

22. This jurisdiction is granted by Article 163 (3) (a) which provides;

(3) The Supreme Court shall have -

(a) exclusive original jurisdiction to hear and determine disputes relating to the elections to the office of President arising under Article 140;

23. The court invoked this jurisdiction after the 2013, 2017 and 2022 general election cycles. Notably, this is a jurisdiction that is unique with its own Rules. The cases determined under this jurisdiction are:

i. *Raila Odinga & 5 Others v Independent Electoral and Boundaries commission & 3 others,* [2013] eKLR (*Raila 2013*).

ii. *Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 2 others* [2017] eKLR (*Raila 2017*).

iii. *John Harun Mwau & 2 others v Independent Electoral and Boundaries Commission & 3 others [2017] eKLR*

iv. *Odinga & 16 others v Ruto & 10 others; Law Society of Kenya & 4 others (Amicus Curiae),* Presidential Election Petition No. E005, E001, E002, E003, E004, E007 & E008 of 2022(Consolidated) [2022] KESC 54 (KLR)

24. In the first case, the Court unanimously upheld the presidential elections. This Petition was the first one to be heard by the Supreme Court under the new Constitution. While the Court's decision received accolades and criticism in equal measure, the case is significant as it helped quell the anxiety in the Country at the time and confirmed the renewed trust that the People could now use the Courts to solve election disputes.

25. In the second case, The Court by a majority, annulled the election. While the *Raila 2017* case is significant for the fact that by a majority, the Supreme Court of Kenya became the first apex Court in Africa and fourth in the world to annul a presidential election, as a Court however, our pride is not in being the first or fourth to annul an election, but the fact that the Court was able to follow the Constitution and reach a decision that in its opinion (by a majority) was constitutionally sound.

26. The third case emanated from the fresh elections that were conducted upon the nullification of the 2017 Presidential elections. In this matter, the Court dismissed the consolidated petitions that challenged the fresh election results holding that they were conducted in accordance with the Constitution and electoral laws.

27. In the fourth case, the Court received the highest number of petitions, being nine in number challenging a presidential election. The Court dismissed two at an interlocutory stage as they were not challenging the presidential election petition, and the remaining seven after the hearing.

28. These four cases have equipped the Court with sufficient experience on how to handle presidential election petitions despite the various challenges that the Court has to manoeuvre, such as the strict timelines.

(d) *Article 163 (6): Jurisdiction to render Advisory opinions*

30. The Supreme Court has the jurisdiction to render advisory opinion at the request of the National Government, any State organ, or any County government with respect to any matter concerning County Governments. Article 163 (6) provides;

The Supreme Court may give an advisory opinion at the request of the national government, any State organ, or any county government with respect to any matter concerning county government.

31. This Court has rendered several opinions of great and positive impact to devolution and settled fundamental disputes and issues. Some notable cases include:

i. ***In the matter of Interim Independence Electoral Commission*** SC. Constitutional Appl. No. 2 of 2011 [2011] eKLR

32. In this case the Court held that advisory opinions are binding in nature. It also set the broad guidelines for the exercise of the Supreme Court's Advisory-Opinion jurisdiction as follows;

a) *For a reference to qualify for the Supreme Court's Advisory-Opinion discretion, it must fall within the four corners of Article 163(6): it must be "a matter concerning county government." The question as to whether a matter is one "concerning county government", will be determined by the Court on a case-by-case basis.*

b) *The only parties that can make a request for an Advisory Opinion are the national government, a State organ, or county government. Any other person or institution may only be joined in the proceedings with leave of the Court, either as an intervener (interested party) or as amicus curiae.*

c) *The Court will be hesitant to exercise its discretion to render an Advisory Opinion where the matter in respect of which the reference has been made is a subject of proceedings in a lower Court. However, where the Court proceedings in question have been instituted after a request has been made to this Court for an Advisory Opinion, the Court may if satisfied that it is in the public interest to do so, proceed and render an Advisory Opinion.*

d) *Where a reference has been made to the Court the subject matter of which is also pending in a lower Court, the Court may nonetheless render an Advisory Opinion if the applicant can demonstrate that the issue is of great public importance and requiring urgent resolution through an Advisory Opinion. In addition, the applicant may be required to demonstrate that the matter in question would not be amenable to expeditious resolution through adversarial Court process.*

ii. ***In the Matter of the Principle of Gender Representation In The National Assembly And The Senate,*** [2012] eKLR

33. In this Reference the Court addressed the question of gender representation under the new Constitution. By a majority (with Mutunga CJ dissenting) the Court advised that the implementation of the two-third gender requirement was to be progressively realized within 5 years from the date when that opinion was given. To date, Parliament is yet to legislate as advised, leading to several petitions to the Chief Justice (*Emeritus Hon. Justice David Maraga*) that culminated in his advisory to the President of the Republic to dissolve Parliament under Article 261(7) of the Constitution.

iii. ***Speaker of the Senate & another v Attorney-General & 4 others*** [2013] eKLR

34. This Reference demonstrated the Court's ability to amicably settle disputes between various arms of government and ensure comity in the execution of their various mandates. The Court rendered an opinion advising the Senate and the National Assembly on how to proceed in case of a dispute occasioning a stalemate. The Court advised on the formation of a Mediation Committee. The dispute revolved around the role of each house in the enactment of a Division of Revenue Bill. Following this Court's opinion, there now exists a Mediation Committee for disputes concerning the two Chambers of Parliament.

35. Notably, recently in a related Reference, *Council of Governors & 47 others v Attorney General & 3 others (Interested Parties); Katiba Institute & 2 others (Amicus Curiae)* [2020] eKLR, the Court reaffirmed the Senate's role in the enactment of the Division of Revenue Bill and advised on how the county governments could access some funds in case of an impasse in the enactment of the Division of Revenue Act. This advisory opinion affirmed the Supreme Court's role in entrenching the rule of law and protecting devolution.

iv. ***In the Matter of the National Land Commission*** [2015] eKLR

36. On this occasion, the Court resolved the dilemma between the National Land Commission and the Ministry of Lands in regard to land matters in Kenya. The Court ably advised the two parties to work harmoniously together, but respecting the autonomy and constitutional independence of each other. On the strength of this advisory, the two institutions have had a harmonious working relationship ever since.

v. ***In Re Speaker, County Assembly of Embu*** [2018] eKLR,

37. In this reference, the Court advised on the process of filling the position of Deputy Governor, upon a vacancy arising as a result of the removal of a County Governor through impeachment proceedings. At the time, the law was silent on the procedure of filling this vacancy. The Court advised that the same be done within fourteen days of its occurrence. While its advisory opinion was ignored, particularly in relation to Nairobi County, that opinion informed the Senate in the formulation of the County Government Amendment Bill, which culminated in enactment of the amendments requiring Governors to appoint their deputies within fourteen days, in case of a vacancy.

38. It is also worth noting that in exercise of this jurisdiction, the Court has set certain principles. Notable among them being: the rule that before a party seeks the Court's opinion, the opinion of the Attorney General should be first sought; and the matters should not be justiciable and active before other courts. These principles were recently restated *In the Matters of an Advisory Opinion under Article 163(6) of the Constitution* [2021] eKLR, where the Court finding that the opinion of the Attorney General had not been initially sought, declined to exercise discretion to render its opinion holding that the issues on which the Court's opinion was sought were pending before the High Court.

(e) ***Article 168 (8): Jurisdiction to sit on appeal of the decision of a Tribunal to Remove a Judge.***

39. Article 168 (8) provides;

168 Removal from Office

.....

(8) A judge who is aggrieved by a decision of the tribunal under this Article may appeal against the decision to the Supreme Court, within ten days after the tribunal makes its recommendations.

40. This jurisdiction was first invoked by the former Deputy Chief Justice, Lady Justice Nancy Barasa but she withdrew her matter before the Court could substantively hear and determine it. Later on, the Court had an opportunity to exercise it in the case of *Joseph Mbalu Mutava v Tribunal appointed to Investigate the conduct of Justice Joseph Mbalu Mutava*, SC Petition No. 15 of 2016 [2019] eKLR. Justice Mutava was aggrieved by the decision of the Tribunal that had recommended his removal from office and appealed to the Court.

41. The Court heard the matter, but more fundamentally, being the first case under this limb of jurisdiction, it set out foundational principles applicable in exercise of this jurisdiction. In this regard, the Court recognized that in exercising this jurisdiction it acts as the first and only appellate Court from the findings of the Tribunal. Accordingly, it had the duty to re-evaluate and re-assess the evidence on record with a view of establishing whether the Tribunal in arriving at its conclusion, misdirected itself and whether its conclusion should stand.

42. The second time the Court exercised this jurisdiction was in the case of *Hon. Mr. Justice Martin Mati Muya v. The Tribunal Appointed to Investigate the Conduct of Justice Martin Mati Muya*, SC Petition No. 4 of 2020, [2022] eKLR. The Court allowed the appeal due to *inter alia*, the unavailability of the court file before the JSC and the Tribunal was prejudicial to the Judge and amounted to a violation of his right to fair administrative action and hearing. The

Tribunal acted in excess of its mandate when it considered issues pending determination in the High Court and by introducing matters that were not before the Judge when he made the decision in question. One more appeal in exercise of this jurisdiction, filed by *Lady Justice Mary Muthoni Gatumbi challenging her removal on grounds of mental incapacity,* is awaiting judgment by the Court.

(f) ***Article 58(5): Jurisdiction to make pronouncement on declaration of a state of emergency.***

43. The Court has the jurisdiction to determine the validity of a declaration of a state of emergency, an extension of such a declaration, or any legislation enacted in consequence of a declaration of a state of emergency. Article 58 (5) provides;

58 State of Emergency
(5) The Supreme Court may decide on the validity of-
(a) a declaration of a state of emergency;
(b) any extension of a declaration of a state of emergency; and
(c) any legislation enacted, or other action taken, in consequence of a declaration of a state of emergency.

44. This jurisdiction has not been exercised by the Court. As a Court and a country, we pray that there will be no time when the same will be invoked. No democracy wishes for and longs for a Declaration of State of Emergency within its borders. However, borrowing from the *Great Roman General Vegetius,* in time of peace, it is always pragmatic to prepare for any eventuality; hence it is good to have the law in place.

9.3 Established Guiding Principles on Procedural Matters

45. The following principles have been settled by the court to aid in the exercise of its jurisdiction discussed herein above.

(a) ***The Doctrine of necessity as applied to recusal applications before the Supreme Court.***

(i) ***Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others*** Petition (Application) No. 4 of 2012 [2013] eKLR

46. The Court pronounced itself on the application of the Doctrine of necessity whereby a judge who is asked to recuse himself, may have to sit in the matter so as to enable the Court have the constitutional quorum to hear and determine the case before it. This principle is crucial since the Supreme Court occasionally draws its membership from Judges who may have heard matters coming before it on appeal, while they served in the superior courts.

(ii) ***Lady Justice Kalpana H. Rawal & 2 others v Judicial Service Commission & 6 others,*** SC. Civil Application No. 11 of 2016 [2016] eKLR

47. The Court laid emphasis that its *"jurisdiction is a vital constitutional asset, which is not to be constricted upon an ordinary claim. The Court has the ultimate word in the interpretation of the Constitution and, a fundamental guideline in the discharge of that obligation, is the vindication of all elements set out under the Bill of Rights."*

48. The Court found that the rights of the Constitution being dependent ultimately upon the due functioning of the Supreme Court, a Court of limited-size membership, the Court should be guided by the principle *that necessity is a vital criterion, in the make-up of Benches to entertain a matter*. The *Judges of the Supreme Court should not be limited by generalized claims of potential want of impartiality.*

(iii) ***Gladys Boss Shollei v Judicial Service Commission & another,*** SC Petition No. 34 of 2014 [2018] eKLR

49. The Court was faced with an application for recusal of four judges after one Judge had recused himself from hearing the matter, all on the basis of their position in relation to the Judicial Service Commission, either as Chair, member, complainant or accused. The Court declined to allow the application noting that it has a special constitutional mandate which it cannot delegate to any other body or forum in the entire government set up. The Supreme Court Justices reaffirmed their commitment to their oaths of office, pronounced themselves unbiased, and ready and willing to own up to their constitutional mandate of dispensing justice in matters falling within their jurisdiction.

(iv) ***Attorney General v Ndii & 73 others*** (Petition 12 (E016) of 2021) [2021] KESC 15 (KLR) ***(BBI DECISION)***

50. The Court was faced with an application for recusal of three judges on the basis that the applicant lodged with the Judicial Service Commission a Petition on 6th April 2016 for the removal of the judges on account of a breach of code of conduct prescribed for judges and for gross misconduct which petition was still pending.

51. The Court in dismissing the application found that applicant had not spelt out any specific allegation that was likely to impair the judges in dealing with a matter against the applicant and further that the Judges' impartiality and integrity could only be negated following due process. Ultimately, the Court found that the duty of a judge to sit does not amount to the derogation of the right to a fair hearing, where an application for recusal was speculative.

(b) ***Extension of time***

52. In the case of *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others* [2014] eKLR, the Court interrogated its powers to extend time under the Rules and set out guiding principles for consideration in determining an application for extension of time. These principles have subsequently guided the Court and set precedent for other courts.

The Court held as follows;

"This being the first case in which this Court is called upon to consider the principles for extension of time, we derive the following as the under-lying principles that a Court should consider in exercise of such discretion:

1. *Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the Court;*
2. *A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court*
3. *Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;*
4. *Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;*
5. *Whether there will be any prejudice suffered by the respondents if the extension is granted;*
6. *Whether the application has been brought without undue delay; and*
7. *Whether in certain cases, like election petitions, public interest should be a consideration for extending time."*

(c) ***Power of the Court to grant interlocutory orders***

52. The Court was confronted with the question of whether it had the power to grant interlocutory orders. This was

settled in *Board of Governors, Moi High School, Kabarak & another v Malcolm Bell* [2013] eKLR where the Court held that in the exercise of its *appellate jurisdiction derived from the Constitution and the law, the Court was equally empowered not only to exercise its inherent jurisdiction, but also to make any essential or ancillary orders such as will enable it to sustain its constitutional mandate as the ultimate judicial forum.* **Thus**, the Court has power to grant interlocutory orders so as to *safeguard the character and integrity of the subject-matter of the appeal, pending the resolution of the contested issues.*

54. Closely knit to this are the principles for grant of stay of execution orders which were settled by this Court in the *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others* [2014] eKLR case thus:

(i) *the appeal or intended appeal is arguable and not frivolous; and that*

(ii) *unless the order of stay sought is granted, the appeal or intended appeal, were it to eventually succeed, would be rendered nugatory. And,*

(iii) that it is *in the public interest* ***that the order of stay be granted.***

(d) ***Interlocutory applications cannot originate matters before the Supreme Court.***

55. The procedure for instituting appeals before the Supreme Court are very different from the Court of Appeal. Under the Court of Appeal Rules 2010, Rule 5(2)(b) allows a party to file an application for stay of execution upon the filing of a Notice of Appeal, before the filing of the memorandum of appeal.

56. Initially, the Supreme Court was confronted with such applications, where parties, before filing a petition of appeal before the Supreme Court, filed Notice of motion applications seeking stay of execution orders. With the Supreme Court Rules not having the equivalent of Rule 5(2)(b) of the Court of Appeal Rules, the Court had to settle the law on this. This was finally done in a number of cases such as *James Mbatia Thuo & Ephantus Mwangi v Kenya Railways Corporation & Attorney General of Kenya* [2018] eKLR where the Court held that in the absence of an appeal, accompanied by a memorandum of appeal, such an application had no legal basis.

57. This judicial pronouncement has now been enacted in the Supreme Court Rules, 2020 in which Rule 31(2) provides that: *"an interlocutory application shall not be originated before a petition of appeal or a reference is filed with the Court."*

(e) ***The question of admission of Interested Parties and Amici in matters before the Court.***

58. As the apex Court, matters before the Supreme Court attract a lot of interested parties and stakeholders. In its initial days, the Court observed an increase in the number of 'experts' who come up expressing interest in aiding the Court in determining the various issues before it. On its own also, the Court appreciated that in some technical matters, the input of expert opinion would be essential to help the Court to ably unravel the dispute before it.

59. However, in those initial stages, the Court noted that the real parties in a matter before the Court risked being thrown into oblivion. If the Court was not keen, then the real parties to a case could be overshadowed by these experts and interested parties (for instance in Presidential Election Petitions where there are many applications for joinder of amici and interested parties). Consequently, the Court set principles on the admission of Interested Parties and Amici.

60. In the case of *Trusted Society of Human Rights Alliance v Mumo Matemo & 5 others* [2015] eKLR the Supreme Court outlined the difference between amici curiae and interveners, and the principles for admission of an amicus curiae. The Court set out the principles which include;

i. *The applicant ought to raise any perception of bias or partisanship, by documents filed, or by his submissions.*

ii. *The applicant ought to be neutral in the dispute, where the dispute is adversarial in nature.*

iii. *The applicant ought to show that the submissions intended to be advanced will give such assistance to the Court as would otherwise not have been available. The applicant ought to draw the attention of the Court to relevant matters of law or fact which would otherwise not have been taken into account. Therefore, the applicant ought to show that there is no intention of repeating arguments already made by the parties. And such new matter as the applicant seeks to advance, must be based on the data already laid before the Court, and not fresh evidence.*

iv. *The applicant ought to show expertise in the field relevant to the matter in dispute, and in this regard, general expertise in law does not suffice.*

v. *Whereas consent of the parties, to proposed amicus role, is a factor to be taken into consideration, it is not the determining factor.*

61. In the case of *Francis Karioki Muruatetu & another v Republic & 5 others*, SC. Petition No. 15 & 16 of 2015 [2016] eKLR**,** principles for admission of an Interested Party were set. The Court held as follows;

"[41] Having carefully considered all arguments, we are of the opinion that any party seeking to join proceedings in any capacity, must come to terms with the fact that the overriding interest or stake in any matter is that of the primary/principal parties' before the Court. The determination of any matter will always have a direct effect on the primary/principal parties. Third parties admitted as interested parties may only be remotely or indirectly affected, but the primary impact is on the parties that first moved the Court. This is true, more so, in proceedings that were not commenced as Public Interest Litigation (PIL), like the proceedings now before us.

[42] Therefore, in every case, whether some parties are enjoined as interested parties or not, the issues to be determined by the Court will always remain the issues as presented by the principal parties, or as framed by the Court from the pleadings and submissions of the principal parties. An interested party may not frame its own fresh issues, or introduce new issues for determination by the Court. One of the principles for admission of an interested party is that such a party must demonstrate that he/she has a stake in the matter before the Court. That stake cannot take the form of an altogether new issue to be introduced before the Court."

(f) ***Power of court to review and to depart from its own decisions.***

62. Another area where the Court has settled its jurisprudence is *whether it can depart from its decisions.* This flows from the fact that under Article 163(7) of the Constitution, the Court is not bound by its own decisions. Despite this signal, the Court was emphatic that its decisions, as an apex Court, ought to stand the test of time and be certain and predictable. Consequently, the Court should not whimsically depart from its own decisions. It therefore, set principles for instances when it may depart from its own decision in the case of *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai Estate of & 4 others* [2013] eKLR as being:

(i) *where there are conflicting past decisions of the Court, it may* ***opt to sustain and to apply one of them;***

(ii) *the Court may disregard a previous decision if it is shown that such decision was given per incuriam;*

(iii) *a previous decision will not be disregarded merely because some, or all of the members of the Bench that decided it might now arrive at a different conclusion;*

(iv) *the Court will not depart from its earlier decision on grounds of mere doubts as to its correctness.*

63. Regarding *whether the Court may review its own decision*, the Court found that there was no express legal provision for such review. However, invoking its inherent power, the Court set principles on the exceptional circumstances when it may review its own decision. This was in the case of *Fredrick Otieno Outa v Jared Odoyo Okello & 3 others* [2017] eKLR. The exceptional circumstances that may warrant a review were stated as being where:

(i) *the Judgment, Ruling, or Order, is obtained, by fraud or deceit;*

(ii) *the Judgment, Ruling, or Order, is a nullity, such as, when the Court itself was not competent;*

(iii) *the Court was misled into giving Judgment, wRuling or Order, under a mistaken belief that the parties had consented thereto;*

(iv) *the Judgment or Ruling, was rendered, on the basis of a repealed law, or as a result of, a deliberately concealed statutory provision."*

64. These principles have now been enacted in Section 21A of the Supreme Court (Amendment) Act No. 26 of 2022 as read together with Rule 28(5) of the Supreme Court Rules, 2020. This dictum was applied recently in the cases of *Tawai Limited v Eldoret Express Limited; National Land Commission (Interested Party),* SC Application No. 9 of 2021 [2021] KESC 24 (KLR); *Sonko v Clerk, County Assembly of Nairobi City & 11 others,* SC Petition No. 11 (E008) of 2022 [2022] KESC 38 (KLR).

(g) ***Dealing with interlocutory appeals where the substantive matter is pending in the superior court(s).***

65. Another area where the Court has had to clarify its position is in regard to the status of appeal filed before the Court from interlocutory decisions of the Court of Appeal. As a general rule, the Supreme Court has stated that it will not entertain appeals on interlocutory decisions where the substantive matter is still before the Superior courts. In the case of *Basil Criticos v. Independent Electoral and Boundaries Commission & 2 Others,* [2015] eKLR, the Court was confronted with an application in a matter in which the substantive matter had not yet been canvassed before the Superior Court.

66. In declining the application, the Court observed as follows:
"[48] It is clear to us that the applicant is "appealing" against the denial of extension of time by the Court of Appeal. Clearly, the substantive appeal is yet to be filed. Can this Court extend time for an intending appellant, so as to enable the appellant to lodge an appeal at the Court of Appeal, in an election petition?

...
[50] It is clear to us that an appeal against a Court of Appeal decision declining to extend time is not a matter falling under the purview of Article 163(4)(a) of the Constitution. In the absence of a Judgment by the Court of Appeal, in which constitutional issues have been canvassed, what would this Court be sitting on appeal over?"

67. Notably, in the case of *Teachers Service Commission v Kenya National Union of Teachers & 3 others* [2015] eKLR the Court elaborated on the different scenarios when an appeal on an interlocutory decision can be admitted for determination before the Supreme Court and when it cannot. In distinguishing the earlier *Joho* case, the Court stated as follows:

"[34] The application before us relates to the exercise of the Court of Appeal's inherent discretion under Rule (5)(2)(b), and is to be distinguished from instances when this Court has dealt with appeals arising from interlocutory applications originating from the High Court, through to the Court of Appeal and finally to this Court. In the *Joho case, we heard and determined an appeal emanating from a substantive determination by the Court of Appeal of a constitutional question. The appeal had originated from an interlocutory application filed within the Election Petition before the High Court, challenging the constitutionality of Section 76(1)(a) of the Elections Act, 2011 (Act No. 24 of 2011). This application triggered the appellate jurisdiction of this Court; not only had it sought to contest a substantive determination of a constitutional question by the Court of Appeal, but the issue in dispute had been canvassed right through from the High Court to the Court of Appeal, even though the substantive appeal on the election-petition outcome was still pending before the Court of Appeal.*

[35] The application before us contests the exercise of discretion by the Appellate Court, when there is neither an appeal, nor an intended appeal pending before this Court. Moreover, the appeal before the Court of Appeal is yet to be heard and determined. An application so tangential, cannot be predicated upon the terms of Article 163 (4)(a) of the Constitution. Any square involvement of this Court, in such a context, would entail comments on the merits, being made prematurely on issues yet to be adjudged, at the Court of Appeal, and for which the priority date of 22nd September, 2015 has already been assigned. Such an early involvement of this Court, in our opinion, would expose

one of the parties to prejudice, with the danger of leading to an unjust outcome."

68. Thus, the jurisprudence created is that the Court will not sit on appeal of interlocutory decisions of the superior courts save in those rare cases where the interlocutory decision was of a distinct constitutional issue, isolated and resolved at the High Court, escalated on appeal to the Court of Appeal and is now finally before the Supreme Court. This dictum has been followed in subsequent decisions such as *Clement Kungu Waibara v Annie Wanjiku Kibeh & another* SC. Application No. 31 of 2020 [2020] eKLR; and *Bia Tosha Distributors Limited v Kenya Breweries Limited & 6 others* SC. Application No. 10 of 2018 [2018] eKLR and more recently in *Sonko v Clerk County Assembly of Nairobi City & 11 others*, SC Application No. 14 (E022) of 2021 [2021] KESC 14 (KLR), just to name a few.

The Role of the Judiciary in Developing Public Interest Litigation

Hon. Justice (Dr.) Smokin Wanjala, Ph.D, FCIArb, CBS[163]

(This paper was delivered as a keynote address during a Public Interest Litigation Colloquium *held on 20th and 21st May 2012 convened by Katiba Institute)*

11.1 The Context

1. I consider it appropriate at the outset to reflect upon what is meant by Public Interest Litigation. On the face of it, the phrase means recourse to courts of law by individuals, groups, or entities for the protection of the public interest. But this definition does not adequately explain the real nature and purpose of PIL. It is not in the mould of traditional judicial proceedings. In most common law jurisdictions, litigation in non-criminal cases has historically taken the form of adversarial proceedings whereby private parties litigate their claims and the judge is left to adjudicate in favour of one of them. The contest may also be between an individual and the state especially where the latter seeks prerogative orders by way of judicial review. PIL on the other hand marks a significant departure from this type of court action. It has developed over a period time as a way of using law strategically to effect social change and raise issues of broad public concern. In countries where PIL has gained traction such as the U.S, India, Colombia and South Africa, one can clearly see the following characteristics:

2. It is a form of litigation, which seeks to enforce the fundamental human rights of citizens. Despite the range of equality and human rights provisions available in many constitutions, the reality is that the majority for whom these protections were formulated can neither enjoy them nor move the courts to prevent their violation. PIL has therefore evolved as a strategic tool to aid the vulnerable, marginalized, disadvantaged, minority and poor in society to seek justice and protection of their rights through the courts. By the same token, PIL has increasingly been used to challenge government policies and procedures that violate human rights or equality standards and to provoke the political system into responding to a problem it has hitherto ignored. In doing so, it does help check the government, statutory and public bodies, holding them to account for failures to uphold domestic and international human rights by which they are bound.

3. But PIL goes beyond providing a platform for the weaker sections of society to vindicate their rights. It is increasingly being resorted to for the achievement of broader ends of public concern. Through PIL, laws, policies, actions, and omissions of governments, and other organs of state that threaten a society's value system or its democratic fundamentals, can be challenged. In this way, PIL seeks to secure a higher public value; the integrity of governance in accordance with a country's supreme charter-the constitution. PIL is a useful way of raising awareness about issues of public concern. Specific PIL cases can prompt public debate and bring about pressure for social and legislative change outside the courtroom. Novel or untested issues of public interest can be brought to the attention of the courts and trigger much needed interventions by institutions of government.

10.2 The Kenyan Judiciary and PIL

11 Understood in the foregoing context, public interest litigation is still in its infancy in Kenya notwithstanding the fact that we are now celebrating fifty years of independence. Until the promulgation of the Constitution of 2010, the Kenyan judiciary and to a certain extent, the legal profession remained trapped in the bowels of common law and colonial jurisprudence. Courts of law largely performed their traditional roles of dispute resolution in the traditional sense. Aloof and disinterested, the courts dispensed justice in accordance with the adversarial system where rules of rigid procedure reigned supreme. The majority of the population interacted with the courts through the criminal justice system either as accused persons or victims of crime. Otherwise, the people were terrified of the courts and litigation remained largely an elite affair. The old constitution only guaranteed civil and political rights but even these were neutralized by claw back clauses that enabled the government to enact draconian laws in the name of public security. Ironically, this period, which witnessed large-scale violations of human rights, would have provided the perfect tonic for Public Interest Litigation. For it is in a situation where citizens' rights are trampled upon, the poor and the vulnerable are terrified, and the rule of law is subverted by state action that public interest litigation finds its prominent expression. But PIL is dependent on an accommodating, courageous and innovative judiciary to thrive.

163 Justice of the Supreme Court and the Director General of the Kenya Judiciary Academy.

12 Efforts through institutions such as *Kituo cha Sheria* and the *Public Law Institute* to use PIL as a strategy for redress were laudable. While they recorded some measure of success, they were hampered by an over-bearing state machinery and by a judiciary which at best remained benumbed by state terror or at worst a willing participant in the violation of human rights. *Kituo* was limited to offering support through advice and representation to the indigent on a case -by -case basis. Otherwise, the laws that had legalized the detention of persons without trial, or the suppression of freedoms of assembly and expression would have been challenged in public interest as being inconsistent with the constitution on grounds of substantive due process.

13 In 1989, the Public Law Institute in perhaps one of the boldest attempts at Public Interest Litigation filed a suit in the High Court on behalf the late Prof. Wangari Maathai against the Kenya Times Media Trust (*Wangari Maathai vs. Kenya Times Media Trust,* HCCC No. 5403 of 1989). The defendant, a media trust and publisher of the then ruling party newspaper, the Kenya Times had announced and in fact embarked upon plans to construct what would have been the tallest skyscraper in this region. It was to be a sixty two storey tower housing among other things the ruling party headquarters, the Newspaper publishing house, a trading centre shopping malls and car parking. The building was to be constructed right in the middle of UHURU PARK, the only natural green public recreational centre in the heart of Nairobi City. Such a monumental undertaking obviously raised serious environmental, cultural and social questions thus triggering the litigation. The suit was struck out at the behest of the defendant on grounds that the Plaintiff had no locus standi! It did not matter that she had filed the case in the public interest. That was the state of public interest litigation in Kenya in those days. Even the enactment of the Environmental Management and Conservation Act of 1999, (EMCA) did not fundamentally improve the fortunes of PLI in matters environment. It is however noteworthy to note that although Prof. Wangari Maathai lost the legal battle in court, she actual won the real war. The case internationalized the environmental concerns that the plaintiff had raised in court. It also raised public consciousness about the urban environment. The tower was never constructed after the would be financiers pulled out. That today we can see the Park hosting national and international events, ordinary people and their children finding refuge in its sanctuary is a statement of what that case did for the Country. The utility of PIL therefore is not limited to immediate success in the courtroom, but extends to its ability as trigger of national consciousness.

10.3 The place of Public Interest Litigation in the Constitution

11 The 2010 Constitution has opened up the frontiers of Public Interest Litigation. The Preamble to the Constitution recognizes the aspirations of all Kenyans for a government based on the essential values of human rights, equality, freedom, democracy, social justice and the rule of law. Article 1 of the Constitution decrees the sovereignty of the people and subordinates all other institutions and organs of state to them. Article 2 decrees the supremacy of the Constitution. Article 3 obligates every person to respect, uphold and defend the Constitution. Article 10 prescribes the national values and principles of governance that bind all state and public officers and all persons. Thus henceforth, the Kenyan people are not to be governed on the basis of power, but a value-based system of principles of patriotism, national unity, sharing, and devolution of power, the rule of law, democracy and participation of the people; human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized. Integrity, transparency and accountability are to the yardsticks of good governance. The philosophy, rationale, and justification for Public Interest Litigation lie in the Preamble to the Constitution and the articles to which I have made reference. This Part, coupled with the Bill of Rights in Part two are what can be referred to as the "conscience of the Constitution".

12 How are these ideals and aspirations to be attained in real life? It is no longer in doubt that the realization of rights requires much more than constitutional guarantees. The Constitution must be a living document. It must be given life by the actions of individuals, entities and institutions. The constitution has to deliver real social, economic and political goods to the people; otherwise it remains an ornamental charter. Herein lies the role of the Judiciary. Courts of law have the solemn duty and authority to interpret the Constitution and the law. By so doing, they give it real meaning and life. They ensure that what is guaranteed, is not violated. Through declarations, orders, pronouncements and advisories, courts of law ensure the enforcement of laws and policies for the realization of rights. Judicial proceedings are no longer limited to the traditional adversarial system as we have known it over the years.

13 The place of Public Interest Litigation has been firmly and irrevocably secured by the Constitution. Article 22 of the Constitution guarantees every person's right to institute court proceedings for the enforcement of rights. It

specifically provides that a person may not only act in his own interest, but on behalf of others who cannot act in their own name, and in the public interest (emphasis added). In addition, the Chief Justice is required to make rules to further secure the right of standing, to ensure that formalities relating to the proceedings including commencement of the proceedings are kept to a minimum, and in particular that the court shall, if necessary, entertain proceedings on the basis of informal documentation. No fees are chargeable in such proceedings while procedural technicalities are discouraged. The said article also makes provision for the courts to make use of the expertise by Amicus Curiae. The horizons of public interest litigation are further expanded and strengthened by Article 165 which provides that every person has "the right to institute court proceedings, claiming that this constitution has been contravened, or is threatened with contravention". Such a person may act in his own interest or in the public interest (emphasis added). PIL is no just limited to the realization of fundamental rights but extends to other matters of constitutional moment.

14 Since the promulgation of the Constitution, the Judiciary in Kenya, especially the High Court has entertained a number of high-profile public interest cases on the basis of articles 22 and 165. I shall not make reference to specific cases since according to the programme, such cases will be subjects of discussion. My caution is also informed by the fact that some of the issues upon which the High Court has pronounced itself may reach the Supreme Court on which I sit. Suffice it to say that judges of the High Court are increasingly demonstrating not only courage, but, their appreciation of PIL cases. However, three years after the promulgation of the Constitution, Kenya remains one of the most unequal societies in the world. Poverty continues to wreak havoc on the dignity of the majority of the population. Violent crime afflicts large parts of the country. Children are subjected to many forms of abuse. Domestic and other forms of violence permeate our daily lives. Victims of crime go without just recompense while conditions in our prisons and other custodial centres are anything but ideal. The Constitution itself is undergoing a period of turbulence. This is the time for the courts through PIL cases, to stabilize the Constitution and make it a living document. Since the strictures of traditional individualism and locus standi have been removed, let the courts be the gravitas of hope and liberty to which the afflicted in our society will increasingly turn.

15 Public Interest Litigation is a collective enterprise between the lawyers, civil society, public- spirited individuals, the executive and the judiciary. As for the judiciary, it must be realized that in PIL, judges can no longer be disinterested arbiters. In most of the cases, there are no winners or losers. There should be a mental shift of both lawyers and judges from traditional litigation to problem solving proceedings. Increasingly, the judiciary should ready itself to make significant interventions in the day to day social, political, economic, ecological and cultural interactions between citizens and the state. To make human rights meaningful for the poor and vulnerable in our society, judges will increasingly find themselves having to make fundamental pronouncements concerning issues that have for long been considered as the exclusive policy preserve of the executive and legislature. Thus, issues such as those concerning the welfare of children, slum dwellers, the environment, conditions in the prisons, victims of crime, youth unemployment, health facilities, ecology and son on will be subjects of litigation.

11.4 Procedure and Related Matters

16 The Constitution requires the Chief Justice to make rules for keeping to a minimum, the formalities in public interest litigation. But in the absence of such rules, it remains to the Courts to be innovative and admit informal communications for the institution of proceedings. Here the courts could borrow from jurisdictions that have for long been involved in PIL such as India where even letters and post-cards can move the court. Courts in Kenya should also encourage and institutionalize the role of Amicus Curiae, to help in the presentation of both legal and non-legal information especially scientific information to the enable the judges make informed interventions.

Delicate Balancing of Rights

17 By its very nature, Public Interest Litigation will entail adjudicating between competing interests and rights. Often the private rights of the individual will clash with the public rights of the community and yet each is protected by the Constitution. For example, in seeking to enforce the rights of the public to a clean and healthy environment, a court could trample upon the workers' rights of a specific industry that is under attack. Many other situations of competing interests will surface before the courts. It is therefore the responsibility of the judges to engage in a delicate balancing of rights in PIL.

Continuous Monitoring of Orders

18 Since PIL involves not just the petitioners and the specific entities cited in the petition, but also other arms of government for purposes of enforcement, it will be important for courts to issue not just one order but a series of orders that enables a court to continuously monitor the extent of implementation of the original order.

11.5 Challenges and Controversies around PLI

The Law and Policy Divide

19 The doctrine of separation of powers has regarded policy making and implementation to be the exclusive domain of the executive and the legislature. Yet the permissive provisions of the constitution and the nature of PLI mean that judges will be called upon to not only interpret the law but also make pronouncements of policy. The role of various organs of government will become ever so narrow. Where is the divide? Unless handled carefully, this could invite controversy. Perhaps the courts in Kenya could again borrow from comparative jurisdictions where the approach is for the court to ask whether the implementation or non-implementation of a specific policy results in the violation of fundamental rights. If it does, the court can and should impugn the violation and issue appropriate orders. The court could also suspend the effect of the order and require the specific arm of government to take remedial steps.

Procedure and Non-Procedure

20 Law is about certainty and predictability. Thus, the way in which courts are moved is governed by formal rules of procedure. Yet PIL de-emphasizes formal procedure. The Constitution sanctions the said de-emphasis. Yet even in PIL, we should not lose sight of the discipline of law. The solution to this lies in the use by courts of volunteer lawyers to systematize the petitions that come to them by way of PIL.

Vexatious Litigants

21 As in all other traditional litigations, PIL is bound to attract litigants who will file cases not necessarily in the public interest but as a vehicle for individual publicity. This will not only inundate the courts, but defeat the very essence of PIL. The courts should always insist on the fact that the directions and commands issued by them in a public interest litigation must be for the betterment of the society at large and not for the benefit of any individual.

11.6 Conclusion

22 Notwithstanding the infancy of PIL in our country, and the challenges it is bound to face, examples from other jurisdictions and even our own High Court demonstrate the power of PIL in making the Constitution a living reality for a large number of citizens. The challenge is to prevent its misuse while at the same time making sure that its proper use is not blunted. To quote Ashok Desai and Muralidhar:

> "In many ways, PIL imposes a burden on as well as poses a temptation for the judge. On the one hand there is the desire to resolve the problems of a society where laws are not seen to be enforced, particularly where the petitioner before the court is espousing a public and not a private cause. On the hand, there is the temptation for a well-meaning judge to extend the law, if necessary, by decision, departing ever so slightly from the trodden path. Thus, there is an interplay of enforcing the law, moulding it by equity while responding to the perception of 'an imperil judiciary' making history. The future of PIL will depend much on where the court strikes the balance the law and its sense of history".

A Critique of the Judicial Approach on Sexual Offences and the Age of Consent

Hon. Lady Justice Njoki Ndungu, FCIArb, CBS, SCJ[164]

(*The original version of this paper was presented at the 2019 Annual Judges' Colloquium*)

11.1 Introduction

1. There is an emerging national debate as to whether the age of sexual consent as provided for under the Sexual Offences Act, Cap 63A of the Laws of Kenya should be reviewed either upwards or downwards from the current age of 18 years. The debate has engaged Legislators, medical professionals, religious groups, non-governmental organizations, and members of the legal and judicial fraternity. Indeed, Chief Justice Emeritus David K. Maraga, on 26th May 2019 joined in the debate remarking that while the age of consent should not be reduced to 16 years, he was concerned that *boys of between ages 17 and 20 years are being jailed for "voluntary relations.* CJ Maraga is reported to have stated that he feared the sexual offences sentencing system may be skewed against the boy child, observing that it is common in Kenya, to *fill jails* with teenage sex offenders who are male. His sentiments have found both opposition and support in various sectors.

2. There are varying shades of opinion and it is unclear whether there is a common understanding of what the salient issues in this debate actually are. Is this really a debate about the age of consent? Or is it about the minimum sentences under the Sexual Offences Act? Is it about child offenders who are underage or is it about young adult men who are convicted offenders? Is this an offender-oriented discussion or a victim-oriented discussion? Are the offenders, the victims; or are the victims, the offenders? Is this debate about the application of criminal law or is it about the application of African cultural norms as we understand them? Is this a legal debate or one about how we as a community of Kenyans should be socialized? Is this about Public Education? Is this about how we raise our boys as opposed to how we raise our girls?

3. The purpose of this paper is not to take any singular position on any one of this mish-mash of issues but rather to look into the relevant facts, figures and challenges that are useful to the Judicial sector and which may inform the judicial approach on the implementation of the Sexual Offences, including the evidentiary rules regarding consent in general and as it applies to children; the application of minimum sentences under the act and the sentencing of underage offenders, and the proposal to lower the age of consent in Kenya. The paper will also briefly look at an evaluation of the role of the Judiciary in the implementation of the Act through the National Policy Framework as established under Section 47 of the said Act.

11.2 The Sexual Offences Act

4. Enacted in 2006, the Sexual Offences Act (SOA) sought to address the rising problem of rape and sexual assaults in Kenya. In its objects and reasons, the bill proposing the legislation (and from this one can discern the intention of the drafters in Parliament) specifically:

- Responded to a penal system that defined sex crimes as offences against morality (instead of against the person);
- Introduced gender-neutral language to include males as potential victims as well as females as possible perpetrators (the Victorian language of the Penal Code did not do this);
- Introduced 14 new sexual offences not covered under the previous law;
- Expanded the scope and definitions of the offences of rape and defilement;
- Enhanced penalties for sentences for sexual offences;
- Created minimum and maximum sentencing
- Provided medical treatment for both victims and offenders;
- Established a sexual offenders register to be managed by the Judiciary;
- Set up an offenders DNA databank;
- Set up a national policy framework for the implementation of the Act.

