Journal of Conflict Management & Sustainable Development

Volume 7 **Issue 4** **2021** ISBN 978-9966-046-15-4

Journal of Conflict Management and Sustainable Development

Volume 7 Issue 4 **2021**

Journal of Conflict Management and Sustainable Development

Typesetting by:
New Edge GS,
P.O. Box 60561 – 00200,
Tel: +254 721 262 409/ 737 662 029,
Nairobi, Kenya.

Printed by:
Mouldex Printers
P.O. Box 63395,
Tel – 0723 366839,
Nairobi, Kenya.

Published by:
Glenwood Publishers Limited
P.O. Box 76115 - 00508
Tel +254 2210281,
Nairobi, Kenya.

This Journal should be cited as (2021) 7(4) Journal of cmsd

ISBN 978-9966-046-15-40

Journal of Conflict Management and Sustainable Development

Editor's Note

Welcome to the latest issue of the Journal of Conflict Management and Sustainable Development, Volume. 7 No. 4. The Journal highlights and canvasses current and emerging debates on the themes of conflict management and sustainable development.

While Sustainable Development has become the blueprint of the global development agenda, there are factors and intervening issues that need to be addressed to ensure that the same becomes a reality for countries around the world. The Sustainable Development goals envisage a world without poverty, hunger and where everyone can access justice. It is an ideal world that can be achieved.

This issue contains papers on key and pertinent themes on Conflict Management and Sustainable Development including *Electoral Dispute Resolution: Managing Team Dynamics in Election Petitions; Approaches to Biodiversity Conservation: Embracing Global Resource Conservation Best Practices; The role of political institutions – A Case study of Kenya in reference to the Constitution of Kenya 2010; Gender Perspectives in Biodiversity Conservation and Enhancing The Right to Bail (Reviewing The Practice of Demanding Land and Vehicles as Security in Surety Bond).*

The journal is peer reviewed and refereed so as to ensure adherence to the highest academic standards.

The Journal is a valuable resource for scholars, authors, readers, students, policy makers and everyone interested in broadening their understanding in the areas of Conflict Management and Sustainable Development.

The Editorial Team welcomes feedback from our readers across the globe to enable us continue improving the Journal.

I wish to thank the contributing authors, editorial team, reviewers and all those who have made it possible to continue publishing such a high impact Journal.

The Journal can be accessed on https://journalofcmsd.net

Dr. Kariuki Muigua, Ph.D., FCIArb, Ch.Arb,
Accredited Mediator.
Managing Editor,
Nairobi,
December, 2021.

List of Contributors

Prof. Tom Ojienda, SC

Prof. Ojienda holds a Doctor of Laws (LL.D.) degree from the University of South Africa, a Master of Laws (LL.M.) degree from King's College London, and a Bachelor of Laws (LL.B.) degree from the University of Nairobi (UoN). He is an Associate Professor of Public Law at Moi University and a practising Advocate of the High Court of Kenya of the rank of Senior Counsel. He has practised law for over 25 years. He is a former chair of the Law Society of Kenya (LSK), former President of the East African Law Society (EALS), and former Vice President and Financial Secretary of Pan African Lawyers Union (PALU). He has also served as a Commissioner in the Judicial Service Commission (JSC), Commissioner in the Truth Justice and Reconciliation Commission (TJRC) established after the 2007-2008 post-election violence in Kenya, Chair of the Land Acquisition Compensation Tribunal, and member of the National Environment Tribunal. Previously, he was also a Council Member of the International Bar Association, Member of the Board of American Biographical Society, Member of the Council of Legal Education, and Member of the Public Law Institute of Kenya, and the Kenya Industrial Property Institute.

Prof. Ojienda, SC is an ardent scholar and has edited and published over 15 books and over 40 articles on diverse areas of the law. The books include "Conveyancing: Theory and Practice" published by T.O. Ojienda and A.D.O. Rachier, Faculty of Law Moi University; "Constitution Making and Democracy in Kenya" edited by T.O. Ojienda ISBN: 9966-9611-3-6; "The Dawn of a New Era 2004" edited by Tom Ojienda, ISBN-9811-4-4; "A General Introduction to the New Law of the Sea" Published by T.O. Ojienda and Kindiki Kithure; "The Legal Profession and Constitutional Change in Kenya; Anti-Corruption and Good Governance in East Africa: Laying Foundations for Reform" edited by Tom O. Ojienda and published by Law Africa Publishing (K) Ltd, Co-op Trust Plaza, 1st Floor, ISBN.9966-7121-1-9, 221 pages; "Conveyancing Principles and Practice" by Tom O. Ojienda and published by Law Africa Publishing (K) Ltd, Co-op Trust Plaza, 1st Floor, 521 pages; 'Conveyancing Principles and Practice' by Dr. Tom O.

Ojienda and published by Law Africa Publishing (K) Ltd, Co-op Trust Plaza, 1st Floor (Revised edition); "Professional Ethics" by Prof. Tom Ojienda & Katarina Juma published by Law Africa Publishing (K) Ltd, Co-op Trust Plaza, 1st Floor. (Revised Edition) 195 pages; "The Enforcement of Professional Ethics in Kenya" (with Prof. Cox), Amazon Publishers, 2014; "Constitutionalism and Democratic Governance in Africa" (with Prof Mbodenyi), pulp publishers, 2013; "Mastering Legal Research" published by Law Africa, 2013; "Professional Ethics, A Kenyan Perspective" published by Law Africa 2012; "Anti-Corruption and Good Governance in East Africa" published by Law Africa, 2007; and "Conveyancing Theory and Practice" published by Law Africa, 2002.

His published articles include: "Sustainability and The Ivory Trade. Whither the African Elephant?" published in the 2002 issue of the East African Law Review; "Pitfalls in the Fight against Corruption in Kenya: Corruption or Inertia?" in "Anti-Corruption and Good Governance in East Africa: Laying Foundations for Reform" by T. O. Ojienda (eds) pages 95 – 131; "Exploring New Horizons in the Discipline of Advocates, Towards a Review of the Existing Regime of Law" published in "The Advocate; Learning Law by Doing Law: The Theoretical Underpinnings and Practical Implications of Clinical Legal Education in Kenya"; and "An Inventory of Kenya's Compliance with International Rights Obligations: A Case Study of the International Covenant on Civil and Political Rights" the East African Journal of Human Rights and Democracy Vol. 1, Issue No. 1, September 2003 at page 91-104; "Sectoral Legal Aid in Kenya: The Case of the Rift Valley Law Society Juvenile Legal Aid Project", published in various journals including the Advocate, the Lawyer, and the Newcastle Law Bulletin; "Surrogate Motherhood and the Law in Kenya: A Comparative Analysis in a Kenya Perspective"; "Polygamous Marriages and Succession in Kenya: Whither "the other woman?"; "Reflections on the Implementation of Clinical Legal Education in Moi University, Kenya" published in the International Journal of Clinical Education Edition No. 2, June 2002 at page 49-63; "Taking a Bold Step Towards Reform: Justifying Calls for Continuing Legal Education and Professional Indemnity" published in Law society of Kenya Publication (2003); "Terrorism: Justifying Terror in Kenya?" published in The East African Lawyer, Issue No. 5 at pages 18-22; "Land Law and Tenure Reform in Kenya: A Constitutional Framework for Securing Land Rights"; "A Commentary on Understanding the East African

Court of Justice" published in the East African Lawyer, Issue No. 6 at pages 52-56; "Where Medicine Meets the Law: The Case of HIV/AIDS Prevention and Control Bill 2003" published in The Advocate at page 36-40; "The Advocates Disciplinary Process-Rethinking the Role of the Law Society" published in The Lawyer, Issue No. 78 at pages 15-16; "Ramifications of a Customs Union for East Africa" published in The East African Lawyer, Issue No. 4 at pages 17-25; "Gender Question: Creating Avenues to Promote Women Rights after the Defeat of the proposed Constitution" published in the Moi University Journal Vol. 1 2006 No.1, pages 82–92; "Of Mare Liberum and the Ever Creeping State Jurisdiction: Taking an Inventory of the Freedom of the Seas" published in the Moi University Journal Vol. 1 2006 No. 1, pages 105 – 131; "Legal and Ethical Issues Surrounding HIV and AIDS: Recommending Viable Policy and Legislative Interventions" published in The East African Lawyer, Issue No. 12 at pages 19-24; "Implementing the New Partnership for Africa's Development (NEPAD): Evaluating the Efficiency of the African Peer Review Mechanism" published in the Kenya Law Review, 2007 Vol. 1, pages 81-119; "Protection and Restitution for Survivors of Sexual and Gender Based Violence: A case for Kenya." (with R. A. Ogwang and R. Aura) 90 Pages, ISSN:1812–1276; "Legal and Institutional Framework of the TJRC - Way Forward" published in the Law Society of Kenya Journal Vol. 6 2010 No. 1, pages 61 – 95; "A Critical Look at the Land Question in the New Constitution" published in Nairobi Law Monthly, Vol. 1, Issue No. 1 of 2010 at pages 76 – 81; "Researching Kenyan Law" (Globalex, Hauser Global Law School Program, New York University School of Law [updates: November 2006 and March 2008 (with Leonard Obura Oloo); September 2011 (with Matthews Okoth); February 2016; and March/April 2020 (with Brian Ojienda and Gregory Otieno); "Access to Justice in the Era of COVID-19: Adaptations and Coping Mechanisms of the Legal Services Industry in Kenya' (with Lydia Mwalimu Adude) published in Journal of Conflict Management & Sustainable Development, Vol. 6, Issue 2, 2021, ISBN: 978-9966-046-15-4, pages 1-46; "Criminal Liability of Corporate Entities and Public Officers: A Kenyan Perspective" (with Lydia Mwalimu Adude) published in Journal of Conflict Management & Sustainable Development, Vol. 6, Issue 2, 2021, ISBN: 978-9966-046-15-4, pages 117-212; "Changes to Civil Litigation and Mediation Practice Under the Mediation Bill, 2020: What of the Right of Access to Justice and the Independence of the Judiciary?" published in Alternative Dispute Resolution Journal (CIArb-Kenya), Vol. 9, Issue 2,

2021, ISBN: 978-9966-046-14-7, pages 44-65; "Access to Justice: A Critique of the Small Claims Court in Kenya' (with Lydia Mwalimu Adude) published in Alternative Dispute Resolution Journal (CIArb-Kenya), Vol 9, Issue 2, 2021, ISBN: 978-9966-046-14-7, pages 170-201; "Conflict of Interest and Public Office in Kenya" (with Lydia Mwalimu Adude) published in Journal of Conflict Management & Sustainable Development, Vol 6, Issue 5, 2021, ISBN: 978-9966-046-15-4; "Professional Ethics: An Advocate's Relationship with other Advocates" published in Journal of Conflict Management & Sustainable Development, Vol 7, Issue 2, 2021, ISBN: 978-9966-046-15-4, pages 57-78; and a Book Chapter entitled "Land Law in the New Dispensation" in a book edited by P.LO. Lumumba and Dr. Mbondenyi Maurice.

He has also peer reviewed articles, consulted for various agencies, including the World Bank, USAID, UNIFEM, and presented scholarly papers in many countries across the globe.

As a robust litigation counsel, Prof Ojienda, SC, has successfully handled numerous landmark cases at the Supreme Court of Kenya, on Constitutional Law, Administrative Law, Land and Environment Law, Electoral Law, Employment Law, Commercial Law, Family Law, and other areas of law.

He represents various individuals, State agencies, private entities, county governments and multinational agencies. He has represented these entities before Kenyan courts, from the subordinate courts, all the way to the Supreme Court of Kenya. Some of his landmark cases at the apex Court include, In the Matter of the Speaker of the Senate & another [2013] eKLR - Speaker of the Senate & another v Attorney-General & 4 others (Advisory Opinion Reference No 2 of 2013); Independent Electoral and Boundaries Commission & 2 others v Evans Kidero (Petition 20 of 2014); Justus Kariuki Mate & another v Hon. Martin Nyaga Wambora (Petition 32 of 2014); In the Matter of the National Land Commission [2015] eKLR - National Land Commission v Attorney General & 5 others (Advisory Opinion Reference No 2 of 2014); Lemanken Aramat v Harun Meitamei Lempaka & 2 others [2014] eKLR (Petition No 5 of 2014); Cyprian Awiti & another v Independent Electoral and Boundaries Commission & 2 others [2019] eKLR (Petition No 17 of 2018); Mohamed Abdi Mahamud v Ahmed Abdullahi Mohamad & 3 others; Ahmed Ali Muktar (Interested Party) [2019] eKLR

(Petition No 7 of 2018); Martin Wanderi & 106 others v Engineers Registration Board & 10 others [2018] eKLR (Petition No 19 of 2015); Moi v Rosanna Pluda [2017] eKLR; Town Council of Awendo v Nelson O. Onyango & 13 others; Abdul Malik Mohamed & 178 others (Interested Parties) [2019] eKLR (Petition No 37 of 2014); Wilfrida Arnodah Itolondo v Attorney General & 9 others [2021] eKLR (Application No 3 of 2021 (E005 of 2021)); and Speaker Nairobi City County Assembly & another v Attorney General & 3 others (Interested parties) [2021] eKLR (Advisory Opinion Reference No 1 of 2020), among many others which are available at www.proftomojiendaandassociates.com.

Prof Ojienda, SC can be reached through tomojienda@yahoo.com.

Dr. Kariuki Muigua

Dr. Kariuki is a distinguished law scholar, an accomplished mediator and arbitrator with a Ph.D. in law from the University of Nairobi and with widespread training and experience in both international and national commercial arbitration and mediation. Dr. Muigua is a Fellow of Chartered Institute of Arbitrators (CIArb)-Kenya chapter and also a Chartered Arbitrator. He also serves as a member of the National Environment Tribunal and is the Chartered Institute of Arbitrator's (CIArb- UK) Regional Trustee for Africa.

He is an Advocate of the High Court of Kenya of over 30 years standing and practicing at Kariuki Muigua & Co. Advocates, where he is also the senior advocate. His research interests include environmental and natural resources law, governance, access to justice, human rights and constitutionalism, conflict resolution, international commercial arbitration, the nexus between environmental law and human rights, land and natural resource rights, economic law and policy of governments with regard to environmental law and economics. Dr. Muigua teaches law at the Centre for Advanced Studies in Environmental Law and Policy (CASELAP), Wangari Maathai Institute for Peace and Environmental Studies (WMI) and the Faculty of Law, University of Nairobi.

Dr. Kariuki Muigua can be reached through muigua@kmco.co.ke or admin@kmco.co.ke

Ms. Wausi E. Walya
Ms. Wausi E. Walya is a Strategic thought leader with diverse experience in varied sectors of government locally and internationally through exposure to specific work assignments, special government projects and training. She is currently the Head of Public Relations and Corporate Communications at the Kenya Tourism Board(KTB).

She holds a Master of Arts (International Studies – University of Nairobi), Master of Arts (Linguistics) and Bachelor of Education (Kenyatta University) and a post graduate diploma - in Public Relations (Kenyatta University).

She is a PhD candidate at the United States International University - Africa (USIU – Africa) enrolled in International Relations. Her research area of specialization is Foreign Policy and Regional Integration. Additionally, she also has research interests in Tourism, politics and democratization, conflict management and sustainable development.

Ms. Wausi E. Walya can be reached through
Phone:254 733 996406
Twitter: *@wWalya*
LinkedIn: *Wausi Walya*
Skype: *Wausi Walya*
Blog: *https://wordpress.com/home/wausiwalya.wordpress.com*
Email: *We.walya@gmail.com*

Dr. Paul Wamuti Ndegwa
Dr. Wamuti Ndegwa is an Advocate of the High Court of Kenya of over 26 years standing. He holds Bachelor of Laws (LL.B) Honours degree, Master of Laws degree (LL.M) and Doctor of Philosophy (PhD) in Law from the University of Nairobi. As a legal practitioner Ndegwa, is an accomplished trial lawyer specializing in commercial disputes. He practices in Nairobi and Mombasa under Ndegwa, Sitonik, & Karina Advocates. In addition, Ndegwa is a certified mediator under Mediation Training Institute International (MTI) East Africa, a trainer of trainers in the Faculty of the National Institute of Trial Advocacy, and a lecturer at the University of Nairobi where he teaches administrative law, torts, research methods and public procurement regulation. He chairs the committee on human rights and governance at the School of Law of the University of Nairobi at Mombasa.

Ndegwa is prolific researcher and has recently published research papers including,

a. *Adjudicating Land Disputes in a Rapidly Changing Social, Economic and Political Environment* (December, 4th 2019). Kenya Law: VOLUME 8 [No. 1] December 2020

b. *Restoring The Limits Of Judicial Adjudication: Focus On Impeachments* (2020) Journal of cmsd Volume 4(5). Restoring-The-Limits-of-Judicial-Adjudication.pdf (journalofcmsd.net)

Some of the seminar papers he has presented include,

a. *Emerging Legal Tools In Civil Societies Fight Against Corruption (Kenya Experience)* University of Oxford, Oxford Institute for Ethics, Law and armed conflict (Conference on the legal remedies for corruption – (June 6, 2014).

b. *Bail/Bond in serious cases: Balancing National Security and Human Rights in Terrorism Offences,* Ngulia Lodge Judges and Magistrates South West Region Stakeholders Retreat (July 26, 2014).

c. *Introspection & Reflection: Perspectives From The Practitioner: Judges Colloquium Whitesands Hotel July 7, 2017.*

d. *Adjudicating Land Disputes in a Rapidly Changing Social, Economic and Political Environment (*2019 Environment and Land Court Annual Judges Conference).

Previously, Ndegwa led research projects as the lead consultant of the National Consultant for Attorney General & Department of Justice in consultancy for developing the False Claims. The Bill seeks to introduce a law that provides for private persons to undertake legal action to recover public assets lost to corruption and rewarding the private person with a commission. Ndegwa was the Lead Counsel in the Judicial Commission of Inquiry into the Violence in the Tana River, Tana Delta, and Tana North Districts.

Ndegwa is an Anglican by faith and currently, he is the Chancellor of the Diocese of Mombasa in the Anglican Church of Kenya.

Dr. Paul Wamuti Ndegwa can be reached through wamutindegwa@gmail.com

Journal of Conflict Management and Sustainable Development

Volume 7 Issue 4

Electoral Dispute Resolution: Managing Team Dynamics in Election Petitions

By: ***Prof. Tom Ojienda, SC****

1 Introduction

Electoral dispute resolution (EDR) is a key component of the electoral process, especially in furtherance of democracy and **the principle of free and fair elections**. Electoral disputes can occur pre-election or post-election. EDR mechanisms in Kenya are provided for under the Constitution of Kenya, 2010 (the Constitution), electoral statutes and regulations, and political party documents such as political party constitutions; the electoral laws. EDR mechanisms are administrative and quasi-judicial, especially as pertains to intra-party pre-election disputes, and judicial, more so as concerns post-election disputes.[1]

** Prof. Ojienda holds a Doctor of Laws (LL.D.) degree from the University of South Africa, a Master of Laws (LL.M.) degree from King's College London, and a Bachelor of Laws (LL.B.) degree from the University of Nairobi (UoN). He is an Associate Professor of Public Law at Moi University and a practising Advocate of the High Court of Kenya of the rank of Senior Counsel. He is The Managing Partner at Prof. Tom Ojienda & Associates and has practised law for over 25 years. He is a former chair of the Law Society of Kenya (LSK), former President of the East African Law Society (EALS), and former Vice President and Financial Secretary of Pan African Lawyers Union (PALU). He has also served as a Commissioner in the Judicial Service Commission (JSC), Commissioner in the Truth Justice and Reconciliation Commission (TJRC) established after the 2007-2008 post-election violence in Kenya, Chair of the Land Acquisition Compensation Tribunal, and member of the National Environment Tribunal. Previously, he was also a Council Member of the International Bar Association, and Member of the Board of American Biographical Society, the Council of Legal Education, the Public Law Institute of Kenya, and the Kenya Industrial Property Institute.*

As a robust litigation counsel, Prof Ojienda, SC, has successfully handled numerous landmark cases at the Supreme Court of Kenya, on Constitutional Law, Administrative Law, Land and Environment Law, Electoral Law, Employment Law, Commercial Law, Family Law, and other areas of law. He represents various individuals, State agencies, private entities, county governments and multinational agencies. He has represented these entities before Kenyan courts, from the subordinate courts, all the way to the Supreme Court of Kenya. Some of his landmark cases at the apex Court include, In the Matter of the Speaker of the Senate & another [2013] eKLR - Speaker of the Senate & another v Attorney-General & 4 others

(Advisory Opinion Reference No 2 of 2013); Independent Electoral and Boundaries Commission & 2 others v Evans Kidero (Petition 20 of 2014); Justus Kariuki Mate & another v Hon. Martin Nyaga Wambora (Petition 32 of 2014); In the Matter of the National Land Commission [2015] eKLR - National Land Commission v Attorney General & 5 others (Advisory Opinion Reference No 2 of 2014); Lemanken Aramat v Harun Meitamei Lempaka & 2 others [2014] eKLR (Petition No 5 of 2014); Cyprian Awiti & another v Independent Electoral and Boundaries Commission & 2 others [2019] eKLR (Petition No 17 of 2018); Mohamed Abdi Mahamud v Ahmed Abdullahi Mohamad & 3 others; Ahmed Ali Muktar (Interested Party) [2019] eKLR (Petition No 7 of 2018); Martin Wanderi & 106 others v Engineers Registration Board & 10 others [2018] eKLR (Petition No 19 of 2015); Moi v Rosanna Pluda [2017] eKLR; Town Council of Awendo v Nelson O. Onyango & 13 others; Abdul Malik Mohamed & 178 others (Interested Parties) [2019] eKLR (Petition No 37 of 2014); Wilfrida Arnodah Itolondo v Attorney General & 9 others [2021] eKLR (Application No 3 of 2021 (E005 of 2021)); and Speaker Nairobi City County Assembly & another v Attorney General & 3 others (Interested parties) [2021] eKLR (Advisory Opinion Reference No 1 of 2020), among many others available at www.proftomojiendaandassociates.com.

Prof. Ojienda, SC is an ardent scholar and has edited and published over 15 books and over 40 articles on diverse areas of the law. The books include "Conveyancing: Theory and Practice" published by T.O. Ojienda and A.D.O. Rachier, Faculty of Law Moi University; "Constitution Making and Democracy in Kenya" edited by T.O. Ojienda ISBN: 9966-9611-3-6; "The Dawn of a New Era 2004" edited by Tom Ojienda, ISBN-9811-4-4; "A General Introduction to the New Law of the Sea" Published by T.O. Ojienda and Kindiki Kithure; "The Legal Profession and Constitutional Change in Kenya; Anti-Corruption and Good Governance in East Africa: Laying Foundations for Reform" edited by Tom O. Ojienda and published by Law Africa Publishing (K) Ltd, Co-op Trust Plaza, 1st Floor, ISBN.9966-7121-1-9, 221 pages; "Conveyancing Principles and Practice" by Tom O. Ojienda and published by Law Africa Publishing (K) Ltd, Co-op Trust Plaza, 1st Floor, 521 pages; 'Conveyancing Principles and Practice' by Dr. Tom O. Ojienda and published by Law Africa Publishing (K) Ltd, Co-op Trust Plaza, 1st Floor (Revised edition); "Professional Ethics" by Prof. Tom Ojienda & Katarina Juma published by Law Africa Publishing (K) Ltd, Co-op Trust Plaza, 1st Floor. (Revised Edition) 195 pages; "The Enforcement of Professional Ethics in Kenya" (with Prof. Cox), Amazon Publishers, 2014; "Constitutionalism and Democratic Governance in Africa" (with Prof Mbodenyi), pulp publishers, 2013; "Mastering Legal Research" published by Law Africa, 2013; "Professional Ethics, A Kenyan Perspective" published by Law Africa 2012; "Anti-Corruption and Good Governance in East Africa" published by Law Africa, 2007; "Conveyancing Theory and Practice" published by Law Africa, 2002; and "Land Law and Conveyancing: Principles and Practice" published by Law Africa Publishing (K) Ltd, 2015, ISBN: 9789966031846 9966031847 (274 pages).

His published articles include: "Sustainability and The Ivory Trade. Whither the African Elephant?" published in the 2002 issue of the East African Law Review; "Pitfalls in the Fight against Corruption in Kenya: Corruption or Inertia?" in "Anti-Corruption and Good Governance in East Africa: Laying Foundations for Reform" by T. O. Ojienda (eds) pages 95 – 131; "Exploring New Horizons in the Discipline of Advocates, Towards a Review of the Existing Regime of Law" published in "The Advocate; Learning Law by Doing Law: The Theoretical Underpinnings and Practical Implications of Clinical Legal Education in Kenya"; and "An Inventory of Kenya's Compliance with International Rights Obligations: A Case Study of the International Covenant on Civil and Political Rights" the East African Journal of Human Rights and Democracy Vol. 1, Issue No. 1, September 2003 at page 91-104; "Sectoral Legal Aid in Kenya: The Case of the Rift Valley Law Society Juvenile Legal Aid Project", published in various journals including the Advocate, the Lawyer, and the Newcastle Law Bulletin; "Surrogate Motherhood and the Law in Kenya: A Comparative Analysis in a Kenya Perspective"; "Polygamous Marriages and Succession in Kenya: Whither "the other woman?"; "Reflections on the Implementation of Clinical Legal Education in Moi University, Kenya" published in the International Journal of Clinical Education Edition No. 2, June 2002 at page 49-63; "Taking a Bold Step Towards Reform: Justifying Calls for Continuing Legal Education and Professional Indemnity" published in Law society of Kenya Publication (2003); "Terrorism: Justifying Terror in Kenya?" published in The East African Lawyer, Issue No. 5 at pages 18-22; "Land Law and Tenure Reform in Kenya: A Constitutional Framework for Securing Land Rights"; "A Commentary on Understanding the East African Court of Justice" published in the East African Lawyer, Issue No. 6 at pages 52-56; "Where Medicine Meets the Law: The Case of HIV/AIDS Prevention and Control Bill 2003" published in The Advocate at page 36-40; "The Advocates Disciplinary Process-Rethinking the Role of the Law Society" published in The Lawyer, Issue No. 78 at pages 15-16; "Ramifications of a Customs Union for East Africa" published in The East African Lawyer, Issue No. 4 at pages 17-25; "Gender Question: Creating Avenues to Promote Women Rights after the Defeat of the proposed Constitution" published in the Moi University Journal Vol. 1 2006 No.1, pages 82–92; "Of Mare Liberum and the Ever Creeping State Jurisdiction: Taking an Inventory of the Freedom of the Seas" published in the Moi University Journal Vol. 1 2006 No. 1, pages 105 – 131; "Legal and Ethical Issues Surrounding HIV and AIDS: Recommending Viable Policy and Legislative Interventions" published in The East African Lawyer, Issue No. 12 at pages 19-24; "Implementing the New Partnership for Africa's Development (NEPAD): Evaluating the Efficiency of the African Peer Review Mechanism" published in the Kenya Law Review, 2007 Vol. 1, pages 81-119; "Protection and Restitution for Survivors of Sexual and Gender Based Violence: A case for Kenya." (with R. A. Ogwang and R. Aura) 90 Pages, ISSN:1812–1276; "Legal and Institutional Framework of the TJRC - Way Forward" published in the Law Society of Kenya Journal Vol. 6 2010 No. 1, pages 61 – 95; "A Critical Look at the Land Question in the New Constitution" published in Nairobi Law Monthly,

Administrative and quasi-judicial EDR mechanisms are the political parties' internal dispute resolution mechanisms (IDRM), the Independent Electoral and Boundaries Commission (IEBC) mechanisms (that is, the Dispute Resolution Committee, the Electoral Code of Conduct Enforcement

---

Vol. 1, Issue No. 1 of 2010 at pages 76 – 81; "Researching Kenyan Law" (Globalex, Hauser Global Law School Program, New York University School of Law [updates: November 2006 and March 2008 (with Leonard Obura Oloo); September 2011 (with Matthews Okoth); February 2016; and March/April 2020 (with Brian Ojienda and Gregory Otieno); "Access to Justice in the Era of COVID-19: Adaptations and Coping Mechanisms of the Legal Services Industry in Kenya' (with Lydia Mwalimu Adude) published in Journal of Conflict Management & Sustainable Development, Vol. 6, Issue 2, 2021, ISBN: 978-9966-046-15-4, pages 1-46; "Criminal Liability of Corporate Entities and Public Officers: A Kenyan Perspective" (with Lydia Mwalimu Adude) published in Journal of Conflict Management & Sustainable Development, Vol. 6, Issue 2, 2021, ISBN: 978-9966-046-15-4, pages 117-212; "Changes to Civil Litigation and Mediation Practice Under the Mediation Bill, 2020: What of the Right of Access to Justice and the Independence of the Judiciary?" published in Alternative Dispute Resolution Journal (CIArb-Kenya), Vol. 9, Issue 2, 2021, ISBN: 978-9966-046-14-7, pages 44-65; "Access to Justice: A Critique of the Small Claims Court in Kenya' (with Lydia Mwalimu Adude) published in Alternative Dispute Resolution Journal (CIArb-Kenya), Vol 9, Issue 2, 2021, ISBN: 978-9966-046-14-7, pages 170-201; "The Dynamics of Public Procurement of Legal Services in Kenya" published in Journal of Conflict Management & Sustainable Development, Vol 6(3), 2021, ISBN: 978-9966-046-15-4, pages 17-45; "Reflections on the Structure and Leadership of the Senior Bar in Kenya: Some Thoughts" published in Journal of Conflict Management & Sustainable Development, Vol 6(3), 2021, ISBN: 978-9966-046-15-4, pages 136-165; "Conflict of Interest and Public Office in Kenya" (with Lydia Mwalimu Adude) published in Journal of Conflict Management & Sustainable Development, Vol 6, Issue 5, 2021, ISBN: 978-9966-046-15-4, pages 1-68; "Professional Ethics: An Advocate's Relationship with other Advocates" published in Journal of Conflict Management & Sustainable Development, Vol 7, Issue 2, 2021, ISBN: 978-9966-046-15-4, pages 57-78; and a Book Chapter entitled "Land Law in the New Dispensation" in a book edited by P.LO. Lumumba and Dr. Mbondenyi Maurice.

He has also peer reviewed articles, consulted for various agencies, including the World Bank, USAID, UNIFEM, and presented scholarly papers in many countries across the globe.

Prof. Tom Ojienda, SC can be reached through tomojienda@yahoo.com.

[1] *See e.g., The Judiciary Working Committee on Election Preparations, 'Pre-election Dispute Management: Between Judicial And Administrative Dispute Management Mechanisms' (Kenya Law Blog; 17 September 2012) <http://kenyalaw.org/kenyalawblog/pre-election-dispute-management-between-judicial-and-administrative-dispute-management-mechanisms/>.*

Committee, and the Constituency Peace Committees), and the Political Parties Disputes Tribunal (PPDT). Judicial EDR mechanisms means the election courts, which are vested with special electoral jurisdiction, that is, designated Resident Magistrates' Courts, the High Court, the Court of Appeal, and the Supreme Court of Kenya when sitting as such.

Effective EDR mechanisms are central in ensuring **a peaceful and credible electoral process** and must, therefore, be able to deal with any form of challenge that may arise due to a disputed electoral process and outcome. As a consequence, it is imperative that the administrative, quasi-judicial, and judicial bodies mandated to hear and determine electoral disputes adjudicate the process in a free and fair manner pursuant to **article 50(1) of the Constitution**.[2] In ***Moses Mwicigi & 14 others v Independent Electoral and Boundaries Commission & 5 others***,[3] the Supreme Court was categorical that:

> One of the objectives of our Constitution is the establishment of firm institutions, that have a pivotal role in its implementation. Our electoral dispute-resolution regime has a continuum of institutions that require strengthening, through the judicial system: namely, the political parties; the Political Parties Disputes Tribunal; and the IEBC. These have to comply with the Constitution, and the electoral laws and regulations.'[4]

Election petitions are a judicial mechanism for resolving post-election disputes. With an awareness of the entirety of EDR mechanisms available in Kenya towards the resolution of both pre-election and post-election disputes, and the legal framework and principles that underlie the electoral system in Kenya, this paper focuses on the litigation of election petitions. In doing so,

---

[2] *Article 50(1) of the Constitution guarantees the right to a fair hearing and 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.'*
[3] *[2016] eKLR, SCoK Pet No 1 of 2015.*
[4] *SCoK Pet No 1 of 2015, para 121.*

the paper looks into the parameters and tools for managing team dynamics in litigating election petitions.

2 Election Petitions

Election petitions are instituted in court subsequent to the declaration of election results by IEBC's returning officers.[5] In ***Hassan Ali Joho & Another v Suleiman Said Shahbal & 2 Others***,[6] the Supreme Court stated:

> Insofar as the Constitution (Article 87(2)) provides that: "Petitions concerning an election other than a presidential election, shall be filed within twenty-eight days after the declaration of the election results…," while the Elections Act, 2011 (Section 76 (1)) provides that: "A petition – a. 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…," and as it is clear that expedition in the disposal of electoral disputes is a fundamental principle under the Constitution, we hold the said provision of the Elections Act to be inconsistent with the terms of the Constitution.[7]

Election petitions can arise in respect of **presidential, parliamentary and county elections and include by-elections**.[8] Presidential elections concern elections to the office of President. **Articles 140, 163(3)(a), and 165(5)(a) of the Constitution of Kenya, 2010 (the Constitution)** give the Supreme Court exclusive original and final jurisdiction to hear and determine disputes relating to presidential elections.[9] Parliamentary elections concern elections of members of the National Assembly or the Senate, which together

[5] *Constitution of Kenya, 2010, art 87(2); Elections Act, 2011, s 39.*
[6] *[2014] eKLR, SCoK Pet No 10 of 2013.*
[7] *Ibid para 101.*
[8] *See definition of "election" in section 2 of the Elections Act, 2011, Act No 21 of 2011, Laws of Kenya.*
[9] *Articles 136-140 of the Constitution of Kenya, 2010 concern election of the president; qualifications and disqualifications for election as president; procedure at presidential election; procedure to be followed in case of death of a president-elect after being declared elected as president, but before assuming office; and questions as to validity of presidential election.*

comprise Members of the Parliament of Kenya. **Article 105(1) of the Constitution** gives the High Court jurisdiction to hear and determine any question as to whether a person has been validly elected as a Member of Parliament, or whether the seat of a Member of Parliament has become vacant.[10]

County elections concern elections of county governors and members of county assemblies.[11] **Section 75(1) of the Elections Act, 2011** gives the High Court within the county or nearest to the affected county, jurisdiction in respect of a question as to the validity of an election of a county governor. On the other hand, **section 75(1A) of the Elections Act, 2011** gives Resident Magistrates Courts to be designated as such by the Chief Justice, jurisdiction in respect of a question as to the validity of the election of a member of a county assembly (MCA).