164 Justice of the Supreme Court of Kenya.

5. The SOA makes clear provision and definition of sexual offences, providing for various sexual offences including rape, attempted rape, sexual assault, compelled or induced indecent act, acts which cause penetration or indecent acts committed within the view of a family member, a child or person with mental disabilities, defilement, attempted defilement, gang rape, indecent acts with a child, indecent acts with an adult, promotion of a sexual offence with a child, child trafficking, child sex tourism, child prostitution, child pornography, exploitation of prostitution, trafficking for sexual exploitation, prostitution of persons with mental disabilities, incest by male and female persons, sexual harassment, Sexual Offences relating to Position of Authority and Persons in Positions of Trust, Relationships which Pre-date positions of authority or trust, Deliberate Transmission of HIV and Sexually Transmitted Diseases, administering a Substance with Intent, distribution of a Substance by *Juristic* Person, Cultural and Religious Offences, and Non-disclosure of Conviction of Sexual Offences.

6. The Act has been in force for the past 17 years and prescribes minimum sentences setting a legal framework within which the discretion of the judicial officers is exercised; and prescribing penalties geared at having a deterrent effect on future offenders. The objectives of the various sentences prescribed in the SOA are aimed at not only punishing the offender for his or her criminal conduct in a just manner but also at deterring the offender from committing a similar offence subsequently. It is also aimed at discouraging other people from committing similar offences, enabling the offender reform from his criminal disposition and become a law-abiding person, protect the community by incapacitating the offender, and communicate the community's condemnation of the criminal conduct.

11.3 Statement of the problem

7. As stated earlier, the major aim of this paper is to highlight that there is a legal problem that revolves around the judicial approach to sexual offences, particularly in the arena of the *age of consent, the meaning of consent under the SOA* and *sentencing, including the application of minimum sentences*. This will be buttressed by the fact that in the past, decisions have been made by some Judicial Officers that appear to depart from the provisions of the law as will be demonstrated shortly.

12.4 Sampling of the judicial approach to sexual offences and the age of consent

8. Despite the existing law, as stated above, that children lack the capacity to give legal consent, some judicial officers have determined that complainants (*minors*) consented to sexual offences. Others have argued that the offenders were young at the time of committing the alleged offences and it would, therefore, be unfair to impose the minimum sentences including life sentences against them. It has also been argued by at least one judicial officer, that it would be unfair to impose a life sentence against a first-time offender who defiles a child. Consequently, some judicial officers have proceeded to reduce the prescribed minimum sentence or reduce or quash the sentence, despite existing laws and the Constitution. A sampling of such cases is outlined herein below:

The High Court

9. In *Ken Siranga Situma v Republic,* Criminal Appeal No. 32 of 2013 Of [2017] eKLR, the brief facts were that, MS, upon her father's death, had problems with her brother. She went to the appellant, explained her predicament to him and lived with him as a wife, did all wifely duties including having sex with him. She stayed with him for 7 days before they got arrested by the D.O and taken to Malakisi police station.

10. The appellant was charged with defiling the minor (MS) aged 15 years. Based on the evidence of 4 witnesses, the appellant was convicted and sentenced to 15 years imprisonment after the Court rejected his defence.

11. On appeal, the learned judge, on 16th November 2017, held that: *'the appellant was 28 years, knew the victim was a school going child and he went ahead to live with her as a wife. He ought to have known the law and returned her back but alas he took advantage of her and stayed with her and made her his wife!'* As such, she found the conviction safe and affirmed it.

12. On the sentence, she noted that the minimum sentence of the offence that the appellant faced was 15 years and this was what he was sentenced to. She found the *same lawful and did not interfere with it.*

13. However, in *J Y vs Republic, High Court Criminal Appeal No. 81 of 2013[2015] eKLR,* the appellant was charged with the offence of defilement of a 15-year-old, contrary to Section 8(1)(4) of the SOA. He was convicted and sentenced to serve twenty years imprisonment.

14. In upholding the appeal, the learned Judge found that '*the complainant was willingly living with the accused'.* The learned Judge referred to the SOA and noted that its provisions did not allow a *child under the age of 18 to give (her) consent for sexual intercourse.* This notwithstanding, *he noted that it was the complainant who made the appellant believe that she was over 18 years old, bore him children, and she never made any attempts to escape.*

15. Similarly, in *Martin Charo v Republic, Criminal No. 32 of 2015 [2016] eKLR,* the appellant was charged with the offence of defiling a 14-year-old contrary to Section 8(1)(3) of the SOA. The trial Court convicted the appellant and sentenced him to serve twenty years in prison.

16. The main issue to be determined on appeal was whether the appellant had defiled the complainant. One of the grounds for the appeal was that the sentence was excessive.

17. Some reflections on the learned Judge's judgment dated 25th April 2016, were that though the complainant was 'aged 14 years; '*she was behaving like a full-grown-up woman who was already engaging and enjoying sex with men'*. Further, she did not seem to be *complaining* about the incident.

18. On *consent*, the learned Judge noted dutifully that under the SOA, a child cannot give consent to sexual intercourse. However, he determined that: '*where the child behaves like an adult and willingly sneaks into men's houses for purposes of having sex, the Court ought to treat such a child as a grown-up who knows what she is doing.'*

19. The Learned Judge also observed that '*the offence of defilement should not be limited to age and penetration'*. Further that: '*Children are not meant to enjoy sexual intercourse. Whenever they do, then that becomes the behaviour of an adult. Although the public will frown upon an adult who engages in sex with such a child, we should not forget that circumstances have changed.*

20. *Young children engage in sex at a very young age. This is not out of defilement. Conviction of a defiler should be based on actual circumstances and proof that the complainant was indeed defiled. This is more so when one considers the lengthy sentences imposed by the law for such an offence. It is unfair to send someone to 20 years imprisonment yet the complainant was enjoying the relationship.'*

21. Consequently, the Judge allowed the appeal largely on the basis that *the complainant behaved like an adult and engaged in and enjoyed sexual intercourse; the appellant was not expected to inquire from several people about the age of the complainant; and the relationship continued for quite a long time to the extent that age became a non-issue.*

The Court of Appeal

22. In *Eliud Waweru vs Republic, Criminal Appeal No. 102 of 2016, [2019] eKLR,* the appellant was charged with the offence of defiling a child aged *17 years 5 months.* He was convicted to 15 years imprisonment. His appeal to the High Court was dismissed.

23. At the Court of Appeal, one of the arguments made by the appellant was that the High Court failed to note that the complainant had granted her consent; she had the capacity to grant the said consent and he believed she was of age and had capacity to contract marriage.

24. The Court of Appeal allowed the appeal, quashed the conviction and set aside the sentence.

25. On consent, the Appellate Court observed:

"In England, for instance, only sex with persons less than the age of 16, which is the age of consent, is criminalized and even then the sentences are much less stiff at a maximum of 2 years for children between 14 to 16 years of age. See Archbold Criminal Pleading, Evidence and Practice, [2002] p1720. The same goes for a great many other jurisdictions. A candid national conversation on this sensitive yet important issue implicating the challenges of maturing, morality, autonomy, protection of children and the need for proportionality is long overdue."

26. One of the submissions made by the Senior Principal Prosecuting Counsel in this matter, which the Appellate Judges found to pose a predicament of sorts, was:

"It is unfair for the appellant to be sentenced to 15 years imprisonment but that is the law and there is nothing we can do about it."

27. As a consequence, one of the Appellate Court's finding was that the sentence imposed on the basis of a '*mandatory minimum*' was clearly harsh and excessive.

28. In addition, the Appellate Court stated:

"Our prisons are teeming with young men serving lengthy sentences for having had sexual intercourse with adolescent girls whose consent has been held to be immaterial because they were under 18 years. The wisdom and justice of this unfolding tragedy calls for serious interrogation."

12.5 *Consensual sex between minors*

29. In *Evans Wanjala Siibi vs Republic, Criminal Appeal No. 314 of 2018 [2019] eKLR*, the Appellate Court, on 6th June 2019, freed a 26-year-old herds boy who had been jailed for defiling a teen after it was found that *the sex was consensual.* In that judgment, the Court observed that the accused person was 17 years at the time of the commission of the offence while the complainant was 15 years and that the act was voluntary.

30. Noteworthy is the Court's reflections in this matter:

"We think, with respect, that had the two courts below adopted a more fair-minded and-even-handed approach to the case, they would at the very least have sought to establish the appellant's age. *Instead, what emerges is a rush to punish him in a zealous deployment of the Sexual Offences Act for the supposed protection of the complainant.*

Once again the unfair consequences of a skewed application of that statute predominantly against the male adolescent is quite apparent: two youths caught engaging in sex receive diametrically opposite treatment.

The girl is branded a victim and guided to turn against her youthful paramour while the boy, Juliet's Romeo, is branded the villain, hauled before the courts and visited with a lengthy jail term. We very much doubt that it conduces to good sense, policy and our own conceptions of justice and fairness that the law should be deployed in a manner so disparative and discriminative in effect. A supposed justice resting on the shaky foundation of injustice against young boys hardly warrants the term."

11.6 *Issues arising from illustrated case law*

31. In my opinion, the following issues come to the fore from the case law discussed above:

a) *What is the definition and meaning of consent in the SOA?*
b) *Do children have the capacity to consent under the SOA or any other law?*
c) *What is the status of the application of minimum sentencing under the SOA?*
d) *How does the SOA apply to offenders under the age of 18 years?*
e) *Is the proposal to reduce the age of consent in sex offences merited?*

32. These will be dealt with in turn. The relevant provisions of the law are hereunder discussed briefly:

A. *The meaning and definition of consent under the Sexual Offences Act 2006:*

33. The SOA gives an interpretation of consent in Section 2 as follows: "*consent" has the meaning assigned to it under this Act.* The term Consent is mentioned at least 20 times in the Act to qualify or disqualify certain sexual offences. But primarily, it is Sections 42, 43, 44 and 45 that deal with the definitions and meaning of what constitutes consent, including intentional and unlawful acts, and evidential presumptions about consent under the Act.

34. It is Section 42 that provides thus:

> "For the purposes of this Act, a person consents if he or she agrees by choice, and has the freedom and *capacity to make that choice."*

35. Further, Section 43(1) provides:

> *"An act is intentional and unlawful if it is committed:*
> *a) in any coercive circumstance;*
> *b) under false presences or by fraudulent means; or*
> *c) in respect of a person who is incapable of appreciating the nature of an act which causes the offence."*

36. Following on that definition and more importantly, and for the purposes of this paper, under Section 43(4) a person is incapable in law of appreciating the nature of an act if the complainant was *asleep or unconscious*, the complainant was *incapacitated*, the complainant was *drugged* or the complainant is a child.

37. Under Section 2(1), a child is defined as having the meaning assigned thereto under the Children's Act and which is "*a person below 18 years*". This definition is further grounded in the Constitution of Kenya 2010, Article 260.

38. The Sexual Offences Act therefore strictly prohibits any form of sexual activity with a child – *a person below 18 years of age* - because children are deemed incapable of consenting to sexual activity and any agreement to do so is not recognized by law.

39. An accused person, however, may plead a defence (Section 8(5)) that he/she was *deceived* by the said child into believing they were over the age of 18 years and that they *reasonably believed* the child to be over 18 years of age. *Note here that the test, therefore, must be in proof of the deception and that the belief was reasonable.* The burden is on the accused and not the complainant to prove this. It is for *the accused to show which steps he took to ascertain that the complainant was an adult and not a child.* The burden for this test should never shift to the child in question. The court must also determine that there was deception (a deliberate act) and that it was believable.

40. An accused person is prohibited from pleading presumption of consent as a defence under Section 44 of the SOA if *violence was used* against the complainant, or the complainant was *threatened that violence* will be used against another person, or the complainant was *unlawfully detained*. If the accused person intentionally *deceives* a complainant as to the nature or purpose of the act complained of, or intentionally *induced* the complainant to consent to the act complained of by *impersonating* a person known personally to the complainant, it shall be conclusively presumed that the complainant did not consent to the act complained of.

B. What is the age of consent? What is the rationale for it? Where is it derived from?

41. The term "age of consent" presents a two-fold approach; it is firstly generally understood to be *the age at which the law deems those individuals to be capable of giving genuinely informed consent;* it thus demands "a requisite level of *cognitive* and *emotional understanding*". This is what is often called the 'age of majority'. Secondly, it is also referred to as *the age at which individuals can legally engage in sexual intercourse and sexual activity*.

42. The first, the age of majority, is prescribed in law and is in many countries, set at 18 years. This is the legally defined age at which a person becomes an adult, with all the attendant rights and responsibilities of adulthood. It means a person has full capacity to act or engage in any kind of legal activity and/or business and is liable for his/her own actions, such as contractual obligations or liability for negligence. In general, the parental duty of

support to a child ceases when the child reaches the age of majority. The age of majority may be relevant in matters, among others, such as guardianships, legal standing to bring lawsuits, open bank accounts, foster care, alcohol purchases, emancipation, licensing, and marriage.

43. In Kenya, the age of majority is 18 years. A person under the age of 18 years is deemed by law as being incapable of having the capacity to consent. Thus, the Constitution 2010, Article 260 (1) defines a "child" as an individual who has not attained the age of eighteen. An "adult" means an individual who has attained the age of eighteen.[165] The Children Act Cap 141 of the Laws of Kenya defines a child to mean *an individual who has not attained the age of eighteen years*. Most international legal instruments such as the Children Rights Convention (CRC),[166] Africa Charter on the Rights and Welfare of the Child (ACRWC),[167] International Labour Organization (ILO), define a child as any person under the age of 18 years. (note that these instruments are part of Kenyan law under Article 2(6) of the Constitution which may be used in interpreting or clarifying a Constitutional provision to the extent that it is relevant and aligns with the Constitution, statute or a final judicial outcome[168]).

44. Under Kenyan law, children lack the capacity to enter into a contract, open bank accounts, own certain driving licenses, drink, consent to medical procedures or research. For instance, under Section 24 of the Alcoholic Drinks Control Act No. 4 of 2010, no person holding a licence to manufacture, store or consume alcoholic drinks under this Act shall allow a person under the age of eighteen years to enter or gain access to the area in which the alcoholic drink is manufactured, stored or consumed. Under Sections 8 and 9 the Health Act No. 21 of 2017, minors do not have the capacity to give informed consent for the provision of a specific health service. Consent has to be obtained from parents or guardians. Section 33 of the Traffic Act Chapter 403 of the Laws of Kenya prohibits persons below the age of 18 years from holding certain driving licences. Further, under the Elections Act No. 24 of 2011, only adult citizens shall exercise the right to vote specified under Article 38(3) of the Constitution. Even when instituting a suit, minors can only do so through a next of friend.[169]

45. With regard to the second category of the age of consent, it was not until the 18th Century that reforms in the age of sexual consent started to come about.[170] In Europe, countries enacted consent laws in response to an enlightened concept of childhood that focused more on development and growth. Children were distinguished from adults and were identified as vulnerable to harm in the years around puberty.[171] In the year 1885, conservative purity reformers and feminists in England successfully lobbied Parliament to raise the age of consent to 16, which in turn prompted American reformers to act.[172] These reformers were a group of feminists, religious conservatives and white working-class men who came together to raise the age of sexual consent. This resulted in the enactment of the Federal Mann Act of 1910**,** also known as the White-Slave Traffic Act, and was in response to an outcry on middle-class men kidnapping working-class women and forcing them into a life of prostitution.[173]

46. Another wave of reforms followed in the United States and introduced two major changes in the law on sexual consent. In most States, it became law that one of the participants in sexual activity must be a certain number of years older than the other to be prosecuted at the felony level, further that the laws were to be gender-neutral, that is both female and males can be victims and perpetrators of the crime.[174] The laws introduced at this stage had these main features: redefining the crime as "sexual assault" or "sexual battery" to emphasize coercion; grading the offenses based on the age of the victim; broadening the offenses to include touching and oral/genital activity (this was particularly important for cases having to do with very young children); lowering and grading the penalties; eliminating corroboration requirements; eliminating the "promiscuity" clause that dismissed cases if the young female was not a virgin; and eliminating the mistake-of-age defense in which the perpetrator could

165 Article 260 of the Constitution of Kenya 2010
166 The Children Rights Convention, Article 1 define a child as "every human being below the age of eighteen years, unless under the law applicable to the child, majority is attained earlier."
167 African Charter on the Rights and Welfare of the Child, Article 2 defines a child as every human being below the age of 18 years.
168 *Mitu-Bell Welfare Society vs Kenya Airports Authority & 2 Others; Initiative for Strategic Litigation in Africa (Amicus Curiae)* SC Petition No. 3 of 2018); [2021] KESC 34 (KLR)**.**
169 Order 32(1) Civil Procedure Rules, 2010.
170 Stephen Robertson, 'Age of Consent Laws', in Children and Youth in History, < http://chnm.gmu.edu/cyh/teaching-modules/230> (accessed on 20th August, 2019).
171 Stephene, Ibid.
172 Ibid.
173 The Mann Act (1910), <https://archive.org/stream/283075-the-mann-act-1910/283075-the-mann-act-1910_djvu.txt> (accessed on 20th August, 2019).
174 Joseph J. Fischel, 'Per Se of Power? Age of Sexual Consent' <https://pdfs.semanticscholar.org/9320/c1e0e3b2a2a414550ba64ed56d5d44f010b3.pdf> (accessed on 20th August, 2019).

claim he thought the victim was above the age of consent.[175]

47. In Kenya, in 2019, various stakeholders held a forum under the stewardship of the National Gender and Equality Commission, to discuss the minimum age of consent for sex[176] The conversation drew participation from the public and private stakeholders, with a few supporting the reduction from 18 years to 16 years, and a majority opposing the same. The report also included findings from data collected from children aged between 10-13 years and 14-17 years; adults drawn from the religious, social, legal, human rights, health, education & research and the youth groups. The engagement gave rise to various recommendations. One of them, which recommendation was unanimous by the end of the forum according to the report, was that the age of consent should be maintained at 18. Notably, there were various groups representing the children and youth sector and they all opposed lowering the age of consent. Some of the reasons proffered for retaining the age of consent at 18 include: at their developmental stage especially between 10-19 years of age, children go through different physical, cognitive, social and psychological changes that impact their bodies and minds; girls who give birth at a young age are more likely to die as compared to older women, or develop birth-related disabilities; children born to young girls are more likely to suffer child deformities (perhaps because a girl's pelvic bones begin to fuse between the age of 10-19 years); early sex in most cases translates to early marriage; early sexual debut increases the risk of teenage pregnancies (which could invariably affect the transition rate in education for girls), unsafe abortions, maternal morbidity and mortality, sexual violence, HIV/STI infection, mental health problems and school drop-out, propel inequalities and social instability; at 16, most children are not mature enough to appreciate the impact and consequences of engaging in sex (not to mention that PLWD might take longer to mature than the average child); lowering the age puts children at risk within the schooling or education system among others.

48. Similarly, the SOA contains the same provisions as most sexual offences laws in other jurisdictions. It also makes it clear that an under-age child cannot consent to sexual activity. The protective notion of the state, *parens patriae*, assumes that minors are unable to understand fully and consent to the consequences of certain decisions, including sexual activity.

C. What is the status on the application of minimum sentencing under the SOA?

49. The SOA provides minimum sentences for most offences, and if the Act requires the imposition of a minimum sentence, the court does not have discretion and must mete out the prescribed sentence. Consequently, it is the duty of judicial officers to administer justice, according to existing law. In the Judiciary Criminal Procedure Bench Book, the guidelines on sentencing are quite clear that when an offence specifies a minimum sentence, the court ought not impose any sentence below that minimum.[177]

50. Recently, in *Republic vs Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 Others (Amicus Curiae)* SC Petition No. E018 of 2023; [2024] KESC 34 (KLR), the respondent was convicted of the offence of defilement of a 15-year old girl and sentenced to 20 years imprisonment. The High Court upheld the conviction and sentence. However, the Court of Appeal set aside the sentence and substituted it with a 15-year sentence. In making its determination, the Supreme Court noted that the Court of Appeal had erroneously applied the *ratio decidendi* in the *Muruatetu Case I* to the mandatory sentences under the SOA. Whilst reiterating the *Muruatetu Case I*, the Court held that the Court of Appeal had offended the doctrine of stare decisis by arrogating jurisdiction to itself since the issue of the constitutionality of the minimum sentence was not an issue before it.

51. The Court then proceeded to explicitly set out the difference between mandatory sentences and minimum sentences as follows: *'Mandatory sentences leave the trial court with absolutely no discretion such that upon conviction, the singular sentences is already prescribed by law. Minimum sentences however set the floor rather than the ceiling when it comes to sentences.* In that respect thereof, a mandatory sentence and a minimum sentence cannot be used interchangeably nor in similar circumstances. Neither can we apply the phrase *mandatory minimum sentences* in the Kenyan context.

52. Noting that one of the functions of criminal law is deterrence of crime, the Supreme Court agreed with the *amici*

175 Ibid.

176 The National Gender and Equality Commission, *'The Minimum Age of Consent for Sex: Addressing the Dilemma'*, https://www.ngecken-ya.org/Downloads/MINIMUM%20AGE%20OF%20CONSENT.pdf accessed on 28th October 2024.

177 The Criminal Procedure Bench Book, <file:///C:/Users/HP/Downloads/Judiciary%20Criminal%20Procedure%20Bench%20Book%20-%20Feb-ruary%202018%20[Links].pdf> 9accessed on 20th August, 2019).

curiae, who had been admitted in the matter, to the extent that stiffer sentences reflect the seriousness of sexual offences. South Africa for example, enacted the Criminal Law Amendment Act that introduced minimum sentencing to ensure *"a severe, standardized and consistent response from the courts to the commission of such [serious] crimes"*. Put differently, Robert Mueller, a former Assistant Attorney General, in his article *'Mandatory Minimum Sentencing'* published in the Federal Sentencing Reporter, Vol. 4 No. 4, Turmoil over Relevant Conduct in the Ninth Circuit (Jan. – Feb 1992) pp. 230-233, postulates that mandatory minimum sentences communicate the Congress' message that certain behavior will not be tolerated. Ideally, such sentences deter crime by communicating the predictability/ absolute sentencing floor of incarceration for certain serious crimes. [See para. 66 *Joshua Gichuki Case]*

53. The proper position, therefore, in the interpretation of *Muruatetu,* is that the findings of the Supreme Court on Judicial discretion with regard to minimum sentencing were limited to the confines of Section 204 of the Penal Code.

54. Whilst it is the business of the Legislature to set the parameters for sentencing, it is my opinion that any judicial finding on the constitutional validity or applicability of any specific law, ought to come from a direct legal challenge to a specific impugned section, and argued by litigants or interested parties, laying a basis upon which courts may make an exhaustive finding on the issue. It ought not to be a by-the-wayside issue of another unrelated matter as was the case in the *Joshua Gichuki Case*.

55. I do however believe that the minimum sentencing under the SOA has stirred sufficient controversy for it to warrant either (a) recommendation to Parliament to assess the impact or otherwise of the same, including whether the problem it was trying to address through its provision is now resolved; or (b) through a robust and openly public constitutional legal challenge through the courts of law. To pursue this complex legal question in any other way will inevitably bring to the fore the confusion and uncertainty that is apparent today.

Republic v Francis Karioko Muruatetu and Another: Which way for minimum sentences under the Sexual Offences Act?

56. It is however apparent that there is some confusion that appears to have been created by the Supreme Court's decision in *Francis Karioko Muruatetu & another v Republic,* SC Petition 15 of 2015 as consolidated with Petition 16 of 2015 [2017] eKLR (*Muruatetu I)* in terms of sentencing.

57. A perusal of decisions in the Superior Courts reveals the following statements that justify the interference with the minimum sentence. A few examples suffice.

58. In *Simon Kipkurui Kimori vs Republic,* Criminal Appeal No. 27 of 2018 [2019] eKLR, the appellant had been charged with the offence of defilement contrary to Sections 8(1) and (4) of the SOA and sentenced to fifteen years as prescribed by the SOA. He appealed on the sentence only.

59. The learned Judge observed having quoted extensively from *Muruatetu "17. In my view, the opinion of the Supreme Court with respect to mandatory sentences apply with equal force to minimum sentences or non-optional sentences."* Having found this, however, he found no reason to interfere with the sentence meted by the trial Court.

60. In *Guyo Jarso Guyo v Republic,* Petition No. 6 of 2018 [2018] eKLR, the petitioner was charged and convicted of the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the SOA. He was sentenced to 20 years imprisonment. On appeal, his sentence was enhanced to life.

61. A second appeal on the sentence was dismissed. However, the third appeal was somewhat successful as the learned Judge set aside the life sentence and it replaced with the twenty (20) years sentence imposed by the trial magistrate. In coming to his decision the learned Judge reasoned:

> "The trial court had imposed a twenty (20) years imprisonment sentence. The mandatory nature of the life imprisonment sentence takes away the court's direction to punish the offender. It is equivalent to having the Judicial officer hearing the entire case and at the end, finding his hands tied by the law when it comes to the punishment that can be imposed on the convict. That is why the Supreme Court outlawed

the mandatory nature of the death sentence in relation to murder cases. *The decision of the Supreme Court can be extended to any mandatory sentence including robbery with violence and the minimum sentences provided under Section 8 of the Sexual Offences Act."*

62. Similarly, the Court of Appeal in *Jared Koita Injiri vs. Republic, Criminal Appeal No.93 of 2014 [2019] eKLR* held that:
"In this case, the appellant was sentenced to life imprisonment on the basis of the mandatory sentence stipulated by Section 8 (1) of the Sexual Offences Act, and if the reasoning in the Supreme Court case was applied to this provision, it too should be considered unconstitutional on the same basis."

63. Although in this decision the Appellate Court did not go below the stipulated fifteen-year sentence it noted:
"Needless to say, pursuant to the Supreme Court decision in Francis Karioko Muruatetu & Another vs Republic (supra), we would set aside the sentence for life imposed and substitute it therefore with a sentence of 30 years from the date of sentence by the trial court."

64. In addition, in *Evans Wanjala Wanyonyi v Republic, Criminal Appeal No. 312 of 2018 [2019] eKLR,* the appellant was charged with defilement contrary to Section 8 (1) and (4) of the SOA and sentenced to 15 years imprisonment. On appeal, his sentence of 15 years imprisonment was set aside and enhanced to imprisonment for 20 years. In enhancing the sentence, the Judge stated that 15 years was below the minimum sentence provided (20 years) in Section 8 (1) (3) of the Sexual Offences Act No. 3 of 2006.

65. The Court of Appeal has also referred to the Supreme Court decision in *Muruatetu I* to base its decisions in *Christopher Ochieng vs R,* Kisumu Criminal Appeal No. 202 of 2011, [2018] eKLR and *Jared Koita Injiri vs R,* Kisumu Criminal Appeal No. 93 of 2014 [2019] eKLR in relation to sentencing, was convinced and satisfied that the enhanced mandatory 20-year term of imprisonment meted upon the appellant by the learned Judge could not stand.

66. It set aside the 20- year term of imprisonment and substituted the 20- year term of imprisonment with one of ten (10) years with effect from the date of sentence by the trial court. There are numerous decisions to this effect.

67. However, I believe that a clear reading of *Muruatetu* will show that this confusion ought not to exist and that the Supreme Court decision in that case, ought not be misapplied in terms of *sentencing* under the Sexual Offences Act.

68. The case of *Muruatetu* was in regard to the constitutionality of the sentence of the mandatory *death* penalty for the offence of murder. The arguments before the court were that the mandatory death penalty under *Section 204 of the Penal Code*, violated the right to fair trial in that it denied the trial Judge discretion in sentencing.

69. The findings of the court were limited to Section 204 of the Penal Code which provides that *'any person convicted of murder shall be sentenced to death'*.

70. It must be emphasised that the findings in *Muruatetu* were specific to the mandatory nature of the death penalty for the offence of murder. The major reason for this is that the death penalty is *final* in nature. It denies the offender the most fundamental of rights, the right to life. Once you die, you cannot be revived. Indeed, we noted in paragraph 45 of *Muruatetu* that *"we think that a person facing the death sentence is most deserving to be heard in mitigation because of the finality of the sentence."*

71. It is therefore evident that the focal point of the Court in *Muruatetu* was that any law or procedure which when executed *culminates in the termination of life*, ought to be just, fair and reasonable. As such, the finding in *Muruatetu* can, should, and ought to be distinguished from other cases.

72. A close reading of that judgment will show that we declined to address any other section of the law, which had not been interrogated through the hierarchy of courts before reaching us, or a matter on which we had not been addressed (see paragraph 26). The only matter at hand, which was the primary subject of appeal, was Section 204 Penal Code and we clearly so stated this at paragraphs 56 and 59 of the judgment. Further, at Paragraphs 70-77, in line with our narrowly defined purpose, we made recommendations to the Judicial Sentencing Guidelines, only

to the extent of the provisions that addressed sentencing on the death penalty and indeterminate life sentences. We did not revise any or all of the other minimum sentences under the sentencing guidelines. It was also our recommendation, that the Attorney General would set up a framework for resentencing of death penalty cases for murder cases. That recommendation did not include resentencing of any other type of case, again, because *Muruatetu* was limited to the mandatory nature of the death penalty for murder only.

73. Finally, the Supreme Court made recommendations to Parliament to make necessary amendments to the Penal Code. Had *Muruatetu I* been about other minimum sentences including that of the Sexual Offenses Act, the Court would have made similar recommendations. It did not. In fact, the Court issued directions in *Muruatetu II* after noting that the courts below it were applying *Muruatetu I* to all matters prescribing mandatory or minimum sentences. Furthermore, the Court also noted that the re-sentencing issued thereafter was devoid of any formula so that some courts were commuting the sentence to the period served, probation, reduction of sentences- the very state of incertitude that criminal law and *stare decisis* is meant to cure.

D. How does the SOA apply to offenders under the age of 18 years? Is the proposal to reduce the age of sex in sex offences merited?

74. The SOA provides a separate sentence mechanism for offenders below 18 years at Section 8(7). The Section provides thus:
"Where the person charged with an offence under this Act is below the age of eighteen years, the Court may upon conviction, sentence the accused person in accordance with the provisions of the Borstal Institutions Act (Cap. 92) and the Children's Act (Cap. 141)."

75. The current debate is fueled by worrying statements that our jails are being filled with underage boy sex offenders, this calls for clarification in terms of numbers and figures for the same. If indeed this is true, then it would be a clear misapplication of the law by trial courts.

E. So then, what is the national debate around sentencing under the SOA really about?

76. In order to answer this question, there is need to unpack the often-repeated statement which is consistently in the public domain, and from which there is such a ruckus: *"that there are young men 'suffering in jails' for engaging in voluntary relations"*. The veracity of this statement must be interrogated. What are the statistics? Is this a true or false narrative? What informs it?

77. The starting point is that there is no such legal term as *'young men'*. One is either an adult or a child. Men or women above 18 years are *adults*. The age of majority is prescribed in law and is set at 18 years. This is the legally defined age at which a person becomes an adult, with all the attendant rights and responsibilities of adulthood.

78. The Kenya National Bureau of Statistics Age-segregated statistics from the convicted male population shows that ages 18-20 constitute approximately 18%, ages 21-25 is 27%, ages 26-50 is 34% and ages 50+ is 6% of the population. (4% are under 18 in borstal institutions). In terms of the highest number of convictions per crime in the male population, Petty crimes lead including common Assault, Stealing, then GBH, Sexual offences, Robbery with Violence, Manslaughter, and Murder. Male prisoners tend to have more violent-related crimes than women, whose numbers lean towards economic, rather than violence-related crimes. The vast majority of males in prison are not incarcerated for sexual offences only, but for other named crimes.

79. Why then the outcry for young men who commit sexual offences? Where is the pity party for the other young men of the same age who commit other offences? Are they also not sons of people with great futures ahead of them? Are they also not languishing and suffering in jail? What makes this crime that they are convicted of different from any other to warrant an exception in our attitudes?

80. The answer is in the second part of the statement: that they are being *punished* for having *"voluntary"* relations; therefore, connoting that they are *only guilty of having sexual relations and not committing sexual offences.* More importantly, there is an inference that the complainant was also having voluntary relations, and the punishment is grossly unfair. In the open debates on this issue, in court decisions - these complainants are often described as girlfriends, wives and being in a relationship with the offender.

81. The most disturbing, perturbing fact in this whole debate is that those girlfriends, wives or girls in the relationship are below 18. They are legally children. They have no capacity to agree to be in a relationship in which they engage in sex. They are unable to give legal consent. These children are protected under the law from sexual abuse. They are supposed to be protected by the law, policy, and community from early parenthood/parental responsibility, contracting STD's, having unsafe abortions, becoming school dropouts. The Constitution of Kenya, the Children Act and a plethora of Government policies protect their reproductive and sexual health.

82. On the other hand, the convicted offenders or the young men we refer to, are of or above the age of 18 years. Having achieved the age of majority, they can vote, drive, drink, and enter into legal relationships. They have the capacity to consent. We want to place them in the same bracket as under 18's but they are not the same. The consequences for their actions are divided by that line - 18 years of age and all the attendant responsibilities that come with it.

83. I think the elephant in the room is two-fold. Firstly, and in rather harsh terms, I believe that we are hostage (willingly or unwillingly) to a rape-culture. This is to say that we live in "a society or environment whose prevailing social attitudes have the effect of normalizing or trivializing sexual assault and abuse"[178] Secondly, because we subscribe to a rape-culture that has ingrained itself to our socialization and created implicit biases that we accept as normal, we have done little to change it.

84. For example, we find it easier to sympathize with a young sex offender because he did not know better; but do nothing to educate his peers or followers so they do not repeat what he has done. We teach our children that it is criminal to drive without a licence, to drink and drive, to steal, to kill, and very carefully explain the consequences of such acts, but do not bother to educate our children (especially boys) about sex crimes, about the consent that is required before engaging in sexual acts, and how to identify what constitutes consent.

85. We blame and shame the victim and hold them responsible for the act committed by the offender. Yet we would never blame a bank for being open and holding cash; if they were robbed. We know that under our legal framework, no child has the capacity to consent, but in sex crimes, we reinvent the law so that we can find that the child can, and did in fact consent. This legal reinvention suits our individual histories, perceptions, experiences and beliefs around sex and sexual assault. Our belief system overruns the rights of the individual who comes to us for justice under the clear terms of the law; and they do not get what they expect because our personal values are not written in the law books. Uniformity in compliance in the implementation of sexual offences laws therefore will be difficult to achieve, as long as judicial officers use an individual value base to apply the law.

86. The solution to this problem cannot be discussed as part of this paper, as it is a complex, multi-layered, inbuilt societal affliction affecting our value systems as individuals and as a community. In the legal and judicial fraternity, we need to recognize that the problem lies not with the law, but the way in which we view the law through our own rose-tinted implicit and covert biases. As we grapple with how to move to the next step, to propose solutions - it is important that we acknowledge that the genesis of the problem is that of rape culture, and the sooner we address it for what it is, the better for all those young men "languishing" in jail.

12.6 Conclusion and recommendations

87. The implementation and provisions of the Sexual Offences Act will continue to generate debate in our dynamic and advancing society. The interplay between gender roles and responsibilities, human behaviour, the rape culture and its interface with Criminal law, in particular, with sexual offences, will continue in public discourse. In the interim, it remains for every institution in the criminal justice system to play its part, as was envisaged by the National Policy Framework under Section 47 of the SOA. The Judiciary, apart from its role in the determination of criminal cases, also has the responsibility of making rules for the court and the maintenance of the Sex Offenders Register. The following recommendations ought to be considered:

    1. *The Rules of the Court under the SOA, as gazetted by the Chief Justice, need a relook in terms of addressing some of the challenges being faced by the Courts in the implementation of the Act. The Chief Justice should set up a Committee to comprehensively advise her and judicial officers of developments within the*

178 Oxford dictionary.

law and to review and update the rules if need be.

2. *There is also a need for continuous legal education for judicial officers in terms of any development, or new vistas in sexual offences laws, including from a comparative jurisdiction perspective. In particular, the curriculum ought to include training for identification and removal of implicit bias, as well as tools for values separation and clarification in judicial work.*
3. *The Judiciary needs to continue to engage other relevant agencies in the criminal justice sector under the NCAJ in particular to address the*
4. *The Supreme Court, and other superior courts, ought to develop a supervisory mechanism through Structural interdicts that make recommendations that require follow up within the Judiciary or other State Agencies. The Court should also continuously engage with other courts and other stakeholders to ensure its decisions are correctly understood.*

Acknowledgement and Sources

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Books, Papers and recommended reading

- *Sexual Consent. David Archard. 2018. Routledge.*
- *Consent: the new rules of Sex Education. Jennifer Lang MD*
- *Ask: Building a Consent culture. Kitty Striker, Carol Queen 2018*
- *Capacity to Consent to sexual relations: The British Psychological Society May 2019*
- *Legal treatment of Consent in Sexual Offences in Kenya. Dr. Winifred Kamau. Feb 2013*

Judicial Protection of Human Dignity: Insights from Kenyan Jurisprudence

Hon. Lady Justice Njoki Ndungu, FCIArb, *CBS, SCJ*[179]

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13.1 Introduction

1. Human dignity is widely recognized as the cornerstone of human rights, serving as their philosophical and moral foundation.[180] This principle gained prominence in the aftermath of World War II and is reflected in the preambles of key international instruments such as the United Nations Charter and the Universal Declaration of Human Rights. These international legal instruments enshrine the idea of human dignity as a universal value and the bedrock upon which human rights are built.[181]

2. Rooted in the belief that human beings are unique among all creatures, the concept of human dignity highlights the distinct qualities of human beings, including their free will, autonomy, and capacity for reasoned decision-making and moral choice.[182] By emphasizing the intrinsic value of individuals, it underscores the idea that human beings, by their very nature, deserve respect and protection.[183]

3. While human dignity is a widely embraced ideal, it remains a contested concept with multiple interpretations. Scholars and practitioners often describe it in two distinct senses.[184] The first sense refers to the inherent worth that all human beings possess simply by virtue of being human. This worth is considered equal and intrinsic, emphasizing that every individual is entitled to dignity irrespective of their status or circumstances. The second sense relates to an individual's state of existence and lived experience. It focuses on the absence of indignity, humiliation, or degradation, and is closely tied to one's feelings of self-esteem, experiential well-being, and societal recognition of their worth.

4. Courts around the world, including in Kenya, have interpreted and applied the principle of human dignity to safeguard fundamental rights and freedoms, ensuring that individuals are not subjected to treatment that undermines their dignity. It is in this context that this paper examines the judicial protection of human dignity in Kenya, drawing insights from key jurisprudence that highlights its interplay with other constitutional principles and its critical importance in ensuring justice and equality for all.

13.2 Constitutional and Legal Framework

14. Modern constitutions reflect a blend of moral claims and legal entitlements, embedding values and rights that guide governance and societal interactions. A defining feature of constitutional drafting in the post-World War II era has been the explicit recognition of human dignity, either as a foundational value or as an enforceable right entrenched in constitutions.[185]

15. The inclusion of human dignity in constitutional frameworks takes various forms. In some constitutions, it is articulated as a stand-alone value of foundational significance, serving as the philosophical basis for other rights and obligations. In others, it is intertwined with specific interests, such as the prohibition against torture, or protection against inhumane treatment. Human dignity may also be associated with the protection of particular groups, such as vulnerable or marginalised communities, reflecting its universal yet context-sensitive application.[186]All these three approaches to the constitutional entrenchment of human dignity are present in the Kenyan Constitution.

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179 Justice of the Supreme Court of Kenya. I acknowledge the research assistance by Nancy Waruguru.

180 Manfred Nowak, 'Foreword' in Paulus Kaufmann, et al, (eds.) *Humiliation, Degradation, Dehumanization: Human Dignity Violated* (Springer, 2011) v.

181 George Kateb, *Human Dignity* (Harvard University Press, 2011) 1.

182 Dan Egonsso, *Dimensions of Dignity: The Moral Importance of Being Human* (Springer, 1998) 49. See also Rachel Bayefsky, *Dignity and Judicial Authority* (Oxford University Press, 2024) 3.

183 Manfred Nowak, 'Foreword' in Paulus Kaufmann, *et al,* (eds) *Humiliation, Degradation, Dehumanization: Human Dignity Violated* (Springer, 2011) v.

184 Julia Davis, 'Doing Justice to Dignity in the Criminal Law' in Jeff Malpas, *et al,* (eds) *Perspectives on Human Dignity* (Springer, 2007) 169, 177.

185 Catherine Duprř, *Importing the Law in Post-Communist Transitions: The Hungarian Constitutional Court and the Right to Human Dignity* (Hart Publishing, 2003) 23.

186 Erin Daly, *Dignity Rights: Courts, Constitutions, and the Worth of the Human Person* (University of Pennsylvania Press, 2013) 1.