Election petitions are heard and determined by an election court.[12] **Section 2 of the Elections Act, 2011** defines an *'election court'* to mean: *'the Supreme Court in exercise of the jurisdiction conferred upon it by Article 163 (3) (a) or the High Court in the exercise of the jurisdiction conferred upon it by Article 165 (3) (a) of the Constitution and the Resident Magistrate's Court designated by the Chief Justice in accordance with section 75 of [the Elections] Act.'*

Litigating election petitions often brings together more than one advocate or firm to represent a party to the dispute (litigation team). The subsequent parts of this paper consider the dynamics of litigating election petitions in teams, especially in terms of the stringent timelines and special procedures in respect of election petitions that necessitate the need to manage litigation

[10] *Articles 97-105 of the Constitution of Kenya, 2010 concern elections to and membership of the Parliament of Kenya.*
[11] *Articles 177 and 193 of the Constitution of Kenya, 2010 concern the membership of county assembly and qualifications for election as member of county assembly; Article 180 of the Constitution concerns election of county governor and deputy county governor.*
[12] *See rule 6 of the Elections (Parliamentary and County Elections) Petitions Rules, 2017 regarding constitution of an election court.*

team dynamics towards an ultimate desirable and expeditious resolution of an election petition.

3 Litigating Election Petitions

The special nature of election petitions as a component of the larger EDR mechanisms makes them complex, urgent, and demanding of thought and skill. As a result, a one-man job may not be able to pull through, thereby necessitating the need for a litigation team for the proper execution of an election petition. There are stringent timelines to be met. There are special laws and rules of procedure applicable in the context of election petitions. There is need to strategize quickly to best represent your client and outsmart the opponent. There is urgent need for research and analysis of voluminous documents, including documents and materials to be relied on as evidence, and the opponent's pleadings. There is need to draft proper and stellar pleadings to articulate your client's case with accuracy, correctness and completeness. There is limited time to present the best and winning argument before the election court covering all the vital aspects of your client's case.

These multiple components involved in the litigation of election petitions necessitates that a litigation team be on top of their game. Rebecca Green notes the information imbalance that may arise in post-election dispute resolution based on the expertise and preparednesss of a litigation team in comparison to the opponent; an imbalance which may have devastating effects for both the candidate (the client) and the voters:

> *One campaign might hire a sophisticated legal team that understands how various process decisions affect its candidate. If the other campaign has not hired a sophisticated election attorney (or if the attorney hired proves to be less skillful than opposing counsel) this imbalance might prove a great disadvantage. This disadvantage is not just problematic for the candidate, but also for the voters who selected that candidate. In a recount scenario, poor or uninformed lawyering can result in the disenfranchisement of voters. (…) [S]tate election*

> *administrators and judges also vary widely in process sophistication.*[13]

That notwithstanding, generally, and as concerns election petitions, litigating in teams is wrought with both advantages and disadvantages.[14] Election petitions in particular tend to draw large litigation teams. The outstanding advantage of such large litigation teams includes the ability to divide up the necessary tasks and the various issues that are up for determination amongst the advocates or firms based on their skill sets and expertise. Dividing up the tasks and issues among the advocates or firms constituting a litigation team is actually necessary to allow an advocate or team of advocates to pay special and particular attention to one or two issues, keeping in mind the tight timelines for the hearing and determination of election petitions. The disposal of election petitions is done on the foundation of expeditious disposal of matters and in tandem with **article 87(1) of the Constitution, 'timely settling of election disputes'**.

4 Timelines and Procedure in Respect of Election Petitions

Section 85 of the Elections Act, 2011 is categorical that an election petition is to be heard and determined within the period specified in the Constitution. The timelines and procedure in respect of election petitions are provided for in the **Constitution**, the **Elections Act, 2011**, **Elections (Parliamentary and County Elections) Petitions Rules, 2017**, as applicable to parliamentary and county elections,[15] the **Court of Appeal (Election**

---

[13] *Rebecca Green, 'Mediation and Post-Election Litigation: A Way Forward,' (2012), 27(2) Ohio State Journal on Dispute Resolutionp 325-379, 349 <https://core.ac.uk/download/pdf/159589369.pdf>.*

[14] *See e.g., Law Offices of Stimmel, Stimmel & Roeser, 'Team Dynamics in the World of Litigation' <https://www.stimmel-law.com/en/articles/team-dynamics-world-litigation>.*

[15] *As provided in **rule 3 of the Elections (Parliamentary and County Elections) Petitions Rules, 2017**, the rules only apply in respect of election of members of Parliament, county governors, and members of county assemblies. **Rule 2** defines an "election court" to mean "the High Court in the exercise of the jurisdiction conferred upon it by Article 165 (3)(a) of the Constitution or the Resident Magistrate's Court designated by the Chief Justice in accordance with section 75 of the [Elections] Act."*

Petition) Rules, 2017, and the **Supreme Court (Presidential Election Petition) Rules, 2017**. **Rule 4(1) of the Elections (Parliamentary and County Elections) Petitions Rules, 2017** is categorical that the objective of the Rules is to **facilitate the just, expeditious, proportionate, and affordable resolution of election petitions**, in this case, parliamentary and county elections.

Rule 8 of the Elections (Parliamentary and County Elections) Petitions Rules, 2017 provides for the form and content of a parliamentary or county election petition. The election petition, which is supported by an affidavit sworn by the Petitioner,[16] is drafted using **Form 1 in the First Schedule of the Rules**. The election petition is divided into paragraphs confined to a distinct subject and numbered consecutively. The election petition will state: the name and address of the petitioner; the date when the election in dispute was conducted; the results of the election, if any, and however declared; the date of the declaration of the results of the election; the grounds on which the petition is presented; and the name and address of the petitioner's advocate, if any, which shall be the address for service.

The election petition will also set out the relief(s) sought, such as a declaration on whether or not the candidate whose election is questioned was validly elected; a declaration of which candidate was validly elected; an order as to whether a fresh election should be held; scrutiny and recounting of the ballots cast at the election in dispute; payment of costs; or a determination as to whether or not electoral malpractice of a criminal nature may have occurred.

IEBC is a Respondent in every election petition.[17] A response to a parliamentary or county election petition is filed within seven (7) days of service of the petition on the Respondents and is drafted as in **Form 4 in the First Schedule to the Rules**.[18]

---

[16] *See Ibid rules 8(4)(b) and 12.*
[17] *Ibid rule 9.*
[18] *Ibid rule 10 and 11 on service of the election petition on the Respondent and response to the petition, respectively.*

The precise timelines and procedure in respect of election petitions as concerns the various political offices can be summarised as follows:

	Presidential Elections	Parliamentary Elections	County Elections: County Governor	County Elections: MCA
When and where to file the petition	Article 140(1) of the Constitution – file the petition in the Supreme Court within seven (7) days after the date of the declaration of the results of the presidential election; and before 1400 hrs if filed on the last day available for filing (Rule 7(3) of the Supreme Court (Presidential Election Petition) Rules, 2017). – See also articles 163(3)(a) and 165(5)(a) of the Constitution.	– Article 87(2) of the Constitution and sections 76(1) and 77(1) of the Elections Act, 2011 – file the petition within twenty-eight (28) days after the declaration of the election results by IEBC. – Article 105(1) of the Constitution – the petition is filed in the High Court.	Article 87(2) of the Constitution and sections 76(1) and 77(1) of the Elections Act, 2011 – file the Petition within twenty-eight (28) days after the declaration of the election results by IEBC. – Section 75(1) of the Elections Act, 2011 – the petition is filed in the High Court within the county or nearest to the county.	Article 87(2) of the Constitution and sections 76(1) and 77(1) of the Elections Act, 2011 – file the petition within twenty-eight (28) days after the declaration of the election results by IEBC. – Section 75(1A) of the Elections Act, 2011 – the petition is filed in the Resident Magistrate's Court designated by the Chief Justice.
When Petitioner is to deposit security for costs	– Section 78(1) of the Elections Act, 2011 – within ten (10) days after the presentation of the presidential election petition. – Section 78(2)(a) of the Elections Act, 2011 – deposit KES 1 Million in respect of a presidential election petition. –Section 78(3) of the Elections Act, 2011 – the Respondent may apply for dismissal	– Section 78(1) of the Elections Act, 2011 – within ten (10) days after the presentation of the parliamentary election petition. – Section 78(2)(b) of the Elections Act, 2011 – deposit KES 500,000/= in respect of a parliamentary election petition. – Section 78(3) of the Elections Act, 2011 – the Respondent may apply for dismissal of the petition with costs if the Petitioner fails to deposit security as required.	– Section 78(1) of the Elections Act, 2011 – within ten (10) days after the presentation of the gubernatorial election petition. – Section 78(2)(b) of the Elections Act, 2011 – deposit KES 500,000/= in respect of a gubernatorial election petition. – Section 78(3) of the Elections Act, 2011 – the Respondent may apply for dismissal of the petition with costs if the Petitioner fails to deposit security as required.	– Section 78(1) of the Elections Act, 2011 – within ten (10) days after the presentation of the MCA election petition. – Section 78(2)(c) of the Elections Act, 2011 – deposit KES 100,000/= in respect of a MCA election petition. – Section 78(3) of the Elections Act, 2011 – the Respondent may

	of the petition with costs if the Petitioner fails to deposit security as required. – Section 84 of the Elections Act, 2011 – an election court shall award the costs of and incidental to a petition, which costs shall follow the cause.	– Section 84 of the Elections Act, 2011 – an election court shall award the costs of and incidental to a petition, which costs shall follow the cause.	– Section 84 of the Elections Act, 2011 – an election court shall award the costs of and incidental to a petition, which costs shall follow the cause.	apply for dismissal of the petition with costs if the Petitioner fails to deposit security as required. – Section 84 of the Elections Act, 2011 – an election court shall award the costs of and incidental to a petition, which costs shall follow the cause.
When and how to serve the petition	Article 87(3) of the Constitution –the petition may be served directly or by advertisement in a newspaper with national circulation. – Served within 24 hours of filing the petition and served through electronic means within 6 hours of filing the petition – Rule 10 of the Supreme Court (Presidential Election Petition) Rules, 2017).	– Article 87(3) of the Constitution and section 77(2) of the Elections Act, 2011 – the petition may be served personally upon a Respondent or by advertisement in a newspaper with national circulation.[19] – Section 76(1)(a) of the Elections Act, 2011 – a petition to question the validity of an election shall be served within fifteen (15) days of presentation.[20]	– Article 87(3) of the Constitution and section 77(2) of the Elections Act, 2011 – the petition may be served personally upon a Respondent or by advertisement in a newspaper with national circulation. – Section 76(1)(a) of the Elections Act, 2011 – a petition to question the validity of an election shall be served within fifteen (15) days of presentation.[21]	– Article 87(3) of the Constitution and section 77(2) of the Elections Act, 2011 – the petition may be served personally upon a Respondent or by advertisement in a newspaper with national circulation. – Section 76(1)(a) of the Elections Act, 2011 – a petition to question the validity of an election shall be served within fifteen (15) days of presentation.[22]

[19] *Rule 2 of the Elections (Parliamentary and County Elections) Petitions Rules, 2017 defines "direct service" as "personal service or service on a duly authorized agent."*
[20] *See Ibid rule 10.*
[21] *Ibid.*
[22] *Ibid.*

When to respond to the petition	– Respondents, usually the persons declared as President-elect and deputy President-elect, IEBC, and the Chairperson of IEBC as the returning officer for presidential elections,[23] file a response to the petition (in Form B in the Second Schedule plus replying affidavit) within 4 days of service of the petition – Rule 11 of the Supreme Court (Presidential Election Petition) Rules, 2017); or file notice of intention not to oppose the petition (in Form C in the Second Schedule) within three (3) days of service of the petition and serve on the petitioner.	– Respondents, usually the person whose election is challenged, the returning officer, and IEBC,[24] file a response to the election petition within seven (7) days of service of the petition and serve the response within seven (7) days of filing.[25]	– Respondents, usually the person whose election is challenged, the returning officer, and IEBC,[26] file a response to the election petition within seven (7) days of service of the petition and serve the response within seven (7) days of filing.[27]	– Respondents, usually the person whose election is challenged, the returning officer, and IEBC,[28] file a response to the election petition within seven (7) days of service of the petition and serve the response within seven (7) days of filing.[29]
Procedure of the	– Section 79 of the Elections Act, 2011	– Section 79 of the Elections Act, 2011 –	– Section 79 of the Elections Act, 2011 –	– Section 79 of the Elections Act,

[23] See e.g., Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 2 others [2017] eKLR, Supreme Court of Kenya, Presidential Election Pet No 1 of 2017.
[24] Definition of "respondent" in rule 2 of the of the Elections (Parliamentary and County Elections) Petitions Rules, 2017.
[25] Ibid rule 11.
[26] Ibid rule 2.
[27] Ibid rule 11.
[28] Ibid rule 2.
[29] Ibid rule 11.

Court upon receipt of the petition	– upon receipt of a petition, an election court will peruse the petition and: (a) if it considers that no sufficient ground for granting the relief claimed is disclosed therein may reject the petition summarily; or (b) fix a date for the trial of the petition.	upon receipt of a petition, an election court will peruse the petition and: (a) if it considers that no sufficient ground for granting the relief claimed is disclosed therein may reject the petition summarily; or (b) fix a date for the trial of the petition.	upon receipt of a petition, an election court will peruse the petition and: (a) if it considers that no sufficient ground for granting the relief claimed is disclosed therein may reject the petition summarily; or (b) fix a date for the trial of the petition.	2011 – upon receipt of a petition, an election court will peruse the petition and: (a) if it considers that no sufficient ground for granting the relief claimed is disclosed therein may reject the petition summarily; or (b) fix a date for the trial of the petition.
How long the court has to determine the petition	– Article 140(2) of the Constitution – within fourteen (14) days after the filing of a presidential election petition, the Supreme Court shall hear and determine the petition and its decision shall be final. See also Rule 23 of the Supreme Court (Presidential Election Petition) Rules, 2017). – Section 79 of the Elections Act, 2011 – interlocutory matters in connection with a petition challenging results of presidential elections shall be heard and determined by the election court.	– Article 105(2) of the Constitution – the High Court is to hear and determine a parliamentary election petition within six (6) months of the date of lodging the petition. – Section 79 of the Elections Act, 2011 – interlocutory matters in connection with a petition challenging results of parliamentary elections shall be heard and determined by the election court.	Section 75(2) of the Elections Act, 2011 – the High Court is to hear and determine a gubernatorial election petition within six (6) months of the date of lodging the petition. – Section 79 of the Elections Act, 2011 – interlocutory matters in connection with a petition challenging results of gubernatorial elections shall be heard and determined by the election court.	Section 75 of the Elections Act, 2011 does not specify the timeline for the hearing and determination of a MCA election petition, which is heard by Resident Magistrate's Court designated by the Chief Justice. – Section 79 of the Elections Act, 2011 – interlocutory matters in connection with a petition challenging results of MCA elections shall be heard and determined by the election court.

Relief granted	Article 140(3) of the Constitution – if the Supreme Court determines the election of the President-elect to be invalid, a fresh election shall be held within sixty days (60) after the determination. – Section 80(4) of the Elections Act, 2011 – an election court may by order direct IEBC to issue a certificate of election to a President if— (a) upon recount of the ballots cast, the winner is apparent; and (b) that winner is found not to have committed an election offence. – Section 82 of the Elections Act, 2011 – an order for a scrutiny of votes and recounting of ballots cast, upon an application by a party during the hearing of an election petition, or the court acting *suo moto*. – Section 86(1) of the Elections Act, 2011 – a certificate of court as to the validity of a presidential election.	– Section 80(4) of the Elections Act, 2011 – an election court may by order direct IEBC to issue a certificate of election to a Member of Parliament if— (a) upon recount of the ballots cast, the winner is apparent; and (b) that winner is found not to have committed an election offence. – Section 82 of the Elections Act, 2011 – an order for a scrutiny of votes and recounting of ballots cast, upon an application by a party during the hearing of an election petition, or the court acting *suo moto*. – Section 86(1) of the Elections Act, 2011 – a certificate of court as to the validity of a parliamentary election. – Section 87 of the Elections Act, 2011 – a determination and order of the election court on the occurrence of an electoral malpractice of a criminal nature, to be transmitted to the Director of Public Prosecutions (DPP) for criminal investigation and prosecution.	Section 75(3) of the Elections Act, 2011– the court may grant appropriate relief, including: (a) a declaration of whether or not the candidate whose election is questioned was validly elected; (b) a declaration of which candidate was validly elected; or (c) an order as to whether a fresh election will be held or not. – Section 82 of the Elections Act, 2011 – an order for a scrutiny of votes and recounting of ballots cast, upon an application by a party during the hearing of an election petition, or the court acting *suo moto*. – Section 86(1) of the Elections Act, 2011 – a certificate of court as to the validity of a gubernatorial election. – Section 86(1A), (1B) and (1C) of the Elections Act, 2011 – procedure in case of invalidation of a gubernatorial election. – Section 87 of the Elections Act, 2011 – a determination and order of the election court on the occurrence of an electoral malpractice of a criminal nature, to be transmitted to the Director of Public Prosecutions (DPP) for	Section 75(3) of the Elections Act, 2011– the court may grant appropriate relief, including: (a) a declaration of whether or not the candidate whose election is questioned was validly elected; (b) a declaration of which candidate was validly elected; or (c) an order as to whether a fresh election will be held or not. – Section 80(4) of the Elections Act, 2011 – an election court may by order direct IEBC to issue a certificate of election to a MCA if: (a) upon recount of the ballots cast, the winner is apparent; and (b) that winner is found not to have committed an election offence. – Section 82 of the Elections Act, 2011 – an order for a scrutiny of votes and recounting of ballots cast, upon an application by a party during the hearing of an

	– Section 86A of the Elections Act, 2011 – procedure in case of invalidation of a presidential election under article 140(3) of the Constitution. – Section 87 of the Elections Act, 2011 – a determination and order of the election court on the occurrence of an electoral malpractice of a criminal nature, to be transmitted to the Director of Public Prosecutions (DPP) for criminal investigation and prosecution.		criminal investigation and prosecution.	election petition, or the court acting *suo moto*. – Section 86(1) of the Elections Act, 2011 – a certificate of court as to the validity of a MCA election. – Section 87 of the Elections Act, 2011 – a determination and order of the election court on the occurrence of an electoral malpractice of a criminal nature, to be transmitted to the Director of Public Prosecutions (DPP) for criminal investigation and prosecution.
When to appeal	No appeal.	– Section 85A(1) of the Elections Act, 2011 – an appeal from the High Court in an election petition concerning membership of the National Assembly or Senate shall lie to the Court of Appeal on matters of law only and shall be: (*a*) filed within thirty (30) days of the decision of the High Court; and (*b*) be heard and determined within six (6) months of the filing of the appeal.	– Section 85A(1) of the Elections Act, 2011 – an appeal from the High Court in an election petition concerning the office of county governor shall lie to the Court of Appeal on matters of law only and shall be: (*a*) filed within thirty (30) days of the decision of the High Court; and (*b*) be heard and determined within six (6) months of the filing of the appeal. – A first appeal to the Court of Appeal in accordance with article	Section 75(4) of the Elections Act, 2011 – an appeal lies to the High Court on matters of law only, which appeal must be filed within thirty (30) days of the decision of the Resident Magistrate's Court. – Rule 34 of the Elections (Parliamentary and County Elections) Petitions Rules, 2017 makes provision on

		– A first appeal to the Court of Appeal in accordance with article 164(3)(a) of the Constitution, the Court of Appeal Rules, 2010,[30] and Court of Appeal (Election Petition) Rules, 2017. – Rule 6 of the Court of Appeal (Election Petition) Rules, 2017 requires the notice of appeal (in the Form EPA 1 set out in the Schedule) to be filed within seven (7) days of the date of the decision appealed against, without necessarily extracting the decree or order of the High Court. Under Rule 7, a notice of appeal is to be served within five (5) days of filing and the Respondent is to file a notice of address of service within five (5) days of service. Per Rule 9, a record of appeal is to be filed within thirty (30) days of the date of the judgment of the High Court, and is to be served within five (5) days of filing. Under Rules 10 and 11, a notice of cross-appeal (in the Form EPA 2 set out in the Schedule) is filed within seven (7) days of service of the record of appeal and served with five (5)	164(3)(a) of the Constitution, the Court of Appeal Rules, 2010,[31] and Court of Appeal (Election Petition) Rules, 2017. – Section 85A(2) of the Elections Act, 2011 – an appeal to the Court of Appeal under section 85A(1) of the Act shall act as a stay of the certificate of the election court certifying the results of an election until the appeal is heard and determined. – A further appeal to the Supreme Court in accordance with article 163(3)(b)(i), (4) and (5) of the Constitution.	appeals from Resident Magistrates' Courts to the High Court, which take the form of a memorandum of appeal.

[30] *Rule 35 of the Elections (Parliamentary and County Elections) Petitions Rules, 2017.*
[31] *Ibid.*

		days of service; application to strike out the notice of appeal and the record also follow the same timelines (Rule 19). N.B.: The notice of appeal acts as a stay of the judgment/order/decree of the High Court but shall lapse if no record of appeal is filed within thirty (30) days of the judgment of the High Court (Rule 18). – Section 85A(2) of the Elections Act, 2011 – an appeal to the Court of Appeal under section 85A(1) of the Act shall act as a stay of the certificate of the election court certifying the results of an election until the appeal is heard and determined. – A further appeal to the Supreme Court in accordance with article 163(3)(b)(i), (4) and (5) of the Constitution.		

How long for the court to determine the appeal	Not applicable	– Rule 23 of the Court of Appeal (Election Petition) Rules, 2017 – the appeal shall be heard and determined within six (6) months of the date of judgment of the High Court. – Rule 27 of the Court of Appeal (Election Petition) Rules, 2017 – upon filing an appeal, the Appellant must deposit a sum of KES 500,000/= as security for costs of the appeal.	– Rule 23 of the Court of Appeal (Election Petition) Rules, 2017 – the appeal shall be heard and determined within six (6) months of the date of judgment of the High Court. – Rule 27 of the Court of Appeal (Election Petition) Rules, 2017 – upon filing an appeal, the Appellant must deposit a sum of KES 500,000/= as security for costs of the appeal.	Section 75(4)(b) of the Elections Act, 2011, appeals from the Resident Magistrate Court to the High Court, on points of law only, must be heard and determined within six (6) months from the date of filing of the appeal.

5 Case Studies on Team Dynamics in Litigating Election Petitions

Prof. Tom Ojienda & Associates has handled a number of election petitions before the election courts, including other electoral disputes handled via other judicial means. Some of the cases handled are:

(a) ***Joseph Oyugi Magwanga & another v Independent Electoral and Boundaries Commission & 3 others*** **[2018] eKLR, HC (Homa Bay), Election Pet No 1 of 2017, (Karanja, J), judgment dated 20 February 2018:**

- Appearing for the 3rd and 4th Respondents.

- Challenging the election of the County Governor for the County of Homa Bay that declared the 3rd Respondent as the winner.
- Election of the 3rd Respondent (County Governor, Homa Bay County) invalidated.

(b) ***Cyprian Awiti & another v Independent Electoral and Boundaries Commission & 3 others*** **[2018] eKLR, CoA (Kisumu) Election Pet Appeal No 5 of 2018 (*Waki, Sichale & Otieno-Odek JJA*), judgment dated 19 July 2018** (being an appeal from the High Court of Kenya at Homa-Bay in Election Pet No 1 of 2017):

- Appearing alongside James Orengo SC and Otiende Amollo SC for the Appellants.
- Challenging the High Court's decision to invalidate the election of the County Governor, Homa Bay County and that declared the 1st Appellant as the winner.
- Appeal dismissed.

(c) ***Cyprian Awiti & another v Independent Electoral and Boundaries Commission & 2 others*** **[2019] eKLR, SCoK (Nairobi) Pet No 17 of 2018, (Maraga, CJ & P; Ibrahim, Ojwang, Wanjala, Njoki Ndungu & Lenaola, SCJJ), judgment dated 7 February 2019** (being an appeal from the judgment and decree of the Court of Appeal at Kisumu in Court of Appeal Election Pet No 5 of 2018):

- Appearing alongside James Orengo, SC and Otiende Amollo, SC for the Appellants.
- Challenging the Court of Appeal's decision in affirming the trial court's decision in invalidating the Appellant's election as declared by IEBC.
- Appeal allowed and the election results for County Governor, Homa Bay County found to be valid.

(d) ***Lenny Maxwell Kivuti v The Independent Electoral and Boundaries Commission (IEBC) & 3 others*** **[2018] eKLR, HC (Embu), Election Pet No 1 of 2017, (Musyoka, J), judgment dated 22 February 2018:**

- Appearing for the Petitioner.
- Challenging the declaration of the 3rd Respondent as the County Governor, Embu County.
- Election of the 3rd Respondent (County Governor, Embu County) invalidated.

(e) ***Martin Nyaga Wambora v Lenny Maxwell Kivuti & 3 others*****, CA (Nyeri) Election Pet Appeal No 6 of 2018 (Being an appeal from the High Court of Kenya at Embu in Election Pet No 1 of 2017), (*Ouko, Musinga and Sichale, JJA*), judgment dated 17 August 2018:**

- Appearing for the 1st Respondent**.**
- Challenging the High Court's decision to invalidate the election of County Governor, Embu County and that declared the Appellant as the winner.
- Appeal allowed, judgment of the HC set aside.

(f) ***Lenny Maxwell Kivuti v Independent Electoral and Boundaries Commission (IEBC) & 3 others*** **[2019] eKLR, SCoK (Nairobi) Pet No 17 of 2018, (*Maraga, CJ & P; Ibrahim, Ojwang, Wanjala, Njoki Ndungu & Lenaola, SCJJ*) judgment dated 30 January 2019** (being an appeal from the judgment and decree of the Court of Appeal at Nyeri in Court of Appeal Election Pet No 6 of 2018):

- Appearing alongside Ngatia, SC for the Petitioner**.**
- Challenging the Court of Appeal's decision in dismissing the trial court's decision in invalidating the 3rd Respondent's election as declared by IEBC.
- Appeal dismissed.

(g) ***Ferdinard Ndung'u Waititu v Independent Electoral & Boundaries Commission (IEBC) & 8 others*** **[2013] eKLR, HC (Nairobi), Election Pet No 1 of 2013, (Mwongo, PJ):**

- Appearing for the 4th and 5th Respondents**.**
- Petition challenging the declaration of the 4th Respondent as County Governor, Nairobi County.
- Election of the 4th Respondent (County Governor, Nairobi County) upheld.

(h) ***Ferdinard Ndung'u Waititu v Independent Electoral & Boundaries Commission (IEBC) & 8 others*** **[2014] eKLR, CoA (Nairobi) Election Pet Appeal No 324 of 2013 (*Warsame, Kariuki and Kiage, JJA*)** (being an appeal from the High Court of Kenya at Nairobi in Election Pet No 1 of 2013):

- Appearing alongside Mr. Mugambi, for the 4th and 5th Respondents**.**
- An election petition appeal challenging the High Court's decision in upholding the election results for County Governor, Nairobi County.
- Appeal allowed.

(i) ***Evans Odhiambo Kidero & 4 others v Ferdinand Ndungu Waititu & 4 others*** **[2014] eKLR, SCoK (Nairobi) Pet No 18 of 2014 (Mutunga, CJ & P; Rawal, DCJ &V-P, Tunoi, Ibrahim, Ojwang, Wanjala & Njoki Ndungu, SCJJ)** (being an appeal from the judgment and decree of the Court of Appeal at Nairobi in Court of Appeal Election Pet No 324 of 2013):

- Appearing alongside Nowrojee, SC and Oduol for the 1st and 2nd Appellants.
- Challenging the Court of Appeal's decision in dismissing the trial court's decision in upholding the 1st Appellant's election as declared by IEBC.

- Appeal allowed.

(j) ***Dickson Mwenda Kithinji v Gatirau Peter Munya & 2 others* [2013] eKLR, HC (Meru), Election Pet No 1 of 2013, (Makau, J), judgment dated 23 September 2013:**

- Challenging the declaration of the 1st Respondent as County Governor, Meru County.
- Election of the 1st Respondent (County Governor, Meru County) upheld.

(k) ***Dickson Mwenda Githinji v Gatirau Peter Munya & 2 others* [2014] eKLR, CoA (Nyeri) Election Pet Appeal No 38 of 2013, (*Visram, Mohammed and Otieno-Odek, JJA*), judgment dated 12 March 2014** (being an appeal from the High Court of Kenya at Meru in Election Pet No 1 of 2013):

- Challenging the High Court's decision in upholding the election results for County Governor, Meru County.
- Appeal allowed.

(l) ***Gatirau Peter Munya v Dickson Mwenda Kithinji & 3 others* [2014] eKLR, SCoK (Nairobi), Pet No 2B of 2014** (Mutunga, CJ & P; Rawal, DCJ &V-P, Tunoi, Ibrahim, Ojwang, Wanjala & Njoki Ndungu, SCJJ) (being an appeal from the judgment and decree of the Court of Appeal at Nairobi in Court of Appeal Election Pet No 38 of 2013):

- Appearing alongside Okong'o Omogeni, SC for the Appellant.
- Challenging the Court of Appeal's decision in dismissing the trial court's decision in upholding the Appellant's election as declared by the 2nd Respondent.
- Appealed allowed.

(m) ***Aziz Kassim Ibrahim v Independent Electoral and Boundaries Commission (IEBC) & 4 others*** **[2017] eKLR, CMCC (Milimani, Nairobi), Election Pet No 6A of 2017, (Hon Gesora, CM), judgment dated 24 January 2018:**

- Appearing for the Petitioner.
- Challenging the election results for the position of Member of County Assembly, Kwa Njenga Ward, which declared the 5th Respondent as the winner.
- Election of the 5th Respondent (MCA, Kwa Njenga Ward) upheld.

(n) ***Musa Cherutich Sirma v Independent Electoral and Boundaries Commission (IEBC) & 2 others*** **[2018] eKLR, HC (Kabarnet), Election Pet No 1 of 2017, (Muriithi J), judgment dated 2 March 2018:**

- Appearing for the Petitioner.
- Challenging the election results for the position of Member of National Assembly, Eldama Ravine Constituency, which declared the 3rd Respondent as the winner.
- Election of the 3rd Respondent (Member of National Assembly, Eldama Ravine Constituency) upheld.

(o) ***Hussein Abshiro Herin & 23 others v Independent Electoral and Boundaries Commission & 2 others*** **[2018] eKLR, HC (Nairobi), Election Pet No 7 of 2017, (Ong'udi J), judgment dated 27 February 2017:**

- Appearing for the Petitioners.
- Challenging the election results for the position of Member of National Assembly, Mandera North Constituency, which declared the 3rd Respondent as the winner.
- Election of the 3rd Respondent (Member of National Assembly, Mandera North Constituency) upheld.

(p) ***Geoffrey Okuto Otieno v Orange Democratic Movement & 2 others*** **[2017] eKLR, HC (Nairobi), Election Pet Appeal No 61 of 2017, (Riechi, J), judgment dated 25 May 2017** (being an appeal from the decision of the PPDT in case No 177 of 2017):

- Appearing for the Appellant.
- Challenging the decision of the PPDT directing the 1st Respondent to undertake a fresh nomination process for MCA Hospital Ward, Mathare Constituency.
- Appeal dismissed and 1st Respondent directed to conduct fresh nomination exercise.

(q) ***Joseph Mboya Nyamuthe v Orange Democratic Movement & 4 others*** **[2017] eKLR, HC (Nairobi), Election Pet Appeal No 5 of 2017, (Onyiego, J), judgment dated 10 May 2017** (being an appeal from the decision of the PPDT in Complaint No 69 of 2017):

- Appearing for the 2nd Respondent.
- Challenging the decision of the PPDT to dismiss the Appellant's claim that it lacked jurisdiction to hear the matter.
- Appeal allowed and the dismissal by the PPDT set aside.

(r) ***Abdirahman Adan Abdikadir & another v Independent Electoral & Boundaries Commission & 2 others*** **[2018] eKLR, HC (Nairobi), Election Pets No 13 & 16 of 2017, (Mwongo, PJ), judgment of 31 January 2018:**

- Appearing for the 1st Petitioner**.**
- Challenging the declaration of the 3rd Respondent as Senator, Wajir County.
- Election of the 3rd Respondent (Senator, Wajir County) upheld.

(s) ***Hassan Noor Hassan v The Independent Electoral and Boundaries Commission (IEBC) & 3 others*** **[2018] eKLR, HC (Nairobi), Election Pet No 1 of 2017, (F A Ochieng, J):**

- Appearing for the Petitioner**.**
- Challenging the declaration of the 3rd Respondent as County Governor, Mandera County.
- Election of the 3rd Respondent (County Governor, Mandera County) upheld.

(t) ***Harun Meitamei Lempaka v Lemanken Aramat & 2 others*** **[2013] eKLR, CoA (Nairobi), Election Pet Appeal No 276 of 2013, (*Waki, Musinga and Gatembu, JJA*), judgment dated 28 March 2014** (being an appeal from the High Court of Kenya at Nakuru in Election Pet No 2 of 2013):

- Challenging the High Court's decision in upholding the election results for the Member of the National Assembly, Narok East Constituency.
- Appeal dismissed.

(u) ***Lemanken Aramat v Harun Meitamei Lempaka & 2 others*** **[2014] eKLR, SCoK (Nairobi), Pet No 5 of 2014** (Rawal, DCJ &V-P, Tunoi, Ibrahim, Ojwang, Wanjala & Njoki Ndungu, SCJJ), judgment dated 6 August 2014 (being an appeal from the judgment and decree of the Court of Appeal at Nairobi in Court of Appeal Election Pet No 276 of 2013):

- Appearing for the Appellant.
- Challenging the Court of Appeal's decision in setting aside the trial court's judgment and ordering for recount, thus invalidating the election results.
- Appeal allowed.

6 Conclusion

Litigation teams handling election petitions, like in other matters, must adhere to professional rules and guidelines for advocates under the Advocates Act (Cap 16) and the attendant practice rules and regulations in

their interactions with one another. Professional etiquette and civility in personal interactions and correspondences is necessary, especially timely service and response to pleadings. In any case, litigating election petitions requires the sacrifice of time in terms of working long hours into the night to be able to file stellar pleadings within the stipulated timelines.

Approaches to Biodiversity Conservation: Embracing Global Resource Conservation Best Practices

By: ***Kariuki Muigua****

Abstract

This paper critically discusses the main approaches to biological diversity conservation, namely: in-situ and ex-situ conservation, highlighting their main features that countries can adopt as a way to enhance their conservation measures and move closer to achieving sustainable development goals. The author argues that countries should embrace the global best practices in resource conservation while paying attention to both climate change adaptation and biodiversity conservation.

1. Introduction

It has rightly been observed that while 'biodiversity can be greatly enhanced by human activities, it can also be adversely impacted by such activities due to unsustainable use or by more profound causes linked to our development models'.[1] This is despite the fact that biodiversity is considered to be very important for sustenance of all forms of life on earth.[2] Biodiversity is essential not only to the proper functioning of earth systems, it is also key to the delivery of those ecosystem services that are crucial to human dignity

PhD in Law (Nrb), FCIArb (Chartered Arbitrator), LL. B (Hons) Nrb, LL.M (Environmental Law) Nrb; Dip. In Law (KSL); FCPS (K); Dip. In Arbitration (UK); MKIM; Mediator; Consultant: Lead expert EIA/EA NEMA; BSI ISO/IEC 27001:2005 ISMS Lead Auditor/ Implementer; Advocate of the High Court of Kenya; Senior Lecturer at the University of Nairobi, School of Law [November 2021].