(a) **Human Dignity as a National Value and Principle**

16. Human dignity is a cornerstone of Kenya's constitutional framework, enshrined as a national value and principle that influences governance, policymaking, and judicial interpretation. Article 10(2) establishes human dignity as a key national value and principle of governance. These values and principles bind all state organs, state officers, public officers, and individuals when applying or interpreting the Constitution, enacting or interpreting laws, or making and implementing public policy decisions.

17. As a central value and principle of governance in Kenya's constitutional order, human dignity shapes the interpretation and application of laws, governance decisions, and public policies. The Judiciary, in particular, is entrusted with the responsibility of interpreting the law in a way that promotes human dignity, affirming its dual role as both a substantive value and an interpretative tool.

18. Furthermore, Article 20(4)(a) of the Constitution of Kenya requires courts, tribunals, and other authorities interpreting the Bill of Rights to promote "the values that underlie an open and democratic society based on human dignity, equality, equity, and freedom."[187] The significance of human dignity as a value is further emphasized in Article 24(1), which addresses the limitation of rights and fundamental freedoms. It stipulates that a right or freedom in the Bill of Rights may only be limited by law and only to the extent that the limitation is "reasonable and justifiable in an open and democratic society based on human dignity, equality, and freedom."

19. The role of human dignity as a value extends to the functions of state organs. Article 244(d) requires the National Police Service to train its personnel to the highest standards of competence and integrity while respecting human rights, fundamental freedoms, and dignity. Additionally, the President and Deputy President affirm their commitment to human dignity through their oath of office, which includes a pledge to protect and uphold the dignity of the people of Kenya.[188] Under Article 132, the President is also mandated to provide an annual report on progress made in realizing the national values and principles of governance, with human dignity as a critical component.

20. Therefore, human dignity, serving as a value and principle of national governance, permeates Kenya's constitutional framework, serving as legal guide for creating an open, democratic society rooted in respect for the inherent worth of every individual. To this extent, therefore, the value of human dignity can be said to be an interpretative tool which is used by the Courts of law.

(b) **Human Dignity as a Right**

21. The Constitution recognises that human dignity serves as the foundation for the recognition of human rights, underscoring that individuals possess rights both because of and for the preservation of their dignity. Article 19(2) of the Constitution establishes the overarching purpose of recognizing and protecting human rights and fundamental freedoms, stating that it is "to preserve the dignity of individuals and communities and to promote social justice and the realization of the potential of all human beings". This declaration forms the bedrock of Kenya's constitutional regime on human rights, positioning human dignity as the foundation upon which the entire framework of rights is built.[189]

22. Article 28 of the Constitution entrenches human dignity as a stand-alone right. It declares that "every person has inherent dignity and the right to have that dignity respected and protected." The use of the term *inherent* signifies that dignity is an inalienable attribute of all individuals, irrespective of any external conditions. However, Article 28 does not define or delineate the scope of human dignity, leaving room for judicial interpretation and application in diverse contexts.

23. Beyond the general declaration in Article 28, the Constitution provides specific protections aimed at safeguarding

187 Article 20 (4) In interpreting the Bill of Rights, a court, tribunal or other authority shall promote—
(a) the values that underlie an open and democratic society based on human dignity, equality, equity and freedom; and
(b) the spirit, purport and objects of the Bill of Rights.

188 Third Schedule of the Constitution- National Oaths and Affirmations.

189 See Tsega Andualem Gelaye, *The Role and Migration of Human Dignity in African Constitutional Orders: A Comparative Study of South Africa, Kenya and Uganda* (2019, PhD Thesis, Submitted to Central European University) 153.

the dignity of vulnerable groups. Article 54(1)(a) guarantees that individuals with disabilities are "to be treated with dignity and respect and to be addressed and referred to in a manner that is not demeaning." Similarly, Article 57(c) obligates the state to ensure that older persons have the right "to live in dignity and respect and be free from abuse." These provisions illustrate the Constitution's commitment to addressing the unique circumstances of vulnerable and marginalized groups while upholding their inherent dignity. A notable feature of these articles is the subtle distinction they draw between *treating a person with dignity* and *treating a person with respect*. While dignity pertains to the inherent worth of an individual, respect involves the recognition and outward acknowledgment of that worth through actions, words, and behavior.[190]

24. Also notable is the fact that Article 24 of the Constitution of Kenya, provides that all the other rights and fundamental freedoms are subject to limitation that is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. Further, the following factors should be considered when limiting a right:

i. The nature of the right or fundamental freedom;
ii. The importance of the purpose of the limitation;
iii. The nature and extent of the limitation;
iv. The need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms or others; and
v. The relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.

25. Similarly, human dignity may be limited where the aforementioned factors are met. Notably, however, is that human dignity is in itself a test for whether a limitation is reasonable, legal or valid.

(c) Human Dignity and the application of the rules of International Law

26. The foundations of international law in the post-World War II legal order are characterized by a purposive orientation intended to promote the protection of human rights thereby ensuring that the intrinsic worth and dignity of all individuals is respected and upheld.[191] Consequently, international law can be viewed as an instrument that actively safeguards and promotes human dignity through mechanisms designed to protect rights and uphold justice on a global scale.

27. The Constitution of Kenya integrates this international perspective into its legal framework through Articles 2(5) and 2(6). Article 2(5) recognizes that "the general rules of international law shall form part of the law of Kenya." This provision underscores Kenya's commitment to the principles and norms of customary international law, which are universally accepted as binding on states and contribute to the global protection of human rights and dignity.

28. Article 2(6) further strengthens this connection by stipulating that "any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution." This provision ensures that Kenya's domestic legal framework aligns with its international obligations, particularly those related to human rights, equality, and the protection of human dignity.

29. In addition to Articles 2(5) and 2(6), Article 59(2)(g) of the Constitution further strengthens Kenya's commitment to international human rights obligations. It stipulates that the Kenya National Commission on Human Rights (KNCHR) shall act as the principal organ of the State in ensuring compliance with obligations under treaties and conventions relating to human rights. This provision institutionalizes the State's role in promoting and protecting human dignity by ensuring adherence to international standards. The KNCHR serves as a bridge between Kenya's international commitments and their implementation at the national level, reinforcing the integration of human dignity into the legal and policy frameworks.

30. The interplay between international law and Kenya's Constitution is particularly evident in cases where constitutional provisions require clarification or where gaps exist in domestic law. In such situations, customary

190 Rainer Ebert, & Reginald MJ Oduor, 'The Concept of Human Dignity in German and Kenyan Constitutional Law' (2012) 4(1) *Thought and Practice Journal* 43.

191 See Patrick Capps, *Human Dignity and the Foundations of International Law* (2009, Hart Publishing) 243.

international law and treaty obligations provide a valuable interpretative tool, ensuring that the principle of human dignity is consistently upheld. Kenyan courts have drawn on international instruments, such as the Universal Declaration of Human Rights (UDHR) and the African Charter on Human and Peoples' Rights (ACHPR), to inform decisions on fundamental rights and freedoms, particularly where the protection of human dignity is at stake.

31. In case of *Mitu-Bell Welfare Society vs Kenya Airports Authority & 2 Others; Initiative for Strategic Litigation in Africa (Amicus Curiae);* SC Petition No. 3 of 2018; [2021] KESC 34 (KLR), the Supreme Court settled the law on the application of Article 2(5) and (6) of the Constitution. First, the Court understood international law to mean international treaties and international customs. It specifically held that there is no particular body charged with giving effect to international law. Similarly, courts are not expressly bound to give effect to international obligations and laws. That said, the Supreme Court specifically held that Article 2(5) and (6) of the Constitution is both inward-looking and out-ward looking. Inward-looking to the extent that the courts will apply international law to the extent where it is not in conflict with the Constitution, local statutes or a final judicial pronouncement. Further, General Comments issued under various international instruments breathe life into human rights and therefore, constitute soft law. While soft law does not have the same status as Article 2(5), the same may be applied subject to the foregoing reasons. It is outward-looking to the extent that Kenya, as a State, is bound to honour its international obligations under customary international law. To that end, Kenya cannot be boxed into categorization as either a dualist or monist State.

32. Put differently, in the case of *Jasbir Singh Rai & 3 Others vs Tarlochan Singh Rai Estate of Jaswant Singh Rai & 4 Others,* SC Petition No. 4 of 2012; [2013] eKLR, Chief Justice, Emeritus, Hon. Willy Mutunga, stated that the Courts will continue to consider international jurisprudence. However, the said consideration should not be mechanical, but organic to ensure that Kenyan jurisprudence is suitably enriched so that the international jurisprudence is subjected to an inquiry into its context.

(d) **Human Dignity in the Social and /Cultural Front**

33. Kenya's rich cultural diversity, comprising diverse races and over 42 distinct ethnic groups, offers a tapestry of unique traditions and customs. However, a unifying thread across these varied cultures is the recognition of *human dignity***,** often conceptualized as *utu*. Rooted in the idea of inherent worth, *utu* underscores the universal human value that demands respect, fostering a shared ethos across Kenyan communities.[192]

34. In Kenyan and African worldview, the quality of human life is often evaluated through the lens of *utu*—a principle that affirms the intrinsic value of every person. This belief shapes societal norms, relationships, and communal obligations, emphasizing the interconnectedness of individuals within their communities. The concept of *utu* reflects a broader African worldview encapsulated in sayings such as "a person is a person through other persons" or "*I am because we are.*"[193]These expressions convey a profound ethical principle: human beings derive their identity, value, and purpose from their relationships with others. This Afro-communitarian perspective sees human rights violations as a degradation of people's capacity for meaningful relationships—both to love and to be loved.

35. Unlike Western liberal frameworks that often focus on individual autonomy, the Afro-communitarian ethos prioritizes shared life, communal harmony, and collective welfare. Dignity, from this perspective, is intrinsic and signals that human beings possess inherent worth regardless of external validation. This moral worth is rooted in the very nature of being human, and its source is internal, emphasizing dignity as an inalienable and foundational principle.[194]

36. The Constitution of Kenya reflects this communal understanding of dignity. Article 19(2) explicitly recognizes dignity not only as an individual attribute but also as a communal value. It stipulates "The purpose of recognising and protecting human rights and fundamental freedoms is to preserve the dignity of individuals and

192 See generally Kai Kresse, *Philosophising in Mombasa* (Edinburg University Press, 2007).

193 See generally Micere Githae Mugo, *The Imperative of Utu/Ubuntu in African Scholarship* (Daraja Press, 2021). See also Thaddeus Metz, 'Dignity in the Ubuntu Tradition' in Marcus Duwell, et al, (eds) *The Cambridge Handbook of Human Dignity (*Cambridge University Press, 2014) 310.

194 Motsamai Molefe, and Christopher Allsobrook, 'Introduction to Human Dignity in African Thought' in Motsamai Molefe and Christopher Allsobrook, (eds) *Human Dignity in an African Context* (Palgrave, 2023) 1, 15.

communities...". This dual recognition highlights the collective identity inherent in African societies. Moreover, the Constitution enshrines an obligation on the President, Acting President, and Deputy President to pledge to "protect and uphold the sovereignty, integrity, and dignity of the people of Kenya".[195] This constitutional emphasis on communal dignity diverges from traditional Western liberal thought, which centers primarily on individual rights, and aligns closely with the African communitarian ethos. It resonates with the *peoples' rights* framework of the African Charter on Human and Peoples' Rights, which similarly acknowledges the collective dimension of dignity and the interconnectedness of individuals and communities.

37. In essence, the Kenyan, in line with the African communitarian worldview, understanding of human dignity is deeply rooted in the socio-cultural fabric of its people. It is a principle that transcends individual identity, embracing the collective good and fostering an environment where the inherent worth of every person and community is respected and protected in line with the communitarian values of *utu.*

(e) The Normative Contents of Human Dignity

38. The search for a central organizing principle to anchor the concept of human dignity in universal human rights has been an ongoing pursuit in legal and philosophical discourse. In this regard, Christopher McCrudden, in outlining the 'basic minimum content' of human dignity as it appears in human rights instruments, identifies at least three foundational elements that encapsulate the concept.[196]First, he asserts that every human being possesses intrinsic worth simply by virtue of being human. Second, this inherent worth must be recognized and respected by others, with certain forms of treatment being deemed inconsistent with, or required by, such recognition. Finally, McCrudden highlights the relationship between the state and the individual, arguing that the state's existence should be for the benefit of the individual human being, not the other way around. This establishes the idea of a "limited-state" approach, where the state is obliged to protect and promote human dignity.

39. To attempt a similar search for the normative contents of human dignity in the Kenyan constitutional context, based on the constitutional edicts, the normative content of human dignity can, in my view, be crystallized as follows:

1. It is inherent in all human beings by virtue of being human beings.
2. Human rights, being founded on human dignity, are therefore inherent in all human beings.
3. It forms the foundational source of human rights from which new rights may accrue, or existing rights may be extrapolated to apply to new circumstances.
4. It is the basis of all other rights.
5. Not only must it be observed, it demands that one's dignity should be respected and protected.

12.3 Jurisprudence in Promoting, Protecting and Observing Human Dignity: Some Case Studies

40. It is important from the outset, to point out that Article 25 of the Kenyan Constitution lists 4 non-derogable rights:

"

a) freedom from torture and cruel, inhuman or degrading treatment or punishment;
b) freedom from slavery or servitude;
c) fair trial; and
d) right to habeas corpus."

41. Article 24 provides the grounds upon which any right, other than those above-mentioned may be limited. In my opinion, however, these limitations must still conform to respect for human dignity, and therefore, reading the Constitution holistically, human dignity, while not explicitly a non-derogable right, definitely forms the bedrock and foundation of the protection of all other rights.

42. The courts in Kenya have reflected this position and promoted the respect for human dignity in various decisions they have made in recent years:

195 Third Schedule of the Constitution.
196 Christopher McCrudden, 'Human Dignity and Judicial Interpretation of Human Rights' (2008) 19(4) *The European Journal of International Law* 655, 679.

1. ***ANN vs Attorney General*, *Constitutional Petition No. 240 of 2012; [2013] KEHC 6004 (KLR)***, the Court held that the right to privacy, that is closely linked with right to dignity, may be infringed upon when the police need to conduct a search, including conducting a search on an arrested person. However, the Court found that the police had violated the petitioner's rights when they stripped him naked in front of the public as they purportedly conducted a search. The Court also found that media houses that aired this incident on their various platforms further violated the petitioner's right to privacy and dignity.

2. ***Kituo Cha Sheria & 8 Others v Attorney General*, Petition No. 115 of 2013; [2013] eKLR**, In this case, the High Court held that the right to dignity is embedded in Article 28 of the Kenyan Constitution and in international instruments such as Article 1 of the United Nations Declaration of Human Rights (UDHR) and Article 5 of the African Charter on Human and Peoples Rights. In this particular case, the Court found that the policy directive of the Government of Kenya to relocate all refugees living in urban areas to refugee camps and thereafter move them to their home countries, violated various rights of refugees. Among these rights is the right to dignity since the petitioners had established that the refugees had established roots in the country and were working for gain in Kenya thereby establishing some form of normalcy in their lives. The Court found that implementation of the policy would be in complete disregard of the Constitution, international instruments and their right to dignity. In addition, the directive disregarded their peculiar circumstances and vulnerabilities as refugees which includes insecurity and trauma. Further, the manner in which the directive would be implemented would violate their dignity.

3. ***Muruatetu & Another vs Republic; Katiba Institute & 5 Others (Amicus Curiae)*, SC Petition Nos. 15 & 16 of 2015 (Consolidated); [2017] KESC 2 (KLR).** In this matter, the Supreme Court of Kenya held that failure to consider the mitigation of offenders convicted of the offence of murder when imposing sentence, infringed on their right to dignity, among other reasons like impeding on the trial court's discretion to fashion a sentence based on the peculiar circumstances of a case. The Court ultimately held that the mandatory nature of the death sentence for the offence of murder is unconstitutional.

4. ***Priscilla Nyokabi Kanyua vs Attorney General & Another*, Petition No. 1 of 2010; [2010] eKLR**. The Interim Constitutional Dispute Resolution Court held that prisoners have a right to vote and failure to afford this right impedes on an important avenue of teaching them democratic values and social responsibility.

5. ***Moses Dola Otieno v Ministry of Interior & Co-ordination of National Government (State Department for Correctional Services) & 2 Others*, Petition No. E542 of 2022; [2024] KEHC 1639 (KLR)**). Here, the High Court held that detained persons should be treated in a humane way, and that their dignity should be respected and protected. The Court found that detained persons ought to be held in conditions that uphold their human dignity and health such as right to due process, right to reasonable accommodation, nutritious diet, right to education, right to access information, right to be visited, have family days among others. In particular, the Court held that a prisoner has a right to be granted temporary leave of absence to attend a burial or funeral of a close relative. While this right is provided for in Section 30(2)(h) of the Persons Deprived of Liberty Act as read with Article 51(1) of the Constitution, its implementation has been hampered by failure to enact rules thereunder. To date, the rules are yet to be enacted.

6. ***Musa Mbwagwa Mwanasi & 9 Others vs Chief of the Kenya Defence Forces & Another*, Constitutional Petition No. 361 of 2015; [2021] eKLR**. In this matter, the Court held that prolonged pre-trial detention spanning a period of between 64 and 166 days with uncertainty on the detainee's status, and in debilitating conditions, was a violation of human dignity. Further, it found that holding them incommunicado further violated the detainees right to human dignity. The Court stated that the right to life encompasses not only prohibition of taking life through unlawful means, but also promoting rights in which a person's life is sustained in dignity.

7. ***CMM (Suing as the Next of Friend and on Behalf of CWM) & 6 Others vs Standard Group & 4 Others*, SC Petition 13 (E015) of 2022; [2023] KESC 68 (KLR)**. In this matter, the Supreme Court of Kenya was faced with a case where some minors were charged with arson. Some news outlets published the story including the minors' faces and identities, through their respective media houses and various platforms. Their defence was that at the time of publishing, they were not aware that the petitioners were minors and, in any event, in criminal matters, the

minors' right to privacy was not guaranteed**.** The Court held that while the media has every right to cover cases involving children, the Constitution, the Children Act, and the Media Act, were existing laws that stated that the best interests of the child are paramount. The Media therefore ought not to have disclosed the minors' identities and/or particulars. Further, a child in conflict with the law is a vulnerable victim of a failed system and all efforts must be focused on protecting the child from further harm.

8. In ***Macharia vs Safaricom PLC*, Constitutional Petition No. 434 of 2019; [2021] KEHC 462 (KLR)**. The Court was faced with a question of human dignity and fair administrative action of an employee living with disabilities. The Petitioner is visually impaired. He successfully applied for a position with the Respondent. However, he was later denied the opportunity without a reason. The Court had to balance the rights of the petitioner as a person living with disability with those of the respondent to operate its business. It held that in today's world, the Court found, it is possible to employ a visually impaired person to work using a computer. Further, citing the Convention on the Rights of Persons with Disabilities and the Persons with Disability Act, the Court held that the respondent had failed to set in place reasonable accommodation for persons with visual disability. In addition, while the Court agreed that it would have been economically unviable for the respondent to change its entire software system to accommodate the petitioner, the respondent acted in breach of fair administrative action as it failed to act procedurally, fairly and reasonable from the point of recruitment to the point of informing the petitioner that the letter of invitation was erroneously made to him. The Court found that the respondent failed to respect the petitioner's rights to human dignity, equity and equality.

9. ***LAW & 2 Others vs Marura & Nursing Home & 3 Others; International Community of Women Living with HIV (CW) (Interested Party); Secretariat of the Joint United Nations Programme on HIV/AIDS & 2 Others (Amicus Curiae),* Constitutional Petition No. 606 of 2014; [2022] KEHC 17132 (KLR)** In this matter, the High Court was faced with a question of whether the rights of a woman who had been sterilized without her consent, were violated. The Court stated that conducting a Bilateral Tubal Ligation (BTL) on the 1st petitioner without obtaining her informed consent prior, violated her right to the highest attainable standard of reproductive health, right to dignity, right to a family, and was unfair discrimination among others.

10. ***Tatu Kamau v Attorney General & 2 Others; Equality Now & 9 Others (Interested Parties); Katiba Institute & Another (Amicus Curiae),* Constitutional Petition No. 244 of 2019; [2021] KEHC 450 (KLR)**. In this mater, the petitioner challenged the constitutionality of the Prohibition of Female Genital Mutilation Act (No. 32 of 2011) and the Anti-Female Genital Mutilation Board. She pegged her argument on the fact female circumcision is a cultural practice and a national heritage. Further, she argued that the women who practiced it had not experienced any reduced biological functions, and the Anti-FGM Act diminished female agency and imposed colonial standards on the women and was discriminatory on the adult women who willingly chose to undergo female circumcision. She argued interfering with the women's right to self-regulate their affairs, it infringed on their right to dignity.

11. The Court did not agree with this rationale, citing the Maputo Protocol, and also held that harmful cultural practices could not trump the express provisions of the Constitution. Further, the Court was not convinced that one can agree to subject themselves to harmful practices. In addition, the Constitution does not promote any exercise of an individual's freedom that would amount to one causing harm on oneself.

12. ***MWK & Another vs Attorney General & 4 Others; Independent Medical Lega Unit (IMLU) (Interested Party); The Redress Trust (Amicus Curiae), Constitutional Petition Mo. 347 of 2015; [2017] KEHC 1496 (KLR).*** Here, the High Court held that the police officers violated a minor's right to be treated with dignity and right to privacy by stripping her in front of male police officers and taking naked photographs of her. While the police have a duty to enforce public order and to arrest suspects, the same has to tampered with the obligation to respect, promote and fulfil the rights in the Bill of Rights. In addition, the rights of children under Article 53 of the Constitution of Kenya should be protected. Children should only be detained as a last resort and for the shortest period possible. To that end, the Court stated that even when in conflict with the law, children should be treated with care, compassion, empathy and understanding of their vulnerability and inherent frailties. The Court in this case applied both the right of human dignity and rights of children under Article 53 of the Constitution of Kenya**.**

13. There is the High Court's decision in ***Republic vs Kenya National Examinations Council & Another Ex-***

parte Audrey Mbugua Ithibu, JR Case No. 147 of 2013; [2014] eKLR. This matter in lived an intersex person who challenged the Government for declining to issue government documents reflecting her new chosen gender which violated her right to dignity. The litigant was born and raised as a male but subsequently changed her name and gender. Having sat her Kenya National Examinations, her Kenya Certificate of Secondary Examination (KCSE) was issued in the name of a male but she was desirous of having the same changed and issued to reflect her new name and gender. The High Court discussed the place of dignity in the development of a nation. It also acknowledged that human dignity is at the heart of an individual's identity and is the cornerstone of all other human rights.

14. ***JOO (also known as JM) vs Attorney General & 6 Others, Petition Case No. 5 of 2014; [2018] eKLR.*** The petitioner, a woman from a low-income background, was subjected to mistreatment in Bungoma County Referral Hospital when pregnant. She was forced to share a bed with another woman. She was not afforded any help during delivery, lost consciousness in the corridor and ended up delivering on the concrete floor in the view of others and while being recorded. She was also verbally and physically abused by the nurses who found her in this condition. The High Court held that giving birth in the open and on a concrete floor violated the petitioner's rights to maternal healthcare, her right to be treated with dignity under the Constitution, the Maputo Protocol and the Banjul Charter. Further, the Court held that the National and County Governments had failed to devote adequate resources into healthcare services and had failed to put in measures to implement, monitor and provide minimum acceptable standards of healthcare. On appeal, the Court of Appeal upheld the High Court's decision that the respondents violated the petitioner's rights to dignified respectful maternal health care and to the highest attainable standard of physical, mental, sexual and reproductive health. It stated that respectful maternal care is part of the social and economic rights under Article 43 of the Constitution. Further, the right to respectful maternal care is not subject to progressive realization but is part of the minimum core of the right to health that must be realized immediately which is in line with the provisions of Article 12 of CEDAW, Article 10 ICESCR and Article 24 of Maputo Protocol. The respondents were also faulted for failing to establish a human-rights-based protocol for women during childbirth that maintained respectful maternity care, women's dignity, privacy, and confidentially and promoted making informed choices. Article 43 of the Constitution as read together with the various international human rights treaties entails a health system that respects women's sexual and reproductive health and their right to dignity.

12.4 Conclusion

43. In conclusion, the right to human dignity is firmly embedded within Kenya's legal and constitutional framework, with clear provisions that not only recognize its intrinsic nature but also emphasize its protection and promotion. Articles 10, 19, 28, and other related provisions in the Constitution establish a robust foundation for safeguarding human dignity, underscoring its significance as the bedrock upon which all other rights are built. The Judiciary plays a critical role in ensuring that these constitutional guarantees are upheld, continuing to interpret and apply the law in a way that protects the dignity of every individual.

44. However, while the legal framework is well-established, there remains a gap in ensuring that vulnerable and marginalized citizens can effectively access justice to assert their rights. Public interest litigation, facilitated by civil society organizations, serves as an important avenue for addressing this challenge. Civil society groups can bridge the gap between the law and those most affected by human dignity violations, ensuring that those without the means or resources to navigate the legal system can still have their voices heard. By empowering and supporting affected communities, these groups can foster greater access to justice, promote awareness of the right to dignity, and ensure that the judiciary's protective role is more widely realized.

Threshold of Standard of Proof in Election Dispute Resolution

Hon. Mr. Justice William Ouko, FCIArb, CBS, SCJ[197]

(*This paper was delivered between 22nd to 25th February 2023 during the Election Dispute Resolution symposium for Court of Appeal Judges*)

14.1 Introduction

1. Whether you talk of the standard or burden of proof you are talking about evidence. What did Nyarangi, JA say about jurisdiction? Without it a court has no power to make one more step.[198] It downs its tools. So is evidence. Evidence is the foundation stone upon which a case is built; if it is weak the case crumbles and falls.

2. Generally, electoral processes are associated with contending interests and differences in perspective which often results in the rejection of election results as being unreflective of the electorate's choice. Election-related complaints are an integral part of the electoral process, and the Judiciary has the last word: to determine the integrity and credibility of the process. In the determination of electoral disputes, courts have the most difficult task of balancing between upholding or annulling election results. Whenever evidence has been presented to warrant the nullification of elections, Kenyan courts have never shied away from doing so. The circle was completed in 2017 when Kenya made history as the fourth country in the world and the first in Africa to nullify a presidential election.

14.2 Burden of Proof

3. The results of an election will be annulled or upheld depending on the evidence before the election court. You cannot talk of the standard of proof without talking of the person on whose shoulders the burden of attaining that standard lies.

4. The entire Part 1 of Chapter IV (Sections 107 to 119) of the Evidence Act [199] is dedicated to burden of proof. According to Section 107(2);
"When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person"

Therefore, he who asserts the existence of facts must prove that those facts exist. In elections, there is a rebuttable presumption that the result of any election declared by the electoral body is correct and authentic. It follows that the person (the petitioner) who alleges the contrary, has a duty to present evidence in proof.

5. Technically, the phrase burden of proof refers to two distinct types of burdens, namely: the legal burden and the evidential burden. The legal burden lies only on one of the parties and does not shift to the other party throughout the length and breadth of the trial. Section 108[200] explains that the burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

6. On the other hand, evidential burden refers to the obligation on a party to adduce sufficient evidence of a particular contested fact in order to justify a decision on that fact in his favour. A litigant who fails to discharge the evidential burden in a case carries the risk, he may lose the whole or some part of the case. Furthermore, unlike the legal burden, the evidential burden is not static: it keeps shifting between the parties throughout the course of the trial.

7. In *Raila 2013* [201] the Supreme Court explained this burden in election dispute as follows:
"195. There is, apparently, a common thread in the foregoing comparative jurisprudence on burden of proof in election cases. Its essence is that *an electoral cause is established much in the same way as a civil cause:*

197 Justice of the Supreme Court of Kenya.
198 *Owners of the Motor Vessel "Lillian S v Caltex Oil (Kenya) Ltd* [1989] KECA 48 (KLR).
199 Evidence Act, Cap. 80, Laws of Kenya.
200 Section 108 of the Evidence Act, Cap. 80, Laws of Kenya.
201 *Odinga & 5 others v Independent Electoral and Boundaries Commission & 3 others* (Petition 5, 3 & 4 of 2013 (Consolidated)) [2013] KESC 6 (KLR).

the legal burden rests on the petitioner, but, depending on the effectiveness with which he or she discharges this, the evidential burden keeps shifting....
While it is conceivable that the law of elections can be infringed, especially through incompetence, malpractices or fraud attributable to the responsible agency, it behoves the person who thus alleges, to produce the necessary evidence in the first place – and thereafter, the evidential burden shifts, and keeps shifting."

14.1 Standard of Proof

8 Besides the burden of proof, the law also imposes a degree of proof required to establish a fact. The extent of the proof required in each case is what, in legal parlance, referred to as the standard of proof. What is the standard of proof in election petitions?

9 To begin, there are general principles for the electoral system governed by Articles 81 which include free and fair elections, which in turn are free from violence, intimidation, improper influence or corruption; transparent; and administered in an impartial, neutral, efficient, accurate and accountable manner. To this list, Article 86 [202] adds that the IEBC shall ensure that— whatever voting method is used, the system is simple, accurate, verifiable, secure, accountable and transparent; that the votes cast are counted, tabulated and the results announced promptly by the presiding officer at each polling station; that the results from the polling stations are openly and accurately collated and promptly announced by the returning officer. These constitute compulsory minimum standards for a valid election.

10 Taking all these constitutional standards into consideration Section 83 of the Elections Act [203] sets the threshold for nullification of an election as follows:

(1) A Court shall not declare an election void for non-compliance with any written law relating to that election if it appears that-
(a) the election was conducted in accordance with the principles laid down in the Constitution and in that written law; or
(b) the non-compliance did not substantially affect the result of the election."

11 Before and up to the 2017 election, that is how Section 83 read. The word "or" was used between (a) and (b). Debate ensued whether a petitioner was bound to prove both (a) and (b) for the court to nullify an election, or whether the two limbs were to be considered independently.

12 The majority judgment of the Supreme Court in *Raila 2017*, settled the debate by holding that:
"The use of the word "or" clearly makes the two limbs disjunctive under our law. It is, therefore, important that, while interpreting Section 83 of our Elections Act, this distinction is borne in mind."

13 The Court distinguished this from the position under English Law and Elections Law in other commonwealth jurisdictions where the laws use the word "and" instead of "or" like ours. The word "and" would require a "conjunctive" reading. In our case 'a petitioner who is able to satisfactorily prove either of the two limbs can void an election.'

14 The annulment of the presidential elections by the Supreme Court in 2017 triggered the introduction of the Election Laws Amendment Bill, 2017[204] in Parliament to amend various provisions of the Elections Act, the IEBC Act and the Election Offences Act.

15 The Election Laws Amendment Bill, 2017 was passed by Parliament and finally transmitted to the President for assent. The President neither assented to the Bill nor returned it to Parliament and after fourteen (14) days of its passing, the Bill became law by virtue of the provisions of Article 116 of the Constitution. The law was published in the Kenya Gazette on 2nd November 2017 thus becoming effective as the Election Laws Amendment Act, No. 34 of 2017.

16 Under the amendments, Section 83 of the Election Act reads as follows:

202 Article 86, Constitution of Kenya, 2010.
203 Elections Act, Cap. 7, Laws of Kenya.
204 Election Laws Amendment Bill, 2017 (National Assembly Bills No. 39 of 2017).

"(1) A Court shall not declare an election void for non- compliance with any written law relating to that election if it appears that – (a) the election was conducted in accordance with the principles laid down in the Constitution and in that written law; and (b) the non- compliance did not substantially affect the result of the election."
The amendment was seen as an attempt to overturn the "disjunctive" reading of Section 83 of the Elections Act by the Majority of the Supreme Court in *Raila 2017* by replacing that interpretation with a "conjunctive" reading of the provision. The effect was that a petitioner had to prove both limbs as opposed to either.

17 The amendment was challenged before the High Court by Katiba Institute, in *Katiba Institute & 3 Others v. AG & 2 Others* [205] (*Katiba Institute case*); that by amending the law from a disjunctive to a conjunctive test, it would be difficult to challenge an election even where there was violation of constitutional principles.

18 The High Court *(Mwita, J.)* agreed and declared that the amendment was constitutionally invalid. This decision was never appealed nor did Parliament make any subsequent amendments to Section 83 of the Elections Act. This raised the question as to the status in law, of Section 83 of the Elections Act.

19 The Supreme Court got an opportunity in the *Senate & 2 Others v. Council of County Governors & 8 Others* [206] (Senate & 2 Others case) to address the question of what the consequences of nullification of an amendment to a provision of Statute are. The Court categorically held that "*the effect of the courts' declaring the amendment unconstitutional restored section ante".*

20 Subsequently, in *The Attorney General & 2 others v. David Ndii & 79 others*[207], (BBI Case), the Court had no difficulty in relying on the foregoing decision, restating that the effect of a court's declaration of an amendment unconstitutional restores the pre-amendment version of the subject provision.

21 There is an interesting and equally powerful argument that once a provision has been replaced by another which is then subsequently declared unconstitutional, the original provision is not available for a fall back, having been repealed and ceased to exist.

22 To conclude on this issue, the version of Section 83 of the Elections Act that was applicable during the 2022 election is the original disjunctive version before the amendment in 2017 (disjunctive). -

14.2 Qualitative vs Quantitative Test

23. Election irregularities and illegalities revolve around two fundamental aspects.
(i) Whether there were irregularities and illegalities committed in the conduct of the election; and
(ii) If there were, what was their impact on the integrity of the election?

24. The onus is on the Petitioner to prove that the election was so badly conducted and marred with irregularities and illegalities that it does not matter who was declared the winner. In other words, the election was marred by many irregularities the cumulative effect of which fundamentally and negatively impacted the integrity of the election. It is not every infraction of the law that will lead to nullification of an election.

25. In *Raila 2017*, the Supreme Court expressed itself as follows on the threshold:
"[373] .....*Not every irregularity, not every infraction of the law is enough to nullify an election.* Were it to be so, there would hardly be any election in this Country, if not the world, that would withstand judicial scrutiny. *The correct approach therefore, is for a court of law, to not only determine whether, the election was characterized by irregularities, but whether, those irregularities were of such a nature, or such a magnitude, as to have either affected the result of the election, or to have so negatively impacted the integrity of the election, that no reasonable tribunal would uphold it.*

[374] In view of the interpretation of Section 83 of the Elections Act that we have rendered, *this inquiry about the effect of electoral irregularities and other malpractices, becomes only necessary where an election court*

205 *Katiba Institute & 3 others v Attorney General & 2 others* [2018] eKLR.
206 *Senate & 2 Others v. Council of County Governors & 8 Others*, Petition No.25 of 2019; [2022] KSC 7 (KLR).
207 *Attorney-General & 2 others v Ndii & 79 others; Dixon & 7 others (Amicus Curiae)* (Petition 12, 11 & 13 of 2021 (Consolidated)) [2022] KESC 8 (KLR).

has concluded that the non-compliance with the law relating to that election, did not offend the principles laid down in the Constitution or in that law. But even where a Court has concluded that the election was not conducted in accordance with the principles laid down in the Constitution and the applicable electoral laws, it is good judicial practice for the Court to still inquire into the potential effect of any irregularities that may have been noted upon an election. This helps to put the agencies charged with the responsibility of conducting elections on notice."

26. The Court therefore concluded that IEBC committed illegalities and irregularities of such a substantial nature that no court, properly applying its mind to the evidence and the law as well as the IEBC's administrative arrangements, could in good conscience declare that they did not matter and that the will of the people was expressed nonetheless.

27. From an analysis of the threshold of illegalities and irregularities both in the *Raila 2013* and *2017* decisions, as much as the threshold is clear it is not easy to discern the "magnitude" of irregularities and illegalities that would be deemed to affect the result of the election, or to have so negatively impacted the integrity of the election. It is trite that no election is perfect.

28. A petitioner seeking nullification of elections for alleged non-conformity with the Constitution or the law or on the basis of irregularities and illegalities, has the duty to proffer cogent and credible evidence to prove those grounds to the satisfaction of the court. I end where I started, the qualitative and quantitative test turns on cogent and credible evidence. Evidence, evidence and evidence. In *Raila 2022* the Supreme Court in applying the qualitative and quantitative test to the evidence before it stated:

> "27. The question, whether or not the 2022 Presidential Election passed constitutional and legal muster, can only be answered upon consideration and with reference to the threshold of the burden and standard of proof borne by the petitioners. It is ultimately therefore, a question of evidence tendered by the petitioners.
> 28. The law of evidence complements the existing civil and criminal substantive and procedural laws in this country. The outcome of a case depends on the strength, accuracy and reliability of evidence. In an adversarial court system like ours, the courts and Judges are 'blind', in the sense that they do not carry out any investigative roles or gather evidence on behalf of the parties before them. They depend on and determine disputes from what parties present. Consequently, cases are won or lost on the evidence placed before the Court."

13.5 Standard of Proof in Civil Cases

29 Again, it is elementary that in civil cases, the standard of proof required is on a balance of probability or on preponderance of evidence. But there may be degrees of probability or preponderance within that standard. A higher degree of probability would be required where a civil court was considering an allegation of fraud as opposed to a claim of negligence. See *R.G Patel v. Lalji Makanji* [208], where the former Court of Appeal for East Africa stated thus:

"Allegations of fraud must be strictly proved; although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required." So long as the case is civil in nature, a civil court cannot adopt so high a degree as a criminal court.

30 How does a court reach a determination that the threshold of balance of probability or preponderance of evidence has been achieved? The Supreme Court of Nigeria, in the classical case of *Mogaji v. Odofin*[209], graphically illustrated how the court reaches this decision. According to the Court:

"The judge should first of all put the totality of the testimony adduced by both parties on an imaginary scale. He should then put the evidence of the plaintiff on one side of the imaginary scale and put the evidence of the defendant on the other side of the scale. The judge is then expected to weigh the two pieces of evidence together. The judge is then to decide which of the two pieces of evidence is heavier. This is not to be decided by the number of witnesses called but by the quality and probative value of the testimony of the witnesses. The admissibility, relevance, credibility and conclusiveness of the evidence will naturally help the judge in coming to the conclusion in favour of one party against the other."

208 *R.G Patel v. Lalji Makanji* [1957] EA 314.
209 *Mogaji v. Odofin,* (1978) LCN/2064(SC).

A judge involved in this judicial exercise, need not resort the exact mathematical calculus in the weighing machine, rather the judge relies on his judicial and judicious mind and experience in determining where the imaginary scale tilts.

13.6 Burden and Standard of Proof in Election Petitions (*Sui generis*)

31 I need to observe firstly, that elections disputes are *sui generis*, as they transcend ordinary adversarial processes in criminal proceedings and are distinct from ordinary civil cases. They go beyond the parties in the dispute and affect other interests such as those of the voters whose rights are protected in the Constitution. The legal burden in an election petition lies on the petitioner who must prove the ground or grounds alleged in the petition. He is the party who will lose if no evidence is given in support of the grounds.

32 Secondly, that appeals to the Court of Appeal will be in the form of first appeals from the High Court. There will be no second appeals from the magistrate's court on the authority of *Hassan Jimal Abdi v Ibrahim Noor Hussein & 2 others*[210] and *Hamdia Yaroi Sheikh Nuri v. Faith Tumaini Kombe & 2 others* [211], among others. A first appeal is approached as if it is a re-trial. The court has a duty to re-evaluate, re-analyze and re-consider the evidence recorded by the trial court and draw its own independent conclusions, (of course bearing in mind that it did not see witnesses testifying and therefore give due allowance for that). See *Gitobu Imanyara & 2 others v. Attorney General*[212].

33 Having set out these two principles, the question is: What is the extent to which a Petitioner should go to sufficiently persuade the court to interfere with the declared result in terms of Section 83 aforesaid? Put differently, to what standard must the initial burden of proof be discharged?

34 The required standard of proof in respect to election petitions has been addressed differently by different jurisdictions across the world. But the three primary categories of the standard of proof that are common are, starting from the highest standard: first, the application of the criminal standard of proof of beyond [any/all] reasonable doubt; second, the application of an intermediary standard of proof and lastly, the application of the civil case standard of the balance of probability [or on the preponderance of evidence]. In Mauritius, Canada and Malawi for instance, the standard of proof is on a balance of probabilities, see *Jugnauth v. Ringadoo,*[213] *Opitz v. Wrzesnewskyj* [214], and *Mutharika & Anor. v Chilima & Anor,* [215] respectively. Zambia, like Kenya has adopted an intermediate standard see *Lewanika and Others v. Chiluba.*[216] In India, again like Kenya, a higher standard of proof has been required, where the allegations are of a criminal nature see *Shri Kirpal Singh v. Shri VV Giri.* [217]

35 The Supreme Court in *Raila 2013* set out the intermediate standard of proof as well as proof where allegations of commission of election offences have been made:

> "The threshold of proof should, in principle, be above the balance of probability, though not as high as beyond-reasonable-doubt – *[intermediate]* save that this would not affect the normal standards where criminal charges linked to an election, are in question. In the case of data-specific electoral requirements (such as those specified in Article 138(4) of the Constitution, for an outright win in the Presidential election), the party bearing the legal burden of proof must discharge it beyond any reasonable doubt."
> [A candidate shall be declared elected as President if the candidate receives -
> (a) more than half of all the votes cast in the election; and
> (b) at least twenty-five per cent of the votes cast in each of more than half of the counties....50% + 1 threshold].