[1] 'Conserving Biodiversity for Life and Sustainable Development | United Nations Educational, Scientific and Cultural Organization' <*http://www.unesco.org/new/en/media-services/single-view/news/conserving_biodiversity_for_life_and_sustainable_development/*> accessed 29 July 2021; 'Threats to Biodiversity – Biodiversity Clearing House Mechanism' <*http://meas.nema.go.ke/cbdchm/major-threats/*> accessed 31 July 2021.

[2] Dmitrii Pavlov and Elena Bukvareva, 'Biodiversity and Life Support of Humankind' (2007) 77 Herald of the Russian Academy of Sciences 550.

and well-being including: the provision of potable water, food; soil fertility; maintenance of the 'genetic library of biodiversity' – an irreplaceable source of new innovations, pharmaceuticals and chemicals; and climate regulation – among others.[3] The concept of ecosystem services was inspired by the desire to give an economic assessment of these functions thus leading to the appearance of the concept of ecosystem services, that is, consideration with regard to their usefulness for humans.[4] Arguably, ecosystem services are divided into four categories namely: provisioning services refer to natural products that are directly used by humans for food, clothing, medicines, tools, or other uses; cultural services provide recreational opportunities, inspiration for art and music, and spiritual value; regulating services include pest control and carcass removal; and supporting services, such as pollination, seed dispersal, water purification, and nutrient cycling, provide processes essential for ecological communities and agricultural ecosystems.[5]

It is against this background that this paper discusses the global best practices and approaches to biodiversity conservation due to the important role of biodiversity in ensuring that the sustainable development agenda is achieved for the sake of current and future generations. The concept of sustainable development seeks to strike a balance between using ecosystem services to improve human lives and the need to ensure that the environment can comfortably replenish itself, that is, a balance between the ecocentric approaches to conservation against the anthropocentric approaches.[6]

---

[3] 'Conserving Biodiversity for Life and Sustainable Development | United Nations Educational, Scientific and Cultural Organization' <*http://www.unesco.org/new/en/media-services/single-view/news/conserving_biodiversity_for_life_and_sustainable_development/*> accessed 29 July 2021.

[4] Dmitrii Pavlov and Elena Bukvareva, 'Biodiversity and Life Support of Humankind' (2007) 77 Herald of the Russian Academy of Sciences 550, 551.

[5] Wenny, D.G., Devault, T.L., Johnson, M.D., Kelly, D., Sekercioglu, C.H., Tomback, D.F. and Whelan, C.J., 'The Need to Quantify Ecosystem Services Provided by Birds' (2011) 128 The Auk 1.

[6] Louis J Kotzé and Duncan French, 'The Anthropocentric Ontology of International Environmental Law and the Sustainable Development Goals: Towards an Ecocentric Rule of Law in the Anthropocene' (2018) 7 Global Journal of Comparative Law 5; 'Putting Ecosystems into the SDGs' (Water, Land and Ecosystems, 9 October 2015)

Some scholars identify three forms of biodiversity such as alpha (genetic diversity), beta (species richness) and gamma (ecological diversity) and the services that accrue from biodiversity include materialistic gains, ecological services (flood control, climate maintenance, and nutrient cycling), and non-materialistic benefits such as recreation.[7] This paper critically discusses some of the major approaches that have been adopted globally in conserving all the above mentioned forms of biodiversity. The paper also highlights the salient provisions of the 1992 Convention on Biological Diversity, the key international legal instrument on biological diversity conservation.

2. Biodiversity: Definition and Scope

Notably, *Biodiversity*, a contraction of the phrase "biological diversity," can be traced to the first usage by Walter G. Rosen during a planning meeting for the 1986 National Forum on Biodiversity held in Washington, DC, while the first appearance of the word in the print literature likely occurred with the 1988 publication of the proceedings of the said conference.[8]

<https://wle.cgiar.org/news/putting-ecosystems-sdgs> accessed 3 June 2021; Bullock, C. H. "Nature's values: From intrinsic to instrumental. A review of values and valuation methodologies in the context of ecosystem services and natural capital." National Economic and Social Council 10 (2017); 'Striking a Balance between Conservation and Development' (UNEP, 13 May 2019) <http://www.unep.org/news-and-stories/story/striking-balance-between-conservation-and-development> accessed 3 June 2021; McCartney, M., Finlayson, M., de Silva, S., Amerasinghe, P., & Smakhtin, V., 'Sustainable Development and Ecosystem Services' (2014); Rülke, J., Rieckmann, M., Nzau, J. M., & Teucher, M., 'How Ecocentrism and Anthropocentrism Influence Human–Environment Relationships in a Kenyan Biodiversity Hotspot' (2020) 12 Sustainability 8213.

[7]Tamanna Kumari, Pinky Deswal and Vineeta Shukla, 'Approaches to Biodiversity Conservation In India', February 2021 <https://www.researchgate.net/publication/349338888_APPROACHES_TO_BIODIVERSITY_CONSERVATION_IN_INDIA> accessed 11 July 2021.

[8] John Creech, 'Biodiversity Web Resources' <http://www.istl.org/12-fall/internet.html> accessed 29 July 2021; David L Hawksworth and Royal Society (Great Britain), Biodiversity: Measurement and Estimation (Springer Science & Business Media 1995).

The *1992 Convention on Biological Diversity*[9] defines 'biodiversity' to mean "the variability among living organisms from all sources including, *inter alia*, terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part: this includes diversity within species, between species and of ecosystems".[10]

The United Nations Educational, Scientific and Cultural Organization (UNESCO) on the other hand defines 'biodiversity' as the 'diversity of all living forms at different levels of complexity: genes, species, ecosystems and even landscapes and seascapes'.[11] Biological diversity or biodiversity has also been defined as 'the variety of the planet's living organisms and their interactions'.[12] The term is meant to encompass all of life's variation, expressed in genes, individuals, populations, species, communities and ecosystems.[13]

A broader definition of 'biodiversity' has been propounded as referring to three dimensions within which variability occurs: *genetic*, meaning the variation of genes within a species, sub-species or population; *population/species*, meaning the variation between living species and their component populations at different spatial scales (local, regional or global); and *community/ecosystem*, meaning the variation within ecological complexes of which species are a part.[14]

---

[9] United Nations, Convention on Biological Diversity of 5 June 1992 (1760 U.N.T.S. 69).
[10] Article 2, Convention on Biological Diversity.
[11] United Nations Educational, Scientific and Cultural Organization, 'Conserving Biodiversity for Life and Sustainable Development | United Nations Educational, Scientific and Cultural Organization' <http://www.unesco.org/new/en/media-services/single-view/news/conserving_biodiversity_for_life_and_sustainable_development/> accessed 29 July 2021.
[12] Wes Sechrest and Thomas Brooks, 'Biodiversity – Threats' (2002).
[13] Ibid, 1; see also Matta, G., Bhadauriya, G., & Singh, V., "Biodiversity and Sustainable Development: A Review." Fecundity of fresh water prawn Macrobrachium Assamense Penensularae from Khoh River, India: 72.
[14] Roe, Dilys, "Linking biodiversity conservation and poverty alleviation: a state of knowledge review." CBD Technical Series 55 (2010), 13.

These definitions are relevant especially in the context of Sustainable Development debate as they reflect the important role that biological diversity can and indeed plays in meeting the essentials of realising Sustainable Development goals such as food security, alleviating poverty, among others.[15] The World Bank argues that while biodiversity provides many instrumental benefits, from food and fuel to recreation, even where biodiversity is not immediately instrumental, it represents global public goods that must be protected, if only for their potential value in the future.[16]

3. General Approaches to Biodiversity Conservation

There are mainly two approaches to biological diversity conservation, namely: in-situ and ex-situ conservation. There is also the Ecosystem Services Approaches for Biodiversity Conservation. Notably, over the past century a wide range of different conservation-oriented approaches have been enacted, from local and regional scale activities, such as protected area establishment, ex-situ conservation, recovery planning for species and ecosystems, specific threat management (e.g. disease, fire), and biodiversity off-sets, to global scale inter-governmental policy developments such as the *Convention on Biological Diversity* (CBD) and *the Convention on International Trade on Endangered Species* (CITES), all approaches based on multiple values of biodiversity, including those values not related to humans.[17] This section discusses these approaches within the context of the 1992 CBD.

---

[15] Måns Nilsson, 'Biodiversity's Contributions to Sustainable Development' [2019] Nature Sustainability <https://www.sei.org/publications/biodiversity-contributions-sustainable-development/> accessed 3 June 2021; Gagan Matta, Gaurav Bhadauriya and Vikas Singh, 'Biodiversity and Sustainable Development: A Review' Fecundity of fresh water prawn Macrobrachium Assamense Penensularae from Khoh River, India 72.

[16] Sobrevila, Claudia; Hickey, Valerie, The Role of Biodiversity and Ecosystems in Sustainable Development. 2010 Environment Strategy Analytical Background Papers; World Bank, Washington, DC. © World Bank, 2010. https://openknowledge.worldbank.org/handle/10986/27584 License: CC BY 3.0 IGO< accessed 29 July 2021.

[17] Ingram JC, Redford KH and Watson JEM, 'Applying Ecosystem Services Approaches for Biodiversity Conservation: Benefits and Challenges' [2012]

3.1. In-situ Biodiversity Conservation

In situ conservation is defined as the on-site conservation of genetic resources in natural populations of plants or animal species such as forest genetic resources, in natural populations of tree and animal species.[18] The *Convention on Biological Diversity* 1992 defines it to mean 'the conservation of ecosystems and natural habitats and the maintenance and recovery of viable populations of species in their natural surroundings and, in the case of domesticated or cultivated species, in the surroundings where they have developed their distinctive properties'. [19] Notably, Article 8 of the Convention on Biological Diversity (CBD) specifies in-situ conservation as the primary conservation strategy, and states that ex-situ measures should play a supportive role to reach conservation targets.[20] Article 8 of CBD provides that in order to promote in-situ conservation, each Contracting Party should, as far as possible and as appropriate: (a) Establish a system of protected areas or areas where special measures need to be taken to conserve biological diversity; (b) Develop, where necessary, guidelines for the selection, establishment and management of protected areas or areas where special measures need to be taken to conserve biological diversity; (c) Regulate or manage biological resources important for the conservation of biological diversity whether within or outside protected areas, with a view to ensuring their conservation and sustainable use; (d) Promote the protection of ecosystems, natural habitats and the maintenance of viable populations of species in natural surroundings; (e) Promote environmentally sound and sustainable development in areas adjacent to protected areas with a view to furthering protection of these areas; (f) Rehabilitate and restore degraded ecosystems and promote the recovery of threatened species, inter alia, through the development and implementation of plans or other management

S.A.P.I.EN.S. Surveys and Perspectives Integrating Environment and Society <https://journals.openedition.org/sapiens/1459> accessed 12 September 2021.

[18] Ajayi SS, 'Chapter 9 - Principles for the Management of Protected Areas' in SS Ajayi (ed), Wildlife Conservation in Africa (Academic Press 2019) <https://www.sciencedirect.com/science/article/pii/B9780128169629000090> accessed 12 September 2021.

[19] Article 2, Convention on Biological Diversity (CBD) 1992.

[20] 'In-Situ Conservation Definition| Biodiversity A-Z' <https://biodiversitya-z.org/content/in-situ-conservation> accessed 12 September 2021.

strategies; (g) Establish or maintain means to regulate, manage or control the risks associated with the use and release of living modified organisms resulting from biotechnology which are likely to have adverse environmental impacts that could affect the conservation and sustainable use of biological diversity, taking also into account the risks to human health; (h) Prevent the introduction of, control or eradicate those alien species which threaten ecosystems, habitats or species; (i) Endeavour to provide the conditions needed for compatibility between present uses and the conservation of biological diversity and the sustainable use of its components; (j) Subject to its national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices; (k) Develop or maintain necessary legislation and/or other regulatory provisions for the protection of threatened species and populations; (l) Where a significant adverse effect on biological diversity has been determined pursuant to Article 7, regulate or manage the relevant processes and categories of activities; and (m) Cooperate in providing financial and other support for in-situ conservation outlined in subparagraphs (a) to (l) above, particularly to developing countries.

In-situ initiatives beyond protected areas may thus include: habitat restoration, recovery or rehabilitation; strategies for the sustainable use and management of biological resources; recovery programmes for nationally or sub-nationally threatened or endangered wild species; on-farm agricultural biodiversity conservation targeted at traditional crop varieties and crop wild relatives; genetic reserve conservation, that is, monitoring of genetic diversity in natural wild populations within a delineated area (known as genetic sanctuaries or gene management zones); control of threats to biodiversity such as invasive alien species, living modified organisms or over exploitation; preservation and maintenance of traditional knowledge and practices; and implementation of the regulatory, legislation,

management or other frameworks needed to deliver the protection of species or habitats.[21]

Some commentators have observed that while agriculture and protected areas are sometimes seen as opposite ends of a spectrum, in fact, they can play important complementary roles, especially when the protected areas are managed in ways explicitly designed to support agricultural development.[22] Notably, in situ conservation of wild relatives and forest tree resources focuses on responding to the drivers and pressures that threaten the natural populations so as to maintain the genetic diversity and geographic range of species, thereby maximizing their potential to respond to natural or human-made environmental change.[23]

3.2. Ex-situ Conservation

Ex situ conservation is defined as the relocation of endangered or rare species from their natural habitats to protected areas equipped for their protection and preservation, as an essential alternative strategy when in situ conservation is inadequate.[24] The *Convention on Biological Diversity* 1992 defines *"ex-situ conservation"* to mean the conservation of components of biological diversity outside their natural habitats.[25] Ex-situ conservation involves maintenance and breeding of endangered plants and animals under partially or wholly controlled conditions in specific areas including zoo, gardens, nurseries, etc. That is, the conservation of selected plants and animals in selected areas outside their natural habitat is known as ex-situ

[21] Ibid.
[22] 'The Role of Protected Areas for Conservation and Sustainable Use of Plant Genetic Resources for Food and Agriculture - Jeffrey A. McNeely' <https://www.bioversityinternational.org/fileadmin/bioversity/publications/Web_version/62/ch07.htm> accessed 12 September 2021.
[23] Bellon, M.R., Dulloo, E., Sardos, J., Thormann, I. and Burdon, J.J., 'In Situ Conservation—Harnessing Natural and Human-Derived Evolutionary Forces to Ensure Future Crop Adaptation' (2017) 10 Evolutionary Applications 965.
[24] Ajayi SS, 'Chapter 9 - Principles for the Management of Protected Areas' in SS Ajayi (ed), Wildlife Conservation in Africa (Academic Press 2019) <https://www.sciencedirect.com/science/article/pii/B9780128169629000090> accessed 12 September 2021.
[25] Article 2, Convention on Biological Diversity (CBD) 1992.

conservation.[26] Article 9 of CBD provides for *ex-situ* conservation and states that: each Contracting Party should, as far as possible and as appropriate, and predominantly for the purpose of complementing in-situ measures: (a) Adopt measures for the ex-situ conservation of components of biological diversity, preferably in the country of origin of such components; (b) Establish and maintain facilities for ex-situ conservation of and research on plants, animals and micro- organisms, preferably in the country of origin of genetic resources; (c) Adopt measures for the recovery and rehabilitation of threatened species and for their reintroduction into their natural habitats under appropriate conditions; (d) Regulate and manage collection of biological resources from natural habitats for ex-situ conservation purposes so as not to threaten ecosystems and in-situ populations of species, except where special temporary ex-situ measures are required under subparagraph (c) above; and (e) Cooperate in providing financial and other support for ex-situ conservation outlined in subparagraphs (a) to (d) above and in the establishment and maintenance of ex- situ conservation facilities in developing countries.

It has been observed that during recent years, dramatic progress has been made with the development of new conservation techniques for non-orthodox and vegetatively propagated species, and the current ex situ conservation concepts should be modified accordingly to accommodate these technological advances.[27] However, it is suggested that considering the fact that the requirements for optimal conservation vary from species to species, as well as the available infrastructural and human resources, it is important to consider all these aspects as well as the wider socio-economic

[26] Jaisankar I, Velmurugan A and Sivaperuman C, 'Chapter 19 - Biodiversity Conservation: Issues and Strategies for the Tropical Islands' in Chandrakasan Sivaperuman and others (eds), Biodiversity and Climate Change Adaptation in Tropical Islands (Academic Press 2018) <https://www.sciencedirect.com/science/article/pii/B9780128130643000193> accessed 12 September 2021.

[27] Engelmann F and Engels JMM, 'Technologies and Strategies for Ex Situ Conservation' [2002] Managing plant genetic diversity 89, 99.

conditions under which a given conservation effort takes place when deciding how to optimize these parameters into the conservation strategy.[28]

3.3. Ecosystem Services Approaches for Biodiversity Conservation

Notably, ecosystem services as a concept and framework for understanding the way in which nature benefits people has led to a suite of approaches that are increasingly being used to support sustainable management of biodiversity and ecosystems.[29] While the ecosystem approach is a well-established strategy for the integrated management of land, water and living resources that promotes conservation and sustainable use in an equitable way, the Ecosystem Services Approach (ESA) takes this strategy one step further, and through the inclusion of ecosystem services ensures that the complex relationships between nature and humans are more clearly understood and explicitly included.[30] Ecosystem-based management, with a primary focus on ecosystem services, is seen as a viable approach as it can also help broaden constituencies and influence decision-making to support conservation, as an integrated approach to natural resource management that considers the entire ecosystem, including humans, and has the goal of "maintaining an ecosystem in a healthy, productive and resilient condition so that it can provide the services humans want and need".[31]

An Ecosystem Services Approach (ESA) has been associated with four common characteristics: (1) ecosystem services are valued on the basis of their benefits to humans; (2) ecosystem services are underpinned by ecosystem processes and this relationship is made explicit; (3) the approach

[28] Ibid, 100.
[29] Ingram, J.C., Redford, K.H. and Watson, J.E., 'Applying Ecosystem Services Approaches for Biodiversity Conservation: Benefits and Challenges' [2012] SAPI EN. S. Surveys and Perspectives Integrating Environment and Society.
[30] Beaumont NJ, Mongruel R and Hooper T, 'Practical Application of the Ecosystem Service Approach (ESA): Lessons Learned and Recommendations for the Future' (2017) 13 International Journal of Biodiversity Science, Ecosystem Services & Management 68.
[31] Ingram, J.C., Redford, K.H. and Watson, J.E., 'Applying Ecosystem Services Approaches for Biodiversity Conservation: Benefits and Challenges' [2012] SAPI EN. S. Surveys and Perspectives Integrating Environment and Society, 4.

requires interdisciplinary collaboration and stakeholder engagement at multiple scales; and (4) the outcomes of the approach can be incorporated into environmental policy and management decisions.[32]

At COP 26 in Glasgow, Scotland, Climate change experts from United Nations University (UNU) and World Food Programme (WFP) encouraged countries to embrace better integration of nature-based solutions in adaptation planning.[33] Arguably, these nature-based solutions can have the twin benefits of climate adaptation and biodiversity conservation.[34]

At COP 26, embracing nature-based solutions was seen as a way to not only take care of the environment but also ensuring that the ecosystem in turn takes care of human basic needs, and participants thus resolved to explore solutions that cover both the climate and biodiversity crises.[35] A Draft Decision published from COP 26 emphasised "the critical importance of nature-based solutions and ecosystem-based approaches, including protecting and restoring forests, to reducing emissions, enhancing removals and protecting biodiversity".[36]

---

[32] Beaumont NJ, Mongruel R and Hooper T, 'Practical Application of the Ecosystem Service Approach (ESA): Lessons Learned and Recommendations for the Future' (2017) 13 International Journal of Biodiversity Science, Ecosystem Services & Management 68.

[33] 'COP26: Nature-Based Solutions Win in Science and on the Ground - World' (ReliefWeb) <https://reliefweb.int/report/world/cop26-nature-based-solutions-win-science-and-ground> accessed 24 November 2021.

[34] Key, I., Smith, A., Turner, B., Chausson, A., Girardin, C., MacGillivray, M. and Seddon, N., "Can Nature-Based Solutions Deliver a Win-Win for Biodiversity and Climate Change Adaptation?" (2021).

[35] United Nations, 'COP26 Day 7: Sticking Points and Nature-Based Solutions' (United Nations) <https://www.un.org/en/climatechange/cop26-day-7-sticking-points-and-nature-based-solutions> accessed 24 November 2021.

[36] '"Nature-Based Solutions" Prove Divisive at Glasgow Climate Talks' (Climate Home News, 11 November 2021) <https://www.climatechangenews.com/2021/11/11/nature-based-solutions-prove-divisive-glasgow-climate-talks/> accessed 24 November 2021; See also United Nations, Draft CMA decision proposed by the President, Draft Text on 1/CMA.3, Version 10/11/2021 05:51.

The new opportunities that ecosystem services approaches provide for biodiversity conservation include: the development of broader constituencies for conservation and expanded possibilities to influence decision-making; opportunities to add or create new value to protected areas; and the opportunities to manage ecosystems sustainably outside of protected areas.[37]

The main concern, however, despite the increasing adoption of ecosystem services as a framework and suite of tools by the conservation community, regard the application and efficacy of these approaches for conserving all of the components of biodiversity that the conservation community is charged with protecting. This is because at their core, ecosystem services approaches prioritize those processes that contribute to human wellbeing; very different from a biodiversity conservation approach, which is concerned with identifying conservation management actions to promote the persistence of all biodiversity, including species or ecosystems that do not have an identified value for humans.[38] Thus, it is suggested that when utilising ecosystem services approaches for conservation, planners and managers must be realistic and recognise that these approaches are not all-encompassing and there are going to be gap species, ecosystems, and ecological processes whose conservation will require tools tailored to address those issues.[39]

[37] Ingram, J.C., Redford, K.H. and Watson, J.E., 'Applying Ecosystem Services Approaches for Biodiversity Conservation: Benefits and Challenges' [2012] SAPI EN. S. Surveys and Perspectives Integrating Environment and Society, 3.
[38] Ingram, J.C., Redford, K.H. and Watson, J.E., 'Applying Ecosystem Services Approaches for Biodiversity Conservation: Benefits and Challenges' [2012] SAPI EN. S. Surveys and Perspectives Integrating Environment and Society, 5; Reyers B and others, 'Finding Common Ground for Biodiversity and Ecosystem Services' (2012) 62 BioScience 503.
[39] Ingram, J.C., Redford, K.H. and Watson, J.E., 'Applying Ecosystem Services Approaches for Biodiversity Conservation: Benefits and Challenges' [2012] SAPI EN. S. Surveys and Perspectives Integrating Environment and Society.

4. Overview of the Convention on Biological Diversity

The Convention on Biological Diversity (CBD) is the first global agreement to cover all aspects of biological diversity: the conservation of biological diversity, the sustainable use of its components and the fair and equitable sharing of the benefits arising out of the utilization of genetic resources, including by appropriate access to genetic resources and by appropriate transfer of relevant technologies, taking into account all rights over those resources and to technologies, and by appropriate funding,[40] and the same was signed at the Earth Summit in Rio de Janeiro, Brazil, in 1992 and entered into force on 29 December 1993.[41]

The main principle that guides the application of CBD is that 'States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.[42]

The CBD calls for cooperation among Contracting States in conservation and sustainable use of biological diversity.[43] As for individual States, the CBD requires them to develop national strategies, plans or programmes for the conservation and sustainable use of biological diversity or adapt for this purpose existing strategies, plans or programmes which should reflect, *inter alia*, the measures set out in this Convention relevant to the Contracting Party concerned; and integrate, as far as possible and as appropriate, the conservation and sustainable use of biological diversity into relevant sectoral or cross-sectoral plans, programmes and policies.[44]

---

[40] Article 1, Convention on Biological Diversity.
[41] Biosafety Unit, 'Welcome to the CBD Secretariat' (8 April 2013) <https://www.cbd.int/secretariat/> accessed 29 July 2021.
[42] Article 3, Convention on Biological Diversity.
[43] Ibid, Article 5.
[44] Article 6, Convention on Biological Diversity.

As for sustainable use of components of biological diversity, CBD requires Contracting States to, as far as possible and as appropriate: integrate consideration of the conservation and sustainable use of biological resources into national decision-making; adopt measures relating to the use of biological resources to avoid or minimize adverse impacts on biological diversity; protect and encourage customary use of biological resources in accordance with traditional cultural practices that are compatible with conservation or sustainable use requirements; support local populations to develop and implement remedial action in degraded areas where biological diversity has been reduced; and encourage cooperation between its governmental authorities and its private sector in developing methods for sustainable use of biological resources.[45]

CBD also requires each Contracting Party to, as far as possible and as appropriate, adopt economically and socially sound measures that act as incentives for the conservation and sustainable use of components of biological diversity.[46]

In order to build capacity through research and training, CBD requires all the Contracting Parties, taking into account the special needs of developing countries, to: establish and maintain programmes for scientific and technical education and training in measures for the identification, conservation and sustainable use of biological diversity and its components and provide support for such education and training for the specific needs of developing countries; promote and encourage research which contributes to the conservation and sustainable use of biological diversity, particularly in developing countries, inter alia, in accordance with decisions of the Conference of the Parties taken in consequence of recommendations of the Subsidiary Body on Scientific, Technical and Technological Advice: and in keeping with the provisions of Articles 16, 13 and 20, promote and cooperate in the use of scientific advances in biological diversity research in developing methods for conservation and

[45] Ibid, Article 10.
[46] Ibid, Article 11.

sustainable use of biological resources.[47] In addition to this, the Contracting Parties should: promote and encourage understanding of the importance of, and the measures required for, the conservation of biological diversity, as well as its propagation through media, and the inclusion of these topics in educational programmes; and cooperate, as appropriate, with other States and international organizations in developing educational and public awareness programmes, with respect to conservation and sustainable use of biological diversity.[48] In order to reduce or eliminate adverse impacts on biodiversity, CBD requires States to invest in impact assessment measures and/or procedures. [49]

Notably, Kenya is a signatory to the Convention on Biological Diversity, and thus obligated to consider as well as adopt the Aichi Targets in its national plans and programs on biological diversity conservation.[50] It is noteworthy that development and agricultural activities are likely to adversely affect biodiversity conservation measures. As a result, the government should continually establish efficient systems of Strategic Environmental Assessment (SEA), Environmental Impact Assessment (EIA), Strategic Environmental and Social Assessment (SESA) and Environmental Audit and Monitoring of the environment and Environmental Security Assessment (ESA) and ensure that the same are periodically reviewed to ensure that they remain effective. There is a need to ensure that these EIA processes are not only carried out as a formality but are also reflective of what is on the ground and there should also be a follow up mechanism to ensure that the companies

[47] Ibid, Article 12.
[48] Article 13, Convention on Biological Diversity.
[49] Article 14, Convention on Biological Diversity.
[50] Biosafety Unit, 'Main Details' <https://www.cbd.int/countries/profile/?country=ke> accessed 3 June 2021; 'Convention on Biological Diversity | Treaties Database' <http://kenyalaw.org/treaties/treaties/87/Convention-on-Biological-Diversity> accessed 3 June 2021; 'Ministry of Environment and Forestry » Blog Archive » Statement By Kenya On Strategic Plan For Biodiversity 2011-2020' <http://www.environment.go.ke/?p=3091> accessed 3 June 2021.

engage the communities throughout and that they continually carry out their duties as per the law and the assessment reports.[51]

These impact assessment activities should also include Biodiversity Impact Assessment (BIA). BIA, a subset of EIA, has been defined as an evaluation exercise which involves identifying, measuring, quantifying, valuing and internalizing the unintended impacts (on biodiversity) of development interventions.[52] Arguably, EIA processes should entail BIA, and specifically, ecological impact assessment to the extent that ecological diversity is one aspect of biodiversity, in order to determine how and to what extent, development interventions and projects are affecting biodiversity — composition, structure and function.[53] While neither the Constitution of Kenya 2010 nor EMCA expressly mentions BIA, the same can be adopted in line with the provisions of Article 69 of the Constitution as well as sections 57A, 58, 62, and 112 on conservation of environmental resources, including biodiversity.

Internationally, the inclusion of BIA in EIA activities is also supported by Article 14 of the *Convention on Biological Diversity* which states that: each Contracting Party, as far as possible and as appropriate, shall: (a) Introduce appropriate procedures requiring environmental impact assessment of its

---

[51] 'Chapter 3: EIA Process' <http://www.fao.org/3/V8350E/v8350e06.htm> accessed 24 July 2021; '1.7 Overview of the Stages of the EIA Process' <https://www.soas.ac.uk/cedep-demos/000_P507_EA_K3736-Demo/unit1/page_14.htm> accessed 24 July 2021; 'Our Role in Securing Public Participation in the Kenyan Legislative and Policy Reform Process' (Natural Justice, 23 July 2020) <https://naturaljustice.org/our-role-in-securing-public-participation-in-the-kenyan-legislative-and-policy-reform-process/> accessed 24 July 2021; 'Accountability, Transparency, Participation, and Inclusion: A New Development Consensus? - Carnegie Endowment for International Peace' <https://carnegieendowment.org/2014/10/20/accountability-transparency-participation-and-inclusion-new-development-consensus-pub-56968> accessed 24 July 2021.

[52] Wale E and Yalew A, 'On Biodiversity Impact Assessment: The Rationale, Conceptual Challenges and Implications for Future EIA' (2010) 28 Impact Assessment and Project Appraisal 3, 3.

[53] Ibid, 3.

proposed projects that are likely to have significant adverse effects on biological diversity with a view to avoiding or minimizing such effects and, where appropriate, allow for public participation in such procedures; (b) Introduce appropriate arrangements to ensure that the environmental consequences of its programmes and policies that are likely to have significant adverse impacts on biological diversity are duly taken into account; (c) Promote, on the basis of reciprocity, notification, exchange of information and consultation on activities under their jurisdiction or control which are likely to significantly affect adversely the biological diversity of other States or areas beyond the limits of national jurisdiction, by encouraging the conclusion of bilateral, regional or multilateral arrangements, as appropriate; (d) In the case of imminent or grave danger or damage, originating under its jurisdiction or control, to biological diversity within the area under jurisdiction of other States or in areas beyond the limits of national jurisdiction, notify immediately the potentially affected States of such danger or damage, as well as initiate action to prevent or minimize such danger or damage; and (e) Promote national arrangements for emergency responses to activities or events, whether caused naturally or otherwise, which present a grave and imminent danger to biological diversity and encourage international cooperation to supplement such national efforts and, where appropriate and agreed by the States or regional economic integration organizations concerned, to establish joint contingency plans. [54] The Conference of the Parties is to examine, on the basis of studies to be carried out, the issue of liability and redress, including restoration and compensation, for damage to biological diversity, except where such liability is a purely internal matter.[55]

It is, therefore, worth pointing out that Article 14 does not impose a direct obligation that is enforceable by other states to conduct EIAs before

[54] Article 14(1), Convention on biological Diversity; see also generally, Craik N, 'Biodiversity-Inclusive Impact Assessment', Elgar Encyclopedia of Environmental Law (Edward Elgar Publishing Limited 2017).
[55] Convention on biological Diversity, Article 14 (2).

undertaking activities that pose risks to biological diversity.[56] This is also captured in *COP 8 Decision VIII/28, Impact Assessment: Voluntary Guidelines on Biodiversity-Inclusive Impact Assessment* which 'emphasizes that the voluntary guidelines on biodiversity-inclusive environmental impact assessment are intended to serve as guidance for Parties and other Governments, subject to their national legislation, and for regional authorities or international agencies, as appropriate, in the development and implementation of their impact assessment instruments and procedures'.[57]

It has been acknowledged that natural habitat loss and fragmentation, as a result of development projects, are major causes of biodiversity erosion, and while Environmental impact assessment (EIA) is the most commonly used site-specific planning tool that takes into account the effects of development projects on biodiversity by integrating potential impacts into the mitigation hierarchy of avoidance, reduction, and offset measures, the extent to which EIA fully address the identification of impacts and conservation stakes associated with biodiversity loss has been criticized as inadequate.[58]

The *COP 8 Decision VIII/28, Impact Assessment: Voluntary Guidelines on Biodiversity-Inclusive Impact Assessment* provides, *inter alia*, that the Conference of the Parties to the Convention on Biological Diversity:- notes that the Akwé: Kon Voluntary Guidelines for the Conduct of Cultural, Environmental and Social Impact Assessments regarding Developments Proposed to Take Place on, or which are Likely to Impact on, Sacred Sites and on Lands and Waters Traditionally Occupied or used by Indigenous and Local Communities (decision VII/16 F, annex) should be used in conjunction with the voluntary guidelines on biodiversity-inclusive environmental impact assessment contained in the annex below and the draft guidance on

[56] Craik N, 'Biodiversity-Inclusive Impact Assessment', Elgar Encyclopedia of Environmental Law (Edward Elgar Publishing Limited 2017), 2.
[57] Unit B, 'Impact assessment: Voluntary guidelines on biodiversity-inclusive impact assessment' <*https://www.cbd.int/decision/cop/?id=11042*> accessed 10 September 2021.
[58] Bigard C, Pioch S and Thompson JD, 'The Inclusion of Biodiversity in Environmental Impact Assessment: Policy-Related Progress Limited by Gaps and Semantic Confusion' (2017) 200 Journal of environmental management 35, 35.

biodiversity-inclusive strategic environmental assessment contained in annex II to the note by the Executive Secretary on voluntary guidelines on biodiversity-inclusive impact assessment.[59]

The *Voluntary Guidelines On Biodiversity-Inclusive Environmental Impact Assessment* identifies some biodiversity issues at different stages of environmental impact assessment.[60] The guidelines identify different stages in this process: *Screening*- used to determine which proposals should be subject to EIA, to exclude those unlikely to have harmful environmental impacts and to indicate the level of assessment required. Screening criteria have to include biodiversity measures, or else there is a risk that proposals with potentially significant impacts on biodiversity will be screened out; *Scoping*: used to define the focus of the impact assessment study and to identify key issues, which should be studied in more detail. It is used to derive terms of reference (sometimes referred to as guidelines) for the EIA study and to set out the proposed approach and methodology.

Scoping also enables the competent authority (or EIA professionals in countries where scoping is voluntary) to: (a) Guide study teams on significant issues and alternatives to be assessed, clarify how they should be examined (methods of prediction and analysis, depth of analysis), and according to which guidelines and criteria; (b) Provide an opportunity for stakeholders to have their interests taken into account in the EIA; and (c) Ensure that the resulting Environmental Impact Statement is useful to the decision maker and is understandable to the public[61]; *Assessment and evaluation of impacts, and development of alternatives*; *Reporting: the environmental impact statement (EIS)*; *Review of the environmental impact statement*; *Decision-making;* and, *Monitoring, compliance, enforcement and environmental auditing*.[62]

[59] Unit B, 'Impact assessment: Voluntary guidelines on biodiversity-inclusive impact assessment' <https://www.cbd.int/decision/cop/?id=11042> accessed 10 September 2021.
[60] Ibid.
[61] Ibid.
[62] Ibid.

COP 8 Decision suggests that, taking into account the three objectives of the Convention, fundamental questions which need to be answered in an EIA study include: (a) *Would the intended activity affect the biophysical environment directly or indirectly in such a manner or cause such biological changes that it will increase risks of extinction of genotypes, cultivars, varieties, populations of species, or the chance of loss of habitats or ecosystems*? (b) *Would the intended activity surpass the maximum sustainable yield, the carrying capacity of a habitat/ecosystem or the maximum allowable disturbance level of a resource, population, or ecosystem, taking into account the full spectrum of values of that resource, population or ecosystem*? And, (c) *Would the intended activity result in changes to the access to, and/or rights over biological resources*?[63]

It may be important for stakeholders in environmental law in Kenya to review the requirements and process of EIA in biodiversity rich areas to include BIA as envisaged under Article 69(1) of the Constitution of Kenya. Notably, effective impact assessments and management plans largely rely on a solid foundation of: a) Information on biodiversity (e.g., taxonomic descriptions of species, conservation status assessments of species, conservation status assessments of ecosystems, distribution maps of species and habitats at a scale that is appropriate for project planning, understanding of sensitivity to stressors); b) Understanding of direct, indirect, and where feasible, cumulative impacts (i.e., placing the project in the context of land/resource use trends to ascertain how it contributes to landscape-scale impacts); c) Identification of priorities for biodiversity conservation (e.g., existing and planned protected areas, National Biodiversity Strategies and Action Plans); and d) Demonstrated methods to manage impacts.[64]

Arguably, if development projects are to take into consideration biodiversity conservation, then it is the high time that stakeholders consider inclusion of BIA in EIA and ESIA activities in the country. Fostering Environmental

[63] Ibid.

[64] Hardner, J., Gullison, R.E., Anstee, S. and Meyer, M., 'Good Practices for Biodiversity Inclusive Impact Assessment and Management Planning' [2015] Prepared for the Multilateral Financing Institutions Biodiversity Working Group, 4.

Democracy in these processes will also be important as the impact assessment is not purely technical and it is good practice to consult project stakeholders in all steps of the process, especially in the identification of potential impacts at the outset of the assessment.[65] This is especially important because local stakeholders may have a greater appreciation than external technical experts of the biodiversity values in the area and their sensitivity to impacts.[66]

5. Conclusion

The fundamental difference between the two main conservation strategies are: ex situ conservation involves the sampling, transfer, and storage of target taxa from the target area, whereas in situ conservation involves the designation, management, and monitoring of target taxa where they are encountered.[67] It is suggested that each ecosystem should be managed depending on its biodiversity composition and the choice of the management approach should also be informed by the same. If Kenya and the rest of the African countries are to achieve sustainable development goals through effective biodiversity conservation, they must not only embrace the global best practices in biodiversity conservation but must ensure that the same are entrenched and implemented through their domestic laws on environmental conservation.

[65] Ibid, 7.
[66] Ibid, 6.
[67] Maxted N, 'In Situ, Ex Situ Conservation' in Simon A Levin (ed), Encyclopedia of Biodiversity (Second Edition) (Academic Press 2013) <https://www.sciencedirect.com/science/article/pii/B9780123847195000496> accessed 12 September 2021.

References

"Nature-Based Solutions" Prove Divisive at Glasgow Climate Talks' (Climate Home News, 11 November 2021) *<https://www.climatechangenews.com/2021/11/11/nature-based-solutions-prove-divisive-glasgow-climate-talks/>* accessed 24 November 2021.

'1.7 Overview of the Stages of the EIA Process' *<https://www.soas.ac.uk/cedep-demos/000_P507_EA_K3736-Demo/unit1/page_14.htm>* accessed 24 July 2021.

'Accountability, Transparency, Participation, and Inclusion: A New Development Consensus? - Carnegie Endowment for International Peace' *<https://carnegieendowment.org/2014/10/20/accountability-transparency-participation-and-inclusion-new-development-consensus-pub-56968>* accessed 24 July 2021.

'Chapter 3: EIA Process' <http://www.fao.org/3/V8350E/v8350e06.htm> accessed 24 July 2021.

'Conserving Biodiversity for Life and Sustainable Development | United Nations Educational, Scientific and Cultural Organization' *<http://www.unesco.org/new/en/media-services/single-view/news/conserving_biodiversity_for_life_and_sustainable_development/>* accessed 29 July 2021.

'COP26: Nature-Based Solutions Win in Science and on the Ground - World' (ReliefWeb) *<https://reliefweb.int/report/world/cop26-nature-based-solutions-win-science-and-ground>* accessed 24 November 2021.

'In-Situ Conservation Definition| Biodiversity A-Z' *<https://biodiversitya-z.org/content/in-situ-conservation>* accessed 12 September 2021.

'Ministry of Environment and Forestry » Blog Archive » Statement by Kenya On Strategic Plan for Biodiversity 2011-2020' <http://www.environment.go.ke/?p=3091> accessed 3 June 2021.

'Our Role in Securing Public Participation in the Kenyan Legislative and Policy Reform Process' (*Natural Justice*, 23 July 2020) *<https://naturaljustice.org/our-role-in-securing-public-participation-in-the-kenyan-legislative-and-policy-reform-process/>* accessed 24 July 2021.

'Putting Ecosystems into the SDGs' (*Water, Land and Ecosystems*, 9 October 2015) <https://wle.cgiar.org/news/putting-ecosystems-sdgs> accessed 3 June 2021.

'Striking a Balance between Conservation and Development' (*UNEP*, 13 May 2019) <http://www.unep.org/news-and-stories/story/striking-balance-between-conservation-and-development> accessed 3 June 2021.

'The Role of Protected Areas for Conservation and Sustainable Use of Plant Genetic Resources for Food and Agriculture - Jeffrey A. McNeely' *<https://www.bioversityinternational.org/fileadmin/bioversity/publications/Web_version/62/ch07.htm>* accessed 12 September 2021.

'Threats to Biodiversity – Biodiversity Clearing House Mechanism' *<http://meas.nema.go.ke/cbdchm/major-threats/>* accessed 31 July 2021.

Ajayi SS, 'Chapter 9 - Principles for the Management of Protected Areas' in SS Ajayi (ed), *Wildlife Conservation in Africa* (Academic Press 2019) *<https://www.sciencedirect.com/science/article/pii/B9780128169629000090>* accessed 12 September 2021.

Beaumont NJ, Mongruel R and Hooper T, 'Practical Application of the Ecosystem Service Approach (ESA): Lessons Learned and Recommendations for the Future' (2017) 13 International Journal of Biodiversity Science, Ecosystem Services & Management 68.

Bellon, M.R., Dulloo, E., Sardos, J., Thormann, I. and Burdon, J.J., 'In Situ Conservation—Harnessing Natural and Human-Derived Evolutionary Forces to Ensure Future Crop Adaptation' (2017) 10 Evolutionary Applications 965.

Bigard C, Pioch S and Thompson JD, 'The Inclusion of Biodiversity in Environmental Impact Assessment: Policy-Related Progress Limited by Gaps and Semantic Confusion' (2017) 200 Journal of environmental management 35.

Biosafety Unit, 'Main Details' *<https://www.cbd.int/countries/profile/?country=ke> accessed 3 June 2021; 'Convention on Biological Diversity | Treaties Database' <http://kenyalaw.org/treaties/treaties/87/Convention-on-Biological-Diversity>* accessed 3 June 2021.

Biosafety Unit, 'Welcome to the CBD Secretariat' (8 April 2013) <https://www.cbd.int/secretariat/> accessed 29 July 2021.

Bullock, C. H. "Nature's values: From intrinsic to instrumental. A review of values and valuation methodologies in the context of ecosystem services and natural capital." *National Economic and Social Council* 10 (2017).

Craik N, 'Biodiversity-Inclusive Impact Assessment', *Elgar Encyclopedia of Environmental Law* (Edward Elgar Publishing Limited 2017).

David L Hawksworth and Royal Society (Great Britain), *Biodiversity: Measurement and Estimation* (Springer Science & Business Media 1995).

Dmitrii Pavlov and Elena Bukvareva, 'Biodiversity and Life Support of Humankind' (2007) 77 Herald of the Russian Academy of Sciences 550.

Engelmann F and Engels JMM, 'Technologies and Strategies for Ex Situ Conservation' [2002] Managing plant genetic diversity 89.

Gagan Matta, Gaurav Bhadauriya and Vikas Singh, 'Biodiversity and Sustainable Development: A Review' Fecundity of fresh water prawn Macrobrachium Assamense Penensularae from Khoh River, India 72.

Hardner, J., Gullison, R.E., Anstee, S. and Meyer, M., 'Good Practices for Biodiversity Inclusive Impact Assessment and Management Planning' [2015] Prepared for the Multilateral Financing Institutions Biodiversity Working Group.

Ingram JC, Redford KH and Watson JEM, 'Applying Ecosystem Services Approaches for Biodiversity Conservation: Benefits and Challenges' [2012] S.A.P.I.EN.S. Surveys and Perspectives Integrating Environment and Society <https://journals.openedition.org/sapiens/1459> accessed 12 September 2021.

Jaisankar I, Velmurugan A and Sivaperuman C, 'Chapter 19 - Biodiversity Conservation: Issues and Strategies for the Tropical Islands' in Chandrakasan Sivaperuman and others (eds), *Biodiversity and Climate Change Adaptation in Tropical Islands* (Academic Press 2018) *<https://www.sciencedirect.com/science/article/pii/B9780128130643000193>* accessed 12 September 2021.

John Creech, 'Biodiversity Web Resources' <http://www.istl.org/12-fall/internet.html> accessed 29 July 2021.

Key, I., Smith, A., Turner, B., Chausson, A., Girardin, C., MacGillivray, M. and Seddon, N., "Can Nature-Based Solutions Deliver a Win-Win for Biodiversity and Climate Change Adaptation?" (2021).

Louis J Kotzé and Duncan French, 'The Anthropocentric Ontology of International Environmental Law and the Sustainable Development Goals: Towards an Ecocentric Rule of Law in the Anthropocene' (2018) 7 Global Journal of Comparative Law 5.

Måns Nilsson, 'Biodiversity's Contributions to Sustainable Development' [2019] Nature Sustainability <https://www.sei.org/publications/biodiversity-contributions-sustainable-development/> accessed 3 June 2021.

Matta, G., Bhadauriya, G., & Singh, V., "Biodiversity and Sustainable Development: A Review." *Fecundity of fresh water prawn Macrobrachium Assamense Penensularae from Khoh River, India*: 72.

Maxted N, 'In Situ, Ex Situ Conservation' in Simon A Levin (ed), *Encyclopedia of Biodiversity (Second Edition)* (Academic Press 2013) <https://www.sciencedirect.com/science/article/pii/B9780123847195000496> accessed 12 September 2021.

McCartney, M., Finlayson, M., de Silva, S., Amerasinghe, P., & Smakhtin, V., 'Sustainable Development and Ecosystem Services' (2014).

Reyers B and others, 'Finding Common Ground for Biodiversity and Ecosystem Services' (2012) 62 BioScience 503.

Roe, Dilys, "Linking biodiversity conservation and poverty alleviation: a state of knowledge review." *CBD Technical Series* 55 (2010).

Rülke, J., Rieckmann, M., Nzau, J. M., & Teucher, M., 'How Ecocentrism and Anthropocentrism Influence Human–Environment Relationships in a Kenyan Biodiversity Hotspot' (2020) 12 Sustainability 8213.

Sobrevila, Claudia; Hickey, Valerie, *The Role of Biodiversity and Ecosystems in Sustainable Development. 2010 Environment Strategy Analytical Background Papers*; World Bank, Washington, DC. © World Bank, 2010. https://openknowledge.worldbank.org/handle/10986/27584 License: CC BY 3.0 IGO< accessed 29 July 2021.

Tamanna Kumari, Pinky Deswal and Vineeta Shukla, 'Approaches to Biodiversity Conservation In India', February 2021 <*https://www.researchgate.net/publication/349338888_APPROACHES_TO_BIODIVERSITY_CONSERVATION_IN_INDIA*> accessed 11 July 2021.

Unit B, 'Impact assessment: Voluntary guidelines on biodiversity-inclusive impact assessment' *<https://www.cbd.int/decision/cop/?id=11042>* accessed 10 September 2021.

United Nations Educational, Scientific and Cultural Organization, 'Conserving Biodiversity for Life and Sustainable Development | United Nations Educational, Scientific and Cultural Organization' *<http://www.unesco.org/new/en/media-services/single-view/news/conserving_biodiversity_for_life_and_sustainable_development/* > accessed 29 July 2021.

United Nations, 'COP26 Day 7: Sticking Points and Nature-Based Solutions' (United Nations) *<https://www.un.org/en/climatechange/cop26-day-7-sticking-points-and-nature-based-solutions*> accessed 24 November 2021.

United Nations, *Convention on Biological Diversity of 5 June 1992* (1760 U.N.T.S. 69).

United Nations, *Draft CMA decision proposed by the President*, Draft Text on 1/CMA.3, Version 10/11/2021 05:51.

Wale E and Yalew A, 'On Biodiversity Impact Assessment: The Rationale, Conceptual Challenges and Implications for Future EIA' (2010) 28 Impact Assessment and Project Appraisal 3.

Wenny, D.G., Devault, T.L., Johnson, M.D., Kelly, D., Sekercioglu, C.H., Tomback, D.F. and Whelan, C.J., 'The Need to Quantify Ecosystem Services Provided by Birds' (2011) 128 The Auk 1.

Wes Sechrest and Thomas Brooks, 'Biodiversity – Threats' (2002).

The role of political institutions – A Case study of Kenya in reference to the Constitution of Kenya 2010

By: ***Wausi Walya****

Acronyms

AG – Attorney General
CKRC - Constitution of Kenya Review Commission
DPP – Director of Public Prosecution
EACC - Ethics and Anti-Corruption Commission
JSC – Judicial Service Commission
KADU - Kenya African Democratic Union
KANU - Kenya African National Union
KPU - Kenya People's Union
IEBC - Independent Electoral and Boundaries Commission
IOs – International Organizations
NLC – National Land Commission
NGOs - Non-Governmental Organizations
UN – United Nations

Abstract

This paper delves into the role of political institutions in democratization and particularly brings out their role in Kenya focusing on post 2010 constitution period. Evolution of democracy in Kenya has received varied support from political institutions based on factors like the changes in the law and the leadership of the day. While it is key that some of the institutions operate independently in order to reap the best of democratization, it is evident that their entrenchment into the constitution is an advantage to keep them away from manipulation. The Presidency, an expanded legislature through representation in two houses (senate and national assembly) at the national level and additional representation at the county level and an

* ***PhD Cand (International Relations), United States International University; LL.M (International Studies) UON; LL.M (Linguistics)KU; Post graduate Diploma (Public Relations) KU; B.Ed., English Language and Literature, KU. Head of Public Relations and Corporate Communications at the Kenya Tourism Board(KTB).***

independent judiciary form the anchor political institutions that are key in enhancing governance in Kenya. The future of these institutions is strengthened through the entrenchment in the law even though the specific leadership at the executive may interfere with delivery especially where power is under threat.

Key Words: *Political Institutions, democracy, constitution, governance*

1.0 Introduction

Over time, political institutions have been associated with the success of both economic growth and cultural evolution with the relationship of the two evolving over time. While the economy depends on market institutions, it also hinges on legislation which is guided by the constitution , a key political tool. The diverse dimensions of political institutions include the exercising of rights mainly delegated to leaders through political processes like elections. [1] . In addition, the trust in these political institutions by the public is a key element of progressive democracy. Trust serves as an enabler to government decision making as we well as establishing relations with civil society , an important connection of the people with the government . [2] Politics is a game of winners and losers and political institutions will evolve to accommodate the interest of either divide depending on who is in power as part of [3]the political system within which they operate. The institutions credited for grounding these political systems under which they operate in foster development , play a role in averting possible political upheavals and have a bearing on the strength of the government of the day in achieving the synergies required to achieve the strategies of the government. As a creation of political actors to maintain power, the political institutions continue to evolve making a deliberate response to both domestic and international

[1] *Jakob de Haan. (2007) Political institutions and economic growth reconsidered Public Choice . 131: 281–292*

[2] *Mishler William & Rose Richard (1997) Trust, Distrust and Skepticism: Popular Evaluations of Civil and Political Institutions in Post-Communist Societies . The journal of politics, vol. 59, no. 2, pp. 418-51*

[3] ***Swank Duane (2002) Global Capital, Political Institutions, and Policy Change in Developed welfare states . Cambridge University Press pp 33 - 40***

forces that the states experience. They support welfare and economic policies while shaping power. [4]

Political institutions are therefore structured officially to accommodate their crucial role in the political system of a country for example the legislature. The classification of constitutions has defined various systems of governance like democracy, oligarchy and tyranny among others and thus the role of political institutions defined by the system. The institutions' roles in some of the political systems are guided by the constitution. Democracy has been defined by various scholars as a structure that allows for individual participation in political decisions through defined institutions that exercise their power. It is strongly associated with the freedom of the electorate to add their voice into the preferred way of governance This process enables political decisions through the competing for the electorates' votes[5]. The participation of these individuals must be regulated even though their space as expected in democracies is one of competition and to an extent the exercising of executive limitations. The three variables of regulation, competition and executive constraint demonstrated in democracy therefore take lead in political institutions. When there are structures in place, there is guarantee of a degree of order in the various ways that political freedom is exercised.[6]

There are various traditions associated with political institutions. These include the Modernist-empiricist, the formal-legal, Idealist and the Socialist. The modern empiricist is associated with formal structures and formally direct the relationship between individuals and the political systems that are in while the formal legal are concerned with public laws. Idealists concern themselves with managing relations between the citizen and the government

[4] *Mishler William & Rose Richard (1997) Trust, Distrust and Skepticism: Popular Evaluations of Civil and Political Institutions in Post-Communist Societies . The journal of politics, vol. 59, no. 2, pp. 418-51*

[5] *Siddhartha Baviskar and Mary Fran T. Malone (2004) What Democracy Means to Citizens — and Why It Matters . European Review of Latin American and Caribbean Studies / Revista Europea de Estudios Latinoamericanos y del Caribe , No. 76 , pp. 3-23*

[6] *Sandberg Mikael and Lundberg Per (2012). Political Institutions and Their Historical Dynamics. Theoretical Population Ecology and Evolution Group. (7) 10*

and the socialist express issues based on the 'class struggle.' Political Institutions have the direct and indirect participation of the citizen and this can be in the formation of the law and its enforcement among other aspects. The main political institution in democracies include legislative bodies like a parliament, congress, or the senate. This is central in the law-making process thus guarding the welfare of the citizens. The executive in return is associated with enforcing the law, ensuring that it is adhered to. These key institutions and other organs within the political system are kept in check by the judiciary. There may be other secondary political institutions within the political system that are all part of a structure that is meant to enhance democracy. [7]

Political institutions involve a set of rules in which the society is expected to adhere thus contributing to the stability of a country and serving as a guide in decision making. The main purpose of a political institutions is to create and maintain stability. That purpose is made viable by what American political scientist George Tsebelis calls "veto players." Tsebelis (1995) argues that the number of veto players defined as the people who must agree on a change before it can go forward make a significant difference in how easily changes are made. The dynamics of the separate political institutions are critical in their contribution to nation – building processes and transitions that lead to other political happenings like democratization and revolutions. George Tsebelis classifies political institutions as 'veto players' citing that they are key in influencing policy due to their various capacities to exercise power. Political institutions are geared towards resolving issues in political systems through collaboration. Furthermore, they are perceived as the institutions that ensure the effective application of policies by government, allowing for states to map out their priorities as well as keep a check on the fulfillment of any international commitments that have been made in both trade and security. States execute the roles of political institutions differently based on their own circumstances but are all keen on how this converts to economic growth and minimizing of conflict. It is the correlation between

[7] *Rhodes, R.A.W. (2011) Old Institutionalisms: An Overview. The Oxford Handbook of Political Science Edited by Robert E. Goodin, Political Science, Public Policy, Political Institutions p 2*

political institutions and political policies that coalitions for example are able to negotiate. formed through negotiations.

Historical analysis has been a great way in which political institutions have benefited in their evolvement with different political systems adapting based on the different transitional periods of democracy. In the early 1800s, there are no details on political institutions that reflect how political systems were organized thus there may be no modelling on how they have changed over time.[8]

2.0 On Democratization

Democratization is a process that allows for the participation of citizens in the political system, giving then room to be part of the institutions and structures that manage political power in a less authoritarian environment. Schumpeter further defines democracy as an opportunity where individual become part of decision making as representatives of the citizens through competitive elections.[9] Democratization has been historically accredited with economic growth especially in less privileged countries a debate that has prevailed from the days of Plato and Aristotle and is still alive to date .Their study delves into the relation between democratization and [10] The priority and timing of democratization across different states differ but over the years it has been observed as impactful in enhancing governance. International Organizations (IOs) like the United Nations (UN) play a key role in information gathering and raising awareness to their member states to enable them make decisions on the various democratization stages when they are ready. According to the UN, democratic institutions and processes enhance peace within states and facilitate ease in respect across states during negotiations as well as transparency especially in both bilateral and multilateral agreements . The perceived transparency and accountability that these institutions bring in the negotiations tables ideally contribute to

---

[8] *Max Rånge and Mikael Sandberg (2017) Political Institutions and Regimes since 1600: A New Historical Data Set. Journal of Interdisciplinary History, XLVII:4 p495–520.*

[9] *Schumpeter, Joseph A. (1976) [1942]. Capitalism, Socialism and Democracy. With a new introduction by Tom Bottomore. New York: Harper and Row.*

[10] *Elias Papaioannou and Gregorios Siourounis (2008)Democratization and Growth): Elias Volume 118, Issue 532 pp 1520 - 1551*

cohesion. A key brief of UN missions to conflict areas like has been in Congo and Haiti includes the pursuit of overall good governance that includes dialogue in resolving conflict., The recommended democratic institutions must however be customized to suit the law of the particular country. . [11] This also comes with added accountability of states to their citizens. The UN over time has evolved in its role on the support for democratization and played a crucial role especially in the electoral process across many states. The effects of elections that are not free and fair are adverse and where elections are flawed, there is likely to be conflict affecting not only the governance of that country but also neighboring states. The UN's desired position would be to achieve a culture of democratization internationally but that is still a challenge given the varied actors that are involved in the global scene. There are many regional intergovernmental organizations that continue to support the process of democratization and other institutions in development like the Non-Governmental Organizations (NGOs), business groups, institutions of learning and the media among others. Ultimately the success of democratization lies in the commitment of the individuals in the specific states [12]. Democracy is a system of government which embodies, in a variety of institutions and mechanisms, the ideal of political power based on the will of the people and accountable for their collective decision and ideally translating into freedom for all the set of rules within the democracy also create power system observed by all.[13] Political institutions are tools of collectively mitigating issues that are a challenge to the general populace.[14] Political processes that create political institutions have closely been linked to governance. Africa has been particularly in focus among many scholars who have sighted various reasons why the continent's growth is poor.

The management of natural resources , the continents standing in the global arena, the fragmentation in the population arising from ethnic interests and the quality of governance are some of the key factors singled out. Africa

---

[11] UN (2010) Democracy , Peace and Security : The Role of the UN. p42 – 58

[12] Boutros Boutros-Ghali . (1996) An Agenda for Democratization. United Nations p 1 – 2, 18 – 19, 54 – 55

[13] Bassiouni Cherif et al. (1998) Democracy: Its Principles and Achievements . Inter – Parliamentary Union. Geneva

[14] Moe Terry. (1990). Political Institutions: The Neglected Side of the Story. Journal of Law, Economics, & Organization, Vol. 6 (1990), pp. 213-214

colonial history and the tendency to continue depending on the west yet it is the preference for private benefit as opposed to addressing public needs that derails the economic agenda. The capture of governments by the political elite and the lack of accountability has led to huge national debts although many Africa countries have moved from single party and dictatorships to democratically elected governments that have put in place political institutions envisaged as an anchor to good governance. The Bretton wood institutions that have invested heavily in Africa underestimated the impact of external factors like drought and changing fortunes in the global markets and instead focused on determining the extend of political goodwill and existing policies. The role of regional organizations like the Organization of Africa Union in the 80s where leaders who came into power through a coup were banned was key in ensuring that democratic processes were not flawed. [15]

3.0 The History of Democratization in Kenya

Early democracies traced to Athens instituted political institutions through formal and informal rules engaged to determine the constraints and incentives faced by key players in a society. Given the endogenous feature of political institutions, there has been the need to strategically allocate powers that can stimulate appropriately chosen institutions to help develop political systems. Political institutions are therefore an integral part of civilization as they demonstrate the power of the community in law enforcement through those that they elect to represent them. [16]

The quest for a review of the constitution in Kenya that led to a new one promulgated in 2010 was driven by the urge for the need to transit into a new level of democracy that would introduce checks and balances and especially in the executive which over time was regarded as too powerful and thus prone to abuse. The search for a new constitution was also driven by the

[15] *Humphreys , M. and Bates, R (2005) . Political Institutions and Economic Policies: Lessons from Africa , British Journal of Political Science . Vol. 35, No. 3 pp. 403-428 Cambridge University Press Stable*

[16] *Low Polly (2002). Cavalry Identity and Democratic Ideology in Early Fourth Century Athens. Proceedings of the Cambridge Philological Society , 2002, No. 48 , pp. 102- 122*

yearning to establish two levels of government, at the national level and at the county level that was envisaged to be a gateway to economic benefits that come with decentralization. The transfer of authority and resources to regional areas was envisaged to accelerate development in all parts of the country by allowing accountability through actors elected at that level without over relying on the national government. The success of the constitution is pegged largely on a vigilant populace but more also on the strength of the political institutions set up by the constitution. Kenya's constitution came through a structured and peaceful referendum held in August 2010. For the political institutions to play their role, the values and the principles of the constitution must be safeguarded. Key was to promote the participation of citizens in the political affairs of the country, allowing them the freedom especially in the electoral process.

Kenya's democracy journey since independence in 1964 has evolved, beginning with the merger of Kenya African National Union (KANU) and Kenya African Democratic Union (KADU) which effectively depressed the possible emergence of regional powers. The 1960 Lancaster house conference that was aimed at the transfer of power , the larger nationalist movement saw a division into Kenya African National Union (KANU) and Kenya African Democratic Union (KADU) Later those politicians who were disgruntled in government tried to begin a new political party, Kenya People's Union (KPU) but with the ban of opposition parties in 1969, KANU consolidated power. KANU won the pre independence elections and within a year of rule , most of the opposition members of Parliament in KADU has rejoined the ruling party. [17]After the attempted coup in 1982, the constitution was amended to allow for a one-party state only for the government to succumb to the pressure of the growing demand for democracy and reverse the same in 1991 introducing civil and political freedoms in line with what was happening in the rest of the world as part of the third wave.[18]

---

[17] *Throup David (1993). Elections and Political Legitimacy in Kenya. Africa: Journal of the International African Institute , 1993, Vol. 63, No. 3, Understanding Elections in Africa , pp. 371-378*

[18] *Kanyinga Karuti (2014) 'A review by AfriMAP, Open Society Initiative for Eastern Africa and the Institute for Development Studies (IDS), University of Nairobi Democracy and Political Participation. p xiv, 4*

The colonial times leveraged on ethnicity to consolidate power, strengthening it as an informal institution thus stagnated the possibility of formal political institutions. These led to regional powers that were later to work against Kenya's first president Jomo Kenyatta as regional chiefs began to use the same tactic to threaten his rule. His call for 'harambee' and the firm implementation of a one – party rule was his beginning point and what later presidents after him used to build on the political institutions of their time. [19]

Over the years of the process of democratization , the civil society has played a key role . However , in the period that called for change from the long rule of Moi, the civil society can be faulted for having focused too much on the personality - Moi and lost the firm leadership to punch on the ideologies that would be embraced and understood by the public. Instead , the key focus was to get Moi out of power without necessarily offering any alternative policies. Existing vices like corruption for example did not end as soon as Moi was out of power and there was evidently a jostle over power by the opposition. [20]The democratic principles that the new Kenyan constitution focuses on include the separation of powers, financial and decision-making independence through an elective process to enable effective service delivery and inclusion of the two thirds gender rile in representative organs. These principles are tied to the national values that the constitution raises in article 10 beckoning Kenyans to adhere to transparency and accountability. The constitution introduces two levels of government, promotes, and protects citizen rights, encourages citizen participation and the strengthening of political parties[21].

4.0 A Case Study of Kenya

Colomer 2011 defines institutions as structures or a set of guidelines that give people in the way they operate within a certain environment. Political institutions, which can be formal or informal within and outside of

---

[19] Orvis, Stephen. (2006). Conclusion: Bringing Institutions Back into the Study of Kenya and Africa. Africa Today, (53) 2 Creating the Kenya Post-Colony. p. 107

[20]Murunga, R. Godwin and Nasong'o W. Shadrack ed (2007). ***Kenya: The Struggle for Democracy. Codesria books***

[21]Murray, Christina (2013). Kenya's 2010 Constitution Christina Murray. 61 Neue Folge Band Jahrbuch des offentlichen Rechts. P 34 – 36

government have different features that enable manage the actions of political leaders. The institutions must continually demonstrate their power in managing the survival and advancement of the electorate. Their structures should enable political leaders to have the means to access resources and align these within systems that provide for the citizens. The political institutions entrenched in the constitution are geared towards making the state more effective alongside other key support organs like commissions that play like the judiciary. Additionally, these institutions support decided on the economy, human rights and other regulations that enhance governance [22].

Kenya over the years continues to build on some of the colonial institutional legacies as a way of sustaining political institutions as part of governance. Strong leadership and linkage between these political institutions have been key for leaders in achieving control and mobilizing power across the different parts pf the country. The role played by the provincial administration before the new constitution came in to place for example was one of the strong political systems that had served the presidency. The demand for democracy arising from the international pressure to enhance democratization in the early 90s caught up with President Moi . This was part of the international shift towards aligning democratic arrangements to create the necessary synergies brought about by enhanced globalization part of the gains being exposure to international markets. [23]

4.1 The constitution of Kenya

Kenya's constitution promulgated in 2010 was the end of a long journey of a controversial constitution making process that began way back in 1991. This was after the declaration of the end of the single-party system, a demonstration of the importance of democracy to Kenya as a developing state. The first formal attempt to come up with a new constitution was through the Constitution of Kenya Review Commission (CKRC) established in 2001 and envisaged to address Kenya' political challenges through a

[22] *Colomer, J, M. (2011) Comparative Constitution. The Oxford Handbook of Political Science (Edited by Robert E. Goodin) p 11 - 12*
[23] *Rundra Nita (2005) Globalization and the Strengthening of Democracy in the Developing World. Journal of Political Science, Vol. 49, No. 4. pp. 704-73*

constitution review. and whose product was rejected through a referendum in 2005. The contest for power culminated in the 2007 – 2008 post electoral violence, a result of long-term ethnic tensions that existed since independence. The product of this process was largely achieved through public consultation .[24] Its rejection was followed by the sacking of cabinet members who had supported the constitutional change thus the beginning of the tension between government and the leading political parties. This section includes various institutions established by the Constitution of Kenya 2010 to support the democratization process and ways in which they are connected to democracy.

The Key institutions in the constitution include the presidency also referred to as the executive, the legislature, and the Judiciary. There are various other support institutions that were introduced and some enhanced to ensure the support of an enhanced democratization process with good governance. The growth of civil society, professional bodies and mushrooming of NGOs began at this time as it availed avenues for alternative voice to government. The strengthening of the electoral system was a key benefit of the democratic space availed at the time. Additionally, the strengthening of the civil society saw enhanced capacity in individuals to enable them to engage with government, stronger political parties, judicial reforms and a more liberal media.

4.2 Political Institutions entrenched in the 2010 constitution

The constitutional structures that are entrusted with sovereign power are the parliament and the legislative assemblies in the county governments, the national executive and the executive structures in the county governments, the Judiciary and independent tribunals and the sovereign power of the people at both the national and county level. Dahl 2002 lists elected officials as a key political institution. It is the demonstration of a representation of the people thus democracy at display. Since the Middle Ages , representation

[24] *Diepeveen, Stephanie. (2010) 'The Kenyas we don't want' : popular thought over constitutional review in Kenya. The Journal of Modern African Studies , Vol. 48, No. 2 , pp. 231-258*

has served a purpose in allowing governments to get consent for key decisions that affect the electorate and especially legislation [25]

The Executive is the central political institution that derives its power from the people of Kenya and comprises of the president, his deputy and the cabinet secretaries. They exercise their power as a service to the people with the president as head of both state and government. The executive is expected to respect the constitution, be custodian of the state sovereignty and promote good governance including respect for human rights. He has the responsibility to inform the citizens through a parliamentary address on the progress made in line with national values. Other key roles include the nomination to office of the cabinet and other key government officers. He takes full charge of ensuring all international obligations are met. The President comes power through an election process through which he earns more than half of all the votes cast in the election and of these twenty-five per cent of the votes from more than half of the counties. [26]

The legislature is a key political institution in Kenya and its role is elaborated in article 93. (1) .Persson (2002) argues that there is an overwhelming concentration of power in parliament , a factor that implies that they can easily collude at the expense of voters and especially in the environment where the government needs them as a majority to deliberate on legislation. The ruling party and /or the party with the most seats in parliament wields a lot of power in decisions making. [27] The 2010 constitution introduced a second house, the senate in addition to the National Assembly which was the only institution in legislature based on the previous constitution. Parliament, through these two arms is a representation of the people through the election process thus demonstrating sovereignty and the people's will. This is a key institution in safeguarding the constitution and can make amends for the same if need be. Parliament is also entirely responsible for manifesting the diversity of the nation, represents the will of

[25] *Dahl A Robert. (2005) What Political Institutions Does Large-Scale Democracy Require? Source: Political Quarterly, Vol. 120, No. 2 . pp. 187-197*

[26] *The Constitution of Kenya, 2010.p 77 - 78*

[27] *Persson Torsten and Tabellini Guido (2002) Political Economics: Explaining Economic Policy. MIT Press*

the people, and exercises their sovereignty. The people at the constituencies are represented at the National Assembly which directly involves itself in resolving the issues of the electorate, in annual budget allocations and an overall oversight role including review of the dealings of the President, the Deputy President and other State officers.

The Senate not only ensures Political representation of County Governments, but also serves to monitor the exercise of power by the parliament. The senate represents the electorate at the county level and therefore is tasked with managing the interests of the devolved government. In addition to legislation, the senate oversees revenue allocation in counties as well as oversight on key state officers including the president and the deputy president and cross checking on the role of the national assembly.
There have been arguments that the legislature needs to be incentivized due to the strong position that they hold in policy making that can hold government at ransom. With election cycles predictable in most countries , the role of the legislature is crucial.[28]

The Judiciary is an independent state organ that implements its mandate through courts and tribunals. It is supported by various other offices including the Attorney General (AG), Director of Public Prosecution (DPP) and the Judicial Service Commission (JSC). The overall mandate of the Judiciary and its auxiliary institutions is to ensure that justice is executed without delay and any possible alternative methods of resolution like mediation and arbitration are applied where needed.