36 Moreover, the Supreme Court in *Moses Masika Wetangula v. Musikari Nazi Kombo & 2 others*[218] was categorical that where an election offence is alleged in an election petition the standard of proof is beyond reasonable

210 *Hassan Jimal Abdi v Ibrahim Noor Hussein, Returning Officer Wajir North Constituency & Independent Electoral and Boundaries Commission* [2018] KECA 113 (KLR).
211 *Nuri v Kombe & 2 others* [2019] KESC 6 (KLR).
212 Gitobu Imanyara & 2 others v. Attorney General [2016] eKLR.
213 *Jugnauth v. Ringadoo* (Mauritius) [2008] UKPC 50.
214 *Opitz v. Wrzesnewskyj,* [2012] 3 SCR 76.
215 *Mutharika & Anor. v Chilima & Anor,* (MSCA Constitutional Appeal 1 of 2020) [2020] MWSC 1.
216 *Lewanika and Others v. Chiluba*, (1999) 1LRC 138.
217 *Shri Kirpal Singh v. Shri VV Giri*, AIR 1970 SC 2097.
218 *Wetangula & another v Kombo & 5 others* [2015] KESC 12 (KLR) para 119.

doubt similar to that in criminal matters due to the quasi-criminal nature of the cause.
"....It is, therefore, necessary that the offences in question were duly established. Bribery is a criminal offence in general penal parlance; but besides, it is a specifically defined electoral offence, recognised as an incident capable of disrupting the due process of the electoral law".

37 The Court defined the extent to which an election court can go after being satisfied that the commission of an election offence has been established. **"**The election court must not determine whether or not an election offence has been committed" to avoid an embarrassing situation where the two courts (election and criminal trial court) could come to different conclusions on the same matter. The Court directed that criminal offences, including election offences be tried by the ordinary criminal courts where trial rights under Articles 50(2) read together with Article 25 of the Constitution[219] are fully complied with. The election court is not the forum to try election offences. Under Section 23 of the Election Offences Act,[220] it is envisaged that such trials would be conducted before special magistrates.

38 The higher standard of proof in election cases has been criticized as unreasonably high and that strictly speaking an election dispute is just like any other civil case. In *Raila 2017*, the petitioners had urged the Court to review the standard of proof in election petitions as established in 2013 and to find that the applicable standard of proof in the presidential election petition is on a balance of probabilities. The Supreme Court restated the intermediate standard of proof and summarized the law as follows:

i) Where there are allegations of criminal or quasi criminal acts in a petition, the criminal standard of "beyond reasonable doubt" applies.

ii) In the case of data-specific electoral requirements (such as those specified in Article 138(4) of the Constitution, for an outright win in the Presidential election), the party bearing the legal burden of proof must discharge it beyond any reasonable doubt.-

iii) Where there are no allegations of criminal or quasi criminal acts, an intermediate standard of proof, one beyond the ordinary civil litigation standard of "on a balance of probabilities" but below the criminal standard of "beyond reasonable doubt" is applied.

iv) The rationale for this higher standard of proof is based on the notion that an election petitions are not ordinary civil suits. They are unique in many ways. Besides the fact that they are governed by a special code of electoral laws, they concern disputes which revolve around the conduct of elections in which voters exercise their political rights enshrined under Article 38 of the Constitution. This means that electoral disputes involve not only the parties to the Petition but also the electorate in the electoral area concerned.

v) Election petitions are matters of great public importance and the public interest in their resolution cannot be overemphasized. Because of this peculiar nature of election petitions, the law requires that they be proved on a higher standard of proof than the one required to prove ordinary civil cases.

39 This position in *Raila 2017* has also been reiterated in the case of *John Harun Mwau & 2 Others v. IEBC & 3 Others*[221] ***(Mwau).***

40 Another attempt to persuade the Court to review its position on the standard of proof was presented in *Raila Odinga & 16 others v. Ruto & 10 others; Law Society of Kenya & 4 others (Amicus Curiae)*[222] **(**Raila 2022**)**. In their *amici* briefs LSK and ICJ-Kenya had highlighted the different standards of proof in various jurisdictions as the basis for the Court to vacate the standard established in *Raila 2017* and *Mwau*. The Court was not convinced that time was ripe for it to take another look at the position. The Court said:
"We are alive to the fact that different standards have been adopted in other jurisdictions across the globe, as demonstrated in the amici briefs in this Petition on behalf of LSK and ICJ-Kenya Chapter but we find no justification and we are not prepared at this point in time to depart from the test now firmly laid and applied in this jurisdiction.
...
There are therefore only two categories of proof in relation to election-related Petitions in this country: the

219 Constitution of Kenya, 2010.
220 Election Offences Act, Cap. 66, Laws of Kenya.
221 *Mwau & 2 others v Independent Electoral & Boundaries Commission & 2 others; Aukot & another (Interested Parties)* (Election Petition 2 & 4 of 2017) [2017] KESC 54 (KLR)**.**
222 *Raila Odinga & 16 others v. Ruto & 10 others; Law Society of Kenya & 4 others (Amicus Curiae)* (Presidential Election Petition E005, E001, E002, E003, E004, E007 & E008 of 2022 (Consolidated)) [2022] KESC 56 (KLR).

application of the criminal standard of proof of beyond reasonable doubt, as explained and the intermediate standard of proof."

41 This debate is not only confined to Kenya. In Nigeria, for instance, the standard of proof where election offence is alleged (beyond reasonable doubt) has been criticized. It is argued this standard runs contrary to the fundamental principle of reasonableness and proportionality which is germane to the administration of justice. Undoubtedly, the requirement of proof beyond reasonable doubt is the highest standard of proof in the administration of justice and it is particularly required in the administration of criminal justice, where it ought to be confined.

41 A petitioner's reliefs in an election petition are usually declaratory and restorative in nature without more and certainly do not envisage the conviction of the alleged offender. Besides, election petitions being *sui generis* in nature cannot be put on the same footing as traditional criminal proceedings.

43 Furthermore, the machinery of power to investigate, arrest, interrogate and detain which are available to a prosecutor under the law is not available to a petitioner in the proof of the commission of a crime.

44 Even where an election crime is alleged in a petition, the proceedings can only be quasi-criminal and not purely criminal.

1. Does it amount to double jeopardy: before an election court and before a criminal court?
2. Once the election court concludes that an election offence is proved [bearing the standard- beyond reasonable doubt – in mind, can the trial court depart and overrule the higher court?

These are some of questions we must grapple with.

13.7 Conclusion

45 From *Raila 2022*, the take home is that cogent and credible evidence is what a petitioner requires to persuade a court to nullify an election. Every allegation, apart from being specific, definitive and certain, must be backed with cogent evidence that meets the threshold of proof required in such disputes.

46 Elections disputes are *sui generis*, as they transcend ordinary adversarial processes and go beyond the parties in the dispute and affect other interests such as voters whose rights cannot be limited to the petition and are protected in the Constitution. The standard of proof in election petition disputes must go beyond the ordinary civil litigation standard of proof. The jury is still out on whether the standard of beyond reasonable doubt in election related disputes is misplaced.

PART C
ACCESS AND ADMINISTRATION OF JUSTICE

Judicial Independence and Integrity: The Kenyan Experience

Hon. Justice Martha K. Koome, FCIArb, EGH[223]

(Earlier versions of this paper have been captured in speeches delivered at the 23rd Commonwealth Law Conference, Goa - India on 8th March 2023; virtually during the Justice K. T. Desai Centenary Memorial Round Table on 28th July 2021; and the LSK Nairobi Branch Quarterly Luncheon, Crowne Plaza Hotel -1st July 2021)

15.1 Introduction

1. Following the promulgation of the 2010 Constitution, the people of Kenya ushered in a new constitutional order. At the heart of this new constitutional order is a promise to restructure the state and entrench a constitutional government that is founded on values of good governance, democracy, the rule of law, and respect for human rights. On this account, the Supreme Court of Kenya in *Speaker of the Senate & another v Attorney-General & another* (Advisory Opinion Reference 2 of 2013), described the 2010 Constitution as a transformative charter which unlike the conventional liberal constitutions, has an avowed goal to institute social change and reform.[224]

2. As rightly, pointed out by Chief Justice Willy Mutunga (now retired), this magnificent promise of the 2010 Constitution is not guaranteed, 'it must be nurtured, aided, and supported by citizens and institutions.'[225] Therefore, the Judiciary as the custodian of the Constitution must patrol Kenya's constitutional boundaries with vigilance and vigour to avoid relapses to the old order.[226] This imposes a duty to the Judiciary to promote and protect the transformative promise offered by the 2010 Constitution.

3. For the Kenyan Judiciary to discharge this great responsibility, it must remain independent and free from the external pressure from any source, including other arms of government. A Judiciary that is not independent cannot effectively play a central role in the protection and implementation of the Constitution of Kenya 2010. This paper therefore, explores the theme of judicial independence in Kenya in the post-2010 era.

15.2 The Meaning and Essence of Judicial Independence

4. Judicial independence entails judges playing their roles independent of other branches of government and free from external threats and pressures.[227] From a more nuanced perspective, judicial independence relates to both institutional and individual autonomy of judges as well as the actual capacity of courts to make independent decisions.[228]

5. At the global level, there is a degree of consensus on what judicial independence should entail as elaborated under the Bangalore Principles of Judicial Conduct. The Bangalore Principles provide that 'a judge should uphold and exemplify judicial independence in both its individual and institutional aspects.'[229] At the individual level, a judge is required to exercise judicial function independently free from extraneous influences, interference or pressures.[230] At the institutional level, the judiciary should be safeguarded from interference by other arms of government.

6. Judicial independence is a central pillar of the rule of law and a fundamental principle for protection of human rights, democracy, and good governance. Thus, judicial independence is not a mere rhetoric; it is of practical necessity to ensuring that societies enjoy good governance, democracy, and human rights. In countries where judicial independence is upheld, courts effectively play their role as the guardians of democracy and the rule of law.

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223 Chief Justice and President of the Supreme Court of Kenya.

224 *Speaker of the Senate & another v Attorney-General & another; Law Society of Kenya & 2 others (Amicus Curiae)* (Advisory Opinion Reference 2 of 2013) [2013] KESC 7 (KLR) (1 November 2013) (Advisory Opinion) (with dissent - NS Ndungu, SCJ) para 51. See Karl Klare's elaboration of transformative constitutionalism in his article, 'Legal Culture and Transformative Constitutionalism,' (1998) 14 *South African Journal of Human Rights* 146 where he states that by transformative constitutionalism I mean a long-term project of constitutional enactment, interpretation, and enforcement committed…to transforming a country's political and social institutions and power relationships in a democratic, participatory, and egalitarian direction. Transformative constitutionalism connotes an enterprise of inducing large-scale social change through non-violent political processes grounded in law.

225 Advisory Opinion Reference 2 of 2013 para 160.

226 Advisory Opinion Reference 2 of 2013 para 61.

227 Morris K. Mbondenyi and John O. Ambani, *Constitutional Law of Kenya: Principles, Government and Human Rights* (Law Africa, 2012).

228 See Walter Khobe Ochieng, 'The Judicial-Executive Relations in post-2010 Kenya: Emerging Judicial Supremacy?' in Charles Fombad, (ed.) *Separation of Powers in African Constitutionalism* (Oxford University Press, 2016) 286.

229 Bangalore Principles of Judicial Conduct Para 1.

230 As above.

15.3 Judicial Independence and Cooperative Inter-Branch Relationship

7. It is not unusual to find in discussions about judicial independence and the related idea of separation of powers a simple, powerful, and dominant narrative: we have three distinct branches of government, (by some accounts recent constitutions have a fourth branch –independent constitutional commissions/institutions) acting in isolation in pursuit of their constitutional mandates. Today this dominant account is being challenged by constitutional and legislative schemes that we find in places like Kenya which emphasize *institutional independence with dialogic and co-operative inter-branch relationship.*

8. The constitutional architecture for the operations of the Kenyan Judiciary emphasizes the independence of the courts in the discharge of their core judicial mandate. Article 160 of the Constitution is emphatic that in the discharge of judicial role, Judges and other Judicial Officers are to be guided by the Constitution and the law and nothing more. In addition, the Judiciary is not subjected to the control or direction by any person or authority. This is clear enough; it is a constitutional command that no extraneous factor should be brought to bear in the discharge of the core judicial function i.e. judicial decision making.

9. However, at an institutional level outside the core of judicial decision making, the Constitution envisages a more nuanced approach to judicial independence. It emphasizes inter-dependence with other branches of government and state agencies in a facilitative role that enables the Judiciary to discharge its mandate. *The Constitution recognizes that access to justice is a right (Article 48) and all branches of government have an obligation to facilitate the realization of this right.*

10. Starting from Article 6 of the Constitution of Kenya, that emphasis that in delivering access to services to the Kenyan people, state institutions should conduct their relationship on the basis of consultation and cooperation; to article 21(1) of the Constitution that imposes a duty on every state organ to realize rights and fundamental freedoms, including the right to access justice; and the various institutional structuring like the Judicial Service Commission, that has representation from the executive branch; and the appointment of the leadership of the Judiciary i.e. the Chief Justice and Deputy Chief Justice that involve the legislative and the executive branch. In addition, the Cabinet, the National treasury, and the National Assembly are to engage with the Judiciary to ensure the institution is adequately funded to enable it to discharge its mandate.

11. This constitutional scheme of dialogic and cooperative relationship is also reflected in the legislative scheme, where the Justice Sector Actors and Institutions are brought together in a forum chaired by the Chief Justice known as the National Council on the Administration of Justice. The mandate and functions of the National Council on the Administration of Justice are derived from the Judicial Service Act, specifically sections 34-37. The overall mandate of NCAJ is to coordinate the administration of justice and reforms in the justice sector in an efficient, effective and consultative manner.

12. This scheme reflects an attempt to institutionalise: *not detachment of the institution of the Judiciary from other state institutions but to create an institutional framework that emphasises collaboration and cooperation in the activities of state agencies and institutions with the goal of ensuring the attainment of the joint goal of ensuring the realisation of the right to access to justice.*

13. This does not mean that the Judiciary is not independent; but it is out of the reality that it is only through coordination of the activities of actors in the Justice Sector, such as the Office of the Attorney General, Director of Public Prosecutions, Prisons Department, Children's Department, the Police, Anti-Corruption Commission, amongst others, that we can attain efficiency and resolve systemic problems in the pursuit of the constitutional obligation of ensuring that the right to access to justice is realised.

14. This is no doubt a nuanced approach to judicial independence that we find in the constitutional and legislative scheme in Kenya. Where core judicial duty of judicial determination is by constitutional command sacrosanct and should not be subjected to direction or control by any person or institution, but the Judiciary as an institution is *encouraged to be distinct and yet inter-dependent with other state institutions to facilitate the realization of the right to access to justice.*

15.4 Appointment of judges as a critical aspect of judicial independence

15. The Supreme Court of Kenya in the case of *Judges and Magistrates Vetting Board & 2 others v Centre for Human Rights and Democracy & 11 others*, pointed out that in the run-up to the promulgation of the 2010 Constitution, the Judiciary was an institution largely distrusted by members of the public.[231] One of the reasons for this distrust in the Judiciary as asserted by the Task Force on Judicial Reforms led by Justice William Ouko (Ouko Task Force) was that the procedures of appointment of Judges was non-transparent.[232] The Task Force noted that the process of identification and vetting of candidates by the Judicial Service Commission was 'neither transparent, nor based on any publicly known or measurable criteria.'[233] This, according to the Task Force led to loss of public confidence in the Judiciary.[234]

16. Considering that the process of appointment of judicial officers has critical bearing on judicial independence and public confidence in the Judiciary, the 2010 Constitution marked a radical departure from the previous constitutional dispensation. Under the framework of the 2010 Constitution, the appointment of Judges in Kenya follows a meritocratic approach, where the Judicial Service Commission has an obligation to carry out a fair and transparent recruitment process.[235] Meritocracy is also subject to the constitutional command that judicial appointments should reflect the "face of Kenya" i.e. gender and regional balance should be taken into account.[236]

17. Notably, as outlined under Article 171(2) of the 2010 Constitution, the composition of the Judicial Service Commission is representative and considers the stakeholders in the Justice Sector and even has representatives of the Public. In brief, the Judicial Service Commission is chaired by the Chief Justice and has representatives from the various courts of the Kenyan court system, the Law Society of Kenya, the Attorney General, the Public Service Commission, and two representatives of the public appointed by the President. The composition of the Judicial Service Commission is intended to enhance judicial independence. Indeed, under Article 172(1), the 2010 Constitution charges the Judicial Service Commission with the responsibility to promote and facilitate independence and accountability of the Judiciary.

18. As provided for under Article 166 of the 2010 Constitution, the recruitment of the Chief Justice and Deputy Chief Justice is subject to approval by the National Assembly whilst that of other judges goes from the JSC to the President for appointment without parliamentary involvement. The law and practice of recruitment of Judges and other judicial officers has embraced openness and public participation which are core constitutional values in our Constitution.[237]

19. Thus upon the declaration of a vacancy in judicial office, the Judicial Service Commission invites applications in the media, the applicants and shortlisted candidates' names are similarly published in the media and public views solicited on the suitability of the candidates for office, and this is then followed by a public interview that is televised throughout the nation.[238]

20. All these changes and embrace of accountability, transparency, meritocracy and public participation are the results of the adoption of a new Constitution that has been said to be imbued with "a never again" ethos. It represents a rejection of the recruitment processes in the pre-2010 era where the public and members of the legal profession were not involved in the recruitment of judges and magistrates leading to the illegitimacy of the Judiciary.

231 *Judges and Magistrates Vetting Board & 2 others v Centre for Human Rights and Democracy & 11 others* (Petition 13A, 14 & 15 of 2013 (Consolidated)) [2014] KESC 9 (KLR) (5 November 2014) para 79.
232 Final Report of the Task Force on Judicial Reforms (the Government Printer, 2010) 23 – 24 (hereafter: Ouko report).
233 As above.
234 As above.
235 Article 172 of the Constitution.
236 See Walter Khobe Ochieng, 'The Composition, Functions, and Accountability of the Judicial Service Commission from a Comparative Perspective' in Jill C. Ghai, (eds) *Judicial Accountability in the New Constitutional Order* (International Commission of Jurists –Kenya, 2016) 47-71. See also Article 27 of the Constitution on equality and non-discrimination.
237 Ben Sihanya, *Constitutional Implementation in Kenya, 2010-2015: Challenges and Prospects* (Friedrich Ebert Stiftung (FES) & University of Nairobi's Department of Political Science & Public Administration, FES Kenya, Occasional Paper No. 5, 2011) 14.
238 As above.

15.5 Removal of judges as an important aspect of judicial independence

21. The disciplinary and removal procedures constitute a hallmark of an independent and accountable judiciary.[239] To protect the independence and integrity of the judiciary, procedures for disciplining and removal of judges for misconduct or other unprofessional behavior not necessitating removal should be clearly stipulated.[240]

22. The public has a legitimate interest in ensuring that Judges and other Judicial officers do not abuse their power. Like other state agencies, judicial power is a delegated power from the citizens. Like all other persons who exercise delegated power, Judges and Judicial Officers must be accountable. This is the only means of ensuring that Judges and Judicial Officers will act fairly, free from corruption and undue influence.

23. Any scheme for Judicial Accountability must maintain a fine balance between protecting Judges and Judicial officers from arbitrary removal from office and ensuring that Judges and Judicial officers act within acceptable standards of integrity. There ought to be some mechanism for ensuring that Judges and Judicial Officers who do not meet the high standards of judicial office are removed from office after an objective process that accords the concerned Judge and Judicial officer due process.

24. The Supreme Court of Kenya has developed rich jurisprudence on the linkage between judicial independence and removal of judges.[241] Emphasizing the need to follow due process in the removal of a judge, in the case of *Chitembwe v Tribunal Appointed to Investigate into the Conduct of the Hon. Justice Said Juma Chitembwe (Chitembe case), Judge of the High Court*, the Supreme Court asserted that:

> Although Judges have guaranteed tenure until mandatory or early retirement age, they can be removed only for reasons and through the process outlined in the Constitution and the law. These principles are espoused not only in the oath of office of a judge but also in some of the international and regional human rights instruments which in turn are replicated in the Constitution and relevant statutes.

25. Notably, to ensure a transition from the repealed constitutional order to the new constitutional order established under the 2010 Constitution, the Judges and Magistrates Vetting Board was established to vet all judges who had been serving in the pre-2010 era. During this transitional process, several judges were removed in the office on various grounds in order to restore public confidence in the Judiciary.

26. As noted by the Supreme Court in the *Judges and Magistrates Vetting Board & 2 others v Centre for Human Rights and Democracy & 11 others*,[242] Kenyans did not trust the pre-2010 Judiciary that had to a large extent lost legitimacy. Thus, they felt that the task of safeguarding the 2010 Constitution could only be entrusted to a "new" Judiciary. This would involve "new" judges recruited in the "transparent and meritocratic" approach alluded to above but there was also a need to transit the judges and magistrates from the old era who were not tainted with the ills of that era.

27. In essence, the Vetting Board was a one-off transitional justice mechanism, similarly to the lustrations, Transitional Justice Reconciliation Commissions and vetting that were carried out in East and Central Europe, South Africa, and some countries in Latin America after the collapse of authoritarian regimes.[243] Therefore, the Vetting process was a one-off historical moment when Kenya's institutions were being reformed and realigned with the ethos of the new Constitution.[244] Indeed, it has often been stated that in Kenya witnessed a rebirth of the republic in 2010. Thus, the Constitution ushered in the second Republic, the first having been at Independence in 1963.

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239 Ouko Report p 28.

240 As above.

241 See *Chitembwe v Tribunal Appointed to Investigate Into the Conduct of the Hon. Justice Said Juma Chitembwe, Judge of the High Court* (Petition E001 of 2023) [2023] KESC 114 (KLR) (28 December 2023) (Judgment), *Muya v Tribunal Appointed to Investigate the Conduct of Justice Martin Mati Muya, Judge of the High Court of Kenya*, SC Petition 4 of 2020; [2022] KESC 16 (KLR), and *Mutava v Tribunal Appointed to Investigate the Conduct of Justice Joseph Mbalu Mutava, Judge of the High Court of Kenya* (Petition 15 "B" of 2016) [2019] KESC 49 (KLR) (Civ) (12 March 2019) (Judgment).

242 *Judges and Magistrates Vetting Board & 2 others v Centre for Human Rights and Democracy & 11 others* (Petition 13A, 14 & 15 of 2013 (Consolidated)) [2014] KESC 9 (KLR) (5 November 2014).

243 See in this regard Christina Murray, & Jan van Zyl Smit, 'Global Standards on Judicial Independence and Removal: Grappling with Vetting and Fresh Appointment' (2024) 2(2) *Comparative Constitutional Studies* 315-336.

244 See The *First Report of The Kenya Judges and Magistrates Vetting Board* [2012] eKLR.

28. The insulation of the vetting process from judicial review, through constitutional and not legislative ouster clause,[245] was informed by Kenya's constitutional history where Judges had been seen to make self-serving judicial determinations to frustrate the constitution-making process thus there was genuine fear that similar schemes would be deployed to frustrate the constitutionally mandated vetting process were the vetting process to be left exposed to judicial intervention.[246] However, to ensure that the Judges and Magistrates were treated fairly, due process was made a key part of the process. In addition, foreign jurists were invited to part of the process to ensure that the process was not captive to local politics and interests.

29. Coming to the constitutional scheme on removal of judges in the post-2010 era, the Constitution has established inbuilt safeguards aimed at balancing between Judicial Independence and removal of judges. As provided for under Article 168 of the Constitution, a Judge can be removed from office only on specified grounds. The grounds include: inability to perform functions arising from mental or physical incapacity; a breach of the code of conduct; bankruptcy; incompetence; or gross misconduct or misbehaviour.

30. To underscore Article 168 of the Constitution, the Supreme Court in the *Chitembwe case* held that:
"A judge can be removed from office only on specific grounds, namely the inability to perform the functions of office arising from mental or physical incapacity; a breach of a code of conduct prescribed for judges of the superior courts by an Act of Parliament; bankruptcy; incompetence; or gross misconduct or misbehaviour. Where any or some of these grounds are alleged, the concerned Judge is entitled to due process before an independent tribunal is appointed to inquire into the alleged grounds. Similarly, should the tribunal recommend removal, the Judge has the right to challenge the decision of the Tribunal through an appeal process to this Court."

31. In line with Article 168, the removal of a Judge in Kenya goes through a three-tier process (article 168). Due process and right to fair hearing is emphasised through all the three stages. First, the JSC can act on its own motion or when moved by a complainant to initiate investigations into the conduct of a judge. The judge must be accorded due process during this initial process.

32. The second stage; If the JSC establishes that a ground for removal has been established, then the President will suspend the Judge and form an independent Tribunal to inquire and make a binding report to the President on whether the Judge should be removed from office. The Third stage: a Judge who is aggrieved with the decision of the Tribunal has a right to appeal the decision to the Supreme Court which has a final say on whether the President should proceed to act on the Tribunal's recommendation.

33. In sum, it can be concluded that the three-tier process for removal of judges balances judicial independence with accountability and integrity. It ensures on the one hand that in genuine cases where a ground for removal is disclosed, action is taken to remove the judge. On the other hand, it ensures due process and eliminates the possibility of removal of a judge on whimsical or contrived basis through a three-tier process conducted by three different bodies.

34. Indeed, as pointed out by the Supreme Court of Kenya in the case of *Muya v Tribunal Appointed to Investigate the Conduct of Justice Martin Mati Muya*,[247] judges are protected against interference by any person or authority and against arbitrary removal from office. A judge can only be removed from office only for reasons of incapacity or misbehaviour that clearly renders them unfit to discharge their duties.

15.6 Judicial Hygiene

35. Judicial hygiene is a cornerstone of Judicial independence. As such, the universal expectation is that the Judiciary is expected to constitute of men and women who are upright; as a Judiciary can only be as good as the Judges and Judicial officers who run the courts. Therefore, it is not enough for judges and judicial officers to just have qualifications in law but also, they must be people of integrity and good moral standing. As pointed out by the Ouko Task Force:

245 See the Sixth Schedule to Constitution.
246 See *Judges and Magistrates Vetting Board & 2 others v Centre for Human Rights and Democracy & 11 others.*
247 *Muya v Tribunal Appointed to Investigate the Conduct of Justice Martin Mati Muya, Judge of the High Court of Kenya,* SC Petition 4 of 2020; [2022] KESC 16 (KLR) para 25.

> "Ethics and integrity are fundamental pillars of an independent, efficient, and accountable judicial system. Judicial officers and staff are expected to conform to high moral and ethical standards of behaviour befitting persons mandated to safeguard the law and administer justice. They are also expected to be above reproach, scrupulously impartial and fair in their judicial functions as well as in their public and private lives. These precepts are not ends in themselves but means of safeguarding the personal and moral integrity of judicial officers and staff, and thereby ensuring public confidence in the justice system."[248]

36. As held by the Supreme Court in the *Chitembwe case*, judges are entrusted with an important responsibility to uphold the principles of justice and maintain the integrity of the judicial and legal systems.[249] The Court thus went on to state:[250]

> "In their everyday lives, public or private, judges are expected to exhibit the highest standards of impartiality, fairness, and ethical behavior. They must remain unbiased and refrain from any actions or expressions that may compromise their objectivity. They must display a demeanor that commands respect and instills public confidence in the office of a judge."

37. Under the Judiciary's Blueprint, Social Transformation Through Access to Justice (STAJ), the Judiciary is committed to enhance public confidence and trust by embracing *Judicial hygiene*" and living by its "*moral code*" that is the Judicial Service Code of Conduct and Ethics. It is in appreciation of the importance of judicial hygiene that we operationalised the revised Judiciary Code of Conduct and Ethics in February 2021. The revised Code of Conduct and Ethics offers comprehensive and clear guidance to Kenyan Judges, Judicial Officers and Judiciary Staff to maintain the highest standards of judicial conduct and live within the spirit of the ethical standards that we have set for ourselves.

38. In addition, the Judiciary invited the Ethics and Anti-Corruption Commission (EACC) to undertake a thorough systems review of the Judiciary and make recommendations on how to seal loopholes that are being exploited to further corrupt activities. The Judiciary also appointed "integrity and assurance officers", who are trained by the EACC, in each court station to be the champions of our quest for integrity in all court stations.

39. Moreover, the Judiciary has embraced performance management and measurement that ensures that each Judge's or Judicial officers' work and output can be measured and tracked. Through the daily court returns, it is possible to track how each Judge or Judicial Officer within the Judiciary performs his or her duties.

40. Notably, to ensure transparency, the Annual State of the Judiciary Report (SOJAR) Report released to the public details information and account of how different courts are performing. This is a credible resource for anyone interested in getting detailed and update information on the progress achieved by the Judiciary every financial year.

41. All these efforts are being pursued on the understanding that the Judiciary ought to be an institution of men and women of unquestionable integrity, who are honest, upright and ethical. It is when we attain this ideal that we will have confidence in our work and assert our independence given that we will be a Judiciary that the People can identify with - indeed, we will be "the people's Judiciary".

15.7 Judiciary Financing

42. Judicial financial independence and autonomy is appreciated as an essential and necessary part of the achievement of judicial independence.[251] The necessity for judiciaries to enjoy control over the funding, staff, and planning for their functioning is critical to effective and efficient discharge of duties and responsibilities by the Judiciary and attainment of judicial independence.[252] As underscored by the Ouko Task Force, the underlying implications for judicial independence include:[253]

248 Ouko Task Force p73.
249 *Chitembwe case* para 1.
250 As above.
251 Conrad Bosire (ed.), *Judicial Financial Independence in Africa: A study of Eleven Sub-Saharan Countries* (Kabarak University Press, 2024) 1.
252 As above.
253 Ouko Task Force Report, 18-19.

> "That adequate resources are provided for the Judiciary to operate effectively without any undue constraints which may hamper its independence. That the Judiciary's budget should be separately presented for approval by the Legislature and managed autonomously. The Judiciary itself should undertake its planning and management of the Judiciary Fund. That the remuneration of judicial officers and other judicial staff and expenses of the Judiciary be secured by law and charged on the Consolidated Fund."

43. In Kenya for many years, the question of judicial financial independence has been an issue of concern.[254] This is based on the understanding that financial independence would insulate the Judiciary from external control.[255] Essentially, without judicial independence, hiring and removal of judicial officers, the assignment of cases, the transfer of Judges and Judicial Officers can be influenced by external actors towards the attainment of certain outcomes.[256]

44. The 2010 Constitution has enshrined judicial financial independence. The Constitution imposes an obligation on the National Assembly and the executive to appropriate adequate funding to the Judiciary to enable the institution to discharge its mandate. Under Article 173 the 2010 Constitution also establishes a Judiciary Fund where the appropriated fund is deposited to enable the Judiciary to plan and access funds without hindrance. The fund is supposed to be administered by the Chief Registrar of the Judiciary. Article 173(2) provides that the Fund should be used for administrative expenses of the Judiciary and such other purposes as may be necessary for the discharge of the functions of the Judiciary.

45. The Judiciary Fund was operationalized in July 2022 and in line with Article 173, it is administered by the Chief Registrar of the Judiciary.[257] A Judiciary Fund Management Committee (JFMC) was constituted to support the Chief Registrar through overseeing budget implementation and regularly providing advice to the Chief Registrar on the operations and performance of the Fund.

46. However, despite the Judiciary financial architecture that the 2010 Constitution has put in place, there is still a tendency to underfund the Judiciary. The other arms of government tend not to allocate and appropriate adequate finances to the Judiciary. As aptly capture in *the State of the Judiciary & the Administration of Justice Annual Report | 2023-24*:[258]

> "The Judiciary's budgetary needs have consistently fallen short, with funding gaps of 48%, 47%, and 48% over the past three fiscal years. For the past three financial years, the Judiciary has consistently received less than 0.92% of the National Government Budget—significantly below the recommended 3%. This perennial underfunding, especially when compared to the allocations for other co-equal arms of government, has substantially undermined the Judiciary's efficiency, financial independence, and operational autonomy.... The Judiciary received the least amount of funding compared to the executive and legislative arms. Whilst disparity in budgetary allocation to the respective arms of government is to be expected, the extent of the disparity is not proportionate. During the reporting period, the Judiciary regularly engaged with Parliament and the Executive for an increase in the budgetary allocation to the institution."

47. In this respect, everyone concerned with judicial independence, should demand for implementation constitutional mechanisms to guarantee adequate funding to the Judiciary. A proposal in this respect could be having a guaranteed minimum funding to the Judiciary as a percentage of the Budget, for example at least 3% of the budget as a floor appropriation to the Judiciary. Notably, under the STAJ Blueprint, the Judiciary is committed to finding ways to strengthened financial mechanisms that support its independence and integrity.

254 Patricia Kameri-Mbote, & Muriuki Muriungi, 'Internal Mechanisms for Ensuring Independence and Accountability in The Judiciary in Kenya in Judicial Accountability' in Jill Ghai (ed.) *The New Constitutional Order, (ICJ Kenya, 2016)* 74.
255 As above.
256 As above.
257 The Judiciary, *State of the Judiciary & the Administration of Justice Annual Report | 2023-24* (the Judiciary, 2024) 140.
258 As above 143-144.

15.8 Conclusion

48. Evidently, the contemporary conception of Judicial Independence is quite broad. It comprises a diverse range of approaches to institutional relationships, appointment and removal of judges and judicial officers, judicial hygiene, and judicial financial independence. In the case of Kenya, the Constitution is firm in protecting the decisional independence of Judges and Judicial Officers.

49. But that is not all. The constitutional and legislative framework decrees inter-institutional dialogue and cooperation in giving effect to the *Shared Obligation of giving effect to the right to access to justice.* In addition, judicial accountability is given due recognition to ensure integrity of Judges and Judicial officers, but this is given effect to within a constitutional scheme that ensures due process to the concerned Judges and Judicial officers. Importantly, the Supreme Court has developed commendably rich jurisprudence that has largely clarified the contours of judicial independence within the context of the 2010 Constitution.

Management Culture: Towards a More Efficient, Effective and Accountable Judiciary

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(*The original version of this paper was presented at the 2018 Annual Judges' Colloquium, August 2018 Mombasa*)

16.1 Introduction

1. The history of judicial reforms in Kenya has to a large part mirrored our young nation's more than a century old battle to find its political, social, economic, cultural equilibrium; a condition through which all persons and all communities can mutually co-exist and prosper. It can be traced back to the reception of our legal system, as we know it, through the imperial and colonial experience. The first contest was against law as an enabler of injustice, as a tool of social control, of expropriation, dispossession and oppression, as a device to undermine our rich identities and manage the native masses under the falsity of civilization.

2. After our long and bitter struggle for independence came the deracialisation of the legal system. Unfortunately, perhaps due to a myopic yet understandable focus on the 'who' and not the 'what', holistic and meaningful reforms did not take root with the legal system captured by Executive and administrative power. It remained formal, foreign, insular, detached from and barely useful to those it was meant to serve.

3. With the clamour for the return to multiparty democracy, the Judiciary was once again front and centre in the wider political reform agenda. Externally, constitutional reform efforts in regard to the institution primarily sought to secure the independence of the Judiciary and entrench its co-equal status with the other two arms of government.

4. Internally, from the 1991 Committee to Inquire into the Terms and Conditions of Service of the Judiciary (the Kotut Committee), to the 1998 Committee on the Administration of Justice (the Kwach Committee), to the 2003 Integrity and Anti-Corruption Committee of the Judiciary (the Ringera Committee), to the 2006 Subcommittee on the Ethics and Governance of the Judiciary (the Onyango Otieno Committee), to the 2007 Task Force on Terms and Conditions of Service for Judicial Staff (the Bosire Task Force), to the 2008 Committee on Ethics and Governance of the Judiciary (the Kihara Kariuki Committee) and the 2010 Task Force on Judicial Reforms (Ouko Committee), the institution sought to take concrete steps towards meaningful reforms. Indeed, many of the observations and recommendations made during these constitutional and institutional reform processes remain largely relevant and instructive to this day.

5. These efforts at institutional reform, focused on the independence of the Judiciary, culminated with the promulgation of the Constitution of Kenya 2010 and the provisions relating to the Judiciary contained therein. It is safe to say that from jurisdiction, to organizational structure, to appointments, to tenure, to discipline and funding, the Constitution 2010 firmly and unequivocally provides for the independence of the Judiciary, its responsibilities, accountability, and its co-equal relationship with the other two arms of government.

6. Having secured this institutional independence, focus shifted to the enhancing the institutional capacity of, and service delivery through, the Judiciary; for the institution to live up to these new constitutional requirements and the expectations of an enlightened and justifiably expectant public. The policy decisions and strategies the institution has taken in this regard are contained mainly in its strategic plans and the two major strategic blueprints the institution has developed since 2010, the Judiciary Transformation Framework (JTF) 2012-2016 and Sustaining Judiciary Transformation (SJT): A Service Delivery Agenda 2017 – 2021.

7. The purpose of this exposition of our long journey of judicial reform is to illustrate that we have a goldmine of research, information and strategies on how to ensure that the Judiciary succeeds in ensuring that justice is delivered, fairly, effectively, efficiently and accountably. Despite this, we are yet to meet even the targets that we have set for ourselves in regard to all these indices. My proposition in this paper, drawn from my experiences, local and comparative benchmarking, and desk research is that unless we begin to focus on the management culture within the institution as deliberately as we focus upon its independence, structure and resources, we will not fully translate all this knowledge and knowhow into tangible results for court users and the public.

259 Deputy Chief Justice and Vice President of the Supreme Court of Kenya.

16.2 Management Culture

8. Solomon once said there is nothing new under the sun; indeed, strategies related to the concept of management culture emphasized herein are not novel. Organisational culture, leadership and management were key result areas under the second pillar of the JTF. However, the emphasis was on structural, institutional mapping, developing codes and guidelines, management structures and administrative offices, and institutionalizing performance management. The SJT, reorienting transformation from institutional capacity building to service delivery, emphasizes work methods and individual accountability; focusing on increasing productivity, efficiency and effectiveness Emphasising 'purpose driven leadership' across the institution, the Hon. the Chief Justice observed that a critical prerequisite for achieving SJT's vision for an agile, modern and responsive Judiciary that will deliver quality service to the people of Kenya is for judges and judicial officers to 'model behaviour' consistent with this vision.

9. These strategies are key aspects of what I describe herein as 'management culture' and my assertion herein is that we must have a concerted and deliberate focus on the organizational cultures within our institution.

> "Developing and moulding an appropriate court culture is an enterprise with consequences, one that judges and administrators should attend to as purposefully and deliberatively as they do when making legal decisions, issuing orders and distributing institutional resources. In many ways culture shapes and defines what is possible in the work environment."[260]

10. An important management truth is that there is more than one way to get things done and done well in the workplace. There is rarely a single, best way for either a private company or a public institution to organize itself to achieve high-quality outcomes for its customers.

11. Formulating an effective strategy for a particular workplace requires not only a good understanding of the formal structure, institutional culture and lines of authority, but also the unwritten rules, unofficial networks and underlying norms and behaviors that shape how work gets done. As a result, knowledge of an organization's culture is a crucial factor when searching for ways to improve operational effectiveness.

12. The idea of management culture has as its central axis the concepts of efficiency and productivity, and presupposed that, in order to attain these objectives, a change of mentality would be necessary in public administration to incorporate private administration values, like rationality, creativity and performance. Every organization receives influence from the cultural context in which it is situated, and asserted that characteristics found in the culture of public organizations - which, in general, possess centralizing bureaucracies and rigid structures - tend to be reflected in the way their civil servants act and behave.

13. "[C]ulture is the mental representation of the work environment that members of the organization carry in their heads"[261] Local legal cultures are the "...established expectations, practices and informal rules of behavior of judges [and lawyers]."[262] The challenge then is that these expectations are stable, implying that efforts to change culture is likely to "...be met by strong resistance unless the expectations themselves are the subject of planned change."[263] Resistance can be attributed, among other factors, to the professional status itself and its valorization, which enjoys guaranteed autonomy and independence that is not necessarily in accordance with the predictability, standardization and need to achieve goals represented by the administrative disruption intended by the Judiciary Reforms.

14. In this manner, the reform process the Judiciary is undergoing proposes application of managerialist inspiration as it seeks to implement instruments utilized in the administration of private organizations, such as: strategic planning, efficiency indexes, accountability regarding results, control, etc. However, this reform process is taking place in a structure of professional bureaucracy, in which the judges and judicial officers have long operated within a hierarchical centralized system where organizational culture has often not received due attention.