4.3 Supporting institutions

The ***Kenya National Human Rights and Equality Commission*** (KNHRC) was specifically established to ensure compliance in promotion of human rights as well as promote gender equality and equity source. This applies to both public and private institutions acting on behalf of the state where there are agreements on human rights. The National Land Commission (NLC)

[28] Ferraz Claudio & Finnan Frederico (2008) Motivating Politicians: The Impacts of Monetary Incentives on Quality and Performance. Discussion Paper No. 3411. Institute for the Study of Labor

oversees the management of public land at both the national and county levels and overall oversight of all matters related to land. The Independent Electoral and Boundaries Commission (IEBC) takes responsibility for the electoral process and referenda, ensuring registration and education of voters is effectively carried out. [29] Persson argues that most world governments will carry our elections with an intention to allocate both political and legislative control and this is especially so in a case where the executive power relies heavily on legislature for its survival [30]

The Ethics and Anti-Corruption Commission (EACC) referenced in chapter 6 article 79 is a public body established under an act of parliament with the responsibility to fight and prevent corruption while ensuring that the general populace is well appraised with public education that promotes integrity. [31]

The ***Political Parties*** Act also provides for the regulation of political parties and how political parties should be regulated and governed. Political parties are the vehicles of representative democracy through representing the interests of society and committing their leaders to democratic participation. Their capacity to mobilize the electorate is a demonstration of their strength in aggregating diverse groups as part of strengthening national cohesion.

They are ideally expected to promote socio-economic growth as part of political socialization and policy formulation.[32] Other support institutions include the commission for revenue allocation, the salaries and remunerations commission, the public service and the national police service among others that contribute to enhanced governance.

5.0 The future of Political institutions

While there are many long-term gains that can be associated with political institutions, some governments may miss out on these due to their focus on

---

[29] The Constitution of Kenya, 2010 P 40 – 41, 45, 53
[30] Persson p 898
[31] Ibid, p 50
[32]Friedrich Ebert Stiftung (FES) (2010) Institutionalizing Political Parties in Kenya. P v - 2[32] The Constitution of Kenya 2010 p 59 - 60

short term goals thus jeopardizing the gains of generations to come. It is key that legislators transform law into policies that serve governments in the long term. Some of the proposals made to ensure safeguarding of political institutions include political manifestos, parliamentary committees, future country specific visions, independent councils as well as performance indicators that keep governments on check. These collectively respond to anticipated issues in the future in key areas like the economic, social and environmental aspects. There is also a deliberate effort to keep the government on check through committee reporting while aligning governments to global issues like climate change in their foreign policies. The gains of preserving political institutions include political stability, moral legitimacy in governance and enhanced political access by the citizens. Some of the interferences in achieving stable political institutions include media reporting, a weak economy that may introduce dependence on other states, electoral cycles that have no firm structures, and poor auditing procedures of the government structure . In highlighting these areas, Caney (2016) concludes that self-interest and self-preservation of the political class will determine how successful political institution can be. [33]

There is an element of neglect that is associated with political institutions. While in their role they serve to mitigate on overall political challenges and as well to coerce and redistribute government information, they pitch political losers against the winners. The capacity for political institutions to influence political and social behaviors cannot be ignored. The presidency and all the bureaucracies that come with legislation of both mainstream political institutions and other support institutions is key for every political system. It is however questionable if these political institutions give room for public authority. Through the perception of political parties that lose elections, it can be argued, that winners are likely to manipulate the role of the public. Political institutions provide solutions to collective challenges be they economic or social.

Legislators are the main actors through collective decisions that enact political institutions, and the key question would be if they act in the interest

[33]*Caney, Simon (2016) Political Institutions for the Future: A Five-Fold Package. Institutions for Future Generations (Ed. Inigo Gonzalez and Axel Gosseries)*

of the effectiveness of these institutions. The uncertainty that comes with politics however tends to see the same politicians keen on control thus threatening the very structures that they have been put in place There may be interference with the interests of legislators in pursuit of their own interests based on their preferences as they pursue different structures in politics. If we are to appreciate why political institutions look and perform as they do, we need to pay attention to the interests they are intended to serve, and thus to the roles that different types of actors play.[34]

Presidents are singled out as the most powerful players in the politics as they are not only overall authority but they have veto powers over the legislature. Their interests are much more complex than those of the legislators as their responsibilities investigate the bigger picture. Kenya has entrenched political institutions thus they are formalized through legislation. However, across different regimes, it is possible that the same laws may not be honored to favour those in power. Kenya's official opposition role now seems compromised by the 'handshake' between the president and the leader of official opposition Hon. Raila Odinga. They have made a peaceful agreement that opened doors to a working relationship between government and opposition. This is part of conflict transformation as witnessed in resolving the 2008 disputed elections. The 'handshake' extended an opportunity to peacefully neutralize the election crisis of 2017. [35] Some of the official opposition members have since taken up formal positions to serve in government. This has effectively weakened the 'watch – dog' role that the opposition plays. This can be termed as deceptive to the voters who have supported the opposition as their interests are no longer prioritized. Therefore, it appears that personal interests among politicians weaken and can wipe off strong political institutions. The key political institutions in Kenya to an extent have been destabilized and as a result compromised the political stability. Since the multi-party era in 1992, political parties for example have been effective in closely monitoring government deliverables.

---

[34] Moe, T. M. (1990). Political institutions: The neglected side of the story. Journal of Law, Economics, and Organization, 6(Special Issue), p 214, 221, 223 - 224 , 236

[35] Horn Policy Brief (2018) . Conflict Transformation in Kenya: What Raila Odinga-Uhuru Kenyatta Handshake Should Mean. No .5

The control of the presidency and the legislature by the majority party may also have far reaching effects on political institutions as majority party agenda may clash with the intended deliverables of the key political institutions especially closer to election periods. In the year 2017 Kenya witnessed a show down between the leading party politicians and the opposition in a disputed presidential election where the judiciary as a key political institution played a role in determining the same. The opposition remained unconvinced about the ruling party's win thus an element of no confidence in a key political institution, the judiciary. Due to the controversial election results, the legislature at the onset of the new electoral cycle was already agitated based on the ruling. It is possible that when winners in elections impose what is perceived as unfair measures to the losers, when these losers gain power in the next elections, they avenge on the same.

While the future of the state is known as it depends on the existence and survival of political institutions that are created to act on behalf of the sovereign, the commissions and independent offices created are aimed at checking that the key institutions exercise their powers for good governance and maintain accountability of the acts and the omission of the state. These institutions are not independent of the state thus the overall stability of the state will determine the future of the institutions. The electorate remain the biggest threat to the future of these institutions through exercising their power that they delegate to the legislature who must keep the state on check. Parliament may not necessary be effective at checking the executive arm most likely to overreach the legislature without serious consequences.

6.0 Conclusion

Some of the credible ways to manage the risks possibly associated with the opportunistic behaviors found on political systems is having these political institutions firmly entrenched in the constitution. This ensures continuity in maintaining the balance of power as part of the democratization process. There have been arguments for political institutions that point towards an association between the role of political institutions and growth, and most

consolidated democracies can attest to the positive outcomes [36]. The underlying issues include questions on whether political institutions have the capacity to produce change in any country, the more the veto powers, the higher the possibility for collaboration and cohesion, the better for the democratization process and an assurance of good governance. Kenya has had one of the most robust constitutional journeys that has resulted to political institutions strongly embodied in law , however , there must be a deliberate effort by all organs pf government to guard against any retrogression of this key political instruments. A threat to the constitution is a threat to the very core of the progressive sovereign state and its people that it is designed to protect.

Competitive political institutions are likely to influence the country's economy positively arising from the stability that will attract more investors. When democratic processes put in place political institutions that keep the government on check accountability is enhanced leading to more gains in public good. While political processes may be viewed as self-regulating, if there is no enhanced accountability , the same institutions created by the processes will be open to abuse and fail. A study to establish the level of trust in political institutions would inform Kenya more as democratic state on the attitudes of the citizenry towards political institutions.

[36] *Moe, T. M. (1990). Political institutions: The neglected side of the story. Journal of Law, Economics, and Organization, 6(Special Issue), p 213-254.*

References

Barro , Robrt, J. (199) Determinants of Democracy *Journal of Political Economy* , Vol. 107, No. S6 pp. S158-S183

Bassiouni Cherif, Cherif Bassiouni (General Rapporteur), David Beetham, Justice M. Fathima Beevi (Ms.), Abd-El Kader Boye, Awad El Mor, Hieronim Kubiak, Victor Massuh, Cyril Ramaphosa, Juwono Sudarsono, Alain Touraine, Luis Villoro (1998) Democracy: Its Principles and Achievements . Inter – Parliamentary Union. Geneva

Boutros-Ghali, B. (1996). An Agenda for Democratization. United Nations. 1 – 2, 18 – 19, 54 – 55.

Caney, S. (2016). Political Institutions for the Future: A Five-Fold Package. *Institutions for Future Generations* (Ed. Inigo Gonzalez and Axel Gosseries).

Colomer, J, M. (2011). Comparative Constitution. *The Oxford Handbook of Political Science.* (Edited by Robert E. Goodin), 11 – 12.

Everts, P. (2002). Democracy and War. In: *Democracy and Military Force*. Palgrave Macmillan, London.

Jakob de Haan. (2007) Political institutions and economic growth reconsidered Public Choice . 131: 281–292

Humphreys , M. and Bates, R (2005) . Political Institutions and Economic Policies: Lessons from Africa , *British Journal of Political Science* . Vol. 35, No. 3 pp. 403-428 Cambridge University Press Stable

Kanyinga, K. (2014). 'A review by AfriMAP, Open Society Initiative for Eastern Africa and the Institute for Development Studies (IDS), University of Nairobi Democracy and Political Participation. xiv, 4.

Kessler, Christl, Rüland Jürgen and Stefan Rother. (2009). Democratization through International Migration? Explorative Thoughts on a Novel Research Agenda. *European Journal of East Asian Studies, 2*(8), 161–179.

[1] Throup David (1993). Elections and Political Legitimacy in Kenya. Africa: Journal of the International African Institute , 1993, Vol. 63, No. 3, Understanding Elections in Africa , pp. 371-396Mikael, S. and Per, L. (2012). Political Institutions and Their Historical Dynamics. *Theoretical Population Ecology and Evolution Group*. (7) 10

Mishler William & Rose Richard (1997) Trust, Distrust and Skepticism: Popular Evaluations of Civil and Political Institutions in Post-Communist Societies . *The journal of politics*, vol. 59, no. 2, pp. 418-51

Moe, T. M. (1990). Political institutions: The neglected side of the story. *Journal of Law, Economics, and Organization*. 6(Special Issue), 213-254.

Murray, C. (2013). Kenya's 2010 Constitution Christina Murray. 61 Neue Folge Band Jahrbuch des offentlichen Rechts. p747 - 788.

Orvis, S. (2006). Conclusion: Bringing Institutions Back into the Study of Kenya and Africa. 107. Africa Today, 53(2), Creating the Kenya Post-Colony, 95-110.

Pereira, C. and Teles, V. (2008). *Political Institutions as Substitute for Democracy: A Political Economy Analysis of Economic Growth*.

Rundra Nita (2005) Globalization and the Strengthening of Democracy in the Developing World. Journal of Political Science, Vol. 49, No. 4. pp. 704-73

Rustow, A. (1970). Transitions to Democracy: Toward a Dynamic Model. *Comparative Politics*. (2) 3, 337 – 363.

Stiftung, F. (2010). *Institutionalizing Political Parties in Kenya*. p v.

Swank Duane (2002) Global Capital, Political Institutions, and Policy Change in Developed welfare states . Cambridge University Press pp 33 - 40

Persson Torsten and Tabellini Guido (2002) Political Economics: Explaining Economic Policy. MIT Press

Tsebelis, G. (1995). Decision Making in Political Systems: Veto Players in Presidentialism, Parliamentarism, Multilateralism and Multipartyism. *British Journal of Political Science*. 25 (3), 289-325.

Wiredu, K. (2001). Democracy by Consensus: Some Conceptual Considerations. *Philosophical Papers*. *3*(30), p. 227-244.

Econometrica, Vol. 70, No. 3 (May, 2002), 883–905
DO POLITICAL INSTITUTIONS SHAPE ECONOMIC POLICY?
By Torsten Persson

Gender Perspectives in Biodiversity Conservation

By: ***Kariuki Muigua****

Abstract

Environmental conservation discourse has paid increased attention to the gender perspectives due to the different roles and needs of both men and women when it comes to conservation measures. As far as biological conservation is concerned, this paper argues that both men and women have an important role to play in achieving sustainable development agenda. This is especially so because men and women all have different contributions to make since they are also affected in different ways by deterioration of environmental resources. The main argument is that unless the policymakers and other stakeholders pay increased attention to the place of gender in biodiversity conservation debates, the dream of achieving sustainability in the area will remain elusive. Arguably, participatory approaches in biodiversity conservation should also include gender issues, not as special groups' issues but as mainstream issues.

1. Introduction

The term "gender" is used to refer to the set of social norms, practices and institutions that regulate the relations between women and men (also known as "gender relations").[1] It has also been defined as a social construct that ascribes different qualities and rights to women and men regardless of individual competence or desires.[2] In addition, the term 'gender' is also used

PhD in Law (Nrb), FCIArb (Chartered Arbitrator), LL. B (Hons) Nrb, LL.M (Environmental Law) Nrb; Dip. In Law (KSL); FCPS (K); Dip. In Arbitration (UK); MKIM; Mediator; Consultant: Lead expert EIA/EA NEMA; BSI ISO/IEC 27001:2005 ISMS Lead Auditor/ Implementer; Advocate of the High Court of Kenya; Senior Lecturer at the University of Nairobi, School of Law [November 2021].

[1] *United Nations, "The Role of Men and Boys in Achieving Gender Equality," Women 2000 and Beyond, December 2008, p.4. Available at http://www.unwomen.org/~/media/headquarters/media/publications/un/en/w2000menandboyseweb.pdf.*

[2] *G. J. Latham, "A study on gender equality as a prerequisite for sustainable development," Report to the Environment Advisory Council, Sweden 2007:2, p. 17. Available at*

to refer to the socially-constructed expectations about the characteristics, aptitudes and behaviours associated with being a woman or a man, and while gender defines what is feminine and masculine, it shapes the social roles that men and women play and the power relations between them, which can have a profound effect on the use and management of natural resources.[3]

It is noteworthy that gender does not mean 'women' or 'girls' – although the word is frequently (mis)used as shorthand for women, women's empowerment, women's human rights, or, more broadly, for any initiative that is geared towards girls or women.[4] Gender inequality has been defined as the differential treatment and outcomes that deny women the full enjoyment of the social, political, economic and cultural rights and development. It is the antithesis of equality of men and women in their human dignity, autonomy and equal protection.[5] Gender equality is, however, not a 'women's issue' but refers to the equal rights, responsibilities and opportunities of women and men, girls and boys, and should concern and fully engage men as well as women.[6]

While the degradation of natural resources and the loss of biodiversity has an impact on everyone regardless of their status or gender, it has been argued that these changes affect women more due to their closer interactions with natural resources and biological diversity.[7] For this reason, there is a need

http://www.uft.oekologie.unibremen.de/hartmutkoehler_fuer_studierende/MEC/09-MEC-reading/gender%202007%20EAC%20rapport_engelska.pdf.

[3] 'What Is Gender and Biodiversity?' <*https://www.cbd.int/gender/biodiversity/*> accessed 21 November 2021.

[4] UNICEF, "Promoting Gender Equality: An Equity-Focused Approach to Programming," Operational Guidance Overview, p. 10. Available at *http://www.unicef.org/gender/files/Overarching_Layout_Web.pdf.*

[5] Baraza, N., 'Lost Between Rhetoric and Reality: What Role for the Law and Human Rights in Redressing Gender Inequality?' Kenya Law Reform Vol. II [2008-2010] p 1. Available at *http://www.kenyalaw.org/klr/index.php?id=874.*

[6] *See generally 'Universal Declaration of Human Rights - In six cross-cutting themes' Available athttp://www.ohchr.org/EN/UDHR/Documents/60UDHR/Stories_on_Human_Right_PressKit_en.pdf.*

[7] Bechtel JD, 'Gender, Poverty and the Conservation of Biodiversity' [2010] A review of issues and opportunities. MacArthur Foundation Conservation White Paper Series, 4.

for active participation of both men and women in biodiversity conservation. Arguably, the central role of women in the conservation and sustainable use of natural resources has been overlooked in studies on biodiversity, most of which have been done from the perspective of natural science.[8] The Convention on Biological Diversity, which was signed at the Rio Earth Summit in June 1992, explicitly recognizes in its preamble as it states that "the vital role that women play in the conservation and sustainable use of biological diversity" and affirms "the need for the full participation of women at all levels of policy-making and implementation for biological diversity conservation.[9] Similarly, in addition, the 1992 Earth Summit held in Rio emphasized the central role of women in promoting ecologically sound and sustainable development. Since then, feminists all over the world have embraced the environmental challenge and are among the most ardent activists for protecting the planet and its inhabitants.[10]

Kenya's *Draft National Forest Policy* 2020's overall goal is to develop, manage, utilize and sustainably conserve forest resources to cover at least 10% of the total land mass, for equitable sharing of the accrued benefits including the flow of ecosystem services for present and future generations, and one of the cross-cutting issues covered therein is gender and social inclusion.[11] It was inspired by the fact that 'the absence of an approved updated National Forest Policy since 1968 and a decade after the promulgation of the Constitution 2010 means that legal requirements brought about by the Constitution with respect to natural resource management such as public participation, community and gender rights, equity in benefit sharing, devolution and the need to achieve 10% forest cover are not anchored in policy'.[12]

Initially, due to the gender-specific nature of women's chores as homemakers, they were seen as a problem, responsible for the destruction of the environment where the millions of women collecting firewood every day to cook for their families was seen as one of the main causes of deforestation

[8] Zweifel H, 'The Gendered Nature of Biodiversity Conservation' (1997) 9 NWSA Journal 107.
[9] Ibid,107.
[10] Ibid.
[11] Republic of Kenya, Draft National Forest Policy 2020, Chapter Three.
[12] Ibid, para. 1.4.2.

and ecological crisis, although this later change to Women and women's groups all over the world becoming actively engaged in grassroots movements defending the environment against destruction in such movements as the late Prof. Wangari Maathai's Green Belt movement in Kenya.[13]

Arguably, considering gender issues in relation to biodiversity involves identifying the influence of gender roles and relations on the use, management and conservation of biodiversity, where gender roles of women and men include different labour responsibilities, priorities, decision-making power, and knowledge, which affect how women and men use and manage biological resources.[14] It has also been opined that biodiversity is closely connected to development, access to resources, income-generating activities, food, and essential household products, and from this perspective, the disciplines of biodiversity and gender overlap, and certainly are intrinsically linked.[15]

This paper seeks to discuss and affirm the place of both men and women in biodiversity conservation as part of their contribution towards realisation of the 2030 Agenda on sustainable development goals.

2. Gender Perspectives in Biodiversity Conservation: The Legal and Policy Framework

Gender is now considered to be a key consideration for equitable and effective biodiversity conservation practice since ethically, ensuring gender-equitable participation is a cornerstone for respecting, protecting, and promoting human rights and for not disadvantaging anyone in the process of conserving biodiversity.[16]

---

[13] Zweifel H, 'The Gendered Nature of Biodiversity Conservation' (1997) 9 NWSA Journal 107, 109.

[14] *'Gender and Biodiversity' <https://www.cbd.int/gender/>* accessed 21 November 2021.

[15] 'Why Gender Is Important for Biodiversity Conservation' *<https://www.unep.org/news-and-stories/story/why-gender-important-biodiversity-conservation> accessed 21 November 2021.*

[16] Lau JD, 'Three Lessons for Gender Equity in Biodiversity Conservation' (2020) 34 Conservation Biology 1589, 1589.

At the international law level, *CBD Decision XII/7 2* encourages Parties to give gender due consideration in their national biodiversity strategies and action plans and to integrate gender into the development of national indicators.[17]

Under the Constitution of Kenya, Article 10, the national values and principles of governance include–*(a) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people; b) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised.*

Under Article 27*(1), every person is equal before the law and has the right to equal protection and equal benefit of the law; (2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms; (3) Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.*

Article 59 establishes the Kenya National Human Rights and Equality Commission whose functions include inter alia promoting gender equality and equity generally and to coordinate and facilitate gender mainstreaming in national development. Article 175 (c) provides that one of the principles of principles of devolved government is that no more than two-thirds of the members of representative bodies in each county government should be of the same gender. In the spirit of equality and non-discrimination, gender mainstreaming in the agricultural sector becomes an important aspect of human rights approaches to biodiversity conservation.

The *National Gender and Equality Commission Act, 2011*[18] was enacted to establish the National Gender and Equality Commission as a successor to the Kenya National Human Rights and Equality Commission pursuant to Article 59(4) of the Constitution; to provide for the membership, powers and functions of the Commission, and for connected purposes.

[17] CBD Decision XII/7, para.2.
[18] National Gender and Equality Commission Act, No. 15 of 2011, Laws of Kenya.

Some of the functions of the Commission under the Act include, inter alia, to—promote gender equality and freedom from discrimination in accordance with Article 27 of the Constitution; monitor, facilitate and advise on the integration of the principles of equality and freedom from discrimination in all national and county policies, laws, and administrative regulations in all public and private institutions; act as the principal organ of the State in ensuring compliance with all treaties and conventions ratified by Kenya relating to issues of equality and freedom from discrimination and relating to special interest groups including minorities and marginalised persons, women, persons with disabilities, and children; co-ordinate and facilitate mainstreaming of issues of gender, persons with disability and other marginalised groups in national development and to advise the Government on all aspects thereof; work with other relevant institutions in the development of standards for the implementation of policies for the progressive realization of the economic and social rights specified in Article 43 of the Constitution and other written laws; and co-ordinate and advise on public education programmes for the creation of a culture of respect for the principles of equality and freedom from discrimination.

Understanding gender roles and relation in agriculture along value chains and identifying key factors that contribute to gender gaps in agriculture is considered crucial for the design and formulation of gender inclusive policy and institutional innovations that equalize opportunities for women and men farmers and equally benefit women and men from the agricultural research for development and dissemination of technologies.[19]

It is worth pointing out that commentators in the last two decades observed that most sustainable development efforts, including biodiversity initiatives, derived from a gendered vision of segmented sustainability that divides home, habitat and workplace into separate domains, with women at 'home', men in the 'workplace' and protected 'habitats' devoid of humans.[20] However, over the years, there has been a paradigm shift, at least theoretically on the

[19] International Centre of Insect Physiology and Ecology (icipe), 'Gender Research and Mainstreaming,' available at *http://www.icipe.org/research/social-science-and-impact-assessment/gender-research-and-mainstreaming Accessed on 13 July 2021.*
[20] Rocheleau DE, 'Gender and Biodiversity: A Feminist Political Ecology Perspective' (1995) 26 IDS bulletin 9, 9.

relationship between men and women in relation to biodiversity as well as the general relationship between man's day to day life and the natural habitats, in light of the United Nations 2030 Agenda on Sustainable Development (SDGs Agenda). The SDGs Agenda seeks to adopt a holistic approach to sustainability that not only includes both men and women but also recognises the interconnectivity between human life and the natural habitats.[21]

This was informed by the realisation that in many rural communities throughout the world women are responsible for the reproduction of the work force, the production of daily subsistence, and the maintenance of the complex ecosystems and particular species that support agriculture, livestock and forest production, yet, most women are legally landless and not officially part of the work force.[22]

The traditional stereotypical role of women in most African homes makes them important players in conservation and use of Plant Genetic Resources (PGR) worldwide where they are often responsible for ensuring household food security and family health, which makes them have greater knowledge and a more diversified perspective than men on PGR because they are responsible for producing or procuring a large number of plant resources and for storing and transforming plants to meet household needs.[23]

Notably, the Constitution of Kenya provides that the objects of devolved government are, *inter alia,* to promote democratic and accountable exercise of power; to foster national unity by recognising diversity; to give powers of

[21] See UNGA, Transforming our world: the 2030 Agenda for Sustainable Development, Resolution adopted by the General Assembly on 25 September 2015 [without reference to a Main Committee (A/70/L.1)].

[22] Rocheleau DE, 'Gender and Biodiversity: A Feminist Political Ecology Perspective' (1995) 26 IDS bulletin 9, 9; see also Mackenzie AFD, 'Land Tenure and Biodiversity: An Exploration in the Political Ecology of Murang'a District, Kenya' (2005) 62 Human Organization 255; Verma R, '"Without Land You Are Nobody": Critical Dimensions of Women" s Access to Land and Relations in Tenure in East Africa' [2007] Unpublished IDRC Scoping Study for East Africa on Women's Access and Rights to Land and Gender Relations in Tenure.

[23] Howard-Borjas P and Cuijpers W, 'Gender Relations in Local Plant Genetic Resource Management and Conservation' [2002] Biotechnology, in encyclopedia for life support systems. EOLSS Publishers, Cambridge.

self-governance to the people and enhance their participation in the exercise of the powers of the State and in making decisions affecting them; to recognise the right of communities to manage their own affairs and to further their development; to protect and promote the interests and rights of minorities and marginalised communities; to promote social and economic development and the provision of proximate, easily accessible services throughout Kenya; to ensure equitable sharing of national and local resources throughout Kenya; and to facilitate the decentralisation of State organs, their functions and services, from the capital of Kenya.[24] In addition, it provides for participation of, *inter alia*, minorities and marginalized groups,[25] in governance and all other spheres of life.

The foregoing provisions are important especially in relation to the provisions of the *County Governments Act*,[26] which also affirm the fact that citizen participation in county governments should be based upon the principles of, *inter alia*, protection and promotion of the interest and rights of minorities, marginalized groups and communities; legal standing to interested or affected persons, organizations, and where pertinent, communities, to appeal from or, review decisions, or redress grievances, with particular emphasis on persons and traditionally marginalized communities, including women, the youth, and disadvantaged communities; reasonable balance in the roles and obligations of county governments and non-state actors in decision-making processes; promotion of public-private partnerships; and recognition and promotion of the reciprocal roles of non-state actors' participation and governmental facilitation and oversight.[27]

Notably, United Nations *Agenda 21* requires that Governments at the appropriate level, with the support of the relevant international and regional organizations, should, *inter alia*, promote a multidisciplinary and cross-sectoral approach in training and the dissemination of knowledge to local people on a wide range of issues which include various resources management.[28] Further, Agenda 21 states that Coastal States should promote

[24] Art. 174, Constitution *of Kenya 2010.*
[25] Ibid, Art. 56.
[26] County Governments Act, No. 17 of 2012, Laws of Kenya.
[27] Ibid, S. 87.
[28] Clause 13.22.

and facilitate the organization of education and training in integrated coastal and marine management and sustainable development for scientists, technologists, managers (including community-based managers) and users, leaders, indigenous peoples, fisherfolk, *women* and youth, among others.

3. Gender Perspectives in Biodiversity Conservation

Notably, dependence on their natural environments means that when biological resources are depleted, women and men can end up being vulnerable in different ways, although women are often more vulnerable than men partly because women's roles can often be "invisible" compared to that of men and so policies, programmes and related initiatives may not fully take into account the differences in how women and men use and contribute to biological resources.[29]

It has been recommended that some of the specific actions which need to be undertaken to create an enabling environment for biodiversity benefits and improved well-being to be enjoyed by all people, women and men, boys and girls, include: Mainstream gender consideration into all national and local biodiversity policies, programmes, budgeting and monitoring mechanisms; Make awareness-raising and capacity building components mandatory for conservation interventions to inform men and women, including indigenous, local and rural women of their roles, rights and benefits in relation to the intervention; Develop and provide training and capacity building on gender issues and mainstreaming in the context of biodiversity conservation and sustainable use, to policy-makers and those involved in planning and undertaking biodiversity-related projects and programmes; Facilitate evidence-based policies by developing gender-sensitive monitoring and reporting frameworks and promoting gender analysis, including in the National Reports of Parties to the CBD; and Dedicate or increase the allocation of financial resources and strengthen expertise to advance the collection and use of data disaggregated by sex, age, ethnicity, disability and other relevant factors, to inform the development and implementation of gender-responsive biodiversity policies and programmes; Identify

[29] Secretariat of the Convention on Biological Diversity, Addressing Gender Issues and Actions in Biodiversity Objectives, 2020, at p. 3 < *https://www.cbd.int/gender/doc/cbd-towards2020-gender_integration-en.pdf* > accessed 21 November 2021.

opportunities to access climate finance to address relevant gender objectives, and ensure new and innovative biodiversity-related financing mechanisms include avenues for access by marginalized and small-scale actors, particularly women and women's organizations; Identify synergies and reinforce efforts to implement the gender-specific targets and/or mandates of the sustainable development goals and the Rio Conventions, including through collaboration with organizations leading the work on these initiatives, and the identification of approaches to mainstream biodiversity and apply common indicators for monitoring and assessing progress and gaps.[30]

Some commentators have suggested that in order to advance gender equality and women's empowerment in the implementation of the post-2020 global biodiversity framework, there is need to ensure: equal opportunities for leadership, decision-making and effective engagement at all levels of decision-making in matters related to the three objectives of the Convention; equal access, ownership and control over biological resources; and equal access to benefits from biodiversity conservation and sustainable use, and from the utilization of genetic resources.[31]

Gender roles affect economic, political, social and ecological opportunities and constraints faced by both men and women. Recognizing women's roles as primary land and resource managers is central to the success of biodiversity policy. [32] Because of the inherent connectedness between poverty, biodiversity use, and gender and the mutually self-reinforcing nature of these links, addressing rural poverty and environmental

[30] UN-Women, "Towards a gender-responsive post-2020 global biodiversity framework: Imperatives and Key Components," A submission by the United Nations Entity for Gender Equality and the Empowerment of Women
(UN-Women) as an input to the development of the post-2020 global biodiversity framework, 1 May 2019, 8.

[31] UN-Women, "Integrating a gender perspective in the post-2020 global biodiversity framework," Issues Brief – January 2021.

[32] Secretariat of the Convention on Biological Diversity, "Gender and *Biodiversity,"* *www.cbd.int/gender*.

degradation requires a holistic, multidisciplinary approach and an understanding of gender in order to achieve successful sustained results.[33]

There is need for governments to establish policies to incorporate gender and other special perspectives into all policies, laws, procedures, programmes and practices relating to ecosystem services, and to identify gaps in the protection of persons and groups of concern, in line with Aichi Biodiversity Target 14 which requires States to ensure that 'by 2020, ecosystems that provide essential services, including services related to water, and contribute to health, livelihoods and well-being, are restored and safeguarded, taking into account the needs of women, indigenous and local communities, and the poor and vulnerable.[34]

The need for equal and active participation of women in sustainable use and conservation of biodiversity is pegged on the fact that they play critical roles as primary land managers and resource users, and they face disproportionate impacts both from biodiversity loss and gender-blind conservation measures.[35] Governments should thus continually towards promoting equity and equality in biodiversity conservation efforts.

4. Conclusion

It has been observed that ensuring that women and men are equally engaged in biodiversity decision-making is not just a matter of equality, it is critical for ensuring biodiversity conservation and sustainable use efforts are successful over the long term.[36] It is no longer a secret that the recognition,

---

[33] Bechtel JD, 'Gender, Poverty and the Conservation of Biodiversity' [2010] A review of issues and opportunities. MacArthur Foundation Conservation White Paper Series.

[34] United Nations Environment Programme, Law and National Biodiversity Strategies and Action Plans, 2018,
Nairobi, Kenya, at 53.

[35] 'The Role, Influence and Impact of Women in Biodiversity Conservation' (International Institute for Environment and Development, 9 October 2018) *<https://www.iied.org/role-influence-impact-women-biodiversity-conservation>* accessed 15 September 2021.

[36] United Nations, Enabling A Gender-Responsive Process for The Development of The Post2020 Biodiversity Framework: Supplementary Background and Tools, CBD/COP/14/INF/15, 1 November 2018, Conference of The Parties to The

reinforcement, and improvement of both men and women's position, knowledge, and capabilities with respect to the sustainable management of biological diversity are key factors in the success of the conservation and use of natural resources, as well as in the empowerment of women.[37] There is a need for efforts towards biodiversity conservation to ensure active and meaningful inclusion of all people, both men and women, as access to these resources affects men and women in different ways. As acknowledged in COP 26, held in Glasgow, Scotland in November 2021, while environmental degradation has serious consequences for all human beings, it affects, in particular, the most vulnerable sectors of society, mainly women, whose health is most fragile during pregnancy and motherhood.[38] Disregarding gender issues in conservation efforts may increase the loss of biodiversity, due to mismanagement and unsustainable use, [and] the loss of important traditional knowledge, skills and experiences.[39] As a result, participants at the UN climate change conference COP26 called for greater representation of women's voices in climate change policies.[40] Indigenous women, who are seen as conveyors of traditional knowledge to the new generations, have an extremely important role in combating climate change.[41]

It has also been observed that disregarding gender can aggravate poverty and inequality.[42] Notably, The Sustainable Development Goals (SDGs), and the

---

Convention On Biological Diversity, Fourteenth meeting, Item 17 of the provisional agenda*, Sharm El-Sheikh, Egypt, 17-29 November 2018, < *https://www.cbd.int/doc/c/5ab6/13f3/3cff0c5b52c856db19b279ec/cop-14-inf-15-en.pdf> Accessed 21 November 2021*.

[37] Zweifel H, 'The Gendered Nature of Biodiversity Conservation' [1997] Nwsa Journal 107, 119.

[38] 'Women Bear the Brunt of the Climate Crisis, COP26 Highlights' (UN News, 9 November 2021) <*https://news.un.org/en/story/2021/11/1105322> accessed 21 November 2021*.

[39] 'Why Gender Is Important for Biodiversity Conservation' <https://www.unep.org/news-and-stories/story/why-gender-important-biodiversity-*conservation> accessed 21 November 2021*.

[40] 'COP26 Focuses on Gender Issues | NHK WORLD-JAPAN News' (NHK WORLD) <*https://www3.nhk.or.jp/nhkworld/en/news/20211110_06/> accessed 21 November 2021*.

[41] 'Women Bear the Brunt of the Climate Crisis, COP26 Highlights' (UN News, 9 November 2021) <*https://news.un.org/en/story/2021/11/1105322> accessed 21 November 2021*.

[42] *Ibid.*

goals therein to end hunger and poverty, depend on biodiversity and natural capital.[43] During COP 26, it was observed that persistent discriminatory social and cultural norms, such as unequal access to land, water, and other resources, as well as their lack of participation in decisions regarding planning and management of nature, often lead to ignorance of the tremendous contributions women can make.[44] It is thus the high time that all stakeholders not only acknowledge but also do what is reasonably possible to ensure that the role of both men and women in biodiversity conservation takes a centre stage for the sake of achieving sustainable development agenda.