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260 Brian Ostrom, *et al*, *Trial Courts as Organizations* (Temple University Press, 2007) 2.
261 Brian J. Ostrom, & Roger A. Hanson, 'Managerial Court Culture' in Gerben Bruinsma, & David Weisburd, (eds) Encyclopedia of Criminology and Criminal Justice (Springer, 2014) 2972.
262 Thomas W Church Jr, et al, (1978) *Justice Delayed: The Pace of Litigation in Urban Trial Courts* (National Center for State Courts, 1978).
263 Ostrom, et al, *Trial Courts as Organizations* (As above) 2.

15. An assessment of failure rates of planned organizational change in the United States found that "[t]he most cited reason was neglect of the organizations culture. In other words, failure to change the culture doomed other kinds of organizational change initiated."[264]

16. Indeed, even here in Kenya, with the meagre resources we have been allocated, the inadequate facilities and generally tough working conditions, we see varying levels of performance across courts in similar circumstances. The goal for all our courts is the same; the difference is how various courts organize and manage themselves to achieve these goals.

17. Robert Tobin, in his review of the history of court administration, makes the following points:

> "The executive and legislative branches have been reluctant to accord broad management latitude to a branch that has been historically uncomfortable with management culture and inclined to diffuse power among individual judges. Courts must either create an effective and credible management system or lose control over their internal management and, ultimately, the independence of the judiciary."[265]

18. He further adds:

> *"The introduction of court administration is more than a judicial acceptance of the latest trends in public administration. Court administration is the means of preserving judicial independence in the modern era. This struggle to establish and maintain management credibility is an ongoing challenge....Judges are no longer a loose coalition of individuals engaged in adjudication. They are jointly and severally responsible for managing a system that rises or falls on its ability to cope with the social and legal changes that have reshaped the courts."*[266]

19. For the Judiciary as an institution, the effort to better understand the role an institutional management culture plays in shaping how courts operate is an enduring component of modern court administration, with strong implications for both what we think courts are and what they can become, this is because the views of judges, advocates and litigants are critical determinants of emphasis that courts place on administrative goals (e.g., timeliness) and whether they embrace new ideas and innovative procedures.[267]

20. Thomas Church et al. call these views 'local legal culture' and argue they account for why some cases are resolved more quickly than others.[268] Variation among courts in the speed of litigation is not accounted for by objective characteristics, such as the number of cases assigned to each judge or the presence (or absence) of particular procedures (e.g. a cause list or individual calendar). Rather, if practitioners believe cases can be resolved expeditiously, cases are in fact resolved expeditiously. In other words, people live up to their management culture and expectations[269].

21. Court culture is conceived as the beliefs and behaviours shaping *'the way things get done'* by the individual judges, magistrates and court administrators—who have the responsibility of ensuring cases are resolved fairly and expeditiously. In many ways, culture shapes and defines what is possible in the work environment. Because judges and managers can develop and mould court culture, they should attend to the assessment of their culture as deliberatively as they do when making legal decisions and issuing orders. The capacity of court culture to serve as a tool to promote and achieve successful court administration can be seen by looking at a few key aspects of this area of enquiry.

22. "A court's management culture is reflected in what is valued, the norms and expectations, the leadership style, the communication patterns, the procedures and routines, and the definition of success that makes the court unique."[270] "Both values and behaviours blend together to create an organizational culture...culture can have powerful consequences in that the specific character of an organisations culture can either help or hinder...[an organisation's] performance."[271]

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264 Robert Tobin, *An Overview of Court Administration in the United States* (National Center for State Courts, 1997) 6.
265 Ibid.
266 Ibid.
267 Raymond Nimmer, 'A Slightly Moveable Object: A Case Study in Judicial Reform in the Criminal Justice Process: The Omnibus Hearing' (1976) 48 *Denver Law Journal* 206.
268 Ostrom & Hanson (As above) 2972.
269 Thomas W. Church, Jr., 'The 'Old' and the 'New' Conventional Wisdom' (1982) 8 *Justice System Journal* 712.
270 Ostrom et al, *Trial Courts as Organizations* (As above) 5.
271 Ibid.

23. First, the concept of court culture focuses on the daily tasks and ongoing relationships among the judges as well as between judges and court staff members. As a result, it is grounded in activities familiar to all courts. The effort to better understand court culture offers a practical means to make a difference in courts' success.

24. Secondly, culture is manifested in familiar and recognizable activities called *"work areas,"* such as the handling of cases, the responsiveness of courts to the concerns of the community, the division of labour and allocation of authority between judges and court staff members, and the manner in which court leadership is exercised. Each particular culture's way of doing things is matched across four work attributes. These are as follows:

Case Management Style- Judges should be flexible to follow accepted principles for the timing of key procedural events and comfortable in fashioning their own approach to "do the right thing." This should include unanimity amongst judges and judicial officers of expectations concerning the timing of key procedural events are developed and implemented through policy guidelines built on the deliberate involvement and consensus of the entire bench.

Judge and Court Staff Relations- This should be characterized by teamwork, cooperation, and participation. Judges, court administrators, and staff should work things out flexibly as they go along. Judges should support and encourage the individual staff members to obtain satisfaction from work. Judges should also encourage *staff development* characterized by commitment to innovation, diversity of ideas, and widespread managerial and courtroom staff development. Attention is paid to developing effective court-wide communication. Regular systematic performance evaluations are encouraged.

Change Management- The change process tends to occur incrementally through negotiation and agreement. Procedures are seldom rigid so that the actual application of policy changes may reflect revision and compromise among work teams of individual judges and corresponding court administrators and staff. Judges should be innovative enough so that the change process tends to be proactive in order to achieve desired goals. Judges and court administrators must be open to new challenges and acquiring new resources to support innovation**.** Judges and court administrators must also ensure monitoring and reacting to broad court performance targets are encouraged.

Courthouse Leadership- Leadership in the court is generally considered to exemplify building personal relationships and confidence among all judges and court employees; and seeking to reconcile differences through informal channels thereby building trust in the court leadership. *Visionary* leadership in the court is generally considered to exemplify innovation, inclusion, and coordination by the presiding judge and/or court management team to establish a collaborative work environment.

25. The above attributes of management culture and the framework does not imply any particular culture is inherently superior to another in the choice of work-related values. Every culture allows for a court to be deliberative and purposeful in its administrative decision making. Courts, with different cultures, simply are deliberative and purposeful in their own way.

15.3 Multifarious Legal Cultures

26. "We tend to seek easy, single-factor explanations of success. For most important things, though, success actually requires avoiding many separate causes of failure."[272]

27. My emphasis on management culture proposed in this paper is not a single-factor silver bullet for propelling transformation in the Judiciary and manifesting the tangible benefits thereof for the people of Kenya. The idea here is that it is one of a collective that is often ignored and deserves concerted and deliberate focus.

28. The objective of this paper was to highlight the significance of management culture to the effective and efficient operation of courts. Importantly, was to emphasise those aspects of local legal cultures that each of us here are a part of, are crucial to sustainable transformation and tangible improvement in the dispensation of justice. It will

272 Jared Diamond, *Guns, Germs, and Steel: The Fates of Human Societies* (W. W. Norton & Co, 1999) 157.

require further research and analysis to build on this crucial, yet often neglected, aspect of court management in the Kenyan context. Research has been developed into how organizational culture in courts can be assessed within a conceptual framework that contains identifiable and measurable indices of work cultures with specific performance consequences.

29. This could be an important avenue through which leadership across the institution can seek to entrench management culture through influencing local legal cultures. For now, it suffices to emphasise that a more refined understanding of culture is crucial to the judge's role in court management, and is especially critical in our current context and the onus placed upon judges and judicial officers as the principal sites of transformation within each local justice system context. Academics and practitioners stress that it is not enough to merely identify the fact that differences in local legal cultures are the distinguishing feature in differences in court performance. The question that would extend from here is what kinds of court cultures lead to success. In their analysis of management cultures in trial courts in United States, Ostrom et al identified four archetypal cultures (communal, networked, autonomous and hierarchical) each which represents particular combinations of two foundational dimensions, solidarity and sociability. This conceptual framework is then applied across five work areas: case management style, judge-staff relations, change management, courthouse leadership and internal organization.

30. Applying a similar methodology towards assessing the various local legal cultures across our Judiciary could be a useful starting point. In lieu, certain conclusions in regard to management culture can be drawn: "...no single culture is necessarily the most appropriate or efficacious in all situations. Courts demonstrate sensitivity to the complex nature of culture by preferring a distinct combination of cultures across different work areas."[273] This represents a significant disconnect from management culture in private sector organisations where 'cultural incongruency' and the presence of multiple cultures is seen as disadvantageous to the organisations effectiveness. Ostrom et al found that "...for courts and other public sector organisations, successful performance likely requires the ability to accommodate and manage multiple cultures simultaneously."[274] This position underscores the significant challenge you all face in court administration; private sector single culture orientations often driven by profitability and maximizing shareholder value may not translate into effective court management. This highlights the heightened responsibility on the administrative leadership of courts and the need to pay attention to the multiple facets of our local legal cultures.

16.4 Purposive and Deliberate Leadership

31. Ostrom et al state:

> "Success in...court management requires purposeful and deliberative leadership rather than forceful tactics or combative reactions. This is particularly true as a court takes steps to implement an organisations culture change effort. Steps must be taken to promote involvement and minimize resistance, top clarify what the new cultural emphases will be, and to establish a plan of action to initiate and encourage momentum for change."[275]

32. Allow me to describe a comparative example: in the 1980s, the Singapore Subordinate Courts faced perennial challenges including mounting backlog and inefficiency. Prior to the reforms, the Singapore courts were slow, conservative and inefficient; characterized by "...chronic delays and backlogs in the courts."[276] In the 1970s, though reforms were being undertaken to deal with court congestion, backlogs, and delay, they were ad hoc, 'independent', 'unrelated' and "...largely involved procedural reforms and efforts to optimize the use of judicial time in order to increase court productivity."[277]

33. In the early 1990s, both the Executive and the Judiciary leadership recognized the need to reform the Judiciary in order to achieve the vision of Singapore as a developed country. "[I]t became clear that Singapore needed a more modern judiciary to keep pace with the country's fast-moving socioeconomic development."[278] Senior judges in Singapore were trained on and exposed to state of the art techniques in the measurement of

273 Ostrom et al, *Trial Courts as Organizations* (As above) 137-8.
274 Ibid at 138.
275 Ostrom et al, *Trial Courts as Organizations* (As above) 139.
276 Walid Malik, *Judiciary-Led Reforms in Singapore: Framework, Strategies and Lessons* (World Bank, 2007) 15.
277 Ibid.
278 I Walid Malik, *Judiciary-Led Reforms in Singapore: Framework, Strategies and Lessons* (World Bank, 2007) 17.

business results. Systems for the production of statistical reports and data were developed and implemented; performance indicators for use in different justice models were developed and "...statistical reporting, analysis, and studies, including independently commissioned public perception surveys, random opinion polls of users, and feedback from international survey agencies..."[279] widely utilized. Illustrating the manner in which leadership and organizational culture embraced this approach, judges in Singapore later stated that "...the timeliness and quality of statistical data and information on the status of cases in the system have been instrumental in the success of the reform process."[280]

34. Indicating the improved efficiency after the reforms, by 1999 95% of civil and 99% of criminal cases in Singapore were cleared within a year; the overall clearance rate of the subordinate courts rose to 96%.[281] "The average length of commercial cases in Singapore fell from about five to six years in the late 1980s to about one and a half years in the mid-1990s and one and a quarter years in 2000."[282] By 2000,

> "...confidence in Singapore's judicial system...improved to the point that the international business community...[ranked] the system first in the Asia-Pacific region and first in the world (with a score of 8.8 out of 10), in terms of whether the legal framework supports the competitiveness of the economy."[283]

35. Malik identifies five core lessons that emerge from Singapore's experience with reform: First is the importance of strategic thinking and business planning; they are central to the wider institutional success.[284] Second, that "... strong leadership is essential to create and achieve a vision of change."[285] Third, that institutional reform must be tailored for and targeted at those the institution serves, the court users.[286] Fourth, that "[i]ncreasing knowledge and technological innovation are critical components of change;"[287] and fifth, that "[j]udicial reform is facilitated by a stable economy and an efficient political system."[288] The was an entire shift across the institution towards an organizational culture founded on good business practices.

36. In a 2011 Report, the Singapore Subordinate Courts detailed the manner in which it continues to maintain its 'business excellence journey'. It explains that the *leadership* of the court creates and ensures that a culture consistent with its values permeates the organization and supports learning, innovation and achievement of organisation's objectives; the leadership also works to ensure that the vision and values of the institution translate into its policies, practices and behaviours.[289]

37. *Planning* is a key component of its approach; it determines its strategic challenges, develops its strategy and strategic objectives to address these challenges and converts these strategic objectives into action plans.[290] The Court highlights the importance of *information* that drives planning, day-to-day management and improvements to the organisation's performance; how information is selected and collected relative to the organisation's performance objectives and goals; and how it ensures that information is reliable and accessible and widely disseminated.[291] The Court emphasizes knowledge management towards creating value, driving business improvements and improving the organisation's performance. Building and improving the institution's *human resource* is a critical aspect of the Courts approach.[292] Strategies and mechanisms are adopted that encourage and support individual and team participation in achieving the organisation's objectives and goals.

38. The Court encourages and deploys innovation and innovation management processes to support value creation. *Court users* are key stakeholders and the Courts utilize different 'listening and learning' strategies to analyse current customer/market needs and anticipate future ones.[293] The customer requirements and future market are also incorporated into reviews and improvement of the organisation's strategic plans. The Courts finally link all these strategies, actions and innovations to *results*. The Court reports results on various measures including

279 Ibid, 52-3.
280 Ibid 53.
281 Ibid 66.
282 Malik, *Judiciary-Led Reforms in Singapore: Framework, Strategies and Lessons* (As above) 66.
283 Ibid, 67.
284 Ibid xxiii – iv.
285 Ibid.
286 Ibid.
287 Ibid.
288 Ibid.
289 The Subordinate Courts of Singapore, 'Towards Greater Organisational Excellence' http://www.courtexcellence.com/resources/~/media/microsites/files/icce/subordinate%20courts%20singapore%20quality%20award%20with%20special%20commendation%20symmary%20report%202011.ashx accessed on 7 March 2018.
290 The Subordinate Courts of Singapore, 'Towards Greater Organizational Excellence', 5-8.
291 Ibid, 8-13.
292 Ibid, 13-23.
293 The Subordinate Courts of Singapore, 'Towards Greater Organizational Excellence', 30-35.

public trust and confidence, fairness, accessibility, independence, timeliness, employee confidence and financial management.[294]

15.5 **Conclusion**

39. Across Kenya, our courts are replete with examples of purposive, deliberate leadership manifesting itself in better service delivery for court users. It is important that we disseminate and share these experiences, document and learn from the manner in which presiding judges and heads of station successfully organize their local legal cultures and achieve tangible results.

40. There is however no, 'one-size-fits-all' model for management culture across the institution. But we must also be wary of the vagaries of personality and the personal motivations of various Judiciary leaders. As I reiterated earlier, organizational culture is crucial and often neglected and/or misunderstood; but yet it is only one amongst the transformative whole. One area that directly mitigates this multifarious approach to management culture is performance measurement.

> "The hard fact is that no single map exists to serve all court leaders and managers. There is no best culture that offers a shortcut for completing the complex agenda of culture change. Rathe, judges and administrators must engage in a systematic process to uncover and document the terrain of the work environment in their own particular court."[295]

41. In both the private and public sector successful culture change is a difficult task. "Companies, like courts, can resist change with great intensity."[296] But we have a clear strategic blueprint for delivering high quality service and value to court customers in the form of our Constitution, our Oath of Office, and the SJT. We must now purpose to lead change in our local legal cultures; we must delegate and engage with our teams at our various court stations for "...it is not humanly possible for a single presiding judge to check and correct every effort directed to improving how work is done in multiple areas ranging from case management to judge-staff relations to courthouse leadership."[297] You must be able to delegate responsibility and monitor the pace and degree of progress amongst your colleagues and staff.

42. Once again, performance measurement and management is crucial to the process of culture change. Demonstrable progress and reliance upon data and statistics for planning changes and interventions towards further improvement is vital. "Information should be gathered and processed according to a planned schedule... [systematically] rather than casually or anecdotally."[298] Your continued support to and engagement with the Directorate of Performance Management is crucial in this regard. Performance management and measurement is a tool that you must utilize for your benefit. As leaders and managers, you have the authority to determine how to configure your local legal cultures to reap the results. By extension, reliance on performance measurement data then allows you to effectively exercise your responsibility to inquire into why results are falling short and to re-strategise.

43. My final point is on the fact that "[c]ulture evidences itself in the 'accumulated shared learning of a given group.'"[299] Your bench meetings, Leadership and Management Teams and Court Users Committees are crucial forums through which we can accumulate learning and develop the shared patterns that will characterize our local legal cultures. I am greatly encouraged by how committed most judges are to these structures and utilizing them to share ideas on developing strategies for addressing common challenges and future implementation of activities. Once again, we must be consistent, systematic and deliberate in how we approach these engagements; meetings must be regular, documented, with actionable deliverable closely monitored and reported upon.

44. Ostrom *et al* state that courts have been the most understudied major public institution in terms of organizational culture and performance largely due to the common perceptions that they are decentralised, fragmented and autonomous hence defying comparison and that they lack measurable performance goals due to their pursuit

294 Ibid 36-46.
295 Ostrom et al, *Trial Courts as Organizations* (As above) 140.
296 Ibid 143.
297 Ibid 145.
298 Ostrom et al, *Trial Courts as Organizations* (As above) 145.
299 Edgar Schein, *The Corporate Culture Survival Guide* (Jossey-Bass, 1999) 17.

of justice, quality and other intangible objectives.[300] This position is being actively debunked and it is becoming increasingly evident that organizational science particularly management culture is not the preserve of private sector institutions. The Hon. the Chief Justice in his vision for the institution referred to 'business process engineering' in enhancing service delivery through the Judiciary in recognition of the place of organizational science in our institution. Improving our understanding of management cultures is central to enhancing the efficiency, effectiveness and accountability of the Judiciary.

300 Ostrom et al, *Trial Courts as Organizations* (As above) 7.

Enhancing Good Governance: The Institutional Relationship Between the Judiciary and the Legislature

Hon. Lady Justice Philomena Mbete Mwilu, FCIArb, EGH[301]

(*The original version of this paper was a Keynote Address to the 12th Parliament's Post-Election Seminar for Members of the National Assembly on 5th March 2018, Mombasa*)

17.1 Introduction

1. Often, in tedious routine, presenters at such events will stand before you and profess their delight at having been invited to speak to such a distinguished gathering. I for one would like to break from this rote utterance and tell you the truth: I make my presentation to you today in modest excitement. Modest, because I am humbled to be before the entire Assembly today and to have the opportunity to represent the Judiciary at the first Conference of the National Assembly of the 12th Parliament. It is indeed a great honour. I am excited because of the opportunity to speak to, engage with, consult with, and learn from the plenary, the participants and the presenters. It is a great opportunity through which we can foster and enhance the necessary mutually constructive relationship between the two arms of government towards the tangible and substantive benefit of all Kenyans. It is fitting to be excited and motivated at such a propitious occasion and I thank the Speaker of the National Assembly, the Honourable Mr. Justin Muturi for his kind invitation, and the Honourable the Chief Justice, Mr. Justice David Kenani Maraga for entrusting me with the responsibility of delivering this important address.

2. I am further pleased to share this panel with the Honourable Mr. Justice (Dr.) Patrick Matibini, Speaker of the National Assembly of Zambia. He possesses invaluable knowledge, experience and insight having been a law lecturer, senior counsel, a Member of Parliament and now, the Speaker of the National Assembly in Zambia. We can learn a lot from such know-how and expertise from comparative jurisdictions. It will only serve to enrich our discourses and strategies and strengthen the democratic rudiments of our respective institutions. I am truly looking forward to what I am sure will be a stimulating plenary discussion on the institutional relationships between the arms of government.

3. The theme of this year's conference is enhancing good governance and safeguarding the welfare of the Nation. That theme encompasses well our primary responsibility: the public interest. And as I have been asked to speak about the institutional relationship between the Judiciary and the Legislature, the best place to start is at a foundational principle of our constitutional democracy, that of the Rule of Law.

17.2 The Rule of Law and the Doctrine of Separation of Powers

4. The doctrine of rule of law essentially means that 'people ought to be governed by law'. Various principles have been propounded on what constitutes this 'law' that would subject our conduct to the governance of rules. 1. Generality; 2. Promulgation; 3. Non-retroactivity; 4. Clarity; 5. Non-contradiction; 6. Possibility of compliance; 7. Constancy; and 8. Congruence between declared rule and official action. Without going too deep into a jurisprudential debate let me highlight the key canon in our context. In the Kenyan context, the doctrine of the Rule of Law is founded upon the supremacy of the Constitution. The Constitution is the "...fundamental expression of the sovereignty of the State, the basic norm of the legal order that underwrites the legitimacy and validity of all other laws or delegations of law-making authority." Art 2(1) of the Constitution 2010 provides that the Constitution is the supreme law of the Republic and binds all persons and all State organs at both levels of government.

5. The doctrine of separation of powers, "...is a necessary condition for the rule of law in modern society and therefore for democratic government itself."[302] Art. 1(3) of the Constitution 2010 affirms this by expressly delegating sovereign power to Parliament and the legislative assemblies in the county governments; the national executive and the executive structures in the county governments; and the Judiciary and independent tribunals.

301 Deputy Chief Justice and Vice President of the Supreme Court of Kenya.

302 Edith Henderson, *Foundations of English Administrative Law: Certiorari and Mandamus in the Seventeenth Century* (Harvard University Press, 1963) 5 quoted in John Stanton & Craig Prescott, *Public Law* (Oxford University Press, 2018) 42.

6. The doctrine of separation of powers is composed of the following principles:

- The principle of trias politica; requiring a formal distinction between the legislature, executive and judicial branches.
- The principle that same people should not be allowed to serve more than one branch of the government at the same time.
- Separation of functions between the three branches to avoid one interfering with or assuming the roles of the other; and
- the principle of checks and balances that requires that each organ be entrusted with special powers designed to serve as checks on the exercise of functions by the others in order to come to an equilibrium.

7. Sir William Blackstone, the renowned English jurist, stated that public liberty, "...cannot subsist long in any state unless the administration of common justice is to some degree separated from the legislature and executive power."[303] The character of separation of powers under our Constitution is not one of absolute or strict separation. There are many areas of overlap, checks and balances, and interdependence. Parliament plays a critical role in the appointment of the Chief Justice, Deputy Chief Justice as well as certain commissioners in the Judicial Service Commission. Parliament exercises budgetary controls on the Judiciary and the Judiciary is accountable to the Parliament in accounting for its use of public resources and the administration of the Judiciary Fund. The principle of judicial independence nevertheless is paramount to the doctrines of separation of powers and of the rule of law. As Lord Bingham, former Lord Chief Justice of England and Wales, stated,

> "the function of independent judges, charged to interpret and apply the law, is universally recognised as a central feature of the modern state; a cornerstone of the rule of law itself."[304]

8. Further, Dias explains that:

> "The success or failure of judicial control of the abuse of power, whatever form such control may assume, depends on the judges being independent of those wielding the power. Independence means far more than immunity from interference; it means that they are free to bring their own sense of values to bear in considering legislation and do not simply reflect the values of government. For there can be no protection against abuse of power, even when safeguards are enshrined in the Constitution, if the judges who have to interpret these whenever the government is challenged are only puppets of the government."[305]

9. The preconditions of judicial independence are conditions that are necessary to enable both judges as individuals and the judiciary to carry out their adjudicative function in an independent manner. Judicial independence refers:

> "...to the existence of judges who are not manipulated for political gain, who are impartial toward the parties of a dispute, and who form a part of a judicial branch which has power as an institution to regulate the legality of government behaviour, enact neutral justice and determine significant constitutional legal values."[306]

10. Three features are central to this independence: insularity, impartiality and authority. *Insularity* means "judges should not be used to further political aims nor punished for preventing their realisation"[307]. *Impartiality* means, "that judges base their decisions on law and facts and not on any predilections towards one of the litigants"[308]. And *authority* means the courts are seen by the other arms of government and by society as the legitimate body for the determination of right wrong, legal and illegal.

11. The rule of law; separation of powers; and judicial independence. I cannot overemphasize the importance of our appreciation and understanding of these three principles to our constitutional democracy. These three core principles dictate the relationship between the Judiciary and the Legislature. Allow me to describe a few examples that might serve to further practically illustrate this relationship. In the recent *Muruatetu Case*[309], the

303 A and *Others v Secretary of State for the Home Department* [2004] UKHL 56.
304 As per Lord Bingham in A and *others v Secretary of State for the Home Department* [2004] UKHL 56.
305 Reginald Dias, *Jurisprudence* (5th Edition, Butterworths, 2013) 128.
306 Christopher Larkins, 'Judicial Independence and Democratization: A Theoretical and Conceptual Analysis' (1996) 44 *American Journal of Comparative Law* 605.
307 Ibid.
308 Ibid 606.
309 *Muruatetu & Another v Republic; Katiba Institute & 4 others (Amicus Curiae)* (Petition 15 & 16 of 2015) [2021] KESC 31 (KLR) (6 July 2021) (Directions).

petitioners and others were arraigned before the High Court for the offence of murder. Upon their conviction, they were sentenced to death as decreed by section 204 of the Penal Code. Their appeal to the Court of Appeal against both that conviction and sentence was dismissed. Upon further appeal, the Supreme Court found that section 204 of the Penal Code, that provided that 'any person convicted of murder shall be sentenced to death', was unconstitutional. The Supreme Court held that the mandatory nature of the death sentence as provided for under section 204 of the Penal Code deprived the Court of the use of judicial discretion in a matter of life and death. The Court stated that such law could only be regarded as harsh, unjust and unfair. The mandatory nature of the provision deprived courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in appropriate cases. The Court went on to order that the judgment urgently be placed before the Speakers of the National Assembly and the Senate, the Attorney-General, and the Kenya Law Reform Commission for any necessary amendments, formulation and enactment of statute law, to give effect to the judgment on the mandatory nature of the death sentence and the parameters of what ought to constitute life imprisonment.

12. In the election petition involving *Hassan Ali Joho and Suleiman Said Shabal*,[310] Suleiman Shahbal had filed a petition in the High Court challenging the validity of the election of Hassan Joho at the gubernatorial election for Mombasa County. At the heart of the matter was the constitutionality of s. 76(1)(a) of the Elections Act vis-à-vis Art.87(2) of the Constitution. Section 76(1)(a) stated that a petition to question the validity of an election shall be filed within twenty-eight days after the date of publication of the results of the election in the Gazette. Art. 87(2) stated that petitions concerning an election, other than a presidential election, shall be filed within twenty-eight days after the declaration of the election results by the IEBC. Defining the term 'declaration', the Supreme Court declared the provision of s. 76(1)(a) of the Elections Act inconsistent with the provisions of Art. 87(2) of the Constitution and thus pursuant to Art. 2(4), void to the extent of the inconsistency.

13. A third example is that in the *SK Macharia Case*[311], an application for leave to appeal against a judgment of the Court of Appeal. The applicants in that matter were aggrieved with the decision of three Court of Appeal judges who had subsequently undergone the post-2010 vetting of Judges and Magistrates. Pursuant to Section 14 of the Supreme Court Act, they sought leave from the Supreme Court to appeal the decision of the Court of Appeal. The Supreme Court declared Section 14 of the Supreme Court Act unconstitutional insofar as it purported to confer 'special jurisdiction' upon the Supreme Court, contrary to the express terms of the Constitution. Recognising the 'good intentions' of Parliament, the Supreme Court nevertheless found that where the Constitution exhaustively provides for the jurisdiction of a court of law, the court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a court of law beyond the scope defined by the Constitution. Where the Constitution confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.

14. What is clear from the above examples, the golden thread that runs through these decisions, is fidelity to the provisions, principles and spirit of the Constitution. As was stated by the Supreme Court of Kenya in In the Matter of Interim Independent Electoral Commission,

> "...a court may not arrogate to itself jurisdiction through the craft of interpretation or by way of endeavours to discern or interpret the intentions of Parliament, where the legislation is clear and there is no ambiguity."[312]

15. The courts therefore absolutely respect the doctrine of separation of powers and that of legislative autonomy. The formulation and enactment of laws is the province of Parliament and no person or agency, or other governmental organ, may impede the legislature's autonomous discharge of that role. However, as Aharon Barak, former President of the Supreme Court of Israel, opined,

> "the principle of checks that characterises the concept of separation of powers is at work if the judicial branch has the final authority in cases of dispute, to determine the bounds of authority and legality of activity of the other branches. Each branch is independent within its zone so long as it acts according to law, but if any of the branches fail to do so, the judiciary is authorised to interfere...and can nullify actions of both arms of government. In this way, the principle of separation of powers is not contravened."[313]

310 *Joho & another v Shahbal & 2 others* (Petition 10 of 2013) [2014] KESC 34 (KLR) (4 February 2014) (Judgment).
311 *Macharia & another v Kenya Commercial Bank Limited & 2 others* (Application 2 of 2011) [2012] KESC 8 (KLR) (23 October 2012) (Ruling).
312 In *the Matter of Interim Independent Electoral Commission* [2011] KESC 3 (KLR).
313 Aharon Barak, *The Judge in a Democracy* (Princeton University Press, 2008).

16. The Supreme Court of Kenya stated in *Re Speaker of the Senate*[314] stated

> "... as a legal and constitutional principle...Courts have the competence to pronounce on the compliance of a legislative body, with the processes for the passing of legislation."[315]

17. It clarified this position by explaining that the Court

> "...will not question each and every procedural infraction that may occur in either of the Houses of Parliament. The Court cannot supervise the workings of Parliament. The institutional comity between the three arms of government must not be endangered by unwarranted intrusions into the workings of one arm by another."[316]

18. Hence, "...no arm of government holds a position superior to the terms of the law: for in a constitutional democracy, it is the people's will, as expressed in the due operation of all dimensions of the Constitution, that must guide the functioning of the organs of state."[317]

19. This returns us to where we began our analysis of the relationship between the Judiciary and the Legislature: the public interest. Philosophical and institutional debates in regard to roles, responsibilities and powers become mute where every institution across the three co-equal arms of government acts solely in the public interest. It may not be my place to say this, but I shall do so in utmost humility as it is of critical importance to our nation. I recommend that the heads of the three co-equal arms of Government continue to deepen the constructive interdependence between their respective institutions and enhance their engagement as a way of resolving any differences that may arise between the three arms. There is no doubt that with such purposive fraternity at the highest level of government no problem, no issue, no dispute, no challenge will be beyond amicable and positive resolution.

20. Every day, across the country, judges and magistrates resolve hundreds of disputes. Your constituents, your businesses and your institutions approach the courts and tribunals daily for the resolution of a range of matters. In the exercise of our delegated judicial authority, the Judiciary takes this solemn duty very seriously. When we are not supported, or prevented from, or lack capacity to perform our duties, the persons most adversely affected are not judges and magistrates; it is the people of Kenya, the constituents you represent, and in whose interest you have the sole duty and obligation to act. Any act that compromises the lawful exercise of judicial authority is less an attack on judges, magistrates and judiciary staff; it is rather more an attack on the sovereignty of the people of Kenya.

21. Court orders, the decisions of the court, must be respected by all persons and institutions, including all state and public officers. In the very Preamble of our Constitution we recognise the aspirations of all Kenyans for a government based on the essential values of human rights, equality, freedom, democracy, social justice and the rule of law. In the oath you all took not very long ago, you swore allegiance to the People and the Republic of Kenya and to obey, respect, uphold, preserve, protect and defend the Constitution of the Republic of Kenya. In this regard, I will echo the judicious words of our courts who stated that:

> "Court orders must be obeyed whether one agrees with them or not. If one does not agree with an order, then he ought to, move the court to discharge the same."[318]

> "Since the Kenyan nation has chosen the path of democracy rather than dictatorship, the Courts must stick to the rule of law even if the public may in any particular case want a contrary thing and even if those who are mighty and powerful might ignore the Court's decisions since occasionally those who have been mighty and powerful are the ones who would run and seek the protection of the Courts when circumstances have changed...The courts must continue to give justice to all and sundry irrespective of their status or former status."[319]

314 *Speaker of the Senate & another v Attorney-General & another; Law Society of Kenya & 2 others* (Amicus Curiae) (Advisory Opinion Reference 2 of 2013) [2013] KESC 7 (KLR) (1 November 2013) (Advisory Opinion) (with dissent - NS Ndungu, SCJ).

315 Ibid para 55.

316 Ibid para 61.

317 Hon. Justice (Prof.) Jackton B. Ojwang, 'Separation of Powers Under Kenya's Constitution: Emerging Relationship Between the Legislature and the Judiciary' (Annual Judges' Colloquium, Mombasa, 2016) 29.

318 The High Court in *Kariuki & 2 Others v Minister for Gender, Sports, Culture & Social Services & 2 Others*, [2004] 1 KLR 588

319 The Court of Appeal in *Dr. Christopher Ndarathi H Murungaru vs. Kenya Anti-Corruption Commission & Another*, Civil Application

22. In 2014, Hon. Mr. Justice (Dr.) Willy Mutunga the immediate former Chief Justice stated that: "Respect for court orders is not a favour the Judiciary seeks but a duty that we all bear and one that has implications for peace, security, stability and economic development." Four years later, the current Chief Justice, Hon. Mr. Justice David Kenani Maraga was also forced by worrying developments in the administration of justice to reassert that the disregard for court orders is an act that is not only inimical to the rule of law but is also completely at odds with our constitutional outlook.

23. As our elected representatives, you represent the will of the people. The exercise of judicial authority is the delegated sovereignty of the people. No institution ought to have more respect and solemn consideration for the all aspects of the sovereignty of the people of Kenya than Parliament. When the sovereignty of the people is challenged through disregard for orders and decisions of the court, no institution ought to be more enraged than the institution that most directly represents the exercise of such sovereignty; the Legislature. You are the people, and you must act with steadfast commitment and single-mindedness to protect the public interest. You must, where legally enabled, summon, criticize, investigate, and censure all those who purport to impair and diminish the rule of law.

24. After all, each and every day, the Judiciary applies the laws that you have passed and make numerous decisions and orders thereon to ensure compliance with the laws that you enact. Lack of compliance with one court order, is an affront to all court orders, decisions and judgements. Disregard of one court order compromises the judicial authority that has been delegated to the Judiciary by the people in exercise of their sovereignty; it diminishes and weakens the rule of law; it undermines the democratic fabric of our nation; and it exposes us all to the vagaries of despotism, violence and injustice.

25. The Judiciary is not perfect but the Honourable the Chief Justice and I, and the entire leadership of the Judiciary are totally committed to the continued transformation of our great institution. We hear the complaints of litigants and the general public in regard to amongst others, access to justice, delays, backlog, corruption, bail and bond and sentencing. We are acting on each of these issues. We have been undertaking an extensive programme of court construction; we are expediting court proceedings through active case management and the harnessing of ICT for example through e-filing; we are addressing case backlog through judiciary service weeks, alternative dispute resolution and robust case backlog clearance strategies; we have established an Anti-Corruption division of the High Court and increased the number of judges and magistrates in the anti-corruption courts; we have developed and are implementing guidelines on Bail and Bond an Sentencing to ensure our actions in these areas are rationalized and streamlined. These are but a few of the areas we are addressing and initiatives we are undertaking to improve service delivery in the Judiciary.

26. The Honourable the Chief Justice David Maraga in January 2017 launched a comprehensive strategic blueprint for the Judiciary called 'Sustaining Judiciary Transformation: A Service Delivery Agenda 2017-2022'. The strategic blueprint is an ambitious programme to further transform access to justice across the country and sustain the laudable gains the institutions has made over the past 8 years. It contains a detailed and comprehensive programme of the Judiciary's strategy for further entrenching the gains of transformation and achieve our objective of a better, modernised, and responsive Judiciary that will deliver quality service to the people of Kenya.

27. The struggle for democracy in Kenya has gone hand in hand with the fight for an independent, transparent and accountable Judiciary capable of dispensing justice fairly and expeditiously for ALL Kenyans. You will all agree that the Judiciary has come a long way. Particularly given the history of neglect and chronic under-funding, what the institution has managed to achieve particularly since the promulgation of the Constitution 2010, is nothing short of outstanding. As I said above, the people we serve and the people who approach the courts everyday for justice are your constituents. As the Hon. the Chief Justice reiterated in his State of the Judiciary and the Administration of Justice report presented to Parliament earlier this year, Judiciary funding by the Government falls below 1 per cent of the national budget, which is dismally low considering the national footprint of our work, with a staffing complement of more than 5,000. International best practice recommends that the Judiciary receives 2.5 per cent of the national budget and that does not consider the current state of the Judiciary and

No. Nai. 43 of 2006 [2006] 1 KLR 77.

our ambitious programme to ensure that we have a court station in each and every one of the constituencies you represent.

28. Every time the Judiciary leadership has had occasion to engage with you Honourable members of Parliament, we have made impassioned pleas for the increase in our resource envelope, particularly our development budget, in order to enable us serve Kenyans better. In 2014, the then Chief Justice stated:

> "...the Judiciary is in every other district in this country, with court stations spread across all the counties and is constitutionally mandated to establish a High Court in every county. It has nearly 5,000 employees. The courts sit every single day of the week serving wananchi. And the Judiciary had an annual budget of Ksh16 billion. Contrast that with Parliament, which has fewer than 2,000 employees including MPs; is only based in Nairobi; and sits only three days in a week! Parliament has a budget of Ksh20 billion."

29. In January 2018, in an address to the Justice and Legal Affairs Committee of this House, the Hon. the Chief Justice requested Parliament to ensure that the annual State of the Judiciary and the Administration of Justice Report (SOJAR) is a perpetual agenda for debate in its yearly calendar. Through these reports, that the Judiciary has submitted dutifully to Parliament for debate for the past six years, Parliament will appreciate the progress we have made, the problems we face, and the basis for the budgetary requests we are making. I now stand before you making the same impassioned plea: in order to ensure all Kenyans can access justice effectively and expeditiously, the Judiciary requires Parliament to significantly increase the Judiciary's budgetary allocation. We have the reports, we have our projections, we have our strategies, we have our budgets and we are ready to justify and discuss the same with the august House and illustrate the basis upon which we request for the funds we so desperately need to serve Kenyans.

17.3 Conclusion

30. I am most grateful to the Honourable Speaker of the National Assembly for allowing the Judiciary to lay before the August House, a legislative agenda for its consideration.

The Tribunal Bill

Pursuant to Article 1(3)(c) of the Constitution tribunals, that were previously part of the Executive arm of Government, are now part of the Judiciary and are being gradually transited in compliance with the law. The over 52 tribunals are a key avenue through which Kenyans can access justice. They provide expedient and expert resolution of disputes and resolve matters that would otherwise move on to courts contributing to delay and backlog. The Draft Tribunal Bill, 2015 seeks to rationalize, regulate, streamline the governance and operations of Tribunals. We therefore request the expeditious enactment of the Draft Tribunal Bill, 2015.

Judges Retirement Benefits Scheme

As with all employees, Judges have the expectation that a time will come when they will be able to retire. Having diligently and patriotically served Kenyans for many years, many judges in our courts have retired without an appropriate retirement benefits scheme. Many judges are approaching the twilight of their careers on the Bench and are facing an uncertain post-employment reality due to the lack of an appropriate scheme. The Judiciary intends to submit through the appropriate channels a Draft Bill on the retirement benefits scheme for judges and we ask the August House to expedite its debate and enact appropriate legislation to provide this essential basic necessity to our judges.

Judiciary Fund Regulations

Art. 173 of the Constitution established the Judiciary Fund to be used for administrative expenses of the Judiciary. Under this Article, Parliament passed the Judicial Service Act and the Judiciary Fund Act that provided for the regulation of the Fund. The financial independence of the Judiciary is a key aspect of wider judicial independence. We are now at the tail end of finalizing the Judiciary Fund Regulations and request expeditious parliamentary scrutiny of the same.

Miscellaneous Amendments to the Judicial Service Act

As mentioned above, the Honourable the Chief Justice launched his strategic blueprint "Sustaining Judiciary Transformation (SJT): A Service Delivery Agenda 2017-2022' to continue the transformation of the Judiciary into a modern and transformative institution. Amongst the strategies therein is sustaining the fight against corruption by strengthening the Office of the Judiciary Ombudsman (OJO) and expanding and strengthening the Judiciary Leadership Advisory Council (JLAC) as the principal advisory organ for the Chief Justice in the discharge of his constitutional and statutory duties. The Judiciary will be tabling two key proposals for the amendment of the Judicial Service Act in this regard to establish and provide for these two critical organs in statute. They will go a long way towards enhancing leadership and integrity in the institution.

Both in regard to our judicial function and our institutional and administrative interactions, the Judiciary continues to premise its relationship with the Legislature and Executive upon the principle of robust independence and constructive interdependence. I repeat my sincere appreciation to the Honourable Speaker and this August House for so kindly inviting the Judiciary to this important forum today and for your indulgence during my presentation. I look forward to further engaging and deliberating on the issues raised here and to enhancing and improving our mutual commitment to the public interest and fulfilling the sovereign duties that the people of Kenya so solemnly bestowed upon us.