[43] *'COP15 on Biodiversity Is Our Chance to Get to a World We Want' (UNEP, 12 October 2021) <http://www.unep.org/news-and-stories/speech/cop15-biodiversity-our-chance-get-world-we-want> accessed 21 November 2021.*

[44] *'Women Bear the Brunt of the Climate Crisis, COP26 Highlights' (UN News, 9 November 2021) <https://news.un.org/en/story/2021/11/1105322> accessed 21 November 2021.*

References

United Nations, "The Role of Men and Boys in Achieving Gender Equality," Women 2000 and Beyond, December 2008. Available at *http://www.unwomen.org/~/media/headquarters/media/publications/un/en/w2000menandboyseweb.pdf.*

G. J. Latham, "A study on gender equality as a prerequisite for sustainable development," *Report to the Environment Advisory Council*, Sweden 2007:2. Available at *http://www.uft.oekologie.unibremen.de/hartmutkoehler_fuer_studierende/MEC/09-MECreading/gender%202007%20EAC%20rapport_engelska.pdf.*

'What Is Gender and Biodiversity?' *<https://www.cbd.int/gender/biodiversity/> accessed 21 November 2021.*

UNICEF, "Promoting Gender Equality: An Equity-Focused Approach to Programming," Operational Guidance Overview. Available at http://www.unicef.org/gender/files/Overarching_Layout_Web.pdf.

Baraza, N., 'Lost Between Rhetoric and Reality: What Role for the Law and Human Rights in Redressing Gender Inequality?*' Kenya Law Reform* Vol. II [2008-2010]. Available at http://www.kenyalaw.org/klr/index.php?id=874.

'Universal Declaration of Human Rights - In six cross-cutting themes' Available at *http://www.ohchr.org/EN/UDHR/Documents/60UDHR/Stories_on_Human_Right_PressKit_en.pdf.*

Bechtel JD, 'Gender, Poverty and the Conservation of Biodiversity' [2010] A review of issues and opportunities. MacArthur Foundation Conservation White Paper Series, 4.

Zweifel H, 'The Gendered Nature of Biodiversity Conservation' (1997) 9 NWSA Journal 107.

Republic of Kenya, *Draft National Forest Policy 2020*.

'Gender and Biodiversity' <https://www.cbd.int/gender/> accessed 21 November 2021.

'Why Gender Is Important for Biodiversity Conservation' <https://www.unep.org/news-and-stories/story/why-gender-important-biodiversity-conservation> accessed 21 November 2021.

Lau JD, 'Three Lessons for Gender Equity in Biodiversity Conservation' (2020) 34 Conservation Biology 1589.

National Gender and Equality Commission Act, No. 15 of 2011, Laws of Kenya.

International Centre of Insect Physiology and Ecology *(icipe), 'Gender Research and Mainstreaming,'* available at *http://www.icipe.org/research/social-science-and-impact-assessment/gender-research-and-mainstreaming* Accessed on 13 July 2021.

Rocheleau DE, 'Gender and Biodiversity: A Feminist Political Ecology Perspective' (1995) 26 IDS bulletin 9.

United Nations General Assembly, *Transforming our world: the 2030 Agenda for Sustainable Development,* Resolution adopted by the General Assembly on 25 September 2015 [without reference to a Main Committee (A/70/L.1)].

Mackenzie AFD, 'Land Tenure and Biodiversity: An Exploration in the Political Ecology of Murang'a District, Kenya' (2005) 62 Human Organization 255.

Verma R, '"Without Land You Are Nobody": Critical Dimensions of Women" s Access to Land and Relations in Tenure in East Africa' [2007] Unpublished IDRC Scoping Study for East Africa on Women's Access and Rights to Land and Gender Relations in Tenure.

Howard-Borjas P and Cuijpers W, 'Gender Relations in Local Plant Genetic Resource Management and Conservation' [2002] Biotechnology, in encyclopedia for life support systems. EOLSS Publishers, Cambridge.

Republic of Kenya, Constitution of Kenya 2010.

County Governments Act, No. 17 of 2012, Laws of Kenya.

Secretariat of the Convention on Biological Diversity, Addressing Gender Issues and Actions in Biodiversity Objectives, 2020 <https://www.cbd.int/gender/doc/cbd-towards2020-gender_integration-en.pdf > accessed 21 November 2021.

UN-Women, "Towards a gender-responsive post-2020 global biodiversity framework: Imperatives and Key Components," *A submission by the United Nations Entity for Gender Equality and the Empowerment of Women (UN-Women) as an input to the development of the post-2020 global biodiversity framework,* 1 May 2019.

UN-Women, "Integrating a gender perspective in the post-2020 global biodiversity framework," *Issues Brief* – January 2021.

Secretariat of the Convention on Biological Diversity, "Gender and Biodiversity," www.cbd.int/gender.

Bechtel JD, 'Gender, Poverty and the Conservation of Biodiversity' [2010] A review of issues and opportunities. MacArthur Foundation Conservation White Paper Series.

United Nations Environment Programme, *Law and National Biodiversity Strategies and Action Plans,* 2018, Nairobi, Kenya.

'The Role, Influence and Impact of Women in Biodiversity Conservation' (*International Institute for Environment and Development*, 9 October 2018) <https://www.iied.org/role-influence-impact-women-biodiversity-conservation> accessed 15 September 2021.

United Nations, *Enabling A Gender-Responsive Process for The Development of The Post2020 Biodiversity Framework: Supplementary Background and Tools*, CBD/COP/14/INF/15, 1 November 2018, Conference of The Parties to The Convention On Biological Diversity, Fourteenth meeting, Item 17 of the provisional agenda*, Sharm El-Sheikh, Egypt, 17-29 November 2018, <*https://www.cbd.int/doc/c/5ab6/13f3/3cff0c5b52c856db19b279ec/cop-14-inf-15-en.pdf*> Accessed 21 November 2021.

'Women Bear the Brunt of the Climate Crisis, COP26 Highlights' (UN News, 9 November 2021) <https://news.un.org/en/story/2021/11/1105322> accessed 21 November 2021.

'Why Gender Is Important for Biodiversity Conservation' <https://www.unep.org/news-and-stories/story/why-gender-important-biodiversity-conservation> accessed 21 November 2021.

'COP26 Focuses on Gender Issues | NHK WORLD-JAPAN News' (NHK WORLD) <https://www3.nhk.or.jp/nhkworld/en/news/20211110_06/> accessed 21 November 2021.

'COP15 on Biodiversity Is Our Chance to Get to a World We Want' (UNEP, 12 October 2021) <*http://www.unep.org/news-and-stories/speech/cop15-biodiversity-our-chance-get-world-we-want*> accessed 21 November 2021.

Enhancing The Right to Bail (Reviewing The Practice of Demanding Land and Vehicles as Security in Surety Bond)

By: ***Wamuti Ndegwa****

Abstract

In Kenya, Article 49(1) (h) of the Constitution protects the right of the accused to be released on bail. Many judicial decisions acknowledge the right. However, the reality is that accused persons often remain in custody since they are unable to deposit title to land, motor vehicle or other non-liquidated property as the security in surety bonds.

This paper interrogates whether the practice where Kenyan courts reject money and demand title to land or motor vehicles as security in surety bonds is consistent with the right to bail in the legal, social and economic circumstances prevailing in Kenya. The paper starts by examining the content of the right of the accused to bail or bond. It then discusses how demanding land and vehicles as security in surety bond affects the right. Finally, the paper interrogates whether requiring land and vehicles is consistent with the right. The objective of the paper is to provoke debate as to whether the practice is legitimate and perhaps instigate reforms.

I base this paper on the argument that conditions that are not expressly authorised by the law, are unduly difficult or are unnecessary, amount to excessive bail, are unreasonable and unconstitutional. The paper posits that the practice of rejecting money and demanding title to land, motor vehicles and other non-monetary properties is not authorised by the Constitution or statute. The empirical data revealed that majority of Kenyans do not have suitable land or motor vehicles. The data further demonstrated that the process of depositing title to land or motor vehicles as security is unduly cumbersome, costly, corrupt and stressful. Finally, that title to land or

* ***PhD (Law), UON; Advocate of the High Court of Kenya; Lecturer at The University of Nairobi***

vehicle is not any better than cash bail or free bond in ensuring the accused attend trial.

The paper therefore concludes that though long entrenched, the practice of rejecting money and demanding title to land and motor vehicles or other unliquidated assets as security in surety bond does not serve any useful purpose, is unreasonable, amounts to excessive bail and is unconstitutional. Upon this finding, the paper suggests that we abolish this practice so as to enhance access to the right to bail.

In the year 2018, the Judiciary of the Republic of Kenya prepared the Criminal Procedure Bench Book, which amongst other things provides that,

> *'Where an accused is required to provide security so as to be released on bond, the court must be furnished with a security document such as a title deed, motor vehicle log book, or an insurance bond. In addition to the to the security document, the court may require a valuation report revealing the value of the property being offered as security'*[1].

In noting the category of the property that accused may offer as security in surety bond, it is important to note that the properties do not include money. This paper examines the paradox of excluding money from the properties that the surety may give as security and demanding title to land, motor vehicle and insurance bonds for what is essentially a monetary obligation. At the same time, the paper examines another closely related paradox of placing unnecessary obstacles to the money dominated bail /bond system at a time when other jurisdictions are enhancing access to bail by abandoning monetary bail in its totality for non-monetary bail[2]. In fact, excluding money from the security properties suggests that Kenya practises what may be called property bond as opposed to monetary bond.

[1] The Judiciary, *Criminal Procedure Bench Book* (2018) 54.
[2] Lea Hunter, 'What You Need To Know About Ending Cash Bail' (16 March 2020). <https://cdn.americanprogress.org/content/uploads/2020/03/23094429/04-23_Ending-Cash-Bail.pdf?_ga=2.159907134.287116841.1626099696-2122119285.1626099696>

Standard 10-1.4 of the American Bar Association Standards for Pre-trial release demonstrates the trend towards monetary bail and/ or security[3]. It provides that courts should promote release of accused on their own recognisance. Further, that additional conditions including cash bail and surety bond should only be imposed in cases where prosecutors demonstrate the need of the individual case to be reasonably necessary to ensure accused attend trial, protect victims, the public, witnesses and the integrity of judicial process. Standard 10-1.4 (c) provides that even in cases where courts find it necessary to impose financial conditions, the court should first consider releasing on unsecured bond.

In this spirit, the State of Arkansas in 2014 abandoned money bail by passing a law that provides that a judicial officer can only set money bail after he determines that no other conditions for release will reasonably ensure the appearance of the defendant[4]. In 2018, the State of California enacted the California Money Bail Reform Act that eliminated the money bail system and replaced it with a system that assesses the risk of flight, danger to the public and other non-monetary considerations[5]. The objective of these reforms is to avoid detaining the accused only because he cannot afford the amount of money bail[6].

These jurisdictions abandoned the money bail because they realised its shortcomings. Foremost, they realised that many accused remain in remand prisons purely because they cannot afford to pay the money bail.[7] Others plead guilty purely for convenience because the undue fine or sentence is a far lesser devil than remaining in remand prison indefinitely awaiting trial.[8] In Kenya, innocent motorists opt to bribe traffic police officers or plead

[3] The ABA Standards for Criminal Justice: Pretrial Release (3d ed. 2007) <https://www.americanbar.org/groups/criminal_justice/publications/criminal_justice_section_archive/crimjust_standards_pretrialrelease_toc/> Accessed 20 May 2021.
[4] Ark CODE ANN. S9.2 (West 2014)
[5] S.BB10,2017-2018 Leg.,Reg. Sess. S.36 (Cal.2017)
[6] Hunter (n 2).
[7] ibid.
[8] James A. Allen, 'Making Bail': Limiting The Use of Bail and Defining the Elusive Meaning of 'Excessive Bail' Journal of Law and Policy, vol. 25 No. 2, 2017 p. 637.

guilty purely because of fear of Kenya's bail system since it throws every accused into prison cells and makes it extremely difficult to satisfy the conditions for release on bail[9]. Another shortcoming of money bail is that it discriminates accused based on wealth, or rather lack of it, since the system releases wealthy accused facing similar charges. In addition, the money bail system violates the constitutional right to presumption of innocence by detaining the accused before conviction[10].

In Kenya, unfortunately, courts have not only stuck on the old money bail and security but they have also made it more difficult to satisfy its conditions by rejecting money and demanding title to land, motor vehicle or other non-monetary property as the security in surety bond[11]. This is despite the fact that the 2010 Constitution gives the court wide leeway for improvising conditions for release. Rejecting money and demanding land and vehicles frustrates the right to be released on bail on reasonable conditions. Whereas this paper aspires that Kenya enhances the right to bail to the great heights of releasing accused without demanding money bail, this paper settles for a fairly modest objective that Kenyan courts accept money in surety bonds instead of the unlawful condition of title to land and vehicles. In the part below, the paper starts by discussing the nature and purposes of bail.

Whereas stakeholders including litigation lawyers assume that demanding title to land, vehicles and insurance bonds is lawful and necessary, data indicates that the practice is unlawful, and unnecessary. Above all, it frustrates exercise of the right to be released on bond since the process is cumbersome, bureaucratic and often insurmountable for many accused. Often, accused persons remain in custody because it is extremely difficult to

[9] Transparency International Kenya, Traffic Legislation Gaps and Drivers of Corruption in Traffic Matters (May 2018) https://tikenya.org. <Accessed November 15,2021>.

[10] Tracey Meares and Arthur Rizer, 'THE "RADICAL" NOTION OF THE PRESUMPTION OF INNOCENCE' [2020] The Square One Project. *<https://www.safetyandjusticechallenge.org/wp-content/uploads/2020/05/CJLJ8161-Square-One-Presumption-of-Innocence-Paper-200519-WEB.pdf>*

[11] Article 49(1)(h) of the 2010 provides that accused has a right to be released on bail on reasonable conditions unless there is a compelling reason not to.

raise sureties who have land, vehicles and the requisite title documents. It is not surprising that pre-trial detainees make up almost half of the prison population and contribute substantially to overcrowding in prisons. [12] Accused whose sureties are otherwise able to deposit money as the security remain in custody because the sureties are not able to deposit land or vehicles. Ironically, while the Criminal Procedure Code describes the security in surety bond as a sum of money, Kenyan courts demand properties other than money[13].

Demanding land, vehicles, insurance bonds or other bail conditions that are out of reach of the accused is tantamount to denying bail altogether. In *ODonell v. Harris County*[14], and in many other cases, courts in the U.S. held that conditions that are out of reach of the accused amount to de facto pre-trial detention. Disturbed by the detention of accused whom courts have in theory released on bond, the study investigated the legality or otherwise of the practice of demanding land, vehicles, and other properties while rejecting money. The objective of the study is to enhance access to pre-trial release by unmasking the illegality of the practice.

Part One

Purpose of Bail

There are at least two schools of thought on the purpose of taking bail/ bond from the accused. On one hand, Starger and Bullock argue that the purpose of bail is to guarantee the appearance of the accused for the trial[15]. The school is reflected in the decision of the Supreme Court of the United States in *Stack v Boyle*[16]. In that decision, Chief Justice Vinson addressed four important matters relating to bail. First, that pre-trial detention hampers preparation of

[12] National Council on the Administration of Justice, Bail and Bond Policy Guidelines March 2015 at 3. <*http://www.kenyalaw.org/kl/fileadmin/pdfdownloads/Bail_and_Bond_Policy_Guidelines.pdf* > Accessed 1/2/2019.

[13] Sections 123 -133 of the Criminal Procedure Code Cap. 75 Laws of Kenya.

[14] Civil Action No. H-16-1414 (S.D. Tex. Nov. 21, 2019)

[15] Collin Starger & Michael Bullock, 'Legitimacy , Authority and the Right to Affordable Bail', William & Mary Human Rights Journal , Vol.26:589 (2018) 609

[16] 342U.S. at 5.

the defence while pre-trial release prevents infliction of punishment before conviction. Second, that unless the right to bail before trial is preserved, the presumption of innocence loses meaning. Third, that the test of excessiveness of bail is whether the court calculated the amount reasonably to ensure that the accused will attend trial. Finally, that setting the amount of bail should be an individualised evidence-based inquiry into what is necessary to ensure the accused attend trial[17]. In *Gerstein v Pugh*, the U.S. Supreme Court held that pre-trial detention are measures taken by the state before it presents its evidence of the crime and that therefore, the detention and the conditions for release are just administrative measures for ensuring the accused attend trial. The law does not intend the pre-trial detention and the conditions for bail to be punishment of any kind[18].

In Kenya, the school is reflected in the Bail and Bond Guidelines 2015. General Principle 3.1 (d) provides that bail and bond amounts and the conditions shall be no more than is necessary to guarantee the appearance of an accused for trial. A number of judicial decisions also reflect this school. For instance in *Republic v Godfrey Madegwa & 6 others*[19] , *Republic v Jao & Another*[20], *Samuel Kimutai Koskei & 15 Others v Director of Public Prosecutions*[21] and *Grace Kananu Namulo v Republic*[22], the High Court held that the amount of bond should not be greater than is necessary to guarantee that the accused person will appear for trial. The choice of words indicates that the guidelines and courts view bond as an instrument of ensuring that the accused returns for the trial. In *Republic v Alex Otieno Onyango*, the High court held that the objective of taking security from the surety is not to obstruct the right of the accused to pre-trial release but to ensure that he returns for the trial.[23] I will refer to this view as the 'guarantee for reappearance' school.

[17] At 6.
[18] Gerstein v Pugh (1975) 420 US 103.
[19] [2016] eKLR.
[20] [2019] eKLR.
[21] [2019] eKLR.
[22] [2019] eKLR.
[23] R*epublic v Alex Otieno Onyango* [2015] eKLR.

The other school posits that bail and bond have nothing to do with guaranteeing the appearance of the accused for trial. They argue that bail and bond is merely an instrument for pre–ordaining the punishment for failing to appear for trial[24]. This idea is apparent in the definition of bail in the Bail/ Bond Policy Guidelines 2015. The guidelines define bail as an agreement between an accused person or his/ her sureties and the court that the accused will attend court when required and that should the accused abscond, in addition to the court issuing warrants of arrest, a sum of money or property directed by the court to be deposited will be forfeited. They define bond as an undertaking with or without sureties, or security entered into by an accused person in custody under which he or she binds him or herself to comply with the conditions of the undertaking and if in default of such compliance, to pay the amount of bail or other sum fixed in the bond[25]. I will refer to this view as the 'penalty' school.

The school further argues that admitting the accused to bail connotes that the court is convinced that he is not a flight risk and there is no other compelling reason for denying him bail. Therefore, detaining accused because of inability to raise the sum in the bail bond is taking away the right to pre-trial release through the back door. The Criminal Procedure Code seems to support this argument since inability to raise the sum required for bail bond is not listed in section 123A of the Criminal Procedure Code or the Bail Bond Guidelines 2015 as a reason for refusing to release the accused on bail. The thought of bail/ bond as a mere penalty for the accused failing to reappear voluntarily is reflected in the Judiciary Hand Book. It provides that upon approving the surety, the court should clearly explain that should the accused abscond or breach the terms of the bond, the surety will pay the penalty or forfeit the bail or bond amount[26].

[24] Donald J. Harris, The Vested Interests of the Judge : Commentary on Fleming's Theory of Bail(1983) 490.

[25] [25] National Council on the Administration of Justice, Bail and Bond Policy Guidelines March 2015 at 3.
<http://www.kenyalaw.org/kl/fileadmin/pdfdownloads/Bail_and_Bond_Policy_Guidelines.pdf > Accessed 1/2/2019.

[26] The Judiciary, *Criminal Procedure Bench Book* (2018) 54.

This paper adopts the penalty school of bail/ bond. This is because it is difficult to conceptualise how money deposited in court or undertaken to be forfeited can guarantee that a person who is minded to abscond returns. The certainty of forfeiting the money is not a physical constraint. The penalty school is also more consistent with the literal interpretation of the words that the accused and or the surety will pay the amount thereby specified if the accused default in attending court. The penalty school is also more compatible with the argument that it is unreasonable to exclude money and insist on land, vehicles or other unliquidated properties as security for what is essentially a financial consequence.

Test for the legitimacy of the practice

The legitimacy of the terms of bail may be tested using the principles of reasonableness and excessiveness or otherwise of the terms of bail. The test of reasonableness or otherwise derives from Article 49(1) (h) of the Constitution. It provides that an arrested person has the right to be released on bond or bail, on reasonable conditions, pending a charge or trial, unless there are compelling reasons not to be released. On the other hand, the test of excessiveness or otherwise of the terms derive from section 123(2) of the Criminal Procedure Code. It provides that the amount of bail shall be fixed with due regard to the circumstances of the case and shall not be excessive. The two tests are the same since the Black's Law Dictionary defines reasonableness as proper, fair, or moderate in the circumstances and guided by reason[27]. On the other hand, the dictionary defines excessive as "greater than what is usual or proper; what goes beyond just measure or amount." [28]. It is a question of terminology used in different jurisdictions. In the U.S., unreasonable terms of bail are referred to as excessive while in Kenya, the excessive conditions are referred to unreasonable. Accordingly, this paper uses the two terms interchangeably.

1.0 Excessiveness and reasonableness are questions of mixed law and fact

Excessiveness and reasonableness are relative terms. They are not capable of accurate measurement. They depend on the law and the factual

[27] Bryan A Garner, *Black's Law Dictionary* (8th edn, West Publishing Co 1999).
[28] Ibid at 670.

circumstances of each case. Accordingly, the excessiveness or reasonableness or otherwise of the practice of excluding money and demanding land, vehicles and insurance bonds is a question of mixed law and fact. Therefore, the excessiveness or unreasonableness of the practice will be tested against the law as well as the factual circumstances, that is, the de-jure and de-facto excessiveness or reasonableness respectively.

1.2 De jure excessiveness

The excessiveness or otherwise of the practice is tested against the provisions of the Constitution, statutes, precedent and guidelines governing administration of bail/ bond. Where the practice contradicts the law, the study categorises such unlawfulness as excessive in law. Excessiveness, like the principle of legality, requires authorities to found their decisions on the law[29]. Where the law gives discretion, the discretion ought to be exercised according to the principles established by the law[30]. The principle of legality is reflected in Principle 3.1, 3.2 and 3.3 of the United Nations Standard Minimum Rules for Non-Custodial Measures (The Tokyo Rules)[31]. Principle 3.10 of the Tokyo Rules prohibits authorities from restricting the rights of offenders further than is authorised by the competent authority[32]. Since the law governing the bail and bond in Kenya is the Constitution, the Criminal Procedure Act, and precedent, this paper used these laws to test the excessiveness or otherwise of the practice in law. To be reasonable, the conditions imposed by courts must conform to those laws. Therefore, conditions that contradict Article 49(1) (h) and sections 122-126 of the Criminal Procedure Code are excessive or unreasonable. The provisions of the Constitution, the statute, the guidelines and precedent are discussed below[33].

---

[29] Lesega Mnguni and Justin Muller, 'The Principle of Legality in Constitutional Matters with Reference to Masiya v Director of Public Prosecutions and Others 2007 (5) SA 30 (CC)' [2009] SAFLII 6.
http://www.saflii.org/za/journals/LDD/2009/9.pdf

[30] CF Forsyth and William Wade, *Administrative Law* (Oxford University Press 2014) 286.

[31] United Nations Standard Minimum Rules for Non-custodial Measures (The Tokyo Rules) https://www.un.org/ruleoflaw/files/UNITED~2.PDF

[32] Ibid.

[33] N. 38-85.

1.3 De facto unreasonableness

The factual circumstances may render the conditions excessive [34]. Accordingly, section 123 of the Criminal Procedure Code requires the court to have due regard to the circumstances of the case when fixing the amount of bail. Principle 3.1 (d) of the Bail/ Bond guidelines provides that the bail amount should not be greater than is necessary to guarantee that the accused will appear for the trial or so low as to entice the accused to forfeit. It further provides that the Court should take into account the personal circumstances of the accused person. What is reasonable the guidelines say will depend on the facts and circumstances of each case. Commenting on the money bail system of the U.S, Brian Frosh, Attorney General for Maryland, observed that too many people are kept in jail in Maryland purely because they cannot raise the money[35]. Therefore, the factual difficulties of depositing title to land or vehicle may be so insurmountable as to be tantamount to denying bail[36]. In *Republic v Jao & Another*, the High Court in Kenya held that in setting the terms of bail, the court should not subject the accused to any condition which is not pragmatic[37]. In *Sumit Mehta v State of N.C.T of Delhi*, the Supreme Court of India held that 'any condition' should not be regarded as conferring absolute power on a court to impose any condition it chooses. Any condition has to be interpreted in the pragmatic sense and should not defeat the order granting bail[38].

Therefore, evaluating the practice for possible de-facto excessiveness requires one to examine how the demand affects the practical exercise of the right. In *Andrew Young Otieno v Republic*[39] and *Samuel Kimutai & 15*

[34] Kellen Frank , 'The Present Crisis in American Bail', (The Yale Law Journal Forum April 22, 2019) at 1107.

[35] Open Meeting to Consider the One Hundred Ninety –Second Report of the Standing Committee on Rules of Practice and Procedure Before the Court of Appeals.(Md.2017(testimony of Brian Frosh),https://mdcourts.gov/sites/defaulat files/import/coappeals/media/2017 opnmtngs/20170105rulesmtgpt 1.mp4(at10:33 to 40:28.

[36] Collin Starger & Michael Bullock, 'Legitimacy, Authority , and the Right to Affordable Bail', William & Mary Human Rights Journal , Vol.26:589 (2018) 609

[37] [2019] eKLR.

[38] *Sumit Mehta v State of N.C.T of Delhi* (2013) 15SCC 570.

[39] [2017] eKLR at paragraph 47.

Others v Director of Public Prosecutions[40], the High Court held that to impose stringent bail terms that an accused person cannot afford is akin to taking away his right to bail through the back door. In the latter case, the accused were charged with corruption offences. The Magistrate ordered that they be released on a bond of Kshs 50 million with one surety or cash bail of Kshs 12 million.

Therefore, the words 'excessive' in section 123 of the Code and 'unaffordable' in judicial decisions apply equally to the other requirements including the security that the accused may be unable to comply with. These could be requirements that are not practical[41], unnecessary[42], illogical[43], too costly[44], disproportionate[45], or otherwise too difficult to satisfy. In *Republic v JAO and DAO*, the High Court held that the court should consider the economic circumstances of the accused when fixing the conditions[46]. The list is endless but each circumstance is a question to be decided on the facts of each case. The idea of de facto unreasonableness merges well with the principles of administrative law, which presumes that the law never intended to give public authorities authority to act unreasonably.[47] Demands that are more cumbersome than those prescribed by Parliament constitute de-facto unreasonableness. In line with this argument is the principle of administrative law that the Constitution and Parliament never intended to authorize interpretations or applications that make the law unrealistic or unnecessarily difficult to satisfy.[48]

Whether the demand is unreasonable on account of violating the law or by its practical implications, it falls short of the standard of reasonableness

[40] *Samuel Kimutai Koskei and 15 Others v Director of Public Prosecutions* [2019] eKLR at paragraph 29.
[41] *Sumit Mehta v State of N.C.T of Delhi* (2013)15 SCC 570.
[42] Bail and Bond Policy Guidelines, General Principle 3:1.
[43] *Council of Service Union v Minister for the Civil Service* [1984] 3 All ER.
[44] *Republic v JAO & another* [2019] eKLR.
[45] Forsyth and Wade (n 30) 312.
[46] (2019) eKLR.
[47] *Wanzusi Anor Vs Kampala Capital City Authority* [2019] UGHCCD 119.
[48] Craig, Paul. "Ultra Vires and the Foundations of Judicial Review." The Cambridge Law Journal 57, no. 1 (1998): 63-90. http://www.jstor.org/stable/4508421 accessed 28 August 2019.

envisaged by Article 49(1) (h) of the Constitution. It is excessive, unreasonable, unlawful, unconstitutional and void.

Part Two

Content of The Right

The right to bail is of ancient origins. In the Bible, when Apostle Paul was arraigned in the Court of Governor Felix in Caesarea to answer charges relating to blasphemy, the Governor ordered that he be released. He further ordered Paul to attend for hearing on a date when his accuser, the Jewish Council known as Sanhedrin, would present its evidence[49]. The ancient Roman colonial criminal justice system even released convicted prisoners on bail pending the hearing and determination of appeals. After conviction, Paul appealed to Emperor Ceaser. Emperor Ceaser allowed Paul to stay at his own rented house for a whole two years but under guard[50]. As early as the 15th century, Britain had enacted the Habeas Corpus Act 1679 and the English Bill of Rights 1689. The Acts protected the right to bail by prohibiting excessive bail. The Act simply provided that, 'excessive bail shall not be required'.[51]

In Kenya, bail is governed by Article 49(1) (h), section 123 to 131 of the Criminal Procedure Code, precedent, and the Policy Guidelines on Bail and Bond 2015. Article 49(1) (h) of the Constitution provides that an arrested person has the right to be released on bond or bail, on reasonable conditions, pending a charge or trial, unless there are compelling reasons not to be released.

Section 123(1) of the Criminal Procedure Code provides that when a person other than a person accused of murder, treason, robbery with violence, attempted robbery with violence or drug-related offences is arrested or detained without warrant by an Officer in Charge of a Police Station or appears or is brought before a court and that person is prepared at any time while in the custody of that officer or at any stage of the proceedings before

[49] The Bible, King James Version Ch. 23: 24 Acts of the Apostles.
[50] Ibid Ch. 28: 30.
[51] www.legislation.gov.uk accessed September 25, 2019.

that court to give bail, that person may be admitted to bail. Section 123A and Article 49(1) (h) have since overridden the exception of murder, treason and robbery by availing bail in all offences. However, there is a proviso that the officer or the court may instead of taking bail from that person, release him on his executing a bond without sureties for his appearance. The bond is executed according to the subsequent provisions of the Act.

Section 123A (1) provides that in making the decision on bail or bond, the court should have due regard to all the relevant circumstances of the case. In particular, the nature or seriousness of the offence, the character, antecedents, associations and community ties of the accused person, his record in complying with conditions of previous bail and the strength of the evidence of the case. These considerations are subject to Article 49(1) (h) of the Constitution and section 123 of CPC.

Section 123 (2) provides that the amount of bail shall be fixed with due regard to the circumstances of the case and shall not be excessive.

Section 124 provides that before a person is released on bail or on his own recognisance, he shall execute a bond for such sum as the court or police officer thinks sufficient. It further provides that the bond shall be executed by one or more sureties undertaking that the person shall attend at the time and place mentioned in the bond and shall continue to attend until otherwise directed by the court or police officer.

Section 126 provides that the arrested person may deposit a sum of money or property in lieu of executing a bond. Further, that where the person is required to execute a bond with or without surety, the court or officer may except in the case of a bond for good behaviour, require the person to deposit a sum of money as the court or officer may fix or to deposit property in lieu of executing a bond.

Evidently, the provisions are not very clear. They use the words bond, bail, and recognisance interchangeably. This ambiguity is not unique to Kenya. Commenting on administration of bail/ bond in the United States, Domingo and Denny argue that vagueness in the wording of the statutes regulating

bond creates space for courts to misinterpret the Act[52]. Nevertheless, the study was able to extract the primary elements of the right to bail/ bond. This paper will discuss the elements in the following section.

The Bail/ Bond Policy Guidelines 2015 define bail as an agreement between an accused person or his/ her sureties and the court that the accused will attend court when required and that should the accused abscond, he will be arrested and in addition, forfeit the asum of money of property directed by the court to be deposited. The guidelines define bond as an undertaking with or without sureties or security entered into by an accused person in custody under which he or she binds him or herself to comply with the conditions of the undertaking and if in default of such compliance to pay the amount of bail or other sum fixed in the bond[53]. Security is defined as the sum of money pledged in exchange for the release of an arrested or accused person as a guarantee of that person's appearance for trial. Surety is defined in the guidelines as the person who undertakes to ensure that the accused will appear for trial and abide by bail conditions and puts up security such as money or title to property, which may be forfeited if the accused fails to appear. The paper addresses the specific guidelines, policies and situational analysis in the 2015 guidelines.

2.0 The right is not discretionary

It may appear superfluous but in Kenya, it is necessary to reiterate that Article 49(1) (h) of the Constitution protects the right to release on bond on reasonable conditions. It provides that a person who is arrested has a right to be released on bail on reasonable conditions unless there is a compelling reason for not releasing. The need to reiterate arises because as recently as 2019, courts have attempted to subjugate the right to their discretion. In

[52] Pilar Domingo and Lisa Denney 'The Political Economy of Pre-Trial Detention' February 2013 < https://www.odi.org/publications/7286-political-economy-pre-trial-detention >Accessed March 21,2019.

[53] National Council on the Administration of Justice, Bail and Bond Policy Guidelines March 2015 at 3.< http://www.kenyalaw.org/kl/fileadmin/pdfdownloads/Bail_and_Bond_Policy_Guidelines.pdf > Accessed 1/2/2019.

Republic v Danfornd Kabage Mwangi,[54] the High Court held that "I hold the view that after considering the circumstances of each case the court has the discretion to grant or to refuse bail provided the discretion is exercised judiciously". In *Republic v Zachariah Okoth Obado*[55], the High Court held that "the application [for bail] cannot be determined before the witness statements and other evidence are filed and availed to all parties. That is the only way that this court can fully exercise its discretion". In *Grace Kananu Namulo v Republic*, the High Court held that "the discretion to grant bail and set the conditions rests with the court"[56]. Further, that in exercising the discretion, the court strikes a balance between protecting the liberty of the individual and safeguarding the proper administration of justice[57]. It is perhaps this downgrading of the right to a discretionary favour that prompted the High Court in *Samuel Kimutai Koskei and 15 others v DPP*[58] to reiterate that bail is not a privilege but a constitutional and statutory right subject to some conditions.

Article 49(1) (h) does not confer discretion. It creates a jurisdictional fact or a right that is dependent on the existence or non-existence of a certain fact. It is important to distinguish between discretion and jurisdictional fact. According to Christie, discretion is the freedom to decide between two or more options permitted by the law[59]. Jurisdictional fact on the other hand does not leave options. Wade says that jurisdictional fact is a fact whose existence or non-existence determines the existence or non-existence of the jurisdiction in question[60]. With respect to Article 49(1) (h), the jurisdictional fact is the compelling reason. The existence or non-existence of the compelling reason determines the existence of the jurisdiction of the court to detain the accused. If the compelling reason is not established, the court has

[54] [2016] eKLR .
[55] [2018] eKLR .
[56] [2019] eKLR
[57] *Grace Kananu Namulo v Republic* [2019] eKLR at paragraph 10.
[58] [2019] eKLR at paragraph 10
[59] De Smith ,Woolf & Jowell, Judicial Review of Administrative Action (1995) 296; George C Christie, 'An Essay on Discretion' (1986) 1986 DLJ 747. *https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=2958&context=dlj*
[60] Forsyth and Wade (n 30) 212.

no jurisdiction to detain the accused. Put another way, the court does not have the option or jurisdiction to detain the accused unless the fact constituting the compelling reason is established.