The Judiciary Perspective on Leadership: *Behaviour, Ethics and Standards*

Hon. (Mr.) Justice Mohammed K. Ibrahim, CBS, SCJ[320]

(*This paper was delivered at the National Assembly's 2023 Post-Election Seminar, held between 29th January -4th February 2023*)

"It is better to lead from behind and to put others in front, especially when you celebrate victory when nice things occur. You take the front line when there is danger. Then people will appreciate your leadership".
~Nelson Mandela~

18.1 Introduction

1. Gary Yukl in his book defines leadership as *"the process of influencing others to understand and agree about what needs to be done and how to do it, and the process of facilitating individual and collective efforts to accomplish shared objectives".*[321] Peter Northouse (2010) defines leadership as *"a process whereby an individual influences a group of individuals to achieve a common goal".*[322] What is evident from these definitions is that leadership is made up of several components including that is a social process as it involves using social skills to influence others. Thus, it is evident that leadership must occur within a group as opposed to vacuum and it involves the marshalling people around a shared common goal in order to achieve that goal. The very act of defining leadership as a process suggests that leadership is not a characteristic or trait with which only a few certain people are endowed at birth. More importantly, leadership inspires others to embrace and actively participate in finding and implementing a solution that contributes to the change.[323]

2. Transformative leadership is acknowledged by Kenya Vision 2030 as being essential to accomplishing the transformation objective. By doing this, it recognises the need of having a productive, driven, and well-trained public service and aims to step up efforts to reform public service attitudes so that accountability to Kenyan residents, transparency, and values are respected and enforced.[324]

3. The presentation traces the legislative framework and decisions by the Courts on various facets of leadership and ethics. The paper will first examine constitutional provisions on ethics, discuss the Judiciary's internal mechanisms for maintaining ethical standards and performance. It will then explore the external mechanisms that exist to govern public conduct of state officers and discuss the consequences of integrity breaches including recovery of assets. The paper will also seek to highlight possible areas of improvement in each of these sections.

18.2 Constitutional Provisions on Ethics

4. The Constitution sets a high bar for ethical leadership among state officers. Before assuming office, a State officer must, by Article 74, take and subscribe to the oath or affirmation of office and swear or affirm before God and the people, to obey, preserve, protect and defend the Constitution and all other laws of the Republic; and to *"protect and uphold the sovereignty, integrity and dignity of the people of Kenya"*[325]**.**The Constitution, Article 260 creates a distinctive category of members of society called State officers, who are regarded and idolized as exceptional pedigree of leaders in the society and to whom much is given, and therefore, much is required and expected[326]. They include (*a) President, (b) Deputy President, (c) Cabinet Secretary, (d) Member of Parliament, (e) Judges and Magistrates, (f) Member of a commission to which Chapter Fifteen applies; (h) Member of a county assembly, Governor or Deputy Governor of a county, or other member of the executive committee of a county government; (i) Attorney-General; (j) Director of Public Prosecutions; (k) Secretary to the Cabinet; (l) Principal Secretary; (m) Chief of the Kenya Defence Forces; (n) Commander of a service of the Kenya Defence Forces; (o) Director-General of the National Intelligence Service; (p) Inspector-General, and the Deputy Inspectors-General, of the National Police."*[327] *[Emphasis mine]*

320 Justice of the Supreme Court of Kenya and Chairperson of the Judiciary Committee on Elections.
321 Gary Yukl, *Leadership in Organizations* (6th ed., Pearson-Prentice Hall, 2006).
322 Peter G. Northouse, *Leadership: Theory and Practice* (5th ed., Sage, 2010).
323 *Sonko v County Assembly of Nairobi City & 11 others* (Petition 11 (E008) of 2022) [2022] KESC 76 (KLR)
324 Hannah Wang'ombe, et al, *Tracing the Path to Transformative Leadership in the Public Sector in Kenya,* KIPPRA Working Paper No. 32 of 2019 (2019).
325 Article 74 of the Constitution of Kenya, 2010.
326 *Sonko v County Assembly of Nairobi City & 11 others* (Petition 11 (E008) of 2022) [2022] KESC 76 (KLR)
327 Article 260 of the Constitution of Kenya, 2010.

5. Chapter 6 of the Constitution is Christened Leadership and Integrity. The Supreme Court, in the case of *Sonko v County Assembly of Nairobi City & 11 others,*[328] termed Chapter 6 as the *soul of the Constitution of Kenya*. Without integrity in leadership, the Constitution itself will be in the utmost peril. Through the Constitution, the people have ordained integrity as a value and principle of governance, dedicating a whole chapter to it, and at the same time, they have determined what level of integrity is needed in leadership.

6. All state officers are tasked with upholding the 'public trust', which means that they have an obligation to serve the people rather than govern them. The ethical basis for state officers is outlined in Article 73(2), which emphasises the dedication to serve rather than to govern. State officers are also required by Article 75 to refrain from conflicts of interest, prioritise public service over private benefit, and refrain from acts that bring disgrace to their position.

7. Whether these restrictions are sufficient to discourage wrongdoing is still up for debate. For example, even though Article 74 mandates that state officials take an oath to maintain integrity, the growing number of high-profile corruption cases casts question on how effective these protections are. The continued occurrence of ethical transgressions points to a discrepancy between the application of the law and its provisions. Do the punitive actions suffice? Or should the definition and implementation of leadership accountability be re-examined?

8. This disparity may result from a number of things, such as inadequate deterrent and punitive strategies. State officials are less likely to adhere to ethical standards since it seems that the costs of corruption are minimal when weighed against the possible rewards. It might also indicate a weakness in the enforcement and implementation processes, casting doubt on integrity monitoring techniques and organisations like the Ethics and Anti-corruption Commission. It is necessary to assess if the Commission's independence, resources, and capacity need to be strengthened. Beyond the requirements of the law, larger cultural and systemic problems that normalise or even promote unethical activity may also have an impact on the continuation of corruption. Legal improvements by themselves are insufficient because of these variables, which might erode a person's commitment to moral principles.

9. These factors could mean exploring a combination of stricter sanctions, greater transparency, enhanced institutional capacity, and public accountability mechanisms. Alternatively, it may involve a cultural shift that promotes ethics in public service as a core value, rather than a formal requirement.

18.3 Looking Inward: How the Judiciary handles Behaviour, Ethics & Standards issues

10. Chapter 10 of the Constitution provides the framework for Kenya's Judiciary. Article 159 establishes that judicial authority is derived from the people and vested in the courts and tribunals established under the Constitution.[329]

11. The Judiciary under the three Chief Justices under the Constitution, 2010 has had three blueprints commencing with the 'Judiciary Transformation Framework (2012-2016)' under Chief Justice Rtd. (Prof.) Willy Mutunga which set the judiciary on a transformative path after the adoption of the 2010 Constitution with the aim of restoring public confidence in the judiciary. We then had the 'Sustaining Judiciary Transformation (SJT) (2017-2021)' under former Chief Justice Rtd. David Maraga which was aimed at sustaining and deepening the transformation efforts through reforms to make justice more efficient. Now the Judiciary has the 'Social Transformation Through Access to Justice (STAJ)' under Chief Justice Martha Koome and which is aimed at ensuring that judicial transformation is sustained and that justice reaches even the most marginalized populations. These frameworks have enabled the Judiciary to enhance its ethical and performance standards.

12. Leadership in the judicial sense is viewed chiefly through reference to the cases decided or the jurisprudence developed by individual judges through their decisions. However, more recently leadership has been viewed in ways beyond the jurisprudence that flows from particular cases. Judges have increasingly been taking responsibility for the overall health of the judicial institution and its effectiveness at dispensing substantial justice in the society.

328 Petition 11 (E008) of 2022) [2022] KESC 76 (KLR).
329 Article 159(1) of the Constitution of Kenya.

13. Fundamental mechanisms of both deterrence and enforcement of ethical standards within the Judiciary include the Judicial Service Commission (JSC) and the Office of the Ombudsman[330]. Additionally, the Judiciary has played a role in interpreting ethical standards and addressing misconduct through cases and the Ethics and Anti-Corruption Court.

14. As an arbiter the Judiciary has had occasion to interpret various statutes related to Ethics, Conduct and the Interpretation of Chapter 6 of the Constitution. It has also had to check on multiple malpractices conducted by individuals and institutions. There has also been an Ethics and Anti-Corruption Court established to handle cases related to ethical and corruption charges.

15. For a Judge, complying with ethical requirements is an essential duty that derives from his constitutional and legal status. The conduct of Judges and Judicial Officers is guided by several legal sources including the Constitution of Kenya, the Judicial Service Act, the Judicial Code of Conduct and international legal standards of judicial ethics, including the Bangalore Principles of Judicial Conduct[331].

Judicial Service Commission

16. The Constitution establishes the Judicial Service Commission[332] and its include amongst others; *appoint, receive complaints against, investigate and remove from office or otherwise discipline registrars, magistrates, other judicial officers and other staff of the Judiciary, in the manner prescribed by an Act of Parliament*[333].

17. The Judicial Service Act[334] further elaborates on the powers and functions of the commission. The Act provides for the procedure for appointment and removal of judges, and discipline of judicial officers and staff.

The Bangalore Principles of Judicial Conduct

18. The Bangalore Principles of Judicial Conduct set standards for ethical behaviour among judges, recognizing six core values: independence, impartiality, integrity, propriety, equality, competence, and diligence. The Bangalore Principles have been adopted under The Judicial Service (Code of Conduct and Ethics) Regulations, 2020.[335]

Judicial Service (Code of Conduct and Ethics) Regulations, 2020

19. The Judicial Service (Code of Conduct and Ethics) Regulations 2020 further guide judges in their professional and personal conduct.

20. It gives effect to Articles 168 (1) (b) and 172 (1) (c) of the Constitution; Article 10 of the Constitution on national values and principles of governance; the provisions of the Leadership and Integrity Act[336], the Public Service (Values and Principles) Act[337] and the Public Officer Ethics Act.[338]

21. The Code mandates judges to uphold judicial independence, demonstrate impartiality, maintain integrity, and avoid conflicts of interest. Judges are also responsible for upholding professional standards in their decisions and interactions.

22. Public Officers Ethics Act provides that commissions can set up their own code of conduct[339], hence enacting the Judicial Service Regulations. The Judicial Service Code of Conduct is couched in the same manner as the Public Officer Ethics Act.

23. To give a highlight of the provisions of the Code of Conduct see the following:

330 Office of the Judiciary Ombudsperson Judiciary Website https://judiciary.go.ke/office-of-ombudsman/ accessed on 9th January, 2023.
331 Adopted by resolution No. 2006/23 on 27th July, 2006 of the Economic and Social Council of the United Nations.
332 Article 171 of the Constitution of Kenya, 2010.
333 Article 172 of the Constitution of Kenya, 2010.
334 Cap 8A Laws of Kenya.
335 12 JUNE 2020: KENYA GAZETTE SUMMARY | Vellum Kenya. https://vellum.co.ke/12-june-2020-kenya-gazette-summary/
336 Cap 185C Laws of Kenya.
337 Cap 185A Laws of Kenya.
338 Cap 185B Laws of Kenya.
339 Section 5 of the Public Officers Ethics Act.

I. Moral and Ethical Requirements (Section 6): These align with Article 166(2) of the Constitution and Section 13 of the Leadership and Integrity Act, 2012. Judges must demonstrate honesty in public affairs and refrain from actions that constitute abuse of office.

II. Independence (Section 7): Judges are required to uphold the independence and integrity of the Judiciary, maintaining impartiality in the performance of their judicial duties.

III. Impartiality (Section 9): Judges must carry out their duties with objectivity, in line with Articles 10, 27, 73(2)(b), and 232 of the Constitution. They are prohibited from engaging in favouritism, nepotism, tribalism, cronyism, and any corrupt or unethical practices. Additionally, judges must recuse themselves (Section 21) when their impartiality is in question.

IV. Integrity (Section 11): Judges are required to act with honour and integrity in discharging their duties. They must avoid accepting gifts, personal loans, or benefits that may compromise their impartiality. Judges are also prohibited from altering their decisions after delivery. They must also ensure that they minimize any extra-judicial activities to avoid potential conflicts of interest.

V. Propriety (Section 14): Judges are required to avoid both actual impropriety as well as the appearance of impropriety. This requires them to steer clear of improper influences or activities that could give the appearance of diminishing the dignity of the court. They are also proscribed from serving as executors or personal representatives.

VI. Professionalism (Section 16): Judges are required to conduct themselves in a manner that fosters public confidence in their integrity. They are also obligated to maintain high standards of performance and professionalism. They are also expected to cooperate with other judges and court officials in the administration of court affairs.

VII. Additional restrictions include the prohibition from operating bank accounts outside Kenya without permission (Section 25) and the engagement in any other gainful employment (Section 26), the prohibition from sexual harassment (Section 29) and the requirement to be responsible for their social media activities (Section 12), advising them to avoid activities that could negatively impact their impartiality.

17.4 **Maintaining Judiciary Standards**

24. The Judiciary utilizes Performance Management and Measurement Understanding (PMMU), regular trainings, reporting, digital automation and case management to maintain discipline further.

a) ***Performance Management and Measurement Understanding (PMMU)***

25. Judicial officers and staff through PMMU set performance targets. The purpose of this understanding is to enhance accountability for results by focusing on delivery of the mandate of the Judiciary and forms the basis for continuous improvement for the transformation of the Judiciary.

26. This understanding establishes a framework for clear performance objectives, goals and targets for the Judiciary and its staff through monthly, quarterly and annual performance reports. Performance indicators and targets of every individual and department is presented to the Chairman of JSC, and/or his designated representative.

27. The reports must be accurate, timely and submitted in the specified reporting formats to monitor performance progress and for annual evaluation.

b) ***Regular Training***

28. Judicial officers and staff attend regular trainings, colloquiums, and exchange programmes on topical issues throughout the year. The Kenya Judiciary Academy also established, which offers training to judicial officers and staff and equally grants judicial officers the ability to make presentations in different topical issues.

c) ***Digital Automation & Case Management***

29. Digital automation has really assisted the court in delivery of justice. Currently, within Nairobi and its environs cases are heard online through the Microsoft Teams system. Litigants are equally able to file cases through the Judiciary e-filing system. Litigants are equally able to know the status of their cases through a messaging system.

30. Corollary to this the court has a better way to manage the status of its cases. The court makes monthly, quarterly, and yearly statements about the status of the cases, particularly concerning case backlogs and how best to clear them.

d) ***Reporting***

31. Every year the Judiciary presents the State of the Judiciary and the Administration of Justice. The state of the Judiciary and the Administration of Justice Report is a constitutional and statutory imperative drawn from Article 159 of the Constitution which assign judicial authority and exercise.

32. Through the framework of Kenya Law Reporting decisions made by Judges from the High Court, Court of Appeal and the Supreme Court are posted on the Kenya Law website on a weekly basis.

e) ***Office of the Ombudsman***

33. The Office of the Judiciary Ombudsman (OJO) is an administrative office under the Office of the Chief Justice.[340] The office aims to rebuild confidence in the Judiciary from the people it serves and assess the institution's performance from the public's point of view by obtaining feedback from the public.[341]

34. The office has the following mandates; a*) Receive and process complaints by members of the public against the Judiciary b) Receive and process complaints by members of the public against Judicial officers and judicial staff c) Receive and process complaints from employees d) Enhance public confidence and improve transparency and accountability within the Judiciary and e) Encourage public participation and engagement f) The office executes this mandate by providing a confidential, neutral, independent and informal process that facilitates fair and equitable resolution of grievances*[342].

35. Despite these robust mechanisms, questions still linger concerning their effectiveness. For instance, JSC has long been criticized for its slow process and lack of transparency in some cases. Furthermore, the effectiveness of the PMMU in enhancing judicial accountability should be interrogated, particularly concerning its capacity to handle the ongoing challenges of case backlogs and administrative delays. Backlogs and administrative delays are often symptomatic of deeper, systemic issues such as resource constraints, procedural inefficiencies, and high caseloads per judge, all of which may not be fully captured by quantitative evaluations alone.

36. For example, JSC has long faced criticism for its cumbersome procedures and, in certain situations, its lack of openness. Additionally, the PMMU's potential to improve judicial accountability should be examined, especially in light of its ability to manage the persistent problems of case backlogs and administrative delays. Administrative delays and backlogs are frequently signs of more serious, systemic problems that may not be adequately identified by quantitative assessments alone, such as a lack of resources, ineffective procedures, and a high caseload per judge.

37. This raises another worry that the significance of qualitative assessments may be overlooked due to the current emphasis on quantitative measurements.

38. Qualitative assessments would allow for a more thorough examination of judicial performance. This would allow for the highlighting of the calibre of judicial reasoning, conformity of decisions with the law, and the impact of

340 Judiciary of Kenya, *Office of Ombudsman* accessed from <https://judiciary.go.ke/office-of-ombudsman/> on 9th January, 2023.
341 Ibid.
342 Ibid.

decisions on justice outcomes. It is my considered belief that judicial accountability should take into account the fairness and substance of court rulings as well as encompass quantifiable elements like case processing timeframes.

18.5 Looking Outwards: Ensuring good Behaviour, Ethics and Standards as a State officer

39. Ethical leadership means that individuals behave according to a set of principles and values that are recognized by the majority as a sound basis for the common good[343]. These include integrity, respect, trust, fairness, transparency, and honesty. Ethical leadership must be a conscious decision[344].

Acts of Parliament

40. Besides the Acts mentioned in Chapter 3 that regulate the conduct of judges and magistrates various other statutes in Kenya have been enacted to enhance the ethics of public and state Officers. The Public Officer Ethics Act is an Act of Parliament to advance the ethics of public officers by providing for a Code of Conduct and Ethics for public officers and requiring financial declarations from certain public officers and to provide for connected purposes.[345] The Leadership and Integrity Act gives effect to, and establish procedures and mechanisms for the effective administration of Chapter Six of the Constitution and for connected purposes.[346]

a) *The Public Officer Ethics Act, 2003*

41. Section 2 of the Act describes a public officer as; any officer, employee or member, including an unpaid, part-time or temporary officer, employee or member, of any of the following-
    (a) the Government or any department, service or undertaking of the Government;
    (b) the National Assembly or the Parliamentary Service....."[347]

42. Part III of the Act sets out the General Code of conduct for public officers which include professionalism (Section 9) Rule of Law (Section 10) No improper enrichment (Section 11), conflict of interest (Section 12). It also provides that a public officer shall not solicit or collect harambees (Section 13), act for foreigners or further the interest of a foreign government (Section 14). Section 17 prohibits public officers from practicing nepotism or favouritism. Section 19 makes it illegal to knowingly provide false or misleading information to the public or any public officer. Additionally, Section 21 explicitly prohibits sexual harassment.

43. Sections 28–34 cover the requirements for declaring income, assets, and liabilities, with Section 32 making it an offense to fail to submit such declarations. Sections 35–37 focus on the enforcement of the Code of Conduct, with Section 36 outlining the disciplinary actions that can be taken.

b) Leadership and Integrity Act

44. The Leadership and Integrity Act was enacted to give effect to, and establish procedures and mechanisms for the effective administration of Chapter Six of the Constitution and for connected purposes.

45. Section 3 of the Act reiterates the principles outlined in Articles 73 and 75 of the Constitution, while other sections provide specific guidelines. These include professionalism (Section 11), financial integrity (Section 12), moral and ethical requirements (Section 13), the effect of wrongful or unlawful acquisition of property (Section 15), conflict of interest (Section 16), the operation of bank accounts outside Kenya (Section 19), acting for foreigners (Section 20), misuse of information (Section 22), political neutrality (Section 23), impartiality (Section 24), and the prohibition against state officers engaging in other gainful employment (Section 26). The Act also outlines disciplinary procedures (Section 41), provides for referral to civil and criminal proceedings (Section 43), and sets out penalties for obstruction under the Act.

343 What are the ethical leadership concepts? – Cowetaamerican.com. https://cowetaamerican.com/2022/05/12/what-are-the-ethical-leadership-concepts/
344 Ibid.
345 The preamble of the Public Officer Ethics Act.
346 The preamble of the Leadership and Integrity Act.
347 Section 2 of the Public Officer Ethics Act.

46. Despite their elaborateness, these laws setting standards for public officers have faced criticism for their limited deterrent effect. For instance, while public officers are required to declare their wealth, the enforcement of this provision is often perceived as feeble for various reasons such as inconsistency in application, lack of follow-up, and the inadequate verification of declared assets. Due to public officers viewing this requirement as merely procedural, it has the consequent effect of undermining the intended deterrent effect of the policy.

47. This has opened up debate on whether the penalties and enforcement measures under these laws are adequate to prevent the abuse of public office. If the consequences for not declaring assets or misstating them are minimal, then the law lacks the "teeth" to deter unethical behaviour effectively. For true deterrence, laws need to establish clear obligations and ensure that meaningful penalties are consistently applied to those who flout them.

48. Consequently, it is my considered view that a more sustainable approach to combatting corruption would involve tackling the underlying issues that allow corruption to flourish. This could take on various aspects including strengthening the capacity and independence of oversight bodies, revising laws to impose stricter penalties, and implementing more comprehensive checks and balances within public institutions.

18.6 Disciplinary Procedures and Recovery of Assets

a) Removal of a Judge from Office

49. Article 168 of the Constitution outlines the grounds for the removal of judges from office, which include mental or physical incapacity preventing them from performing their duties; a breach of the judicial code of conduct prescribed for superior court judges by an Act of Parliament; bankruptcy; incompetence; or gross misconduct or misbehaviour[348].

50. The Judicial Service Act provides detailed provisions on the "Appointment and Removal of Judges and Discipline of Other Judicial Officers and Staff" (Part V). While the Judicial Service Commission is empowered under Section 32 to subject "judicial officers" to disciplinary procedures, "judges" are only subject to investigation by a tribunal appointed by the President for purposes of removal (Article 168(5) of the Constitution; Section 31 of the Judicial Service Act).

51. Under Article 163(2)(b) of the Constitution, the Supreme Court holds exclusive jurisdiction to hear appeals from such tribunals. Additionally, Section 15C of the Supreme Court Act, 2011 stipulates that a superior court judge aggrieved by the decision of a tribunal made under Article 168 may appeal directly to the Supreme Court within ten days after the tribunal issues its recommendations.

52. The former Deputy Chief Justice, Lady Justice Nancy Barasa, first invoked this jurisdiction but withdrew her matter before the Court could substantively hear and determine it.

53. Subsequently, the Supreme Court has determined four key appeals. In the case of *Joseph Mbalu Mutava v Tribunal appointed to Investigate the conduct of Justice Joseph Mbalu Mutava*[349]. Justice Mutava was aggrieved by the decision of the Tribunal that had recommended his removal from office and appealed to the Court. The Court heard the matter, but more fundamentally, being the first case under this limb of jurisdiction, it set out foundational principles applicable in exercise of this jurisdiction. In this regard, the Court recognized that in exercising this jurisdiction it acts as the first and only appellate Court from the findings of the Tribunal. Accordingly, it had the duty to re-evaluate and re-assess the evidence on record with a view of establishing whether the Tribunal in arriving at its conclusion, misdirected itself and whether its conclusion should stand.[350]

54. The second time the Court was exercising this jurisdiction was in the case of *Hon. Mr. Justice Martin Mati Muya vs. The Tribunal Appointed to Investigate the Conduct of Justice Martin Mati Muya, Judge of the High Court*[351], the

348 Article 168 of the Constitution.
349 SC Petition No. 15 of 2016 [2019] eKLR.
350 Ibid.
351 SC Petition No. 4 of 2020; [2022] KESC 16 KLR.

Court set aside the tribunal's recommendation for the Judge's removal. It determined that the main complaint against the Judge of delay in delivering a ruling did not amount to gross misconduct warranting removal. It was found that the delay was justified due to the exigencies of work faced by the Judge while handling judicial and administrative duties in two court stations.

55. In *Hon. Justice Mary Muthoni Gitumbi vs. The Tribunal Appointed to Investigate the Conduct of Hon. Justice Mary Muthoni Gitumbi*[352], the Court for the first time determined the question of a judge's mental incapacity to undertake the functions of the office of a judge. Importantly, the Court formulated guidelines to guide courts in the assessment of mental incapacity.

56. In the case of *Hon. Justice Said Juma Chitembwe vs. The Tribunal Appointed to Investigate into the Conduct of the Hon. Justice Said Juma Chitembwe, Judge of the High Court*[353], the Court upheld the Tribunal's decision that the judge's actions to wit, lack of impartiality, integrity, accountability, professionalism, subversion of justice, involvement in corrupt practices and conduct unbecoming of a judge amounted to gross misconduct under Article 168 (1) (e).

57. Taking a critical look at the removal process, it can be critiqued for being reactive rather than preventative. This is because, by the time removal proceedings are initiated, public confidence and trust in the Judiciary may already be eroded, and the damage to the institution's integrity could be significant. Such that rebuilding that trust may be an uphill task.

58. How can these processes be made more proactive in ensuring ethical conduct before it reaches the point of removal? There is a need to shift towards proactive ethical oversight and preventive measures to reinforce judicial integrity overall. One of the strategies that can be deployed can involve implementing early warning systems and monitoring mechanisms to identify early signs of potential ethical transgressions, to allow for timely interventions. These systems could involve peer reviews, performance evaluations, or other accountability checks. These would enable the early detection of concerning patterns or behaviours that could later lead to more severe misconduct. These evaluations would also assist in offering judges and Judicial Officers the support and guidance needed to address potential vulnerabilities.

59. Closely linked to this would be creating mentorship programs where experienced judges provide guidance and support to their peers, particularly to those newer to the bench. The more experienced judges would model ethical behaviour and provide guidance on handling complex ethical dilemmas. Such mentorship can assist judges navigate ethical dilemmas before they become problematic. This would be a constructive way to instill high standards from the outset of their judicial careers.

60. Finally, perhaps it is time to consider strengthening the role of the Judicial Service Commission, whereby the JSC could be empowered to carry out more proactive oversight, engage in routine evaluations, and offer constructive feedback rather than intervening only when a complaint arises. This could create a culture of continuous improvement and ethical vigilance rather than just engaging in removal proceedings.

b) Removal of a member of a commission or an independent office

61. Article 251(1) provides for circumstances that can lead to removal of a member of a commission or an independent office. They include *serious violation of this Constitution or any other law, including a contravention of Chapter Six; (b) gross misconduct, whether in the performance of the member's or office holder's functions or otherwise; (c) physical or mental incapacity to perform the functions of office; (d) incompetence; or (e) bankruptcy.* Sub Article 2 provides that a person desiring the removal of a member of a commission or of a holder of an independent office on any ground specified Sub Article 1, may present a petition to the National Assembly setting out the alleged facts constituting that ground, and (3) *The National Assembly shall consider the petition and, if it is satisfied that it discloses a ground under clause (1), shall send the petition to the President*[354].

352 SC Petition 10 (E013) of 2022; [2023] KESC 73 (KLR).
353 SC Petition No. E001 of 2023; [2023] KESC 114 (KLR).
354 Article 251 of the Constitution.

62. In *Okiya Omtatah Okoiti v National Assembly of Kenya & 4 others Interested Party; Edward Ouko 5 others*[355], the Court in a case challenging the mandate of the National Assembly under Article 251 the Court dismissed the petition and held that Article 251 was clear of the National Assembly's mandate to hear petitions for removal of members of an independent office.

c) **Removal of a governor**

63. The Removal of a governor is found in Article 181 of the Constitution which provides that a county governor may be removed from office on any of the following grounds; *(a) gross violation of this Constitution or any other law; (b)where there are serious reasons for believing that the county governor has committed a crime under national or international law; (c) abuse of office or gross misconduct; or (d) physical or mental incapacity to perform the functions of office of county governor*[356]. Section 33 of the County Governments Act[357] provides the procedure, from the County Assembly to the Senate, for the removal of a county Governor.

64. The removal of a governor has successfully been utilized on two occasions; (i) Mike Sonko Mbuvi Gidion Kioko in Nairobi County (ii) Ferdinand Waititu in Kiambu County.

65. The removal of Mike Sonko Mbuvi Gidion was the subject of litigation from the High Court to the Supreme Court. The Supreme Court in *Sonko v County Assembly of Nairobi City & 11 others*[358] is significant in various respects it *first* laid out with emphasis the provisions of Leadership and Integrity in Paragraphs 6-11 and addressed the need for state officers to conduct themselves with integrity. *Secondly* it provided the threshold to be met to sustain a claim for impeachment of a state officer. *Third,* it laid out principles governing the process of impeachment or removal of a county. *Fourth*, it gave forbearance to Article 75 (3), which states; A person who has been dismissed or otherwise removed from office for a contravention of the provisions specified in clause (2) is disqualified from holding any other State office. At the time the former governor had sought to vie for an elective post and had been cleared to vie by the electoral body.

18.7 Forfeiture & Asset Recovery

66. The Assets Recovery Agency through Proceeds of Crime and Anti-Money Laundering Act (POCAMLA) Act[359] has recovered assets that have been determined to be proceeds of crime. The Ethics and Anti-Corruption Commission (EACC) through the Anti-Corruption and Economic crimes Act[360] has through forfeiture recovered unexplained assets. As of 4th March, 2022 EACC recovered properties worth Kes. 30 Billion with civil cases filed in various courts across the country to recover public assets valued at Kes.14 Billion.

67. The Judiciary has done its role through setting up of the Ethics and Anti-Corruption Court and through hearing of petitions presented under the Proceeds of Crime and Anti-Money Laundering Act (POCAMLA) & the Anti-Corruption and Economic Crimes.

68. In *Kenya Anti-Corruption Commission v Stanely Mombo Amuti*[361] the Court opined as follows;

> "Forfeiture is a fair remedy in this instance as it serves to take away that which was not legitimately acquired without the stigma of criminal conviction. Criminal forfeiture requires a criminal trial and conviction while civil forfeiture is employed where the subject of inquiry has not been convicted of the underlying criminal offence, whether as a result of lack of admissible evidence or a failure to discharge the burden of proof in a criminal trial. See- Kenya Anti-corruption Commission v James Mwathethe Mulewa & another [2017] Eklr.

69. Corruption often has deep-rooted causes, such as systemic weaknesses, lack of robust oversight, low levels of transparency, and a culture that may tolerate or even normalize unethical practices. Taking a more critical evaluation of the aforementioned provision, one must ask themselves the question Is asset forfeiture effective in curbing unethical behaviour, or is it merely treating the symptoms of a deeper issue of governance and public accountability?

355 HC Petition No. 62 of 2017 [2019] eKLR.
356 Article 181 of the Constitution of Kenya.
357 Cap 265 Laws of Kenya.
358 (Petition 11 (E008) of 2022) [2022] KESC 76 (KLR).
359 Cap 59A Laws of Kenya.
360 Cap 65 Laws of Kenya.
361 (Anti-Corruption and Economic Crimes Case 5 of 2016) [2017] KEHC 1050 (KLR).

70. Asset forfeiture, though a good avenue of enforcement, does not address these root causes. This is so because, while it can penalize individuals after the fact, it does not inherently prevent others from engaging in similar behaviour. This *"symptom treatment"* approach could allow corrupt practices to persist, as the structural conditions that enable corruption remain unchallenged. To address the core of the issue, asset forfeiture should be complemented by broader reforms that strengthen governance structures, enhance transparency, and foster a culture of accountability at all levels of public service.

71. Moreover, it is also crucial to appreciate how public perception in the success of these initiatives affects the success of asset recovery. The public's perception of these initiatives has the power to either support or contradict their efficacy. The public perception and trust in the Judiciary as the body that enforces asset forfeiture, could be called into question if it is thought to be sluggish or mired in bureaucratic inefficiencies. However, visible, prompt, and efficient action is frequently necessary to win over the public to anti-corruption initiatives. Further, when the Judiciary's role is viewed as a component of a much larger and broader integrity upholding approach, then it reinforces the public confidence that the Judiciary is independent, impartial and committed to upholding justice.

18.8 Conclusion

72. The role of the Judiciary is well defined in the Constitution under Chapter 10 of the Constitution with Article 159 (e) mandating the Judiciary to protect and promote the purpose and principles of the Constitution.

73. The actions of the Judiciary as an arbiter and to ensure compliance with the moral, ethical principles and standards is also owing to it due to fact that judicial authority is vested and exercised by the courts and tribunals. The Judiciary has in various cases made decisions to ensure compliance with the constitutional provisions on leadership and integrity. The duty to maintain to a specific code of leadership and integrity is solely on the public entity and individual. Public institutions such as the EACC and ARA investigate the conduct of individuals in both public and private life.

74. As shown in part 5 the Judiciary will not shy away in assisting the various institutions in achieving their roles and mandate. As for the removal of state officers from office, the same is clearly based on constitutional principles which have to be adhered to.

75. The Judiciary's perspective on leadership: behaviour, Ethics and Standards is for it to ensure that constitutional principles in this regard are maintained not only to itself but through looking outward, for the betterment of the people from whom its authority is derived.

Technology as a Tool for Access to Justice

Hon. (Mr.) Justice Isaac Lenaola, FCIArb, CBS, SCJ[362]

(This paper was presented on 4th December 2024 at the Regional Conference on the Use of AI, Digital and Social Media in Elections in Kenya, held at Villa Rosa Kempinski Hotel – Nairobi)

18.1 Introduction

1. Access to justice is defined as the ability of individuals and businesses to seek and obtain a just resolution of legal problems through a wide range of legal and justice services. These services include legal information, counsel and representation, formal (e.g. courts) and alternative dispute resolution, and enforcement mechanisms. Emphasis should also be placed on legal empowerment, which enables people's meaningful participation in the justice system and builds their capability to understand and use the law for themselves. The rule of law requires impartial and non-discriminatory justice. Without equal access, a large portion of the population can be left behind and their vulnerabilities exposed.[363]

2. The scope of access to justice as enshrined in Article 48 of the Constitution is wide. Courts are enjoined to administer justice in accordance to the principles laid down under Article 159 of the Constitution. Thus, with regards to access to justice and fair hearing the state through the courts, ensures that all persons are able to ventilate their disputes.[364]

3. The Final Report on the Task Force on Judicial Reforms released in 2010[365] ("2010 Final Report") acknowledged delays in finalizing cases, missing court files and corruption as major issues and recommended the use of information and communications technology (ICT) in improving the administration of justice. The Report set out initiatives such as digitization of court records, short messaging service (SMS) inquiry systems, teleconferencing, electronic billboards, audiovisual recording systems, case tracking, integrated personnel and payroll system and digital recording of proceedings and transcription. The Report also recommended that "adequate finances and human resources be availed to roll out full implementation of an ICT strategy in the judiciary".

4. Technology has, since the above report was released, been a key part of the transformative framework of the Judiciary. In all its blue-prints therefore, technology has been cited as a pillar to the transformation of the Judiciary. In the Judiciary Transformation Framework (JTF) (2012-2016)[366] one of the pillars was harnessing *technology as an enabler to justice.* The Sustaining Judiciary Transformation Framework (SJT) (2017-2021)[367] expounded on the *Judiciary Digital Strategy* comprised in five categories i.e. Judicial operations Support Systems, Court management systems, Enterprise Resource Planning, Document and archive Management and ICT Infrastructure. The Social Transformation through Access to Justice (STAJ) (2023-2033) [368] optimizes adoption of people-centered justice technology with the end user in mind.

5. The Judiciary has progressively transformed from very limited adoption and utilization of information and communication technologies to where it is properly harnessed and developed. As technology continues to evolve, there is ample room for further development. The judiciary's commitment to continuous improvement in this area reflects an understanding that technology isn't just a tool but a critical component of modern justice delivery. Indeed, in her Foreword to the STAJ blueprint the Chief Justice Martha Koome notes as follows;

> *"As the world moves towards a digital future, it is incumbent upon the Judiciary to harness technology to make justice not just expeditious but also widely accessible. The emphasis on leveraging technological innovation in the delivery of justice within STAJ is, therefore, both timely and strategic...."*

362 Justice of the Supreme Court of Kenya.
363 OECD, *Equal Access to Justice for Inclusive Growth: Putting People at the Centre,* (OECD, 2019) available at: https://doi.org/10.1787/597f5b7f-en
364 *Muruatetu & another v Republic; Katiba Institute & 5 others (Amicus Curiae)* [2017] KESC 2 (KLR).
365 Final Report of the Task Force on Judicial Reforms. Available at: https://kenyalaw.org/kl/fileadmin/pdfdownloads/ Final_Report_of_the Taskforce on_Judicial_Reforms.pdf
366 Judiciary Transformation Framework (2012-2016) https://kenyalaw.org/kl/fileadmin /pdfdownloads /Judiciary Transformation Framework.pdf
367 Sustaining Judiciary Transformation Framework (2017-2021) https://kenyalaw.org/kl/ fileadmin/pdfdownloads/ Strategic_BluePrint.pdf
368 A blueprint for Social Transformation through Access to justice https://judiciary.go.ke/wp- content/uploads/ 2023/11/STAJ-Blueprint-1.pdf

6. This paper reflects on the Judiciary's progress in harnessing technology, the challenges encountered and what the future holds with the advent of new and fast emerging technologies.

19.2 Deployment and Use of Technology in the Judiciary

7. The 2005-2008 Strategic Plan on Leveraging in Digital Technology in the Administration of Justice identified Court Records Managements Systems and Digital Audio Recording as key in enhancing service delivery. It further laid the ground for the infusion of digital technology in the Judiciary through plans to introduce ICT facilities within the Court system. This enabled the Judiciary to develop software that could monitor, collect and record judicial opinions delivered in the superior courts. It is through this initiative that led to the formation of the National Council for Law Reporting a semi- autonomous state corporation mandated to provide public information. National Council for Law Reporting utilizes technology in its law reporting.[369]

8. Under the JTF , the Judiciary sought to implement the following activities aimed at automating judicial operations: establish an electronic case management system; establish an SMS inquiry system to inform members of the public about the status of their cases; digitize court records; install teleconferencing facilities; mainstream the use of electronic billboards in the courts; establish an integrated personnel and payroll system; and ensure the digital recording of proceedings and transcription.

9. In its implementation, the Chief Justice emeritus Dr. Willy Mutunga established the Integrated Court Management System Committee (ICMSC) in October 2014. In 2015, the Judiciary managed to roll out the Daily Court Returns Template to evaluate job performance. The Judiciary also piloted court case management system in Eldoret Law courts.

10. The period 2011- 2015 saw progressive legislation incorporating ICT utilization in various statutes. The land Registration Act (2012) now provides for the maintenance of relevant documents in safe and accessible formats in electronic files. Section 10 requires that information be provided to the public by electronic means. The National Land Commission and Ministry of Lands and Physical Planning created the *Ardhi Sasa* Platform that allows the citizens to interact with land information held by the Government.[370]

11. Section 3 (I) of the Judicial Service Act CAP 8A provides that the Judiciary and the Judicial Service Commission should apply modern technology in their operations. The Magistrates Court Act CAP 10 provides that the Chief Justice shall make rules such as; automation of court records, case management, protection and sharing of court information and the use of information communication technology to enhance effective administration. The Evidence Act CAP 80 has also been reviewed to allow for admissibility of evidence that is provided through electronic means.[371] The Act admits oral evidence adduced through teleconferencing and videoconferencing. Consequently, witnesses do not need to present themselves in courts to adduce evidence. This has enhanced cost efficiency to litigants as they do not need to travel to the court.[372] The period also saw the digitization and automation of government services through the E-Citizen platform and *Huduma* centres.

12. SJT built on JTF and proposed the following initiatives: internet connectivity in all court stations, mobile payment of court fees, e-filing of pleadings, mobile SMS queries of judicial processes, electronic revenue collection and court fee payment, secured email system with a new judiciary domain, judicial operations support systems, court management systems, enterprise resource planning, document and archive management and support to ICT Infrastructure such as networks, internet access, security and disaster recovery capabilities.

13. The ICMSC developed an ICT Master plan (2018-2022). The master plan identified over 30 potential ICT projects. It prioritized 6 as flagship projects. These 6 projects are (i) the Court Case Management System (CMS), (ii) the Court Recording and Transcription Services (CTRS), (iii) the Judicial Integrated Financial Management System (JIFMS), (iv) the Human Resource and Performance Management, (v) the ICT Connectivity Infrastructure, and (vi) the Judiciary Intranet to improve internal communication.[373]

369 Leveraging on Digital Technology in Administration of Justice (KIPPRA, July 2021)/ https://kippra.or.ke/leveraging-on-digital-technology-in-administration-of-justice

370 Fortune W. Wabwile, & Adit M. Njoki, 'Is Law and Technology a Boon or Bane in Kenya' (2023) 10 *University of Nairobi Law Journal* 103.

371 Section 106 (A-I), Section 78 of the Evidence Act.

372 Wabwile, & Njoki, (As above n 375) 110.

373 Judiciary ICT Master Plan (2018-2022) file:///C:/Users/Admin/Downloads/JUDICIARY%20ICT%20MASTER% 20PLAN.pdf

14. The committee also piloted the Judiciary Automation Transcription System in the Commercial and Tax Division of the High Court in Nairobi. The pilot provided useful information on the basis of which the court recording and transcription solution for the entire Judiciary was modeled. The advent of Covid- 19 also saw the adoption of the E-filing system and virtual courts system in a widely hailed manner.