There are other distinctions. While discretion is the power of the court to take one option or the other, the right to be released on bail belongs to the accused depending on the existence or non-existence of the jurisdictional fact[61]. Accordingly, the law usually gives discretion in permissive words. Examples are 'may', 'in his opinion', 'deem', 'consider' etc. On the other hand, the law confers rights in mandatory terms. Examples are 'shall', 'must', and 'entitled', etc.[62] Further, discretion is inherently subjective while a jurisdictional fact is inherently objective. Objectivity requires that the matters used by the judge to conclude that the compelling reason exists or does not exist should be capable of proof by empirical evidence independent of the judge.[63] Subjectivity on the other hand is a matter of personal opinion. The matters relied upon in forming the personal opinions need not be capable of proof by extrinsic evidence.[64] These distinctions mean that compelling reason is not a matter of opinion of the judge. It is a fact to be established by evidence.

2.1 Compelling reason is restricted by statute

The decision on whether to admit to bail is governed by section 123A (2) of the Civil Procedure Code. Act No. 18 of 2014 introduced the section. It restricts the compelling reason to cases where the accused has previously absconded, is likely to abscond if released, and the need to keep accused in custody for his own protection. Listing the factors that the court may use to deny bail suggests that other considerations such as likelihood of interfering with witnesses and committing other crimes do not apply. This view may appear absurd but it is not without support. Schnacke argues that this narrow interpretation prevailed in the U.S. until 1984 when Congress corrected the absurdity by amending the federal bail statute to require courts to take into

[61] Mahipal v Rajesh Kumar, Criminal Appeal No. 1843 of 2019 SC. <https://main.sci.gov.in/supremecourt/2019/21884/21884_2019_7_1502_18784_Judgement_05-Dec-2019.pdf >
[62] Forsyth and Wade (n 30) 196.
[63] C.R. Kothari, *Research Methodology* (2004), 4.
[64] Ibid .

account the safety of the public, victims, and potential witnesses in bail hearings[65]. Further, Colin Starger and Michael Bullock argue that prior to the decision of the U.S. Supreme Court in *United States v Salerno*, it was technically illegal to detain a non-capital offender even on grounds that he posed serious danger to society since every accused enjoyed a constitutional right to affordable bail[66]. Courts had no constitutional, statutory or precedent basis for denying bail on such grounds[67]. Faced with legal vacuum, courts would illicitly use excessive bail to detain the accused[68]. Applying this interpretation to Kenya, it means that the only legitimate purpose of bail is to assure return of the accused. In the absence of evidence of a compelling reason, the accused in Kenya has a right to affordable bail. Genuine inability of the accused to pay bail or provide land or vehicle renders the bail excessive, unreasonable, and unconstitutional. In the U.S case of *Bandy II*, Justice Douglas of the Eighth Circuit Court asserted that a poor man cannot be denied freedom where a wealthy man would not just because the poor man does not have enough money to pay for his freedom. The Judge asserted that instead, the poor man has a right to be released on his personal recognisance where it is reasonable to believe that he will attend trial and comply with the other terms of release[69]. In the *Pugh II case*, the Fifth Circuit court held that if the appearance of a person who cannot afford the bail can reasonably be assured by alternative conditions of release, detaining such a person purely for inability to pay the bail is excessive bail and wealth based discrimination[70].

2.2 Accused need not apply for bail

The Judiciary of Kenya confirms that the accused need not apply to be released on bail[71]. When the accused person steps into the Court, he comes

---

[65] R.Schnacke, The History of Bail ad Pretrial Release , PRETRIAL JUST. INST. (Sept. 23,2010),https://cdpsdocs.state.co.us/ccjj/committees/BailSub/Handouts/History of Bail-Pretrial Release –PJI_2010.PDF {HTTPS://PERMA.CC/V8QM-FYS9}.

[66] Collin Starger & Michael Bullock, 'Legitimacy , Authority , and the Right to Affordable Bail', William & Mary Human Rights Journal , Vol.26:589 (2018) 609.

[67] *United States v. Salerno* (1987) 481 US 739.

[68] Ibid.

[69] 82S.Ct 11.

[70] 572 F.2d at 1056.

[71] Republic of Kenya, The Judiciary, Criminal Procedure Bench Book p47.

carrying his right to release on reasonable conditions. In *Grace Kananu Namulo v R,* Odunga J. held that the accused does not have to apply to be released. The Judge argued that a person to whom the Constitution bestows rights is not obliged to ask for the same[72]. This is the official position of the Judiciary. The Judiciary Bench Book provides that the accused need not make a formal application for bail. Further, that courts should grant bail as of right unless the prosecution objects to release on the basis of a compelling reason[73]. However, the Bench Book notes that in many Magistrate Courts in Kenya, the practice is that it is the accused who applies to be released on bail[74].

2.3 Conditions should be individualised

Standard 10-5.3 of the ABA standards provides that courts should tailor the conditions for release including the amount of bail to the circumstances of each particular accused[75]. Section 123 of the Criminal Procedure Code requires the court to have due regard to the circumstances of the case when fixing the amount of bail. Principle 3.1 (d) of the Bail /Bond guidelines provides that courts should in setting the terms of bail/ bond, take into account the personal circumstances of the accused person. What is reasonable the guidelines say will depend on the facts and circumstances of each case.

2.4 Detaining is a measure of last resort

Detaining the accused in custody is a measure of last resort. The accused has not been tried or convicted and is entitled to be treated as innocent. Principle 6.1 and 6.2 of the Tokyo Rules reflects this view[76]. In Kenya, Principle 3.1(b) of the National Council on the Administration of Justice, Bail and Bond Guidelines 2015 requires courts to make every effort to avoid pre-trial detention and resort to it only as a measure of last resort[77]. In U.S., section

[72] *Grace Kananu Namulo v Republic* [2019] eKLR at paragraph 18.
[73] The Judiciary (n 26) 47.
[74] n. 12 Principle 4.8
[75] The ABA Standards for Criminal Justice: Pretrial Release (3d ed. 2007).
[76] United Nations Standard Minimum Rules for Non-custodial Measures (The Tokyo Rules) https://www.un.org/ruleoflaw/files/UNITED~2.PDF
[77] General Principle 3.1(b) of the National Council on the Administration of Justice, Bail and Bond Guidelines. At 8.

3142 (e) of the U.S. Bail Reform Act allows a Federal Court to detain an arrestee pending trial only if the Government demonstrates by clear and convincing evidence that no release conditions will reasonably assure re-appearance of the person and the safety of the community. In U.S., the issue at the bail hearing is not whether the court should release but rather, whether it should detain. This distinction is important because in the former, which is the practice in Kenya, the accused bears the burden of applying and proving that he satisfies the conditions for release. In the latter, the burden of applying for detention and imposition of conditions for release falls on the prosecutor. To justify detention, prosecutors in the U.S must prove that there are no conditions or a combination of conditions that can secure re-appearance of the accused.

2.5 Right cannot be denied without a hearing

The court cannot deny the right to bail without a hearing. In the famous R *v Electricity Commissioners* ex *p. London Joint Committee Co. (1920) Ltd* [78] the English Court of Appeal held that the duty to hear applies whenever any person or body of persons vested with public power by the law makes decisions that adversely affects the legal rights of subjects. A magistrate in bail hearing is such a person and the duty to hear applies. In *Republic v Galma Abagaro Shano*, the High Court held that the accused has a right to be heard in every aspect of the criminal proceedings[79]. This includes bail hearing. The hearing should not be a mere formality. Stevenson notes that in the U.S., bail hearing is more or less a formality lasting less than two minutes[80].

2.6 Hearing must be adversarial

The prosecutor must establish the compelling reason in an adversarial hearing since Kenya adopts the adversarial system. Article 50(1) of the Constitution emphasizes the adversarial character of our legal system by guaranteeing fair trial before an independent and impartial court. The hearing must be substantive, not a mere procedural formality. The accused should be

[78] 1924 (1KB) at 205.
[79] *Republic v Galma Abagaro Shano* [2017] eKLR.
[80] Megan T. Stevenson, Distortion of Justice : How the Inability to Pay Bail Affects Case Outcomes, 34 J.L. Econ. & Org. 511, 514 & n.5(2018).

informed in advance of the matters allegedly constituting the reason for denying bail, be allowed to cross-examine the accuser and be allowed to present his evidence to contradict or explain the allegation[81]. Further, the court ought not to see itself as having some duty to assist the state in detaining suspects. In the spirit of the adversarial system, the court should not impose conditions not sought by the prosecution.

2.7 Burden of proving the need for detention or imposing conditions lies on prosecution

The burden of proving the circumstances compelling the court to deny the right to bail lies on the prosecution[82]. Standard 10-1.4 and 10-5.1 of the American Bar Association Standards for Pre-trial Release provides that courts should presume that the accused is entitled to release on personal recognisance or when necessary on unsecured bond but on condition that they attend trial as required and they do not commit any criminal offence. Standard 10-5.1(c) provides that judicial officers should record the reasons in cases where they decide not to release the accused on personal recognisance. Accordingly, the prosecution may rebut the presumption that the accused is entitled to release on personal recognisance only by evidence of substantial risk of absconding or endangering the victims, witnesses or the public at large or evidence of need for additional conditions or evidence that the defendant should be detained[83]. In this regard, Standard 10.5.3 provides that financial conditions other than unsecured bond should be imposed only when no other less restrictive conditions of release will reasonably ensure that the accused attend trial. In cases where the court finds that it is necessary to impose financial conditions, Standard 10-5.3(d) (i) provides that the court should give the accused, as the first option, an unsecured bond. In Kenya, the equivalent would be a surety bond for a specified amount of money but without a security.

[81] Katherine Doolin and others, *Criminal Justice* (2nd edition, Sweet & Maxwell Ltd 2002) 210.
[82] Republic of Kenya, The Judiciary Bench Book, p.47.
[83] A Standard for Criminal Justice: Pretrial Release 3rd ed. at 14.

In Kenya, the law on this point is settled but as will be shown later in this paper, the practice is wholly different. In *R v Danson Ngunya & Anor* [84], *R v William Mwangi Wa Mwangi*[85], *and R v Danford Kabage Mwangi*,[86] the High Court held that the burden is on the state to prove the compelling reason why the accused should be denied the right. Further, that if the State wants the accused to be detained it has to apply and prove by evidence. However, in Kenya unlike in the U.S, courts reverse the practice of bond bail hearing. Magistrate Courts conduct bail hearing on the premise that it will detain the accused in custody unless he applies for release on bond/ bail and proves that he meets the conditions. This is an anomaly because as held by Justice Odunga in *Grace Kananu Namulo v R*, the accused does not have to apply to be released.[87]. The reversal of roles undermines the right to be released since Article 49(1) (h) establishes a presumption that the accused will be released unless the prosecutor proves the reason compelling the court not to release and naturally, the conditions should be sought by prosecution.

If the Court doubts that the alleged compelling reason exists, it should request for a bail report. This position was adopted by the High Court in *The State v Evans Nzau Ithioka*[88]. Guideline 4.12 of the Bail and Bond Policy Guidelines supports this position by providing that the Court may request for bail report in certain circumstances. The circumstances include where the court doubts the information given by the accused or prosecutor, where the accused claims that he is unable to meet the terms of existing bail, where the victim contests the terms of bail, and by the Court on its own motion.

2.8 Reason not compelling unless there is no alternative to detaining

For the reason to compel the court, the prosecution must demonstrate that no condition or combination of conditions can ensure that the accused will return for trial[89]. In *Grace Kananu Namulo v R*, Justice Odunga held that the Court is required to explore the possibility of ensuring the accused's return

[84] [2010] eKLR .
[85] [2014] eKLR .
[86] [2016] eKLR.
[87] *Grace Kananu Namulo v Republic* [2019] eKLR at paragraph 18.
[88] [2019] eKLR.
[89] *Oscar Edwin Okimaru v Republic* [2021] eKLR.

by imposing conditions that pre-empt the grounds for denying bail[90]. In *Republic v Danford Kabage Mwangi,* the court adopted Black's Law Dictionary definition of 'compelling'. It held that compelling requires the prosecution to convince the court that the only method of ensuring the accused attends trial is by detaining him[91]. The conference of Chief Justices of U.S advised Courts to extend the Bearden rule to bail to the effect that, *'a financial condition of release that operates to detain an indigent defendant must be based on a finding that such condition is necessary to secure the state's interests in ensuring appearance at trial or public safety'* [92].

With regard to demanding land, vehicles and other properties other than money, the hearing must establish land and vehicles are specifically more effective than money in ensuring appearance of the accused or protecting the other interests of the state. In *United States v. Sarleno,* the U.S. Supreme Court held that no matter what process the courts use, they must establish that the limitations on liberty is narrowly tailored to serve the compelling interest of the state and that the threat to the interest must be identified and articulable and that no conditions of release can reasonably safeguard it[93]. This strict scrutiny protects fundamental rights from avoidable infringements. Like the fading money bail system of the U.S, demanding that the surety deposit land and vehicle does not serve any identifiable and articulable interest in returning the accused. Extending this argument means the prosecution must prove that only land or vehicle will prevent the accused from absconding or violating other terms of the bond. Article 24 of the Constitution of Kenya reflects the U.S. strict scrutiny test. It provides that a fundamental right shall not be limited except by law and only to the extent that the limitation is reasonable and justifiable in an open and democratic society. Further that the limitation must take into account the nature of the freedom, the importance of the purpose of limitation, the nature and extent of the limitation. Article 24(3) provides that the person seeking to justify a particular limitation shall demonstrate to the court that the limitation satisfies

[90] n. 8 at paragraph 22.
[91] [2016] eKLR
[92] Brief of Conference of Chief Justice as amicus Curiae in Support of Neither Party , ODonnell, 892,F.3d 147(5th Cir.2018) (n0.17-20333), 2017 WL 3536467, at 24, 26-27.
[93] 481 U.S.739 (1987).

the conditions of Article 24. To satisfy the strict scrutiny test and Article 24, the court must be satisfied that there is no alternative to detention for failure to deposit land or vehicle. My view is that the practice of demanding land and vehicles does not satisfy the strict scrutiny test because to begin with, the law does not require land and vehicle. The Criminal Procedure Code demands money. Depositing land or vehicle is actually the alternative to depositing money. There is no legal basis for detaining the accused because he cannot deposit land or vehicles yet he is able to deposit money.

2.9 Reasons must be proved by evidence

Finally, there must be sound evidence to support the finding of compelling reason. The no–evidence rule denies court's jurisdiction to find a fact without reasonable evidence in support. In *R v Dwight Sagaray and Others*,[94] the High Court held that the prosecution must produce materials to demonstrate actual or perceived interference with witnesses, threats to witnesses, direct or indirect communication between the accused and witnesses. In *R v Danford Kabage Mwangi*, the court refused to rely on the speculative allegations in an affidavit sworn by the investigating officer[95]. In *Allison v General Medical Council*,[96] the Court of Appeal of U.K held that the no-evidence rule extends to cases where the evidence taken as a whole is not reasonably capable of supporting the decision. Accordingly, courts do not have jurisdiction to deny bail in the absence of clear and convincing evidence of the alleged compelling reason. If the prosecutor alleges that the accused is a flight risk, he should produce clear and convincing evidence of the accused for fleeing, ticket to a destination outside the Country, and correspondence, actual attempt to flee before or during arrest, past attempts in other cases or such equally persuasive evidence. Courts cannot speculate, infer, or theorise that the accused may fail to return. It has to be hard evidence. To borrow from the civil process, a judgement must identify the points for determination, the decision on each point, and the reasons for the decision[97]. In criminal proceedings, the liberty and so much more of the

[94] [2013] eKLR.
[95] [2016] eKLR.
[96] (1894)1 QB 750 AT 760, 763.
[97] Civil Procedure Rules, 2010 Order 21 Rule 4.

accused is at risk, accordingly, courts should apply the structured approach much more strictly to deciding whether to detain and the terms of releasing.

2.9.1 The standard of proof is beyond reasonable doubt

In U.S, the courts describe the standard of proof as clear and convincing evidence[98]. In Kenya, the standard of proof in criminal cases is beyond reasonable doubt[99]. However, in *Republic v Jao & Anor*., the High Court held that the standard of proof required in establishing the compelling reason is the balance of probabilities[100]. The objective of placing the standard of proof at beyond reasonable doubt is to prevent wrongfully convicting and punishing the innocent[101]. To avoid wrongful denial of bail, this paper argues that the standard of proof in bail hearings should not be lower than beyond reasonable doubt. In any event, bail hearing is a crucial part of the criminal trial. Further, the consequence of denying the bail is that the un-convicted persons lose their liberty and suffers many other disadvantages despite the presumption of innocence.

2.9.2 Conclusions on the substance of the right

The statutory framework for administration of bail/bond in Kenya is similar to that of the U.S. Accordingly; we can reasonably conclude that the right to bail/ bond in Kenya contains the elements established in the United States. These are that the right is constitutional, it is not discretionary, detaining is a measure of last resort, it cannot be deprived without a fair adversarial hearing, the burden of proving the compelling reason for not releasing lies on the prosecution, and that the standard of proving the compelling reason is beyond reasonable doubt. Above all, the reason is not compelling unless the

---

[98] Bill Vance, 'The Clear and Convincing Evidence Standard in Texas: A Critique' (1996) 48 Baylor L Rev 391 *https://vpn.uonbi.ac.ke/proxy/6644f210/https/heinonline.org/HOL/Page?public=true&handle=hein.journals/baylr48&div=19&start_page=391&collection=journals&set_as_cursor=0&men_tab=srchresults*

[99] *Pius Arap Maina v Republic [2013] eKLR*

[100] [2019] eKLR.

[101] Federico Picinali, 'Can the Reasonable Doubt Standard Be Justified? A Reconstructed Dialogue' (2018) 31 CJLJ 365. *https://www.cambridge.org/core/journals/canadian-journal-of-law-and-jurisprudence/article/can-the-reasonable-doubt-standard-be-justified-a-reconstructed-dialogue/E67B6B8D17D4E1F66585BAADCCFD5E4F*

prosecution proves that no condition or combination of conditions will ensure that the accused will return for trial.

This part has established the content of the right to release on bail. In the part below, the study examines the practice of demanding and depositing land and vehicles in for bail and bond in Kenya.

Part Three

The Practice

In Kenya, there are four legal regimes for releasing the accused on bail or bond. These are personal bond, cash bail, surety bond, and surety bond with an alternative of cash bail. The bench book observes that the Criminal Procedure Code is not clear on the precise circumstances in which the accused will released on cash bail, personal cognisance, surety bond, multiple sureties. In the situational analysis, the handbook concedes that consequently, there is huge disparity in the conditions of bonds imposed by different courts and it is not clear how they determine the nature, amount, and conditions of bail[102]. It further concedes that the procedures for processing and releasing accused who are able to comply with the condition of bail/ bond are not uniform across the courts[103].

Whatever the kind of bail, the court hands the accused to prison authorities in cases where the accused is unable to satisfy all the requirements of bail or bond. The document used to hand over the accused from the court to the prison authorities is known as Warrant for Commitment on Remand. The prescribed format is exhibited as *Appendix i.* In the part below, the paper examines the nature of various types of bail and the requirements and process of each type of bail or bond.

3.0 Cash bail

The first scenario is where the court releases the accused on cash bail. Here, the accused simply pays the sum of money specified in the court order. The registry issues a receipt. If the Magistrate has not signed the remand warrant

[102] n.1 at 4.7.
[103] Ibid.

and the accused presents the receipt to the holding cells, officers in charge of the court cells release the accused forthwith. If the Magistrate has already signed the Warrant of Commitment to Remand, he is required to sign an additional document. This is the Release Order. The Registry fills a form known as 'Release Order Where Cash Bail has been Received'. The form is exhibited as *Appendix ii*. The magistrate signs on the form making it a court order. Upon receiving the order, the Prison authorities release the accused. This may happen within the courthouse or at the remand prison.

3.1 Personal bond

The second scenario is where the court release the accused on personal bond. Here, the accused signs a Form known as 'Bail and Bail Bond'. The form has two parts. The accused fills the first part. The form begins with the accused entering his name and acknowledging that he has been called upon to enter into his own recognisance to appear in court on the date specified or whenever else so required and to continue so attending until otherwise directed. The form contains a further declaration that in case the accused defaults in so attending, he shall forfeit the sum of Kenya shillings specified in the court order. The accused then signs the duly filled Bail/Bond Bail Form. The Form is dated. *Appendix iii* shows the standard format. The surety fills the second part of the form. However, since in this scenario the order is that the court release the accused on his own bond, the second part is not completed. The personal bond or own recognisance of the accused is thus complete. The court cells release the accused as soon as the court registry acknowledges that it has received the said personal bond. If the court had signed the warrant of commitment to remand, it in addition signs the release order.

3.2 Surety bond

The third scenario is where the court release the accused on his bond and one or more sureties. In this case, the surety fills the second part of the Bail/ Bail Bond Form. The part contains spaces where the proposed surety declares himself the surety for the accused. In the third segment of the form, the surety declares that the accused shall attend court on the days fixed and as may be required. The surety then declares that if the accused defaults, he will forfeit the sum of Kenya shillings stated in the court order. The form has space for

filling the sum of Kenya shillings ordered by the court. The surety signs and dates this part. It is crucial to note that the Bail/ Bail Bond form does not have a provision for indicating the type of security, particulars of registration or the value of the security taken from the accused or the surety. Nevertheless, the, Judiciary of Republic of Kenya Bench Book provides that,

> *'Where an accused is required to provide security so as to be released on bond, the court must be furnished with a security document such as a title deed, motor vehicle log book, or an insurance bond. In addition to the security document, the court may require a valuation report revealing the value of the property being offered as security'*[104].

This misconception of the security as a property such as land or vehicle marks the start of the wrong turn in approving the surety since whereas the section 123 to 133 of the Criminal Procedure Code and the forms refer to sums of money, courts demand title to land and motor vehicles.

3.3 Process of approving surety

This brings us to yet another form that the procedure requires the surety to fill in cases where the court release the accused on surety bond.

The title of the form is 'Particulars of Surety'. The clerks of the Criminal Registry fill the form. The form records the particulars of the surety. These include the name, relationship with accused, national identity card number, location of residence, address, occupation, telephone number, income and kindred. It has spaces for name, and signature of the Court clerk who fills the form. The last part records the details of the Executive Officer of the Court who checked the details filled by the clerk, the signature of the surety, and the decision of the court. The form does not indicate what kind of decision it requires the court to record. Nevertheless, it appears that the decision at this state is whether to approve or reject the proposed surety. The standard form for recording the particulars of the surety is exhibited as *Appendix iv.*

[104] The Judiciary, *Criminal Procedure Bench Book* (2018) 54.

It is important to note that like the Bail/Bail Bond form, the form for particulars of the surety does not provide space for indicating the particulars of the security. To fill the form, the registry clerks interrogate the surety on the property offered as security. The clerks interviewed indicated that they expect the security to be either a motor vehicle or parcel of land. Further, that they expect the proposed surety to prove his own identity, his ownership of the security, verification by the relevant authority, and the monetary value of the property. For his identity, the proposed surety must produce his original national identity card. The study established that the procedure of establishing the identity of the surety and authenticity of his title documents is not uniform across the court stations. The anti-corruption courts in Milimani, Nairobi require the Directorate of Criminal Investigations to verify the identity of the proposed surety and authenticate the title documents. This process entails presenting the proposed surety and documents to the Directorate to examine their finger prints and the documents, prepare a written report confirming that the bio data matches the proposed surety or otherwise. The officers of DCI undertake the process from their offices, which are normally located away from courts. The relative location is a serious factor since the representatives of the accused race against time to procure the report before 4 pm when Magistrates sign remand warrants. Ordinarily, where the Magistrate has not signed sureties and the bond by 4 pm, the court cells transfer the respective accused to prison authorities to start life in remand prison. The requirement that the accused respective offices cannot begin the verification process until the accused takes plea, court admits him to bail and issues a letter calling for the verification reports considerably delays the commencement of the process. *Appendix v* shows the standard form of the letter for requesting verification report.

In event the surety offers to deposit title to land as the security, he must produce the original title deed, certificate of official search issued by the Land Registrar, and letter from the Land Registrar authenticating the original title deed and the certificate of search. The Land Registrar must be of the Land Registry in which the land is registered. Therefore, if the proceedings are in Nairobi Courts and the land is located in Mombasa, the Certificate of Official Search must be from the Land Registrar Mombasa. To prove the

monetary value, the proposed surety must produce a certificate of valuation issued by a registered valuer. The valuer must undertake the valuation on the ground in Mombasa. His report must confirm that he personally visited the land and observed the material facts. The land should not be under mortgage or otherwise encumbered. The land valuers indicated that the average fees for bail bond valuation is Kshs. 12,000. So, an accused whose surety offers land must assemble the surety in person, the original national identity card of the surety, the original title deed, an original certificate of search, letter from the Land Registrar of the land registry where the land is registered authenticating the documents, and an original current valuation report.

To establish the ownership of the vehicle, the surety must produce the vehicle itself at the court precincts. Magistrates often interrogate whether the prosecutor personally inspected the chassis, engine, plate numbers and other particulars against those indicated on the registration book. The requirement that the prosecutor personally inspect the vehicle means that for proceedings in Nairobi, the surety whose vehicle is in Mombasa must transport it to Nairobi. The accused must in addition produce the original registration book of the vehicle and certificate of the National Transport and Safety Authority on particulars of the vehicle and its registered owner. To prove the monetary value of the vehicle, courts demand valuation report issued by a registered valuer of motor vehicles. Valuers indicated that their average fee is Kshs. 12,000. If the proposed surety is not able to produce any of those documents, the clerks reject the proposed surety at that point. The proposed surety does not reach the Magistrate.

If the surety assembles all the documents to the satisfaction of the registry clerks, the clerks present the bond forms to the Magistrate. The Magistrate interviews the proposed surety afresh. Ideally, the Magistrate should focus on the relationship of the proposed surety to the accused to assess the ability and commitment of the proposed surety to ensure the accused return for trial and his understanding that he risks forfeiting the money stated in the court order if the accused absconds. This is perhaps because section 131(2) of the Criminal Procedure Code provides that if the surety fails to show cause why he should not pay the sum in the bond and further fails to pay the sum, the

security may be sold and proceeds used to pay the amount due under the bond.

In practice however, Magistrates record the same information in the form for particulars of the surety already filled by clerks and verified by the Executive Officer of the Registry. In effect, the Magistrate more or less cross-examines the proposed surety on the information in the form. Presumably, the Magistrate bases his decision to approve or reject the surety on the information in the form and the inquiry. If the Magistrate approves the surety, he signifies the approval by signing on the form. In the event the Magistrate had signed the warrant of remand, he signs the 'Release Order where the Surety has signed Bond'. *Appendix vi* shows the standard format. If the Magistrate rejects the surety or security or otherwise fails to approve, the accused remains in remand prison. The detention is indefinite since there are no time limits for hearing and determining criminal cases.[105] The procedure applies to all accused released on bond.

3.4 Surety bond with alternative of cash bail

In the fourth scenario, the court releases the accused on surety bond of a specified sum of money but gives the accused the alternative of cash bail. Often, the amount of cash bail is lesser than the amount of the surety bond. The accused has the option of paying the cash bail or providing the surety bond. The Bail Bond Guidelines suggests that the alternative of cash bail of a lesser amount applies where the accused is unable to satisfy the higher amount in the surety bond[106]. Courts fix cash bail at lower figures on the understanding that it is more difficult to raise money than a surety bond. The objective of giving the option of cash bail is to enhance access to pre-trial release. However, the rationale is fundamentally flawed because the problem with the surety bond is not the high amount. It is the requirement of land, motor vehicle or properties other than money. Accused especially in corruption offences can comfortably deposit even higher amounts of surety bond if courts accept money as the security of the surety. Indeed, the amount

[105] Omboto John Onyango, 'The Challenges Facing Rehabilitation of Prisoners in Kenya and the Mitigation Strategies' (2013) 2 IJRSS 5. <http://www.ijsk.org/uploads/3/1/1/7/3117743/criminology_6.pdf>

[106] N.12 at Para 4.16-4.17.

of monies stated in the charge sheets especially in corruption offense show that in most cases the accused persons are in control of huge amounts of money far beyond the amounts fixed in the surety bond. Yet, it is common for the requirement of land and vehicle to defeat even the rich resulting in such rich accused spending several days in remand after the court orders release on surety bond The NCAJ policy guidelines admits that the requirement of title deeds and logbooks for motor vehicles and the verification process presents considerable challenges to most accused[107]. Accordingly, though the alternative of cash bail does not have the problem associated with depositing title to land and vehicles, it does not address the conceptual problem of lack of a legitimate rationale for excluding money and demanding land, vehicles, or other non-monetary securities in surety bonds.

Part Four

Analysis And Findings on the Reasonableness of the Practice

The paper used the concepts of de jure and de facto unreasonableness to analyse the reasonableness or otherwise of the practice of demanding land, vehicles or other properties other than money as secu rity in bail/ bond. After analysing the practice, the study found that the demands are unreasonable de-jure and de-facto and hence amount to excessive bail. I present the analysis and findings below.

4.0 Practice lacks factual basis

It is by fact simply unreasonable to reject money as the security for an obligation that is expressed in monetary terms and instead demand title to land, vehicle or other property. This is because the title to land or vehicle per se does not offer any greater guarantee of return of the accused compared to money. Detaining title to land or vehicle does not impose any physical constraints on an accused who intend to abscond. In the absence of a viable factual justification for insisting on land or vehicle, the study finds that the practice is de facto unreasonable. Indeed, studies have in fact shown that most accused persons turn up for the trial even without the court taking any

[107] Ibid at paragraph 4.20.

security from them or surety[108]. For example, the Pre-trial Services Agency for Washington D.C found that in the year 2016, most people released on personal recognisance witness that an overwhelming majority of those so released obey return for the hearing and do not commit other crimes at least during the release.[109] Consistent with the said findings, most accused persons whom the courts released on bond indicated that the most important consideration in choosing whether to attend court for trial is the need to clear their names and to avoid living on the run[110]. The fear of forfeiting land, vehicle, money or any other property whether their own or of the surety did not play a significant role. In any event, Kenyan courts do not allow accused to deposit his own property insisting instead on the property of the surety[111].

4.1 Practice does not have legal basis

The Judiciary Handbook provides that courts should determine the suitability of the surety by examining him on oath. Citing paragraph 4.40 of the Policy Guidelines on bail/ bond and the decision in *R v James Kiarie Mutungei*, the Handbook sets out the factors to be considered. The very first factor is the financial ability of the surety to meet the obligations of the terms of the bond. The Handbook advises that the court should explain clearly to the surety that he will be required to pay the penalty or forfeit the amount in bond should the accused abscond or breach the terms of the bond. In essence, the guidelines require the surety to prove that he owns the amount of money in question and be prepared to forfeit it if the accused absconds[112]. Money in Kenya shillings being the legal tender of the country is the best security for fulfilling a monetary obligation. Conceptually, requiring the surety to deposit money brings the surety in Kenya at par with the bondsman in the U.S. bail system in terms of the conditions of the bond and the legal obligations. As argued by the penalty school of thought, bail and security

[108] VERA Institute of Justice 'Incarceration's Front Door: The misuse of Jails in America' Feb 2015 at 2 <*https://www.vera.org/publications/incarcerations-front-door-the-misuse-of-jails-in-america*> Accessed April 10, 2019
[109] Pretrial Services Agency for Washington D.C., Release Rates For Pretrial Defendants Within Washington, D.C (2017)*https://www.psa.gov./sites/defualt /files//2016/pretiral%defendants.pdf.* Accessed on January 13, 2021.
[110] N. 90.
[111] n. 12 at 4.18.
[112] The Judiciary (n 26) 53.

bond are mere securities for the penalty for failing to attend trial. It is a contingent monetary obligation. The inability of the surety to deposit land, vehicle, or other property other than money does not necessarily mean that he is not able pay the monetary penalty. The other three factors cited by the Handbook for the suitability of the surety are the character of the surety, relationship of the surety to the accused and the residence of the surety. Availability of land, vehicle, or other properties is not relevant to these factors in any conceivable way.

A number of judicial officers indicated that their objective in demanding land, vehicle or property other than money from the surety is to tie him to the proceedings. However, while the objective of tying his land, motor vehicle, or other non-monetary security may be noble, it is ultra-vires. The principles of rule of law and legality deny courts the power to pursue purposes that the law does not authorise expressly or impliedly[113].

In statutory interpretation, the purpose noble as it may be, is excluded by the Act by express omission[114]. In any event, if the objective of taking the land or vehicle is to reduce the flight risk, one would expect the courts to take such from the accused rather than the surety since the risk of forfeiting his property may create a greater incentive for him to return compared to taking the security from his surety. Without explaining the reason, the Handbook notes that courts do not permit accused persons to rely on their own property to secure their freedom[115].

The vanity of insisting on land or vehicles is demonstrated by section 131(1) of the Criminal Procedure Code. It provides that where the accused absconds, the court cannot order the surety or accused to forfeit the land or vehicle. Instead, it requires courts to require the surety to either pay the penalty fixed by the bond or show cause why he should not. If the surety fail to pay or show the cause, the court may invoke section 131(2) and issue warrants for attachment and sale of the property. Citing the same section

[113] *Gibb Africa Limited v Kenya Revenue Authority* [2017] eKLR at paragraph 31.
[114] Georgetown University Law Centre, '*A Guide to Reading, Interpreting and Applying Statutes*' (2017) The Writing Center at GULC, at 5.
[115] N. 12 at 4.18.

131(2), the Judiciary Hand Book acknowledges that should the surety fail to pay the penalty, the court may make an order for attachment of the movable property of the surety[116]. Under section 131(4), the person who gave the bond may be imprisoned for six months if he fails to pay or to show cause and the penalty cannot be recovered by attachment and sale. This demonstrates that taking land, vehicle, or other property other than money does not really change the monetary character of the liability undertaken under the bond. The surety in Kenya stands in the same legal position as the bondsman in the U.S.

In the absence of a constitutional, statutory or other legal basis for excluding money from the properties that may be used as security in surety bond, the study concludes that the exclusion is de jure unreasonable.

4.2 Unlawfully substitutes the alternative for the primary security

Courts base the requirement of title to land or motor vehicle and the refusal to accept any other property including money on interpretation of section 126 of the Criminal Procedure Code which provides that the court or officer may require the person to deposit a sum of money or deposit property[117]. Clearly, the surety may deposit land or vehicle as the security as an alternative to depositing money. Section 126 of the Code does not empower courts to convert the secondary option into a mandatory requirement. Depositing land, vehicle or other property other than money is an option of the accused or surety where they are unable to raise the money fixed in bail/ bond order. The Handbook does not explain why the security must be in form of title to land, motor vehicle, or other property other than money. Administrators have a legal duty to give good reasons for decisions[118]. In the absence of any or any good reason, it is reasonable to conclude that there is indeed no good reason[119]. In Kenya, sections 5, 6, and 7 of the Fair Administrative Act No. 4 of 2015 codifies this principle of law. Failure to give reasons renders the decision liable to nullification.