15. Under STAJ, the Judiciary seeks to adopt and deploy versatile technology through the following initiatives: Integrated case Management system; Securing Judiciary cyber space, digitization of registries, transcription services, automation of administrative services and enhancement of digital tools and infrastructure.

i. Integrated Case Management System

16. The Integrated Case Management System seeks to ensure that no service will require a litigant to physically access the registry or contact the court for it to be provided. The system which encompasses e-filing and case tracking functionalities within the courts ensures the tracking of all the steps and ensuring all the services are available online. Litigants are facilitated in filing all cases, tracking dates, tracking case activities and accessing virtual courts.

17. The COVID-19 Pandemic acted as a catalyst to spurring the Judiciary's uptake of digital technologies. On July 1, 2020 the Judiciary adopted the virtual courts and electronic case management system in Nairobi, with the Supreme Court, Court of Appeal, and the High Court taking the lead. Prior to the launch and to regulate the access and use of Electronic Case Management systems, the Judiciary gazetted the Civil Procedure (Amendment) Rules 2020[374] and the Practice Directions on Electronic Case Management[375]. The implementation of the electronic case management ensured that the courts continue to function remotely minimizing disruption during government restrictions imposed as a way of preventing the spread of Covid-19.

18. The regulation of practice under the virtual court sessions and the use of technology has been continuous. The Chief Justice gazetted the Practice Directions on Virtual Court Sessions on June 2, 2023. These directions standardize the operations of virtual courts across all courts and gives guidance on all aspects of virtual court including; conduct of virtual court proceedings, notification of parties attending virtual proceedings, virtual attendance, dress code and virtual court etiquette, documentation, confidentiality and privacy.[376] On 10th January 2024, the Chief Justice gazetted the Supreme Court (Virtual Sessions) Practice Directions to guide the conduct of virtual proceedings and use of technology in the Supreme Court.

19. The virtual court sessions give the litigants access to courts while also allowing the public to attend the online hearings. Litigants and the general public can access the notices and search for cases on the *Kenya Law website* and the *Cause list* portal. Between 1st April 2020 and 12th March 2021, over 400 virtual court links had been shared on the Judiciary website while over 200 rulings and judgements have been delivered via email and videoconferencing.[377]

20. Various developments have also been made in enhancing the integrated case management system. On 11th March 2024 the Chief Justice launched *e-filing in all courts nationwide* and envisioned that no court should print pleadings and documents from July 1, 2024. The Chief Justice also unveiled a new *Causelist Portal* where litigants and advocates can get information on cases listed for the day and a *Data Tracking Dashboard* that will assist Judiciary leaders to monitor case processing within courts from filing to conclusion.[378]

21. From a litigator's perspective, the system has saved time and resources by automating filing processes and the effective implementation of virtual hearings. From the Court's perspective, the system makes it easier for judges and judicial officers to access court files. E-payments for filing of documents has enhanced accountability, reducing cash handling and tracking payments with great transparency within the judiciary. Additionally, the system has facilitated faster and more reliable transmission of judgments and rulings, strengthening

374 26th February 2020 vide Legal Notice No. 22.
375 24th March 2020 through Kenya Gazette Notice No. 2357.
376 State of the Judiciary and the Administration of Justice Annual Report 2022/23.
377 https://kippra.or.ke/leveraging-on-digital-technology-in-administration-of-justice/
378 https://judiciary.go.ke/judiciary-launches-e-filing-in-all-courts-data-tracking-dashboard-and-causelist-portal-portal/

communication between the judiciary and stakeholders.[379]This adoption of technology reflects a modern, more responsive judiciary better equipped to serve the public.

22. The State of the Judiciary and Administration of Justice Annual Report 2022-2023 reports that 100,295 new cases were filed and 450,123 cases were processed through the Case Tracking System (CTS).

23. The State of the Judiciary and Administration of Justice Report 2023-2024 reports an uptake of 51,729 e-filing accounts by judiciary stakeholders. Out of 51,729 accounts in the CTS, 47,107 are held by individual users, 2,003 by law firms, 2,589 by organizations, and 30 by state entities. This fact has demonstrated the diverse user base of the CTS, serving various stakeholders in Kenya's legal landscape.[380]

24. The Judiciary continues to invest in using technologies, such as Google's Go to Meet and Microsoft TEAMS, to deliver virtual court services. The Judiciary has thus acquired 1,100 Microsoft Teams accounts/licences and 10 GoToMeeting licences. There is also a continuous uptake on the capabilities of video conferencing services through equipment purchases and usages.[381]

ii. Automation of Transcription Services and Digitisation of Court Records

25. STAJ envisions the digitization of all records to reduce the time taken to file and process a case as well as increase transparency. It provides for the repurposing of all registries into electronic formats with no manual files (e-registry) and designating them as digital court service hubs to serve litigants online by filing cases, perusing digital files, making online payments, and downloading digital proceedings.[382]

26. In 2020, the Judiciary, through the Ministry of ICT and in partnership with the private sector (KEPSA), adopted the Ajira Digital Program. Through the program, the Judiciary engaged the services of young people to prepare transcripts of court proceedings and during the reporting period of 2022/2023, a total of 96,646 transcripts were finalized from various courts and in June 2023, a total of 397 agents were engaged to support digitisation in 34 court stations and 37,942 files were scanned.[383]

27. In the 2023/2024, the Judiciary implemented five phases of the Ajira programme through which 4,571 youth were engaged in various court stations to scan court files. A total of 325,651 court files were digitized. Supply chain management and human resource files were also scanned for uploading to the ERP system. Additionally, 1,672 records were scanned and uploaded to the Sexual Offenders Electronic Registrar (SOER).[384] The Ajira Program has been a continuous exercise and a huge success.

28. Through the Court Transcription Service, the court installs technology for the recording of ultimate quality transcription. A National Transcription Centre was established on October 2023 addressing the typing of proceedings. The center leverages on technology such as Artificial Intelligence to transcribe court proceedings. A pilot of the transcription was commenced in Milimani Law Courts. On 16th August 2024, the Chief Justice announced that the Judiciary is set to establish a fully-fledged National Transcription Centre, building on the success of the Nairobi-based Milimani Transcription Pilot Centre.

29. In yet a significant step towards enhancing efficiency and access to justice, the Supreme Court launched its Virtual Registry on June 2024. Court users at the court now access services traditionally offered at the physical location from any location. The virtual registry provides comprehensive support services, including live assistance.[385]

iii. Automation of Judiciary Services

30. The Public Information Kiosk (PIK) under the e-filing system is a public access portal for searching and viewing activities for any case in any Court Station across the country. Litigants do not need to visit the court premises

379 See also https://www.dlapiperafrica.com/africa-wide/insights/africa-connected/issue-05/embracing-electronic-court-case-management-systems-lessons-from-the-kenyan-experience-during-covid-19.html
380 State of the Judiciary and Administration of Justice Report 2023-2024 pg.68 file:///C:/Users/Admin/ Downloads/ SOJAR-2023-2024.pdf
381 SOJAR 2023/2024, Ibid at 70.
382 STAJ Blueprint (As above) 65.
383 SOJAR 2022/2023 (As above) 153.
384 SOJAR 2023/2024 (As above) 69.
385 Virtual Link http://cutt.ly/sesq5n6A

for viewing details about their cases. Besides that, one can also validate court orders and other probate and administration matters filed in any of the court stations across the country alongside viewing a grouping of relevant documents to be filed for a certain case type as outlined in the gazetted court fees schedule.

31. The Judiciary has additionally automated its services through the following modules; the *Judiciary Advocates Management System* launched on August 2022 automating the functions undertaken by the Advocates Section of the Office of the Chief Registrar of the Judiciary; *Judiciary Complaints Management System (JCMS)* initially developed in 2012 to expedite resolution of complaints received by the Judiciary and the *Enterprise Resource Planning System (ERP)* adopted in 2024 automates all administrative functions' processes; and the Judiciary ERP system implementation covers the following functional areas; Financial Management, Supply Chain Management, Human Resource Management, Project Management Performance Management and Collaboration within the Judiciary.

iv. Enhancement of ICT Infrastructure

32. The Judiciary has connected all court stations to reliable internet using fiber and radio technologies. The capacity of internet allocated per station is based on the number of users in the station. Additionally, the Judiciary has completed the installation of primary and secondary data centres using virtualization technology. In the FY 2022/23, the Judiciary increased internet connections to a total of 167 stations while also increasing bandwidth to 5.07 Gbps while 15 stations now have secondary/back up internet link and thirteen remote stations have been connected to the internet through mobile broadband.[386]

33. The Ministry of ICT, through the Google Fund, finalised the laying of fibre to connect 67 Law Courts to the National Fibre Optic Backhaul Initiative (NOFBI). An additional 10 stations were connected by the ICT Authority through the County Connectivity Project. Under the ongoing Google connectivity project, all court stations will be connected to NOFBI, which will provide backup internet service.[387] The Judiciary has also continued to equip court staff with working tools through purchase of 743 pieces of ICT equipment, including desktops and laptops. A total of 884 lease printers were also commissioned.[388]

34. In the year 2023/2024, ten more stations were linked to the NOFBI via the County Connectivity Project in partnership with the ICT Authority. The Judiciary in collaboration with the Communications Authority of Kenya financed by the Universal Service Fund (USF) deployed Local Area Network (LAN) in 42 court stations spread across the country. The LAN ICT infrastructure has enabled the Judiciary to integrate ICT solutions, data, and procedures into a single system increasing corporate efficiency and effectiveness.[389]

35. To ensure the reliability and sustainability of these ICT solutions, it is vital that the Judiciary takes appropriate measures and invests in reliable alternative power solutions for all court stations. As a result, 30 court stations were mapped for installation of green-energy backup. At the end of 2023/2024 reporting period 19 stations had been completed.[390]

18.3 Impact of the use of Technology in the Judiciary

36. The impact of the use of technology continues to leave an indelible mark on the life of Kenyans. Its benefits can be highlighted in the following ways:

i. Interoperability of Systems

37. The Judiciary has already integrated its CTS system with the *Uadilifu* system of the Office of the Director of Public Prosecutions. The integration of the two systems facilitates easy access and retrieval of information between the prosecution and the courts, allowing for ease of access on information regarding the progress and status of criminal cases. Administration of justice for criminal cases have also been done remotely as bail

386 SOJAR 2022/2023 (As above)153.
387 https://judiciary.go.ke/e-filling-is-the-solution-to-efficient-judiciary/#:~:text=The%20next%20frontier%2C%20which%20is,already%20installed%20with%20this%20technology.
388 SOJAR 2022/2023 (As above) 153.
389 SOJAR 2023/2024 (As above) 72.
390 SOJAR 2022/2023 (As above) 153.

and plea taking have been conducted with prisoners on video conferencing platforms.[391] There are ongoing initiatives under the mandate of the NCAJ Steering Committee on ICT to extend this initiative to other justice sector agencies including the prisons and police. This initiative aims at promoting efficiency in the entire justice chain without any agency being left behind in the technology march.

ii. Efficiency and Access to Justice

38. The Case Tracking System (CTS) tracks entire details of a case from initiation to disposition. The CTS has automated registry operations that includes case registration, fee assessment, cause list preparation, court orders generation and performance reports. The CTS has been progressively rolled out and operationalized across all courts and tribunals. A total of 2,133,675 cases had been captured, as at the end of the 2023/2024 FY, with 93 per cent of all court stations utilizing this system.[392]

39. The CTS has had a tremendous impact on the management of court processes at the registries. It has enabled the tracking and management of court cases in real time including file perusal, assessment and payment of court fees. It has also enabled the decongestion of court registries as most services are accessed online.

40. As noted earlier, the e-filing and virtual court system has reduced costs and time associated in bringing a litigant to court.

iii. Open Justice: Transparency and Accountability

41. Technology has enhanced transparency and accountability, and almost all court decisions are published online with the exception of the Lower Courts. Courts publish their cause lists online efficiently informing the public on the schedules for their cases. The Supreme Court produces media summaries for its decisions enhancing accurate reporting of its cases. Technology also enables greater scrutiny of the courts, court staff, and judges including analysis of patterns of decision-making hence enhancing accountability.

18.4 Challenges to the use of Technology in the Judiciary

42. Technological advancements have not come without challenges. Issues such as unequal access to digital tools and the internet, cybersecurity risks and data privacy concerns pose significant hurdles. Additionally, technical glitches and the need for continuous training for judicial officers and litigants highlight the complexities of adopting technology on a large scale. Some of these challenges are addressed hereunder.

i. Digital Divide

43. Equality and inclusion as guiding principles require legal and justice service providers to pay attention to the specific needs and experiences of vulnerable and marginalised groups. People-centred services need to be based on knowledge about who they are designed to service and pay attention to the legal needs of particular groups of individuals. Otherwise, these services run a serious risk of reinforcing barriers for vulnerable groups rather than reducing them.[393]

44. In *Legal Advice Centre t/a Kituo Cha Sheria & 2 others v Chief Justice & 2 others; Law Society of Kenya* (Interested Party) [2021] eKLR the Court addressed itself on the issue of digital divide. Kituo Cha Sheria had sought the reopening of courts with all safeguards to curb the spread of COVID-19 and a declaration that the Chief Justice and the National Council on the Administration of Justice had failed to consider the plight and realities of many Kenyans particularly the indigent, self-representing litigants, the marginalized, those unfamiliar with court procedures, illiterate and semi-illiterate, rural and some urban communities while entrenching the electronic system within the judicial system.

391 https://kippra.or.ke/leveraging-on-digital-technology-in-administration-of-justice/

392 https://judiciary.go.ke/leveraging-on-information-and-communication-technology-ict-to-promote-access-to-justice/#:~:text=The%20digitization%20of%20court%20records,the%20swift%20dispensation%20of%20justice.

393 OECD, *Equal Access to Justice for Inclusive Growth: Putting People at the Centre* (OECD, 2019) available at: https://doi.org/10.1787/597f5b7f-en

45. The Court held that in the peculiar circumstances of COVID-19, adequate public participation could not be undertaken to address the issues raised in the petition. It also took judicial notice that Virtual hearings enables litigants' access to justice and that physical court hearings could also be allowed depending on the nature of the matter. The Court however found that the 1st **and 2nd Respondents had violated the Petitioners' and the Kenyan public legitimate expectation by failing to implement initiatives and** programmes aimed at ensuring that ordinary members of the public seeking Court services, especially those who may not have access to the necessary technological infrastructure, or are unrepresented and unfamiliar with Court procedures. Further, that they had violated the legitimate expectation created that the Judiciary would provide certain ICT support and facilitation within reasonable time to improve access of common man to Judicial services**.**

46. The Judiciary appreciates the need to include a range of possible service types and strategies to employ or adapt to meet the particular legal needs of vulnerable groups. In addressing this challenge, the Judiciary has increased the number of courts within each county and expanded internet connectivity. The Huduma Kenya Secretariat (HKS) and the Judiciary have also collaborated to improve access to judiciary services by establishing service desks in Huduma Centres. The pilot phase started on 29th January, 2024 in Nairobi GPO, City Square, Makadara, Kibra, Eastleigh, and Kiambu. Phase II which is set to be rolled out soon will cover all the other 45 counties. The Judiciary also appreciates the need to make legal information available in a number of languages and in a range of accessible formats.

ii. **Misinformation and Disinformation**

47. Judicial decisions are now easily accessible and readily available to the public. There is therefore the resultant and expected rise in misinformation about such decisions. Individuals or groups may represent or selectively interpret court rulings to suit their narratives, potentially undermining public trust in the judiciary. The Judiciary has adopted proactive measures through issuance of media summaries of their decisions, public engagements and training programs to ease this increasingly dangerous trend. These initiatives demonstrate the judiciary's commitment to countering misinformation while promoting informed public discourse on legal matters. This balance also ensures that transparency enhances trust rather than erodes it.

iii. **Cyber Bulling and Harassment**

48. Associated with misinformation, cyberbullying and harassment has been on the rise as relates to the decisions of the courts and the person of the judges. A judiciary-specific public relations office is recommended to counteract misinformation and maintain public trust.

iv. **Financial Barriers**

49. The judiciary has faced financial barriers in equipping courts countrywide with the necessary ICT infrastructure to make the uptake a success. Judicial officers point towards connectivity challenges, especially for rural courts, as a significant barrier to implementing cloud-based solutions. These tools cannot be leveraged if a courtroom lacks stable electricity and reliable internet connectivity.

18.5 **Advanced technology for the modern Judiciary**

50. The Judiciary's primary objective is to ensure that technology is designed with the end user in mind, and that it is inclusive and accessible to all. However, challenges such as cybersecurity, digital literacy, and infrastructure development must be managed effectively to fully realise the benefits of technology in the Judiciary.[394]

51. The next frontier, which is work in progress, is enhancing our Court Recording and Transcription System (CRTS) through which we aim to achieve full audio and video recording of court proceedings and ultimately quality transcription in all courts. This will include using tools, such as Artificial Intelligence, which transcribes the evidence captured to create a high-quality, verbatim transcript that is securely delivered on time.

52. The Judiciary is also working to integrate and inter operationalize the justice sector agencies, including the ODPP, the Police, the Prisons, Probation and Aftercare Services, Children's Department, amongst others, to

394 STAJ Blueprint (As above) 24.

realise the goal of ensuring that the e-filing system is fully integrated and operational within all our institutions.

53. The risk of an increase in reliance of judicial officers and advocates on AI tools like Chat GPT, which processes information based on data parameters to generate responses underlines the essential need to verify AI generated information. While not necessarily a bad thing, there is urgent need for training of judicial officers on the use and application of AI tools; issuance of guidelines to regulate the use of AI including selection of AI models and ensure the respect for fundamental rights (AI should not interfere with the exercise of the right to access to justice and the right to a fair trial). [395]

54. The Judiciary will also work to ensure it secures the Judiciary cyber space and addresses itself to privacy and data protection. This includes the regulating of the management of AI tools from its generation, utilization and continuous management. The Judiciary will equally enhance its capacity to detect unauthorized access and misuse of data, especially by third parties. An Integrated Security Management Information System (ISMIS) will be developed and deployed to secure all access levels for a single sign-on digital access for the entire Judiciary cyberspace. This will also encompass proactive engagement with the public to enhance understanding and support of Judiciary's initiatives while addressing privacy and security concerns. [396]

18.6 Conclusion

55. The advent of digital technology offers enormous potential to broaden access to justice. The Judiciary has been proactive in embracing technology in all its systems. The application of technology in the justice sector, including virtual courts, e-filing systems, and case tracking system has been transformative but must all involve all agencies at almost equal level if it is to be useful and efficient.[397]

56. The Judiciary is actively addressing identified challenges, focusing on solutions like expanding internet access, strengthening cybersecurity measures, and conducting capacity-building programs. Safeguarding the e-filing system against cyberattacks and enhancing data protection will be critical in upholding the integrity of virtual courts. These efforts are geared toward ensuring that technological advancements fully align with the judiciary's commitment to justice and service delivery for all Kenyans.

57. The next frontier of the Judiciary will see modern technology utilized in the court rooms for efficiency, transparency and accountability. Recognising the double-edged nature of technological progress, the Judiciary shall remain committed to navigating through the complexities of emerging digital tools while stemming and safeguarding the fundamental human rights. The focus will therefore have to shift to harvesting innovations to overcome existing challenges and proactive management of the ethical and legal implications of such technological progress. The Judiciary will equally direct its efforts at tackling concerns relating to the potential of digital exclusion in access to justice. Continuous trainings and capacity building of judicial officers and litigants on ICT also forms part of the strategy to ensure seamless delivery of judicial services.

395 See for example Ethical charter on the Use of Artificial Intelligence in judicial systems and their environment. Adopted at the 31st plenary meeting of the CEPEJ (Strasbourg, 3–4 December 2018) available at: https://rm.coe.int/ethical-charter-en-for-publication-4-december-2018/16808f699c

396 As per panelist at the Supreme Court @12 conference (Panel intervention 7) The judiciary needs to consider and AI policy and guidelines, a cyber-security policy, privacy notices, and the obligation of staff with regards to data.Available at: https://www.youtube.com/watch?v=MJoiaj-dY1p4&t=15603s

397 https://judiciary.go.ke/leveraging-on-information-and-communication-technology-ict-to-promote-access-to-justice/#:~:text=The%20Judiciary%20has%20been%20proactive,innovation%20in%20Kenya's%20justice%20sector.

Crisis and Forced Migration in the Horn of Africa

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(This paper was presented at the 'Online Conference on Crisis and Forced Migration: Manifestations of Power in a Changing World', held between 2nd and 4th November 2022)

20.1 Introduction

1. Climate change is one of the critical challenges facing the international community today and its impact is no longer scientific conjecture, but a lived reality. Rising temperatures and sea levels, desertification, and an increasing number of related disasters are changing the environmental landscapes. Its effects pose innumerable challenges to states, individuals and communities, overstretching many societies' adaptive capacities leading to forced internal and cross-border migration.

2. While predictions vary, World Bank Groundswell estimates that by 2050, the number of people forced to migrate due to climate change will be approximately 216 million, with 86 million being from Sub-Saharan Africa.[399] About 24 million of these migrations resulted from 'sudden onset' weather events, for instance, flooding and forest fires. 'Slow onset' weather events such as desertification, sea level rise and air pollution have also contributed to increased migration in sub-Saharan Africa.[400] The International Organization of Migration (IOM) has in that regard estimated that 13.2 million people were forcefully displaced in East Africa and the Horn of Africa, due to climate change and conflicts in 2021.[401]

3. The impact of climate change in the East and Horn of Africa has been severe. The lack of rain for four consecutive seasons has left millions of people grappling with the worst drought in forty years. As a result, the situation has led to many deaths in Somalia, Ethiopia and Kenya. Approximately more than 18 million people are also at risk of famine and hunger in the region. Likewise, floods and landslides have wreaked havoc in South Sudan, Uganda and Burundi, destroying entire villages and homes, negatively impacting agriculture and affecting the peoples' income and livelihoods. The climate change crisis has therefore forced people to migrate within their countries and across borders increasing the humanitarian need for the displaced. This has placed immense pressure on host countries such as Kenya and Uganda.

4. The dire situation in the region as described above led to the signing of the Kampala Ministerial Declaration on Migration, Environment and Climate Change on 29th July 2022 by Ministers from Burundi, Djibouti, the Democratic Republic of Congo, Eritrea, Ethiopia, Kenya, Rwanda, Somalia, South Sudan, Tanzania, Uganda, Senegal, Egypt and Algeria. The purpose of the Declaration is to bring together nations across East and Horn of Africa to prioritize, respond, and galvanize global support to deal with the harsh effect of climate change on human mobility.[402]

5. Despite witnessing an unprecedented number of climate migrants across the globe, the international community and regional communities are not well-equipped to deal with the crisis. The global community has also not explicitly formulated a protection framework to address the plight of climate change migrants and this state of affairs has caused untold suffering to climate change migrants worldwide. However, African climate change migrants have suffered the most although African countries account for the smallest share of global greenhouse gas emissions at just 3.8% in contrast to China's 23%, the United States of America 19% and 13% in the European Union.[403] Most African countries nonetheless lack adequate resources to deal with climate change effects which hampers their response to the calamities and hosting capacities.

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398 Justice of the Supreme Court of Kenya.

399 The World Bank, 'Climate Change Could Force 216 Million People to Migrate Within Their Own Countries by 2050' available at: https://www.worldbank.org/en/news/press-release/2021/09/13/climate-change-could-force-216-million-people-to-migrate-within-their-own-countries-by-2050 accessed on 26 October 2022

400 John Podesta, *The Climate Crisis, Migration, and* Refugees (Brookings Policy Brief, 2019).

401 Tsion T. Abebe, 'Forced Displacement Trends and Responses in the Horn, Eastern and Great Lakes Region: Overview of the Decade' Paper presented at the 70th Anniversary of the 1951 Refugee Convention.

402 International Organization for Migration, *New Ministerial Declaration on Migration, Climate Change & Environment is endorsed by Presidents and Ministers from the East and Horn of Africa* (2022) available at: https://eastandhornofafrica.iom.int/news/new-ministerial-declaration-migration-climate-change-environment-endorsed-presidents-and-ministers-east-and-horn-africa-kampala-uganda

403 CDP, *CDP Africa Report: Benchmarking Progress Towards Climate Safe Cities, States and Regions* (2020).

6. This paper seeks to examine climate change-forced migration in the Horn of Africa. It will also interrogate the legal barriers to protection for climate change migrants under the current international and regional refugee law regimes, and also address action taken to address the plight of climate change migrants.

20.2 The Concept of Climate Migration

7. Climate Migration is a component of 'environmental migration' where migration is specifically attributed to ecological changes associated with human mobility related to sea-level rise, drought and desertification or sudden disasters such as floods and cyclones.[404] However, climate change on its own does not directly displace people or cause migration. It produces environmental effects which exacerbates current vulnerabilities that make it difficult for people to survive hence migration.[405]

8. Whereas migration as a response to climate change is not new, the anticipated scope of climate-induced displacement is unprecedented. The discourse on climate migration gained momentum in 1990, with the International Panel on Climate Change predicting that the greatest single impact of climate change would be on human migration, with millions of people displaced by shoreline erosion, coastal flooding and agricultural disruptions.[406] The Office of the United Nations High Commissioner for Refugees (UNHCR), shows that an annual average of 21.5 million people have been forcibly displaced by weather-related events since 2008.[407] It estimates that more people will be displaced by climate change in future. UNHCR also postulates that it has become increasingly challenging to distinguish climate migration and other related phenomena because of the combined impacts of conflict, environment and economic pressures.[408] The combined factors that trigger forced migration also makes it difficult to define and characterize climate change migrants.

20.3 Who is a Climate Change Migrant?

9. There is no legal or universally accepted definition of the term climate change migrant, creating debate and semantic battles around the legal status of those fleeing the adverse effects of climate change- those who cannot be called refugees, as their status is not recognized under the existing 1951 Refugee Convention. However, IOM defines climate change migrants as:

"Persons or groups of persons, who for compelling reasons of sudden progressive changes in the environment that adversely affect their lives or loving conditions, are obligated to leave habitual homes, or chose to do so, either temporarily or permanently, and who either within their country or abroad".

10. Similarly, Lauren Nishimura defines climate change migrants as those whose movements are triggered, in part or exclusively, by the effects of climate change. She postulates that multiple factors affect the decision to migrate and that climate change is one of many drivers of migration to trigger assistance. Furthermore, she argues that doing away with the need to link migration exclusively to climate change addresses the conceptual concerns and empirical issues created by focusing only on climate change causation. Nishimura further opines that such understanding accounts for other socio-economic factors caused by climate change.[409]

11. This paper agrees with the definition proffered by Nishimura on the ground that in the Horn of Africa, the effects of climate change cause conflicts, which sometimes results in displacement. Therefore, the definition of climate change migrants should not only focus on the direct climate change effects as the cause of migration but interrogate other factors that are indirectly linked to migration as a result of climate change.

20.4 Defining environmental refugee

12. Climate change migrants have also been referred to as environmental refugees. The term environmental refugee

404 Benoit Mayer, *The Concept of Climate Migration: Advocacy and Its Prospects* (Edward Elgar Publishing, 2016).
405 International Organization for Migration, *Migration, Environment and Climate Change: Assessing the Evidence* (IOM, 2009).
406 International Organisation for Migration, *Migration and Climate Change* (IOM, 2008).
407 Sean McAllister, 'There Could be 1.2 billion Climate Refugees by 2050. Here's What You Need to Know (2022) Zurich Magazine, October 23, 2024.
408 Statement by Mr. Antynio Guterres, United Nations High Commissioner for Refugees, United Nations Security Council Briefing "Maintenance of International Peace and Security: "New Challenges to International Peace and Security and Conflict Prevention" 23rd November 2011.
409 Lauren Nishimura, 'Climate Change Migrants: Impediments to a Protection Framework and the Need to Incorporate Migration into Climate Change Adaptation Strategies' (2015) 27 *International Journal of Refugee* Law 107.

was first popularized by Lester Brown in the 1970s but is generally attributed to Essam El-Hinnawi. Like climate change migrants, there is no universally accepted definition of an environmental refugee. However, several attempts have been made to define the same. Essam El-Hinnawi on his part defines environmental refugees as:

"All those people who have been forced to leave their traditional habitat, temporarily or permanently, because of a marked environmental disruption (natural and/or triggered by people) that jeopardized their existence and/or seriously affected the quality of their life."[410]

13. Similarly, Jodi Jackson defines environmental refugees as 'those people temporarily displaced due to local environmental disruption, those who migrate because environmental degradation has undermined their livelihood or poses unacceptable risks to health and those who resettle because land degradation has resulted in desertification or because of other permanent changes in habitat'.[411]

14. Myers et al. offer an even more inclusive definition of an environmental refugee. They state:
"Environmental refugees are persons who can no longer gain a secure livelihood in their traditional homelands because of environmental factors of unusual scope, notably drought, desertification, deforestation, soil erosion, water shortages and climate change, also natural disasters such as cyclones, storm surges and floods. In the face of these environmental threats, people feel they have no alternative but seek sustenance elsewhere, whether within their countries or beyond and whether on a semi-permanent basis". [412]

15. Because of the fact that most environmental refugees are forced to leave their homes to seek refuge elsewhere from factors that are most of the time beyond their control, the appropriate term to use is environmental refugee or climate refugee as opposed to climate change migrant because the term 'migrant' connotes voluntary movement.

20.5 Understanding the nexus between climate change and migration in the Horn of Africa

16. Climate change affects Africa disproportionately, yet it contributes the least to climate change. The continent is already facing a wide range of impacts including increased drought and floods. In the near future, climate change will contribute to decreases in food production, floods and inundation of its coastal zones and deltas, spread of waterborne diseases and risk of malaria, and changes in natural ecosystems and loss of biodiversity. The frequency and intensity of drought has worsened in some parts of Africa despite accounting only for 2-3 per cent of greenhouse gas emissions.[413]

17. It was projected by the International Panel on Climate Change (IPCC, 2007) Fourth Assessment Report that the East and Horn of Africa will be one of regions of the world to be adversely affected by climate change. The Horn of Africa, which consists of Ethiopia, Djibouti, Somalia, Eritrea, Uganda, South Sudan, Kenya and Sudan, has thus suffered severe droughts and flooding triggering, forced migration since the 1980s and is one of the world's worst conflict-prone and fragile regions. There is no doubt therefore that effects of climate change have worsened an already dire situation.

18. The International Federation of the Red Cross estimates that between 2018 and 2019, internally displaced persons in Ethiopia were 2.4 million. Most climate migrants in the Horn of Africa do move internally within their countries. However, there are also cross-border migrations from migrants to countries within the Horn of Africa due to geographical proximity and partly because climate change migrants are not considered refugees.[414] For, instance, in 2011 millions of Somalis were forced to migrate to Kenya and Ethiopia due to drought. In 2017, approximately 943,000 Somalis, 423,914 Ethiopians and 39, 256 people were displaced by drought.[415]

410 Essam E. Hinnawi, *Environmental Refugees* (UNEP, 1985).
411 Jodi L. Jacobson, 'Environmental Refugees: a Yardstick of Habitability' (1988) 8 *Bulletin of Science, Technology and Society* 257.
412 Norman Myers, et al, *Environmental Exodus: An Emergent Crisis in the Global Arena* (Climate Institute, 1995).
413 United Nations Facts Sheet on Climate Change, 'Africa is Particularly Vulnerable to the Expected Impacts of Global Warming' available at: https://unfccc.int/files/press/backgrounders/application/pdf/factsheet_africa.pdf
414 UNHCR, *Climate Change, Vulnerability and Human Mobility: Perspectives of Refugees from the East and Horn of Africa* (UNHCR, 2012).
415 Office for the Coordination of Humanitarian Affairs (OCHA), *Horn of Africa: Humanitarian Impacts of Drought* – Issue 11 (3 November 2017). Relief Web (2017). Retrieved from https://reliefweb.int/report/ somalia/horn-africa-humanitarian-impacts-drought-issue-11-3- november-2017.

19. The nexus between climate change and forced migration is a product of closely interconnected and intersectional factors. Climate and other environmental factors cannot be isolated from the many social, economic and political factors that spur conflict or lead people to migrate. Climate change does compound these pre-existing vulnerabilities leading people to migrate.[416] There have been global concerns regarding the social and economic impacts of climate change, especially in developing countries that lack the institutional, technological, financial and economic capacity to combat the impacts. Governments in almost all states in the Horn of Africa lack the ability to deal with the effects of climate change. Thus, climate change undermines the capacity of countries to respond to and mitigate its effects. Both under domestic and international law, states are obligated to cushion citizens from social, economic and political disruptions. This obligation requires states to put in strategies to protect vulnerable families in case of floods, drought, earthquakes and famine. Climate change, however, increases the frequency and scale of these catastrophes, thus overrunning state response systems.

20. Due to limited resources, especially in Africa, the state can only play a minimum role in climate change response. Accordingly, vulnerable families unable or unwilling to obtain help from the state often opt to move to other states to seek protection. In this regard, large-scale migration of families and individuals becomes a product of the state's incapacity to respond to climate change. Furthermore, states such as Somalia and Sudan do not necessarily have control of the whole of their territory due to either resource capacity or rebellion. Thus, the inability of these states to exercise control over their territory often creates a suitable environment for terrorist groups, kidnappers and other armed non-state formations. The proliferation of these groups in turn lead to forced migration as people escape harsh rules and deprivation imposed by the non-state actors.

21. Climate change also causes ethnic conflicts as communities escape increased desertification. The relationship between climate change, increased desertification and droughts cannot therefore be over-emphasized. As the frequency and intensity of droughts increase, famine also becomes more severe and pastoralist communities are thus forced to move away from their local habitation into areas with pasture and water. Coupled with the fact that these areas are more often than not already inhabited, pastoralists movement often leads to conflict with other communities. The net effect of these conflicts is the displacement of populations and communities end up either internally displaced persons or asylum seekers in neighbouring countries.

22. Climate change also causes drought and disrupts food systems resulting in famine. Although food is characterized as a right under international law, food scarcity has become a protracted problem among countries in the global south, specifically in the East and Horn of Africa. Food scarcity in itself compels families and individuals to move in search of food both for themselves and their animals. Although this is often considered a temporary measure, the prolonged nature of climate-induced drought often makes it less likely for families to return home. The disillusionment associated with the loss of food and livelihood causes increased migration both within and outside the country of habitual residence.

23. Climate change inevitably causes economic migration as people move away from their habitual residence to seek alternative livelihoods. The 21st century has thus been characterized by an increasing number of economic migrants from the Horn of Africa seeking opportunities in Europe. Although these migrants often move as individuals and not groups, they end up along European coastlines as groups from different countries. Their asylum claims have often been contested on the basis that they are economic migrants and not refugees. Worse still, climate change disrupts rural economies leading to loss of jobs and all sources of livelihoods and thus worsening poverty. Poverty-induced migration as a consequence of climate change has thus become one of the main sources of economic migration.

24. Climate change in addition causes protracted displacement. All countries in the Horn of Africa are dotted with refugee and internally displaced persons' camps. These camps date from postcolonial civil wars that caused people to move from Somalia, Sudan, South Sudan and Democratic Republic of Congo. Though peace has been restored in some parts of these countries, attempts at voluntary repatriation have been undermined by climate change which has caused increased desertification in their countries of origin. Refugees are thus unwilling to go back home, not necessarily due to conflict but due to disruptions caused by climate change which have made their original homes inhabitable due to lack of water and pasture. This reality has made them continue to stay in the camps and resist repatriation or seek resettlements.

416 Sara Vigil, et al, *Exploring the Environment-Conflict-Migration Nexus in Asia* (Danish Refugee Council, 2022).

25. Climate change has also aggravated the conflict between refugees and host communities. Although international law obligates states to support refugee communities, it does not put an equal obligation on states to support and protect host communities in the same circumstances although of course this remains a national state obligation. However, since most camps are located amongst deprived populations, a situation worsened by climate change that has extinguished local food and production systems, locals are compelled to fight for relief food and other services with refugees. The competition and hostility between host communities in Kakuma and local Turkana herders in Kenya is a case in point. Hostilities and competition between refugees and host communities have undermined integration efforts and worsened state hostility against refugees. Some countries like Kenya have therefore become increasingly unwilling to accept additional refugees and have even tried to close camps and repatriate refugees to their countries which exercise has largely failed.

26. Although climate change plays an essential role in migration in the Horn of Africa, it is not the primary cause of movements. Political unrest, conflicts and poverty play the biggest role in migration. Numerous studies focused on examining the nexus between climate change and human migration depict that climate change is just a catalyst for mass migration in the Horn of Africa.

27. Kenya is one of the major destinations for migrants in the Horn of Africa. Somalis represent the highest number of refugees and migrants hosted in Kenya followed by refugees and migrants from other Horn of Africa countries including Eritrea, Ethiopia and South Sudan. The extreme weather conditions experienced in the Horn of Africa has resulted in more migrants seeking refuge. However, since most refugee camps are located in northern Kenya, an arid area which in itself is susceptible to climate change, it is imperative to find better policy and institutional solutions within the Horn of Africa to protect climate migrants whose numbers are increasing every day.

28. According to Victor Nyamori, in 2011 several Somali refugees sought refuge in Kenya due to drought that was ravaging the Horn of Africa. He proffers that life of the climate change refugees in Kenya was harsh and painful. Many Somalis recounted resource related conflicts with communities they encountered on their way to either Kenya, Uganda or Ethiopia. It must be reiterated that a climate change refugee's situation in Kenya is not easy because refugee camps are located in semi-arid or arid thus duplicating their misery. The local communities also face the same harsh conditions causing conflict between the refugees and the locals as they both scrounge for very limited resources for sustainance.[417]

20.6 Gaps in the legal protection of climate change migrants The 1951 Refugee Convention

29. The notion of climate change refugee is comparatively new, despite the fact that international migration in response to environmental factors have occurred throughout human history. The notion of climatic migration began in earnest in the 1990s. Thus, there is no special treaty to protect climate change migrants. This is in part due to the fact that the 1951 Refugee Convention was established majorly in response to Cold War needs, a different context under which it is currently operating, therefore, not a suitable framework for addressing the plight of climate change refugees or migrants.[418]

30. The unprecedented climatic conditions witnessed in the recent past leading to massive internal and cross-border movement has reignited the debate on the suitability of the 1951 Refugee Convention to deal with the persons fleeing persecution based on grounds not provided for in the Convention, for instance, economic refugees, climate change migrants and LGBTIQ related movements although the latter is on a minor scale.

31. The International Convention on refugees as read together with additional protocol 1 defines a refugee as a person who:

"owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it."

417 Victor Nyamori. 'The Legal Protection of Climate Refugees in East Africa' (2020) Policy Commons, available at: https://www.africaportal.org/features/climate-refugee-rights-east-africa-op-ed-victor-nyamori/

418 Jane McAdam, 'Refusing 'Refuge in the Pacific: (De) Constructing Climate-Induced Displacement in International Law' in Etienne Piguet, *et al*, (eds) *Migration and Climate Change* (Cambridge University Press, 2011) 102.

32. The 1951 Refugee Convention provides an understandably narrow definition of a refugee as it requires that a person to qualify as such ought to be fleeing persecution, but climate change refugees flee because of climatic disruptions and so these climatic disruptions cannot per se fall within the definition of well-founded fear of persecution. The 'source of persecution' is also a key factor in determining refugee status. The cause of harm should either be government, a person or groups of persons whom the government is unwilling or unable to prevent from stopping the persecution.

33. In addition, some scholars argue that the danger caused by climate change is indiscriminate and not based on any protected grounds: race, religion, nationality, membership of a particular social group or political opinion, therefore, outside the scope of protection.[419] One of the fundamental tenets of interpreting laws is to interrogate the logic behind the laws. Even though climate change migration was common at the time of drafting the 1951 Refugee Convention as evidenced by its interpretative guides such as the Refugee Convention, 1951: The Travaux préparatoires analyzed with a Commentary by Dr. Paul Weis, the drafters recognized the existence of natural calamities as a factor but did not extend the definition to cover such events. Therefore, climate migration that causes a person to cross an international border cannot in and of themselves ground for grant of refugee status.[420]

34. Although an exception to the rule, refugee law may provide protection to climate change migrants in two cases; first, if the 'source of persecution' requirement can be fulfilled by establishing that a government has not been willing to reduce vulnerability of a group to climatic phenomenon. For instance, a national policy preventing any internal displacement of endangered populations or mistreatment of those who move from an endangered location could be qualified as "persecution," entitling some climate migrants to refugee protection. This condition can also be fulfilled if the government excludes a minority from any protection in face of a natural catastrophe, as the minority members who are discriminated against might be considered to be suffering from persecution by the government. Preventing international humanitarian assistance from being provided to victims of a natural disaster may also be considered as a form of persecution.[421]

35. European Countries such as Finland and Sweden, have granted subsidiary protection to anyone who left their country but who by reason of climatic catastrophe, cannot return to his home country. This is however, an exception to the rule as climate change migrants are generally not entitled to refugee protection under international law.

36. Notably, in 2018, two major international mechanisms moved to recognize the plight of climate migrants. The Global Compact on Refugees is a non-binding legal document emanating from fundamental principles of humanity and international solidarity, and seeks to operationalize the principles of burden and responsibility sharing to better protect and assist refugees and support host countries and communities. It acknowledges that, while not in themselves the cause of refugee movements, climate and environmental degradation and natural disasters increasingly interact with the drivers of refugee movements to cause displacement. It therefore, sets out principles to complement United Nations endeavors to guarantee safe migration and reduction in the factors causing environmental degradation.[422]

37. Also, the Global Compact for Migration is an inter-governmental negotiated agreement, prepared under the auspices of the United Nations covering all aspects of international migration in a holistic manner. The non-binding document was finalized on 13th July 2018. The Compact, which was endorsed by almost all African states, introduces a unique concept of climate migration and encourages national and regional authorities to lead in addressing it. While the Compact does not create new legal entitlements per se, it invites governments to consider creating new visa categories and other forms of assistance for people forced to escape the impacts of floods, earthquakes, droughts, and rising sea levels.[423]

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419 Mathew J. Lister, 'Climate Change Refugees' (2014) 17 *Critical Review of International Social and Political Philosophy* 619.

420 Jeanhee Hong, 'Refugees of the 21st Century: Environmental Injustice' (2001) 10 *Cornell Journal of Law and Public Policy* 323.

421 Benoit Mayer, 'The International Legal Challenges of Climate -induced Migration: Proposal for an international legal Framework' (2011) 22 *Colorado Journal of International Environmental Law and Policy* 357.

422 International Organization for Migration, *Global Compact on Migration* (IOM, 2018).

423 International Organization for Migration, *Global Compact for Migration: Refugee and Migrants* (2017) available at: https://refugeesmigrants.un.org/migration-compact.

The 1969 OAU Convention governing Specific Aspects of Refugee Problems in Africa

38. The 1969 OAU Convention governing Specific Aspects of Refugee Problems in Africa (OAU Refugee Convention) is the main treaty for the protection of refugees in Africa. The definition of a refugee under the OAU Convention extends to persons fleeing events seriously disturbing public order which can possibly be applied to persons fleeing sudden-onset disasters such as floods, droughts, cyclones, earthquakes and rising sea levels. While Ethiopia, Kenya, South Sudan, Sudan and Uganda have ratified the OAU Convention, Djibouti, Eritrea and Somalia have not done so thus compounding mitigating measures, within a legal framework, of climate change movements within the Horn of Africa.

20.7 Climate induced Internal displacement

39. East and Horn of Africa hosted 6.5 million internally displaced persons (IDPs) in the year 2020. By end of 2021, the region hosted about 12 million IDPs.[424] The extreme weather patterns experienced in the region leading to widespread hunger, loss of livelihoods, death in some instances majorly contributed to internally displaced populations.[425][426]

40. States are primarily responsible for the protection of its own when natural disasters like floods, desertification occur causing displacement. Most countries in the Horn of Africa do not have the requisite legal framework to deal with climate change induced migrants. Although there is no international binding law to provide for the protection of internally displaced persons, the United Nations adopted the United Nations Guiding Principles on Internal Displacement which applies to any person or group of people:
who have been forced or obligated to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effect of armed conflict, situations of generalized violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognized State border.

41. Principle 3 bestows upon the state the primary duty and responsibility to provide protection and humanitarian assistance to IDPs. Despite the Guiding Principles placing an obligation on states to prevent, fulfill and protect the rights of IDPs, these principles have had negligible impact on the protection of climate change IDPs if any. This is because, by its nature the protection of IDPs rights is limited to national legislation operating under the auspices of international law.

42. Even though it can be argued that the definition of IDP as provided under the Guiding Principles encompass some elements relevant for the determination of climate change migrants, it is uncertain and ambiguous since it is questionable whether certain climate change effects would be considered a 'natural disaster' for purposes of the Guiding Principles. For instance, while the changes in sea level and acidity certainly are natural and will have disastrous consequences, they may not trigger the illusory protections of the Guiding Principles since their impacts are not immediate, but instead, occur over an extended period of time.[427] Furthermore, given that UNHCR's mandate is limited to the international protection of refugees, climate change IDPs lack a body to monitor and ensure protection of their rights. Moreover, due to its limited resources, the UNHCR has constantly considered that it "does not have a general competence for internally displaced persons" and its intervention is far from automatic.[428]

43. The relevant law for the protection of IDPs in Africa is the Convention for the Protection and Assistance of Internally Displaced Persons (Kampala Convention), which adopts the same definition as that provided for under the United Nations Guiding Principles on Internal Displacement. While Ethiopia, Djibouti, Somalia, Uganda and South Sudan have ratified the Convention, Kenya, Sudan and Eritrea are yet to ratify the Convention.

44. Notably, though Kenya is not a party to the Kampala Convention, it has made tremendous effort in safeguarding the rights of IDPs by enacting the Prevention, Protection and Assistance to Internally Displaced Persons and Affected Communities Act. Just like the United Nations Guiding Principles on Internal Displacement and Kampala

424 UNHCR, 'East and Horn of Africa and the Great Lakes' (2021) available at https://reporting.unhcr.org/ehagl
425 International Organization for Migration, *Climate and Migration in East and the Horn of Africa: Spatial Analysis of Migrants* (IOM, 2021).
426 Suzi M. Rashas, 'African Climate Refugees: Environmental Injustice and Recognition' (2020) 10 *Open Journal of Political Science* 546.
427 Nicole A. Cudiamat, 'Displacement Disparity: Filing the Gap of Protection for the Environmentally Displaced Person' (2012) 46 *Valparaiso University Law Review* 891.
428 UNHCR, *Internally Displaced Persons* (2004) available at: https://www.unhcr.org/4444afce0.pdf

Convention, the definition provided for under the Act is uncertain and ambiguous since it is questionable whether certain climate change effects would be considered a 'natural disaster'. Therefore, the international and regional protection of IDPs does not adequately consider their plight of IDPs. In addition, the non-binding nature of the United Nations Guiding Principles on Internal Displacement does not inspire compliance from member states.

20.8 Complementary protection of climate change migrants

45. The impact of climate change affects people's enjoyment of human rights. Climate change will affect *inter alia* food production, dwelling places, and infrastructure, thereby threatening the right to life, right to adequate food, right to be free from hunger, and right to property among other rights. Failure to protect these rights coupled with the lack of enforcement mechanisms to ensure that these rights are protected contributes to a gap in protection as illustrated above. Thus, general international human rights treaties expanded their scope of protection to extend to situations where *lex specialis* does not adequately protect the rights of human beings. For instance, the International Covenant on Civil and Political Rights (ICCPR) and Convention Against Torture's (CAT)mandate complementarily protects refugees and migrants that do not fall under the criteria set in Article 1A of the 1951 Refugee Convention. This extended protection is known as complementary protection. This paper will discuss certain rights such as the right to life, prohibition from torture, or cruel, inhuman, and degrading treatment in that context.

46. *Non-refoulment* is a well-established principle of customary international law that guarantees that no one should be returned to a country where they would face torture, cruel, inhuman, or degrading treatment or punishment, and other irreparable harm. The principle of *non-refoulment* provides an additional obligation that could be a solution to climate migrants, considering the universal refugee instruments and customary international refugee law. Complementary protection refers to the mechanism to grant international protection to persons who do not meet the established requirements to be considered a refugee in the scope of the 1951 Convention.

47. This principle applies to all migrants, irrespective of their migration status. It becomes very difficult for a climate change migrant to establish that a socio-economic right amounts to inhuman and degrading treatment. However, there are instances where socio-economic forms of harm may trigger the principle of non-refoulment.

48. Also, human rights treaties and their monitoring bodies have often failed to accord the same weight to economic, social, and cultural rights as they have to civil and political rights. A holistic approach to the interpretation of the International Covenant on Economic, Social and Cultural Rights (ICESCR) shows that civil and political rights could have inherent socio-economic elements. [429] Therefore, a treaty guaranteeing civil and political rights could have its norms used as vehicles for the direct or indirect protection of norms of another treaty concerning a different category of human rights.[430]

Right to life

49. The right to life is guaranteed under Article 3 of the Universal Declaration on Human Rights, Article 6 of ICCPR, Article 6 of the Convention on the Rights of the Child, and Article 4 of the African Charter on Human and Peoples Rights. This is an inviolable and non-derogable right that triggers the application of the principle of non-refoulment.

50. The right to life is closely related to other human rights, such as the right to an adequate standard of living under human rights law, including adequate food, clothing, housing, and the continuous improvement of living conditions,[431] and the right not to be deprived of means of subsistence.[432] These rights are necessary components of the right to life. If compromised by climatic conditions such as global warming, it leads to the destruction of people's ability to hunt, fish, gather, or undertake subsistence farming.[433] The UN Commission on Human Rights

429 *Airey v. Ireland* (1979–80) 2 EHRR 305, para. 26.
430 Jane McAdam, *Climate Change Displacement and International Law: Complementary Protection Standards* (UNHRC, 2011) available at: https://www.unhcr.org/4dff16e99.pdf
431 ICESCR art. 11.
432 F. Menghistu, 'The Satisfaction of Survival Requirements' in Bertrand G. Ramcharan (ed.) *The Right to Life in International Law* (Martinus Nijhoff Publishers, 1985) 63.
433 Petition to the Inter American Commission on Human Rights Seeking Relief from Violations Resulting from Global Warming Caused by Acts and Omissions of the United States available online at: http://www.earthjustice.org/library/legal_docs/petition-to-the-inter-american-commissionon-human-rights-on-behalf-of-the-inuit-circumpolar-conference.pdf

observed that the right to life 'encompasses existence in human dignity with the minimum necessities of life.[434]

51. The Human Rights Committee has provided the following criteria apply for violation of the right to life:

- the risk to life must be actual or imminent;
- the applicant must be personally affected by the harm;
- environmental contamination with proven long-term health effects may be a sufficient threat. However, there must be sufficient evidence that harmful quantities of contaminants have reached, or will reach, the human environment;
- a hypothetical risk is insufficient to constitute a violation of the right to life; and;
- cases challenging public policy will, in the absence of an actual or imminent threat, be considered inadmissible.[435]

Cruel, inhuman, or degrading treatment

52. Freedom from torture and cruel, inhuman, or degrading treatment or punishment is guaranteed under Article 7 of ICCPR. The standard approach of the UN Human Rights Committee is to regard these forms of ill-treatment as falling on a sliding scale, or hierarchy, with torture the most severe manifestation. The distinction between torture and inhuman treatment is thus one of a degree. The UN Human Rights Committee considers it undesirable to draw up a list of prohibited acts or to establish sharp distinctions between the different kinds of punishment or treatment; the distinctions depend on the nature, purpose, and severity of the treatment applied. For a climate change migrant to meet the threshold of protection under Article 7 of ICCPR, the impacts of climate change must render survival in a particular location impossible. Notably, the complementary mechanism does not allow pre-emptive movement where conditions are anticipated to be dire.

53. From the above, the threshold for complementary protection for persons not falling under the requirements of Article 1A of the 1951 Refugee Convention is very high. Linking economic and social rights with civil and political rights is arduous. Therefore, complementary protection does not readily offer a solution to climate change migrants.

19.9 Recommendations

1. Advocate for progressive evolutionary interpretation of the principle of non-refoulement to expand the protection offered by the principle to climate change migrants.
2. Establish climate change migrants' specific treaty with an enforcement mechanism to ensure the protection of their rights
3. Encourage durable solutions such as burden sharing to ease the burden of refugee-hosting countries.
4. Continue the conversation on an adequate definition of climate change migrants and environmental refugees and settle obligations of states especially in areas such as the Horn of Africa.

434 Petition to the Inter American Commission on Human Rights Seeking Relief from Violations Resulting from Global Warming Caused by Acts and Omissions of the United States available online at: http://www.earthjustice.org/library/legal_docs/petition-to-the-inter-american-commissionon-human-rights-on-behalf-of-the-inuit-circumpolar-conference.pdf

435 McAdam, *Climate Change Displacement and International Law: Complementary Protection Standards* (As above n 435).

"Nuts and Bolts" of Working in a Multi-Member Bench: Best Practices

Hon. (Mr.) Justice William Ouko, FCIArb, CBS, SCJ[436]

(This paper was presented during the induction of Court of Appeal Judges' on 22nd September 2022 at Sarova Woodlands, Nakuru; and during the Supreme Court Judges' retreat on 17th January 2023 at Mt. Kenya Safari Club in Nanyuki)

21.1 Collegiate Court

1. The question this paper seeks to answer is how collegiate courts make their decisions. The answer lies, first in understanding what a collegiate court is. But what is collegiality to begin with?

2. The Oxford Dictionary defines collegiality as *characterizing collaboration among colleagues: companionship and cooperation between colleagues who share responsibility.*

3. Judges are on a daily basis involved in resolving conflicts in an adversarial system, like ours; a system that pits people against each other so firmly and directly, sometimes accompanied by strong emotions. Problems will occur when strong advocacy is combined with uncivil personal attacks. Lawyers against each other, and lately lawyers against judges, and sometimes judges against each other. When judges disagree publicly, the justice system as a whole is weakened, its integrity compromised, and ultimately the confidence of those who serve in the system is lost.

4. Collegiality is therefore a process that helps to create the conditions for principled agreement, or disagreement by allowing all points of view to be aired and considered. It allows judges of differing perspectives to communicate with, listen to, and ultimately persuade one another in a constructive and legitimate manner. Collegiality is lively, tolerant, thoughtful debate; it is the open and frank exchange of opinions; it is comfortable controversy; it is mutual respect earned through vigorous exchange. It is knowing my fellow judges so well, and respecting their intellects and work patterns so much, that I am willing to listen and consider carefully their perspectives on each legal issue that we confront.

5. In an un-collegial environment, judges tend to have a predetermined outcome and therefore adopt unalterable positions on the issues before the court, especially in complex and highly controversial cases. Sharp divisions in a collegiate court can easily give rise to 'camps' among judges.

6. Collegiality does not of course mean that everyone is friends with everyone else, or that judges never disagree. In a system where judicial independence is considered a constitutional principle, the right to disagree is fundamental. But it must be exercised in support of the rule of law, and not as a pretext for personal attacks against those who disagree with us.

7. Judges, as members of the Judiciary, have a common interest; to get the law right. And to achieve this, we must be willing to listen, to persuade, to be persuaded and to accommodate all in an atmosphere of civility and respect.

21.2 So what is a collegiate court?

8. In one of her many lectures on collegiality of her Court, Justice Ruth Bader Ginsburg of the US Supreme Court Judge, said;

> "Collegiality is crucial to the success of our mission. We could not do the job the Constitution assigns to us unless we worked well together."[437]

9. At her funeral service on 23rd September, 2020, one of her colleagues also described that relationship saying that;

> "The nine justices, who sit in a horizontal array with the most senior justices grouped in the middle, flanked by their more junior colleagues, span the ideological spectrum—from conservative

436 Justice of the Supreme Court of Kenya.

437 Jack Wang, 'Justice Ruth Bader Ginsburg Reflects on Supreme Court's Unchanging "Collegiality"' (Harris School of Public Policy, University of Chicago, 9 September 2019) < available at https://harris.uchicago.edu/news-events >

to liberal. Yet, despite sharp disagreements on legal issues, their sense of collegiality and respect for the institution shine through in their interactions with one another".

10. Judges in a collegiate court are equal in rank, each with one vote, and work together as colleagues in a joint effort towards achieving appropriate outcome as a court.

11. In contrast, trial judges sitting alone have been described as exercising monarchial powers over their own courtrooms. They are like the King in King Louis XVI film: ***"I****t's good to be the king. What the king wants, he gets; he has only to say the word".*[438]_

12. A trial judge, solo in the courtroom, is mistress or master of all the processes and cases before her or him. Some judges upon elevation from the High Court to the Court of Appeal would lament over the loss of freedom. Judges in a collegiate court are joined at the hip. Your speed, time and style are not your business.

13. The establishment of multiple member courts has been justified on the basis that they encourage greater deliberation by judges; and also because they lend greater dignity and more acceptance of decisions of the court since three or more judicial minds, deciding collectively, would lead to a better result than just one judge. Parties aggrieved by court decisions will always crave to challenge them in the highest level of the court system available.

14. Judging is treated as though it were a solitary act and not a process. Parties are only always interested in the outcome; the final pronouncement. It is the process that I will be dealing with in this paper. Appellate adjudication is essentially a group process.

21.3 The Practice in the Court of Appeal

Composition of the Court of Appeal

15. Article 164 (1) of the Constitution[439]. The Court of Appeal shall consist of the number of judges, being not fewer than twelve, as may be prescribed by an Act of Parliament. Section 7 of the Judicature Act [440] fixes the full complement of the COA at 70 Judges (previously the full complement was 30 Judges).The Court is deemed to be duly constituted despite any vacancy in the office of the President of the Court or other judge. See: Section 4 of the Court of Appeal (Organization and Administration) Act.[441] (CA (O&A) Act)

Quorum of the Court of Appeal

16. By Section 5(3)(i) of the Appellate Jurisdiction Act[442] the Court is properly constituted for the purpose of any final determination of a matter by a bench comprising *an odd number of Judges not being less than three (3).*

17. Therefore, there can be a bench of 3, 5, 7, 9 or more depending on the total number of Judges of Appeal at the time and as long as the number is uneven. The purpose of having an uneven number in any bench is to *avoid a stalemate in decision-making.*

18. Special benches (or what is referred to in section 13 of the CA (O&A) Act as extraordinary benches can be constituted in the following circumstances: See: *Multichoice (Kenya) Ltd vs. Wananchi Group (Kenya) Limited, Communications Commission of Kenya & Kenya Broadcasting Corporation.*[443]
    i) Where the Court is being asked to *depart from one of its previous decisions; Abu Chiaba vs. Electoral Commission of Kenya (ECK) & 2 Others*[444] where the Court of Appeal was invited to over-rule its earlier 5 Judge bench decision in *Kibaki v. Moi* [445] on the question of personal service.
    ii) Where the Court is requested to *review its conflicting opinions;* and

438 Mel Brooks, *History of the World, Part I* (20th Century Fox, 1981).
439 Constitution of Kenya, 2010.
440 Judicature Act, Cap. 8, Laws of Kenya.
441 Court of Appeal (Organization and Administration) Act, Cap.9, Laws of Kenya.
442 Appellate Jurisdiction Act, Cap. 9, Laws of Kenya.
443 *Multichoice (Kenya) Ltd vs. Wananchi Group (Kenya) Limited, Communications Commission of Kenya & Kenya Broadcasting Corporation* [2020] KECA 633 (KLR).
444 *Abu Chiaba vs. Electoral Commission of Kenya (ECK) & 2 Others* [2005] eKLR.
445 *Mwai Kibaki vs Daniel Toroitich Arap Moi* [1999] KECA 158 (KLR).

iii) Where *a novel or weighty issue of law is being raised e.g. Republic vs. Tony Gachoka & Another*[446] (7 Judges) on the question of contempt of court proceedings where the respondents had published defamatory articles against the judiciary); *Justice Kalpana H. Rawal vs. Judicial Service Commission & 3 others*[447] (7 Judges) on the interpretation of Article 167 of the Constitution[448] in respect of the retirement age of judges who were in office at the effective date of the Constitution (74 or 70 years) and the *BBI case* that deal with the broad issue of the power and process of amending the Constitution..

19. There are, however, applications that a single judge may determine, that is: certificates of urgency (Rule 47(2) Court of Appeal Rules); extension of time (Rule 4 Court of Appeal Rules) and settling terms of the order (Rule 34(3).

20. The full bench of 3 Judges, as a general practice hears all other applications and appeals.

Selection of the benches of the COA

21. Over the years, until 2012 the Court of Appeal was domiciled in Nairobi with circuit sessions once or twice in a year to Mombasa, Kisumu and Nyeri. It was finally decentralized to Malindi, Kisumu and Nyeri in 2012, with sub-registries in some parts of the country.

22. The senior most judge in each of those Court stations would be designated *Presiding Judge.* At Nairobi the Court has a Presiding Judge for Civil and Criminal Divisions. Outside Nairobi the benches are more or less permanently constituted. (In 2020 the sittings outside Nairobi were suspended due to shortage of Judges and then Covid-19).

23. In Nairobi the *President has full discretion* to empanel the benches, without reference to anybody (not even the Chief Justice). See Section 13(1)(b) of the Court of Appeal (Organization and Administration) Act. The role of allocating cases and constituting benches is entirely ministerial.

24. In empaneling the benches, the President takes into consideration some of the following factors:
i) Whether the Judge *previously determined the matter in the High Court or lower court.*
ii) Whether the Judge previously *handled the matter as counsel.*
iii) Whether the *Judge has indicated that he/she is in any way conflicted* and is therefore recused from hearing the matter. Recusals raised by parties or advocates can be abused through forum shopping. Some Judges also too often resort to this practice when they want to avoid sitting in controversial matters.

25. Occasionally the President may take into consideration *the presumed ideological leaning* of a judge (*Non-Governmental Organizations Co-Ordination Board vs. EG & 5 others*[449] *(LBGTIQ persons case- Waki, Nambuye, Koome, Makhandia & Musinga JJA),* ethnicity, gender, flair, complexity, workload and schedules of the Judges.

26. There are 2 reform questions on the composition of benches in the Court of Appeal that have lingered on for some time; the introduction of a software for automated random empaneling of benches; and whether it is healthy to have permanent or fixed benches. Personally, on the second issue, I believe that, given the interpersonal dynamics of multi-member courts, it is healthy to constitute benches differently. The automated empanelment of benches is an excellent proposal.

21.4 What is the Practice in the Supreme Court?

Composition of the Supreme Court

27. The Supreme Court consists of the Chief Justice (President), the Deputy Chief Justice (Vice President) and five other judges, making a total of 7 judges (see Article 163(1)[450]. The Court is, however according to Article 163(2)[451],

446 *Republic vs. Tony Gachoka & Another* [1999] eKLR.
447 *Justice Kalpana H. Rawal vs. Judicial Service Commission & 3 others* [2016] eKLR.
448 Constitution of Kenya, 2010.
449 *Non-Governmental Organizations Co-Ordination Board vs. EG & 5 others* [2019] eKLR.
450 Constitution of Kenya, 2010.
451 Ibid.

properly constituted for the purposes of its proceedings if it is composed of five judges.

Quorum

28. When a bench is constituted the senior-most judge in the panel is designated Presiding Judge. The President [delegated to Vice President] has full discretion to impanel the benches. The role of allocating cases and constituting benches is entirely ministerial.

29. Not having the luxury of numbers, like the superior courts below, the President lacks the leeway and flexibility in empaneling the benches. After all, what choice does one have in impaneling benches from seven Judges? The President of the Court of Appeal, on the other hand, for example would take into consideration the factors earlier highlighted.

Jurisdiction

30. Due to its jurisdictional boundaries, the Supreme Court hears only a limited number of cases each year, many of which involve high profile, controversial, and difficult legal issues. The method by which several judges' opinions are fused in deciding the case before the court, and also in shaping the law of the land, is a decisive moment in the exercise of judicial power.

31. It is no exaggeration to state that apart from the judges themselves, litigants and even counsel do not know the process by which courts arrive at any judicial determination. To them, decision-making, in a multi-member court simply involve judges voting their own views and the outcome depends on the vote.

21.5 Pre-hearing Procedures and Policies in a Multi-member Court

32. There are few instances of pre-hearing conference in the Court of Appeal unlike the Supreme Court, where before all hearings, there is a brief pre-hearing conference.

33. Before post-hearing conference all members of bench of the particular Bench need to fully understand the issues in each file listed for hearing. In the Supreme Court, Bench Memos are an extremely useful device for the pre-hearing conference as they summarize the case, analyze the submissions, and discuss applicable laws and precedent.

34. It is not a good practice to agree on the outcome of the case in advance of the hearing. It is also a good practice not to agree in advance on *who the drafting judge* is.

35. At the Court of Appeal, in the courtroom the presiding judge is flanked on both sides [if 3] by the two judges with the next senior most to the right and the third judge to the left. This arrangement is replicated in the extraordinary benches.

36. At the Supreme Court, in the courtroom the presiding judge is flanked on both sides [if 5] by four judges, according to their seniority; the 2nd senior most judge to the right of the presiding judge, the 3rd to the left, 4th to the right and the 5th to the left. This arrangement is replicated in a bench of the entire court [seven].

21.6 Practice in Court

37. Seek clarification from counsel or parties in an orderly manner. With the permission of the Presiding Judge. Preferably at the close of counsel or parties' submissions.

38. Speak only if you must. Do not say things that are likely to disclose or expose your thinking of the merit or otherwise of the matter.

39. Consultation in the bench be in low tones with microphones off if done in open court or the court may adjourn. In virtual hearings members of the Bench can either adjourn or exchange text messages.

40. All members of the Bench must remain attentive and alert.

41. Avoid annoying things: drinking water loudly; domineering presiding judge/or one of the judges; open display of impatience; contradicting or correcting colleagues or correcting counsel in a disrespectful and demeaning manner.

42. The court or parties frame issues for determination, so the lawyers must structure and limit their oral arguments in line with those issues.

43. The Court must allocate reasonable time for oral arguments [highlights]. In some Supreme Courts, once time is allotted it is cast in stone. Depending on the nature of the case, it is necessary to balance; be flexible but remember also that it makes no sense to allow advocates to present oral arguments that last many hours, or days, as is the case in some jurisdictions, when they have comprehensive submissions on record.

21.7 The Court's Decision- Making Process; Conference & Collegiality in a Multi Member Court

44. Bear the following in mind as you retreat for the post arguments conference.
- A strong collegiality allows the judges to disagree freely and to use their disagreements to improve and refine the opinions of the court, taking into account each judge's independence of mind while acknowledging that appellate judging is an inherently interdependent enterprise.
- It is also the case in many instances that some judges emerge from the conference with different opinions from those they initially held.

45. In order to foster collegiality and a warm working relationship, it is important always to try and build consensus on the outcome and the reasons among the members of the panel.
- Be flexible: your views must never be cast in stone.
- Adjourn the conference for more research, reflection and consideration.
- Strive to be unanimous though there is nothing wrong in having divergent views

21.8 Post Hearing Conference

46. This is the most critical phase of the process. This is where individual patience of a judge and true collegiality of a court is tested. This is also where power of lucid exposition of legal issues is demonstrated.

47. Judges retire to the chambers of the presiding judge to consider the arguments and the outcome. The deliberations are always confidential, to ensure full and open consideration of cases before a panel. This further allows the judges to honestly air their views with one another as they strive for consensus.

48. Deliberations start by getting the opinions of the panel in ascending order, from the junior judge to the presiding judge on all the issues argued. In some jurisdictions, a record of each vote on every issue and on the agreed disposition of a case, is maintained by the presiding judge. It is a good practice for each judge to take written notes during the conference about each case discussed. Those notes must be safely and securely kept. They are useful as reference points once the draft judgment has been circulated by the drafting judge. Record too the agreed outcome.

49. At the Conference it is useful to bear the following in mind:
- Appellate judging is an inherently interdependent enterprise.
- A strong collegiality allows the judges to disagree freely and to use their disagreements to improve and refine the opinions of the court, taking into account each judge's independence of mind.
- It is also the case in many instances that some judges emerge from the conference with different opinions from those they initially held.

50. It is emphasized that in order to foster collegiality and a warm working relationship, it is important always to try and build consensus on the outcome and the reasons among the members of the panel.
- Be flexible: your views must never be cast in stone.
- If need be, and to achieve consensus, adjourn the conference for more research, reflection and consideration.

21.9 Allocation of Drafting chamber

51. If the general tenor of the deliberations and opinions are unanimous and acceptable, as is always the case in the majority of situations, one Judge would be tasked by the presiding judge to generate a draft judgment or ruling for consideration by the rest of the members of the bench. The draft must be headed **"**DRAFT". In assigning drafting judge, equity is paramount. A judge cannot unilaterally demand to draft an opinion on any matter.

52. Normally, the panel counts on the judge who has been assigned to generate a draft to put together a strong opinion that reflects, not only the panel's but the entire Court's view. If in the course of preparing a draft the judge encounters any challenges, she or he may pursue further deliberations with the other panel members for clarification. It is unacceptable for the drafting judge to unilaterally change the agreed outcome without recourse to the rest of the members.

53. In some jurisdictions, the U.S.A, the UK and Canada, there are policies, rules or customs regarding:
- *the assignment of a drafting judge.*
- *how long a drafting judge ought to take to circulate the draft [within 60 days];*
- the period within which member of the bench must respond [Within 24 hours for an average / run- of – mill case or 48 hours or 14 days for heavier cases. If a judge needs to take longer, most judges will send a courtesy memo so stating.] The period will also depend on the level of the court. Apex courts have longer periods because of the binding nature of their decisions.
- how many times in a term should a judge sit and how many opinions can be assigned to a judge in a term.

54. The draft should be circulated in good time for the other members of the bench to have sufficient time to consider before the date for delivery.

55. Judges are expected indeed required to through the draft carefully and meticulously. Remember the final decision will carry all the names of the members of the Bench. Try to be as specific and respectful as possible in your remarks/ corrections. Where proposed changes are substantial it is advisable to meet with the drafting judge to discuss and agree. Where there is no consensus on the draft, a re-conference of members of the Bench should be held.

56. Feedback to the drafting judge suggesting changes must be prompt.

21.10 Judgment of the Court

57. When there is unanimity in a decision, and depending on the type of case, the panel can agree on whether a single judgment with all the names of the judges will suffice [common in most jurisdictions] or they can also adopt what has been called a single lead judgment, where one judge generates a draft in his/her name [Judgment of X,SCJ] and the rest simply do a one-liner agreeing …" I have read, in draft the opinion of judge X with whom I agree" or "I agree with my noble lord X and have nothing useful to add" or add a few lines.

57. There is also a third option, separate but concurring judgment.

Separate Concurring Opinion

58. Separate concurring opinions has become a common question. There are many reasons why a judge would take the trouble to write a separate concurrence judgment. Those reasons include-
(1) to support the majority's result with *additional reasons;*
(2) to *set the factual record straight,* since sometimes the account of the facts proposed by the majority may appear incomplete, incoherent or even misleading;
(3) to record disagreement with the legal rationale used to support the agreed result *(agreement on the outcome but for different reasons);*
(4) to *emphasize a fact* that either went unmentioned or was minimized in the lead opinion; and
(5), finally, to simply *make a record of one's opinion* in an area of the law for the future.

Costs of Separate Writing

58. The leading cost is an obvious one: *it takes time and energy to write separately. Consider the volume and nature of work* in the Court *vis a-vis* the number of judges. (one liners 'I have considered in draft the judgment of X JA...I agree..." -as a form of accountability will suffice, unless of course in ground-breaking decisions).

59. It is emphasized that in general, and although there are certainly no fixed rules, the prevailing view appears to be that it is only if a concurring judge has something significant to add that a judge should write his or her own concurring judgment. It has been argued that in concurring judgments, it is sometimes extremely hard to ascertain the ratio of the decision due to the number of different views expressed in different judgments, even though all the judges ultimately come to the same conclusion. Judgment-Writing: A Personal Perspective: Annual Conference of Judges of the Superior Courts in Ireland- By Lord Burrows, Justice of the Supreme Court of the United Kingdom[452]; and an analysis of our separate judgments in BBI – basic structure- by Gautam Bhatia demonstrates the difficulty.[453]

60. I very humbly agree that it is not easy to extract the ratio in separate concurring judgments, save to add that the approach is also time-consuming and can be off-putting for a reader who has to wade through several judgments instead of a single definitive judgment. In general, therefore I recommend the production of a single (unanimous or majority) judgment as a better goal, although there will remain cases where that is not possible and may not even be desirable.

Dissenting Opinions

i) ***Practice in the Supreme Court***

61. In deciding cases, the judges who serve on a panel are not obliged to be in agreement on the outcome of a case. They are not robots. I reiterate that under the Constitution all seven judges were appointed on account of their experience, high moral character, integrity, impartiality, independence and intellect. They are very independent thinkers, quite confident in their own views. Where we disagree on the outcome, we have a responsibility to dissent, and to explain why. To do otherwise would be to abdicate our judicial responsibility, because to dissent is to demonstrate the democratic and autonomous nature of the work of a judge. All the judges have been making decisions either as trial or appellate judges, hence they are free to write separate concurring or dissenting opinions, as they see fit. But a judge's individual decision in every case must be made in good faith and according to his or her best judgment and conviction. That opinion must, in turn be respected by those who do not agree with it.

62. Whenever there are dissenting voices in particular cases, it is very easy for the general public [or even some members of the bench] to claim that our decision-making is unduly influenced by other factors. Yet dissents are not necessarily an indication that decision-making has been inappropriately influenced. Dissenting opinions are not invariably evidence of dysfunction in a court. A good, well-functioning collegiate court leaves space for constructive disagreement and well-placed dissenting decisions. There is nothing as toxic and treacherous as a trust deficit in a collegiate court.

63. No doubt dissents serve a very important purpose indeed in the development of jurisprudence. Dissenting opinions sometimes become too passionate in tone, or worse, may degenerate into personal attacks on other judges of the court. This may inflict a cost on the court specifically and on the Judiciary generally, in the form of a general loss of public confidence, that goes well beyond the immediate case. Respect, civility and decorum are paramount, even if we hold different opinions. Remember a dissenting opinion is not judgment on an appeal against the majority decision. It must never be used to attack the majority decision. They are two parallel decisions, each one side believing that they are right.

452 Burrows, Andrew. "Judgment-Writing: A Personal Perspective." Annual Conference of Judges of the Superior Courts in Ireland, May 20, 2021.< available at www.supremecourt.uk/docs/judgment-writing-a-personal-perspective-lord-burrows.pdf >

453 "The Kenyan Supreme Court's BBI Judgment – Part I: On Constitutional Amendments and the Basic Structure." *The Elephant*, April 11, 2022. <available at: https://www.theelephant.info>

ii) **Dissenting Opinion Practice in the Court of Appeal**

64. In some instances, the opinion may not be unanimous. Section 5(3)(ii) of the Appellate Jurisdiction Act provides that a matter (whether final or interlocutory) is determined by the Court, where more than one judge sits, according to the opinion of a majority of the judges who sit for the purpose of determining that matter.
In criminal appeal there are no dissenting judgments. Under Rule 32(2) of the Court of Appeal Rules where one judge has died, ceased to hold office, or is unable to perform the functions office or refuses (declines) to sign the judgment the decision of the other two judges will constitute the judgment of the Court.

65. Although a judge will hold independent view from those of his colleagues, the practice is to have an open mind as you discuss and to be ready to be persuaded by the views of the other judges. If therefore the view held by the Judge does not coincide with the views of the other members of the panel or court, and he is not persuaded by their position, then the judge's only defensible option is to pen a dissent.

66. No doubt dissents serve a very important purpose indeed. Dissenting opinions have in history played a critical role in the development of jurisprudence. As Nyamu, J.A so famously said of the importance of dissenting opinion in *Stanbic Kenya Ltd v Kenya Revenue Authority*:[454]

> "Dissenting judgments constitute an expression of independence, freedom of thought and intellect and, they may lay the basis for future development of the law. Further they may provide a firm base for future generations not to contain themselves in straight jackets, but to always remember that at the end of the day, that much sought justice might after all not be in the thunder of the majority judgment, but in the silent breeze of the minority judgment...A dissenting judgment should never stir up anger but instead encourage a brotherhood of service to the law and society!"

67. I have no empirical basis for stating that, unlike the US, dissenting opinions in Kenya are rare. But looking our own Law Report this statement would appear to be correct.

68. Dissenting opinions sometimes become *too passionate in tone, or worse, may degenerate into personal attacks on other judges of the court*. This may inflict a cost on the court specifically and on the Judiciary generally, in the form of a general loss of public confidence, that goes well beyond the immediate case.

69. On the other hand, the dissenting Judge may be branded as a "a perennial complainer/ whiner" and may in the end lose credibility or may be disregarded altogether. *Respect and decorum are paramount, even if we hold different opinions.*

70. To ensure consistency of the decisions of the Court the general rule is that when faced with the same set of issues the Court of Appeal is bound by its own previous decisions to avoid conflicting decisions.

- A monthly cause list showing all the matters coming for hearing during the month is settled by the President and a team of staff.
- The listing is also done equitably among the Judges...4 applications or more and 3 appeals (depending on the complexity of the matter) on each day before each bench, sitting from Monday to Wednesday and sometimes Thursday.
- Each week, whether during term or Recess, there is a judge on duty to consider applications for certificates of urgency. There will also be a Judge every fortnight on a Friday to deliver judgments/ rulings on behalf of the Court.
- The Court has endeavored to keep to the 90 days' period after hearing arguments to render Judgments/ Rulings. The practice of putting off judgments/rulings without dates (on notice) is discouraged.
- There is a no adjournment policy save in exceptional cases and for good reason.

20.11 **How Does a Court Instil and Maintain Collegiality?**

71. Developing easy, comfortable tolerance and understanding among very different and independent human beings is not easy. It requires time and serious commitment. If we took time, we would realize how easy many of our minor differences in opinions, viewpoints, and methods of operation can be resolved by a mere telephone call, text message or a visit to a colleague's chambers.

72. Through collegiality we should be able to respect each other's personal style. Let us direct our concerns to substance and worry less about form. Restrict corrections to substantive and the intellectual merits of issues in an opinion.

454 *Stanbic Kenya Ltd v Kenya Revenue Authority* [2009] KLR.

73. Other internal operating rules to facilitate cooperation among judges and infuse ordinary interactions with a sense of shared purpose include:

- Every judge must sit with every other judge in a term to promoted familiarity and good working relationships among all judges on the court.
- Adopting rules or policy governing the circulation of drafts. A judge who has burnt midnight oil wants to hear from the other judges on the panel as promptly as possible while the draft is still fresh on the mind of the drafting judge. If a judge wants to write a separate opinion, she or he must do so within a specific period of time. This policy will prevent individual judges from unduly holding up the court's work.
- Like the Supreme Court justices, and to foster collegiality between them, it is now a tradition whenever the court has hearings for all the justices to share meals together. The pre-COVID 19 period, the Court of Appeal visited judges in their homes for lunch each term in turns. The Supreme Court has picked up the practice and perfected it.
- Establish rules that structure deliberations at pre and post-hearing conference ensure that substantive ideas are effectively addressed as a group. Although simple, these rules help keep conferences professional, respectful, and orderly.
- The court and its traditions, including the 'Judicial Handshake' has been a tradition in the US SC since 19th century. When the Justices assemble to go on the Bench each day and at the beginning of the private Conferences at which they discuss decisions, each Justice shakes hands with each of the other eight, as a reminder that differences of opinion on the Court did not preclude overall harmony of purpose.

21.12 The Potential Threats to Collegiality

74 Although there is little doubt that collegiality facilitates collegial decision-making, collegiality is not a given. There are a number of things that can threaten judicial collegiality. For example:

- The size of the court may make it more difficult to maintain collegiality.
- The location of the judges' chambers. When judges are spread apart, they may interact less because they sit in distant locations.
- The addition of new judges to a court can also affect collegiality. A new judge will face new demands of collegial decision-making which may be different from the demands of many of the positions from which new judges come when they join the court
- All conferences must involve all members of the panel. Any selective conferences involving only some members is a threat to collegiality. Do not seek support or a vote for your view in a manner that suggests some interests other than the correct and legitimate determination of a case.
- Finally, individual personalities can pose threats to collegiality on a court. There are two principal issues here. The first concerns the personal qualities and talents of the persons who are appointed to a court. It is fair to assume that a collegial court is invariably better if all the judges possess great integrity, intelligence, and diligence. The second consideration has to do with temperament, difficult personalities that sometimes distract from a court's mission. It is the responsibility of the head of the Court to maintain civil discourse among the judges. There may be times when the head of the court will be required to talk privately to an offending colleague and, with diplomacy and respect, press for courtesy, civility, adherence to court rules, or whatever else is required to restore collegiality on the court.

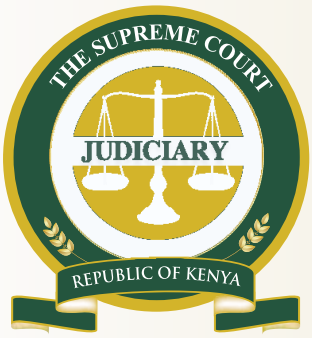
21.13 Conclusion

75. Our judicial system is not perfect, and judges have frailties just like all human beings that sometimes adversely affect decision-making. Judges are constantly tested. As long as we stay within the constraints implicit in our mission, we will retain the capacity to serve justice as we should. And our efforts always will be enhanced if we can maintain collegiality in our collegial decision-making.

76. It would be impossible to design consciously a system that would cultivate collegiality for a court or for any other group. Rather, collegiality is a goal whose characteristics are defined by those who pursue it in their interactions. It takes different forms in every court because it is a function of the individuals themselves and the history of the particular institution.



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