[116] The Judiciary (n 26) 54.
[117] N12 at 4.20.
[118] Jarrod Hepburn, 'The Duty To Give Reasons For Administrative Decisions In International Law' (2012) 61 The International and Comparative Law Quarterly 641.
[119] *Jopley Constantine Oyieng v Pubic Service Commission*, Civil Appeal No. 32 of 1981 (Unreported).

4.3 Taint of bad faith

It is possible that the whole idea of excluding money is deliberate and intended to cause the accused to spend several days in remand. The motivation of the court may simply be to act or appear to act tough. Indeed, in corruption offences, Edwards notes that judicial officers in Kenya tend to put up a show of acting tough[120]. The observation has some basis since in *Reuben Marumben Lemunyete v R* [121], the High Court noted that given the abhorrence that Kenya expresses towards corruption, it is tempting to give in to the public opinion and lock up the accused in corruption charges or to give them bail or bond terms that are so stringent that they remain in remand. Not surprisingly, bail/ bond hearing takes the predictable pattern where the accused is remanded in prison for three days or so ostensibly to give time to the Magistrate to consider the submissions and write the ruling. After three or so days, the court delivers the ruling. Invariably, the ruling releases the accused on bond of a specified sum of money with one or two sureties of a similar amount. At times, the ruling gives the accused an option of depositing a lesser amount as cash bail. Deferring the ruling for several days suggests bad faith since the submissions are routine and there is rarely anything novel in the ruling or the terms of the bond. Excluding money and deferring the ruling suggests that courts deliberately clog the right to pre-trial release with the unlawful and cumbersome requirements and processes. Such motives are de jure unreasonable since the terms of bond should not punish[122].

4.4 Practice is unrealistic in Kenya's social economic circumstances

It is a matter of judicial notice that in Kenya access to land, vehicles or title documents is limited. In addition, there are logistical problems, heavy expenses, bureaucracy and even corruption. These and other factors makes

---

[120] Edwards (2012) 'Snap-shot of the Use of Conditions of Pre-Trial in Police Cells in Africa'. APCOF report < *http://apcof.org/wp-content/uploads/2016/05/No-7-Pre-Trial-Justice-in-Africa-An-Overview-of-the-Use-of-Arrest-and-Detention-and-Conditions-of-Detention_-English-Louise-Edwards-.pdf*> Accessed March 22, 2019

[121] [2019] eKLR.

[122]Michael J. Eason, Eighth Amendment--Pretrial Detention: What Will Become of the Innocent, 78 J. Crim. L. & Criminology 1048 (1987-1988) *https://pdfs.semanticscholar.org/a918/e66ae647d8367dfcecd7e2212c40260b3cc8.pdf*

it difficult for the accused to deposit land or vehicle for bond. Conditions that are too difficult to satisfy deny the right to bail through the back door. It is perhaps for such concerns that section 123 of the Code requires courts to consider all the circumstances of the case when fixing the terms of the bail/ bond. Courts act unlawfully when they fail to consider these social economic circumstances.

In *Samuel Kimutai Koskei and 15 others v DPP*, the High Court took judicial notice of the fragile and poor state of the economy, that not many people own property worth Kshs. 50 million and held that the bond of Kshs. 50 million imposed by the Magistrate is beyond the reach of majority of Kenyans[123]. Therefore, demands that put the right beyond the reach of majority of Kenyans are de facto unreasonable. Byamugisha demonstrated that about 5 million Kenyans live in informal urban settlements commonly known as slums[124]. That in itself means that the 5 million Kenyans do not own the land they live on. Of those who own land, a huge majority own it communally meaning they do not have title deeds or the land register does not recognise their ownership.[125] Beneficial ownership without registration is quite common in Kenya especially where family land is registered in the name of the ancestor.[126]

The scenario is more or less the same with access to motor vehicles. Research by World Bank indicates that only 23.8 out of every 1000 Kenyans owned motor vehicles as at year 2010[127]. As at year 2017, the number of motor vehicles registered in Kenya stood at 2,989,788 against an estimated population of 47.8 million[128]. Again, actual owners are not necessarily registered as such.

---

[123] Ibid at 36 and 38.
[124] Frank. K. Byamugisha 'Securing Africa's Land for Shared Prosperity: A Program to Scale Up Reforms and Investments. at 85 accessed September 25,2019.
[125] Ibid note 77.
[126] Advisory on Comprehensive Programme for Registration of Title in Land Draft Report*http://www.landcommission.go.ke/media/erp/upload/draft_advisory_comprehensive_program_booklet_for_registration_of_tittle_in_land..pdf*
[127] *World Bank, https://data.worldbankd.org*>country
[128] Kenya/Road Transport: No of Motor Vehicles: Registered: Economic Indicators CEIC <https://www.ceicdata.com>Kenya> accessed September 25, 2019.

Regarding the cost of valuation, the average of Kshs 12,000 charged by valuers for valuation reports for land or vehicles is beyond the reach of most Kenyans. This becomes more apparent when one considers that the number of Kenyans in wage employment in the country is a mere 2,765,100 out of an estimated population of 47.8 million as at year 2019[129]. This number, according to the World Bank, translates to unemployment rate of 9.3 % of the labour force. Further, that even for those lucky to be employed, the bulk earns an average monthly wage of Kshs. 9,014 for agricultural areas and Kshs. 16,841 for urban areas as at January 2019[130]. The situational analysis by the Bail/Bond Policy Guidelines notes that in Kenya, many accused persons are unable to afford cash bail in amount as low as Kshs. 1,000 due to poverty and so they remain detained in police custody[131].

In the *Samuel Kimutai Koske*i case, the High Court took judicial notice that in Kenya, employment opportunities are rare[132]. Ehlers argues that to reduce unnecessary pre-trial detention, it is necessary to take into account the economic circumstances of the accused when deciding the type and terms of bail[133]. Indeed, Principle 1.3 of the United Nations Standard Minimum Rules for Non-Custodial Measures (The Tokyo Rules) requires member states to take into account the political, economic, social and cultural conditions of the country and the objectives of the criminal justice system of the country[134]. Accordingly, when courts decide the security, they ought to take into account the reality that majority do not own land or vehicles. In *ODonnell v Harris County*, the U.S. Fifth Circuit Court held that a system that results in releasing those who afford while detaining those who cannot amounts to discrimination based on wealth[135]. Equally, releasing those who can avail

[129] Kenya National Bureau of Statistics, Economic Survey 2019 at 42. < http://www.knbs.or.ke> accessed September 25, 2019.
[130] Kenya National Bureau of Statistics, Economic Survey 2019 at 50 and 51. < http://www.knbs.or.ke> accessed September 25, 2019.
[131] N. 12 at Principle 4.2(d).
[132] Ibid at 37.
[133] Ehlers, L. (2008) 'Frustrated Potential: The Short and Long Term Impact of Pretrial Services in South Africa'. Open Justice Society Initiative Spring :121-139
[134] Adopted by General Assembly resolution 45/110 of 14 December 1990. <https://www.un.org/ruleoflaw/files/UNITED~2.PDF> Accessed on April 2, 2019.
[135] 251 F.Supp.3d 1052(S.D.Tex. 2017,aff'd as modified,892 F..3d 147(5th Cir.2018).

land and vehicles while detaining those who cannot is discrimination based on wealth.

The study takes into account the fact that even where Government offices ought to issue bail documents free of charge or at a minimal fee, accused are often forced to incur heavy costs. For the certificate of official search for land, the fee is Kshs. 100 only. The letter of the Land Registrar verifying the authenticity of the title documents and the letter from the Directorate of Criminal Investigations verifying the identity of the surety are officially free. The indirect expenses include the cost of travelling to distant Land Registries where the land is far from the Court. An example is where the land is registered in Kisumu, while the proceedings are in Mombasa. The two towns are about 1000 kilometres apart. Bearing in mind that the cost of travelling to Kisumu from Mombasa averages Kshs. 3,000 one way, it may take the accused several days or weeks in remand prison as he waits for the surety to raise the Kshs. 10,000 for fare and travel to and from Kisumu just to obtain the documents.

Where the surety is offering a motor vehicle as security, there are hidden costs too. For instance, the study established that where the vehicle is stationed far from the court, the cost of delivering the vehicle to the court may be prohibitive. Where the vehicle offered is a lorry located in Kisumu, the accused needs about Kshs 80,000 to fuel the vehicle and Kshs 10,000 for a driver to transport it to Mombasa. Over and above these direct and indirect expenses, there is the unspoken bribes that officials inevitably extract from desperate friends and relatives and even Counsel.[136] Time is crucial in actualising the order of release because the surety has to obtain the required official documents, present the surety and the document to the Registry and Magistrate, persuade the Magistrate to approve the surety, and hopefully secure a release order before the accused persons are committed to remand prison. The anxiety and often desperation makes the accused and counsels vulnerable to extortion of bribes by officials whose services the accused needs desperately. In fact, the Bail Bond Guidelines notes that the

[136] Bail and Bond Decision making 4.3 http://www.klrc.go.ke/index.php/mandate/bail-and-bond-policy-guidelines/622-4-bail-and-bond-decision-making

bureaucracy forces accused persons or their relatives to bribe officials to expedite the process[137]. This relationship between the terms of bail and vulnerability to extortion for bribes is confirmed by Saxena whose research demonstrated that imposing terms of bail that are difficult to fulfil renders the detainee more vulnerable to exploitation by third party professional bailers[138]. Cases where police release the accused against cash bail and police bond best demonstrate the irony of excluding money. The accused dutifully presents himself to court as required by police bail only for courts to demand land or vehicles as security for the same amount of surety bond and lock up accused that are unable to avail land or vehicles.

4.5 Requirements cause undue delay in releasing

The consequence of the bureaucracy is that considerable numbers of accused who are technically out on bond remain in custody because they cannot obtain a surety who holds title to land or motor vehicle and is ready and willing to deposit them as security. In the U.S., Turner notes that the extent to which the system holds un-convicted people in jail simply because they are too poor to pay bail is horrifying[139]. The Bureau of Justice Statistics in U.S. estimated that as at year 2019, sixty to seventy percent of all persons in U.S. prisons were pre-trail detainees[140].

In Kenya, the Judiciary admits that the process of complying with the conditions of bail including approving sureties and the securities is characterised by administrative bottlenecks, which considerably delay release of the accused from custody[141]. It further concedes that some courts entrust verification of the title documents to investigating officers without setting timelines and that ultimately, the requirement of title to land and motor vehicles in surety bonds and the verification of security documents

[137] n. 12 at 4.20.
[138] Saxena, RK. (2008) 'Catalyst for Change: The Effect of Prison Visits on Pretrial Detention in India' Open Justice Society Initiative , Spring:57-69.
[139] VERA Institute of Justice 'Incarceration Front Door: The Misuse of Jails in America' Feb 2015 < https://www.vera.org/publications/incarcerations-front-door-the-misuse-of-jails-in-america > Accessed April 10, 2019.
[140] Todd D. Minton & Zhen Zeng, Bureau of Justice Statistics, U.S. Department of Justice , NCJ 248629
[141] n. 12 at 4.20

mean that the accused stays in prison for considerable durations and in some cases, for the entire duration of the trial[142].

4.6 Way forward

Various authorities have suggested that money bail should be abolished and replaced with proof that the accused is well grounded in the local society. In the *State of Rajasthan, Jaipur v Balchand*,[143] the Supreme Court of India observed that the monetary bail may not be very relevant to accused deciding whether or not to reappear for trial. Therefore, the decision urged rethinking of the monetary bail. In this spirit, the State Government of California on August 28, 2018 abolished the requirement of posting money bail and substituted it with evidence of social groundings[144]. The law, which came into force on October 1, 2019, requires accused to be subjected to pre-trial risk assessment. The Pre-trial Risk Assessment Services assesses and reports to the court recommending the conditions for release. New York City has since substituted money bail with pre-trial supervised release. These developments are largely informed by the paradox that most people remain in remand prison because they cannot afford to pay bail bond yet most of them can be relied upon to attend court even without depositing the cash bail or other forms of security.[145] This school is reflected in *US v Anthony Salerno and Vincent Cafaro*[146] in which the US Supreme Court held that purposes of pre-trial detention are distinct from the purposes of bail. It argues that an accused who is a flight risk ought to be remanded in custody. It should not matter that he can raise the bail. On the other hand, accused who is not a flight risk should not be detained on account of not being able to pay bail or deposit security. Bail and security bond are mere securities for fulfilling the financial liability for failing to attend trial. It is a contingent financial liability. The study referred to this viewpoint as the penalty school.

---

[142] Ibid.
[143] 1977 SCC (4) 308.
[144] Government Code Chapter 1.5 (section 1320.7).
[145] VERA Institute of Justice 'Incarceration's Front Door: The misuse of Jails in America' Feb 2015 at 2 <https://www.vera.org/publications/incarcerations-front-door-the-misuse-of-jails-in-america> Accessed April 10, 2019.
[146] 481 U.S 1987.

Imprisoning automatically for failing to pay fine provides a good parallel. In *Bearden v Georgia*, the accused was imprisoned after failing to pay a fine. Outlawing as discrimination based on wealth, the Supreme Court held that, "*the Constitution prohibits the state from imposing a fine as a sentence and then automatically converting it to a jail term solely because the defendant is indigent*"[147].

5.0 Conclusion

The study concludes that though courts, lawyers, accused and scholars assume that the practice of demanding land, motor vehicles and other properties other than money as security for bail bond is lawful and useful, it is indeed unconstitutional and does not serve any demonstrable useful purpose. It is unduly difficult to comply with, unnecessary, expensive, inconvenient, unrealistic, corrupt, abusive, irrational, and unproductive. It is de facto unreasonable, runs contrary to section 123-126 and 131 of the Criminal Procedure Code and amounts to excessive bail. Courts may nullify the requirement under section 7(2) (i) of the Fair Administrative Action Act on the ground that it is not rationally connected to the purpose for which it is imposed. Above all, it offends Article 49(1) (h) of the Constitution thus rendering it unconstitutional.

The study acknowledges the noble motives of tying the surety and perhaps the accused to the proceedings. It further appreciates that the rigorous scrutiny of the surety and security assist in weeding out fraudsters. In fact, the study encountered cases where sureties used false names and title documents to assist the accused to abscond. However, the noble intentions cannot legitimise the illegitimate. Guilty as the accused may turn out to be, courts must protect his right to pre-trial release on reasonable conditions so long as there is no legitimate compelling reason militating to the contrary.

As observed by Justice Marshall of the US Supreme Court in *United States v Rabanowiltz*, "*…it is a fair summary of history to say that the safeguards of liberty have frequently been forged in controversies involving not very nice people*"[148]. In the case of the right of the accused to bail on reasonable

[147] 461 U.S.1,20-22(1973).
[148] *United States v. Rabinowitz*, 339 U.S. 56, 69 (1950).

conditions, the demands for land and vehicles to the exclusion of other perfectly legitimate securities such as cash money is not authorised by the law. In fact, by unlawfully demanding land, vehicles or other property other than money, courts may very well be unwittingly contributing to use of false title deeds and logbooks. The study hopes that this report will trigger debate amongst the stakeholders towards realigning administration of bail and bond to the letter and spirit of the law and the prevailing social economic realities.

References

Cases

Allison v General Medical Council (1894)1 QB 750

Andrew Young Otieno v Republic [2017] eKLR

Bandy II case, 82S.Ct 11.

Bearden v Georgia 461 U.S.1, 20-22(1973).

Council of Service Union v Minister for the Civil Service [1984] 3 All ER.

Gerstein v Pugh 1975 (1975) 420 US 103.

Gibb Africa Limited v Kenya Revenue Authority [2017] eKLR

Grace Kananu Namulo v Republic [2019] eKLR.

Jopley Constantine Oyieng v Public Service Commission, Civil Appeal No. 32 of 1981 (Unreported).

Mahipal v Rajesh Kumar, Criminal Appeal No. 1843 of 2019 SC. (available at*https://main.sci.gov.in/supremecourt/2019/21884/21884_2019_7_1502_18784_Judgement_05-Dec-2019.pdf)*

Masiya v Director of Public Prosecutions and Others 2007 (5) SA 30 (CC)' [2009] SAFLII 6. (Available at *http://www.saflii.org/za/journals/LDD/2009/9.pdf).*

ODonell v. Harris County Civil Action No. H-16-1414 (S.D. Tex. Nov. 21, 2019)

ODonnell v Harris County 251 F.Supp.3d 1052 (S.D. Tex. 2017,aff'd as modified,892 F..3d 147 (5th Cir.2018).

Oscar Edwin Okimaru v Republic [2021] eKLR.
Pius Arap Maina v Republic [2013] eKLR

Pugh II case, 572 F.2d at 1056.

R v Danson Ngunya & Anor [2010] eKLR

R v Dwight Sagaray and Others [2013] eKLR

R v Electricity Commissioners ex *p. London Joint Committee Co. (1920) Ltd* [1924] 1 KB 205.

R v William Mwangi Wa Mwangi [2014] eKLR

Republic v Alex Otieno Onyango [2015] eKLR.

Republic v Danford Kabage Mwangi [2016] eKLR

Republic v Galma Abagaro Shano [2017] eKLR.

Republic v Godfrey Madegwa & 6 others [2016] eKLR.

Republic v Jao & Another [2019] eKLR.

Republic v Zachariah Okoth Obado [2018] eKLR

Reuben Marumben Lemunyete v R [2019] eKLR

Samuel Kimutai Koskei & 15 Others v Director of Public Prosecutions [2019] eKLR.

Stack v Boyle, 342U.S.

State of Rajasthan, Jaipur v Balchand 1977 SCC (4) 308

Sumit Mehta v State of N.C.T of Delhi (2013) 15SCC 570

The State v Evans Nzau Ithioka [2019] eKLR

United States v Rabinowitz, 339 U.S. 56, 69 (1950).

*United States v Salerno (*1987) 481 US 739.

US v Anthony Salerno and Vincent Cafaro 481 U.S 1987.

Wanzusi Anor Vs Kampala Capital City Authority [2019] UGHCCD 119.

Legislation and Statutory Instruments

ABA Standards for Criminal Justice: Pretrial Release (3rd ed. 2007) <*https://www.americanbar.org/groups/criminal_justice/publications/criminal_justice_section_archive/crimjust_standards_pretrialrelease_toc/*> (Accessed 20 May 2021).

Arkansas Code, ANN. S9.2 (West 2014).

California Government Code, 2005.

California Money Bail Reform Act, S.BB10,2017-2018 Leg.,Reg. Sess. S.36 (Cal.2017).

Civil Procedure Rules, 2010.

Constitution of Kenya, 2010.

Criminal Procedure Code, Cap. 75 Laws of Kenya.

General Assembly resolution 45/110 of 14 December 1990. <*https://www.un.org/ruleoflaw/files/UNITED~2.PDF*> (Accessed on April 2, 2019).

Habeas Corpus Act 1679. < *https://www.legislation.gov.uk*> accessed September 25, 2019.

National Council on the Administration of Justice, Bail and Bond Policy Guidelines, March 2015. *<http://www.kenyalaw.org/kl/fileadmin/pdfdownloads/Bail_and_Bond_Policy_Guidelines.pdf >*

United Nations Standard Minimum Rules for Non-custodial Measures (The Tokyo Rules) *<https://www.un.org/ruleoflaw/files/UNITED~2.PDF>*

Books and Journals

Allen JA, 'Making Bail': Limiting The Use of Bail and Defining the Elusive Meaning of 'Excessive Bail' (2017) 25 Journal of Law and Policy No. 2.

Byamugisha FK 'Securing Africa's Land for Shared Prosperity: A Program to Scale Up Reforms and Investments.' (2019).

C.R. Kothari, Research Methodology (2004), 4.

Craig P, 'Ultra Vires and the Foundations of Judicial Review' (1998) 57 The Cambridge Law Journal 63.

De Smith ,Woolf & Jowell, Judicial Review of Administrative Action (1995) 296; *<https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=2958&context=dlj>*

Domingo P and Denney L, 'The Political Economy of Pre-Trial Detention' (2013)*<https://www.odi.org/publications/7286-political-economy-pre-trial-detention>*Accessed March 21, 2019.

Eason MJ, 'Eighth Amendment - Pretrial Detention: What Will Become of the Innocent' (1987-1988) 78 J. Crim. L. & Criminology 1048. *<https://pdfs.semanticscholar.org/a918/e66ae647d8367dfcecd7e2212c40260b3cc8.pdf>*

Edwards (2012) 'Snap-shot of the Use of Conditions of Pre-Trial in Police Cells in Africa'. APCOF report < *http://apcof.org/wp-content/uploads/2016/05/No-7-Pre-Trial-Justice-in-Africa-An-Overview-of-the-Use-of-Arrest-and-Detention-and-Conditions-of-Detention_-English-Louise-Edwards-.pdf* >

Ehlers, L. 'Frustrated Potential: The Short and Long Term Impact of Pretrial Services in South Africa' (2008) Open Justice Society Initiative Spring: 121-139.

Funk K, 'The Present Crisis in American Bail' (2019) 128 Yale L J F 1098.

Georgetown University Law Centre, 'A Guide to Reading, Interpreting and Applying Statutes' (2017) The Writing Center at GULC, at 5.

Harris DJ, 'The Vested Interests of the Judge: Commentary on Flemming's Theory of Bail' (1983) 8 American Bar Foundation Research Journal 490.

James I K, *The Bible, King James Version* (Public Domain 1611).

Minton T D & Zeng Z, 'Bureau of Justice Statistics', U.S. Department of Justice , NCJ 248629.

Saxena, RK. 'Catalyst for Change: The Effect of Prison Visits on Pretrial Detention in India' (2008) Open Justice Society Initiative , Spring:57-69.

Schnacke R, 'The History of Bail and Pretrial Release, PRETRIAL JUST. INST. (Sept. 23,2010),
< https://cdpsdocs.state.co.us/ccjj/committees/BailSub/Handouts/History of Bail-Pretrial Release- >

Starger C and Bullock M, 'Legitimacy, Authority, and the Right to Affordable Bail' (2018) 26 William & Mary Bill of Rights Journal 589.

Stevenson MT, 'Distortion of Justice: How the Inability to Pay Bail Affects Case Outcomes' (2018) 34 J.L. Econ. & Org. 511.

Vance B, 'The Clear and Convincing Evidence Standard in Texas: A Critique' (1996) 48 Baylor L Rev 391. *<https://vpn.uonbi.ac.ke/proxy/6644f210/https/heinonline.org/HOL/Page?public=true&handle=hein.journals/baylr48&div=19&start_page=391&collection=journals&set_as_cursor=0&men_tab=srchresults>*

Vance B, 'The Clear and Convincing Evidence Standard in Texas: A Critique' (1996) 48 Baylor L Rev 391.

VERA Institute of Justice 'Incarceration's Front Door: The misuse of Jails in America' (2015) *<https://www.vera.org/publications/incarcerations-front-door-the-misuse-of-jails-in-america >*

Websites and webpages

Advisory on Comprehensive Programme for Registration of Title in Land Draft Report. *<http://www.landcommission.go.ke/media/erp/upload/draft_advisory_comprehensive_program_booklet_for_registration_of_tittle_in_land.pdf>* (Accessed October 25, 2019).

Brief of Conference of Chief Justice as amicus Curiae in Support of Neither Party, O'Donnell, 892, F.3d 147 (5th Cir.2018) (n0.17-20333), 2017 WL 3536467. *<https://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=1053&context=scb>* (Accessed August 5, 2019).

Kenya National Bureau of Statistics, Economic Survey 2019 at 50 and 51. <http://www.knbs.or.ke> (Accessed September 25, 2019).

Kenya/Road Transport: No of Motor Vehicles: Registered: Economic Indicators CEIC <https://www.ceicdata.com> (Accessed September 25, 2019).

Open Meeting to Consider the One Hundred Ninety –Second Report of the Standing Committee on Rules of Practice and Procedure Before the Court of Appeals. (Md. 2017 testimony of Brian Frosh)

<https://mdcourts.gov/sites/defaultfiles/import/coappeals/media/2017opnmtngs/20170105rulesmtgpt 1.mp4> (at10:33 to 40:28). (Accessed November 27, 2019).

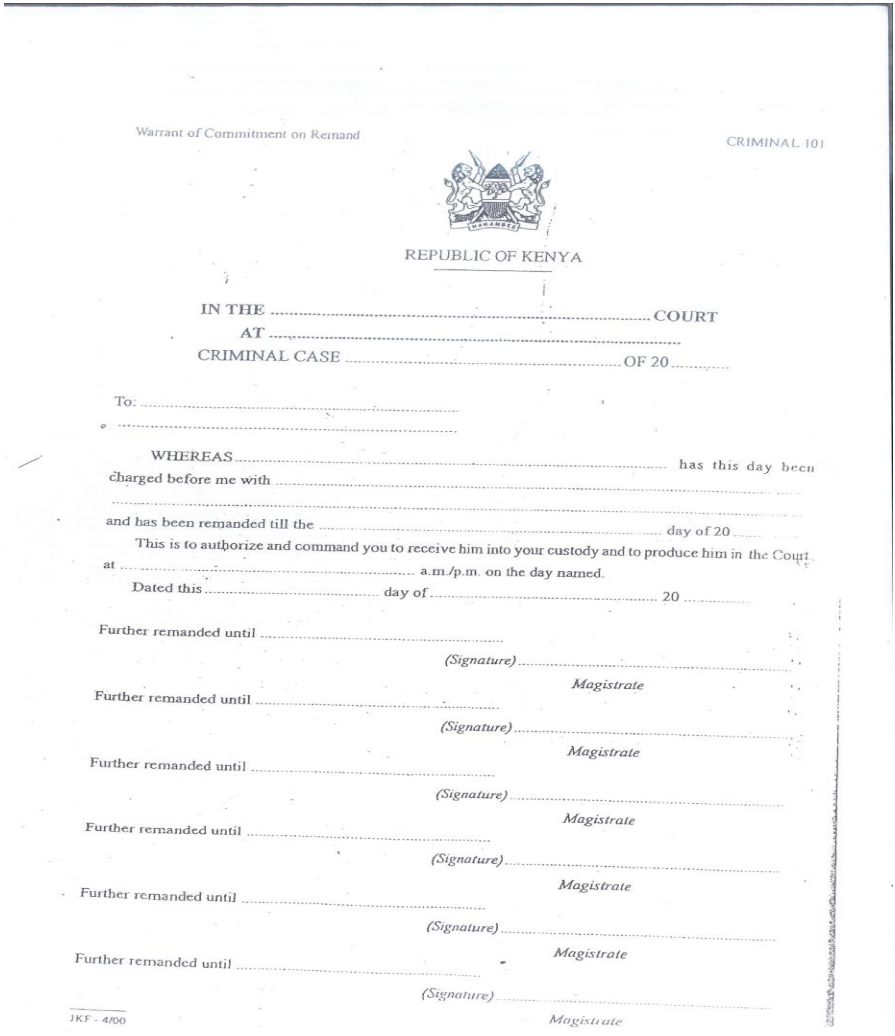
Pretrial Services Agency for Washington D.C., Release Rates for Pretrial Defendants within Washington, D.C (2017). *<https://www.psa.gov./sites/defualt /files//2016/pretiral%defendants.pdf>* (Accessed on January 13, 2021.)

Transparency International Kenya, Traffic Legislation Gaps and Drivers of Corruption in Traffic Matters (May 2018) *<https://tikenya.org.>* (Accessed November 15, 2021).

World Bank, < https://data.worldbankd.org> (Accessed September 25, 2019).

Appendix

Appendix i - Warrant of Commitment on Remand.



Warrant of Commitment on Remand

CRIMINAL 101

REPUBLIC OF KENYA

IN THE ..... COURT

AT .....

CRIMINAL CASE ..... OF 20.....

To: .....

.....

WHEREAS ..... has this day been charged before me with .....

.....

and has been remanded till the ..... day of 20.....

This is to authorize and command you to receive him into your custody and to produce him in the Court at ..... a.m./p.m. on the day named.

Dated this ..... day of ..... 20 .....

Further remanded until .....

(Signature) .....

Magistrate

Further remanded until .....

(Signature) .....

Magistrate

Further remanded until .....

(Signature) .....

Magistrate

Further remanded until .....

(Signature) .....

Magistrate

Further remanded until .....

(Signature) .....

Magistrate

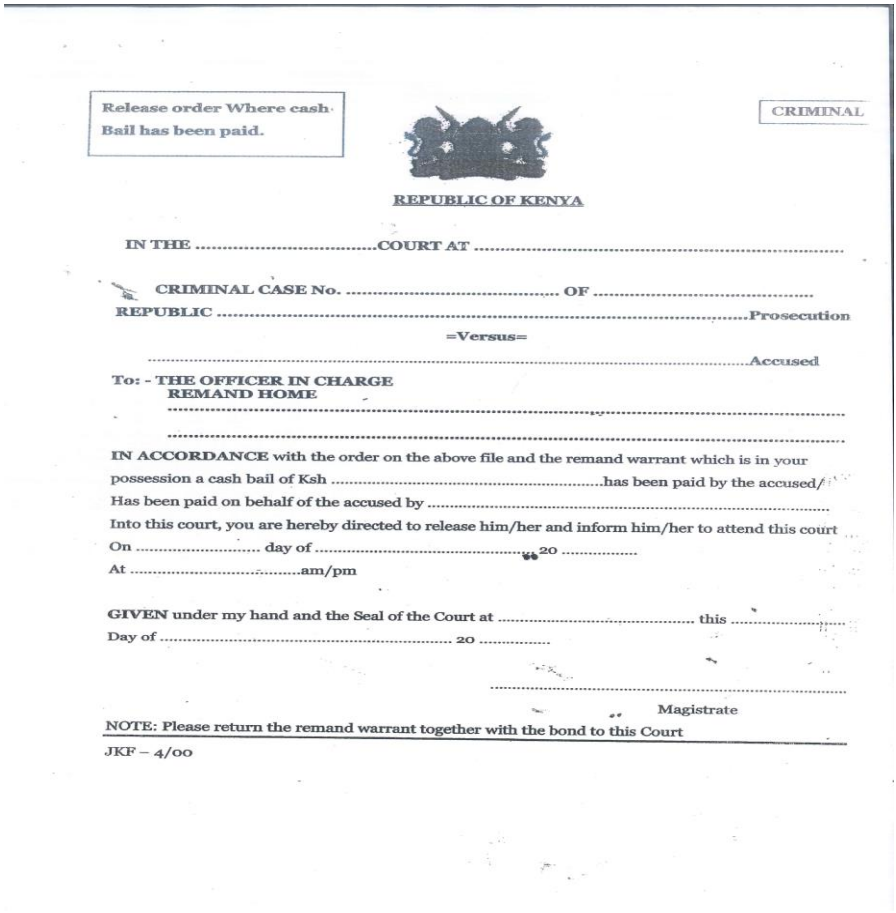
Further remanded until .....

(Signature) .....

Magistrate

JKF - 4/00

Appendix ii - Release order Where cash Bail has been paid.



Release order Where cash Bail has been paid.

CRIMINAL

REPUBLIC OF KENYA

IN THE .....COURT AT .....

CRIMINAL CASE No. ..... OF .....

REPUBLIC .....Prosecution

=Versus=

.....Accused

To: - THE OFFICER IN CHARGE
REMAND HOME

.....

.....

IN ACCORDANCE with the order on the above file and the remand warrant which is in your possession a cash bail of Ksh .....has been paid by the accused/

Has been paid on behalf of the accused by .....

Into this court, you are hereby directed to release him/her and inform him/her to attend this court

On ..... day of .....20 .....

At .....am/pm

GIVEN under my hand and the Seal of the Court at ..... this .....

Day of ..... 20 .....

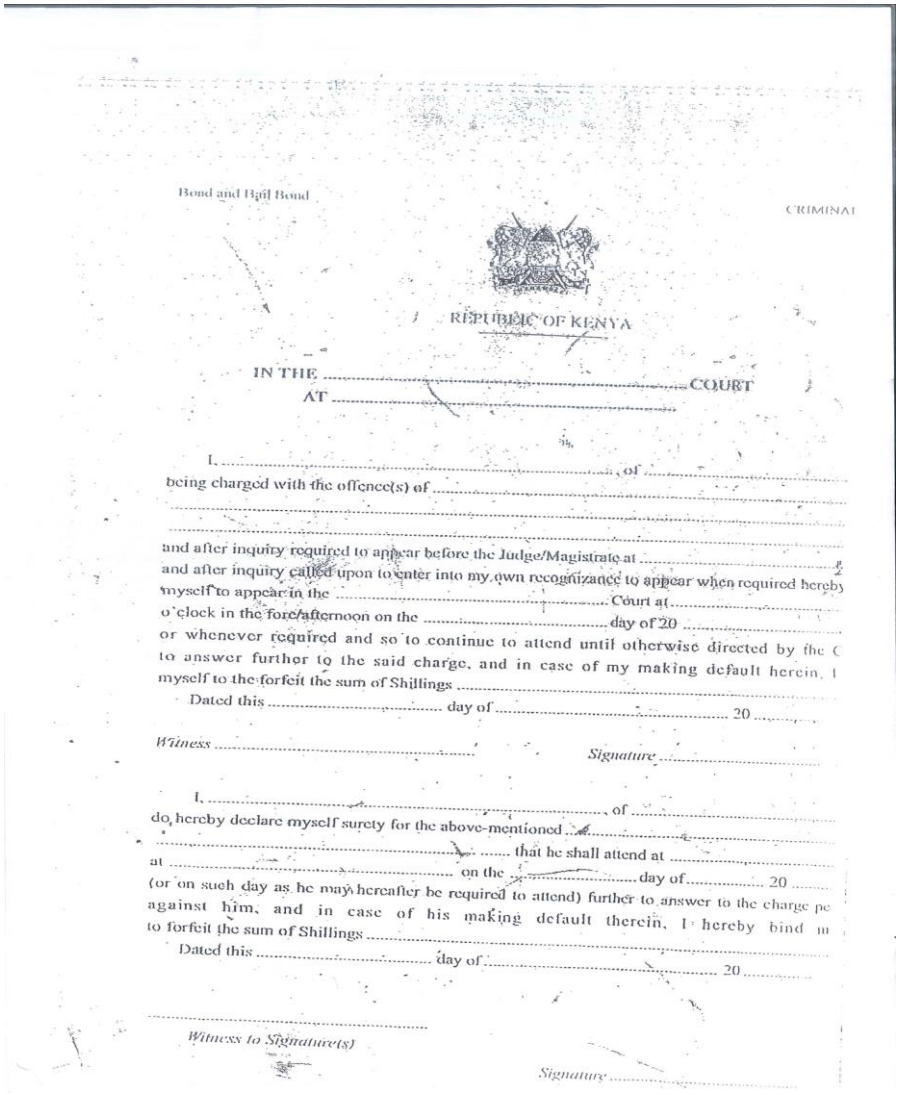
.....

Magistrate

NOTE: Please return the remand warrant together with the bond to this Court

JKF – 4/00

Appendix iii - Bond and Bail Bond.



Bond and Bail Bond

CRIMINAL

REPUBLIC OF KENYA

IN THE ..... COURT
AT .....

I, ... of .....
being charged with the offence(s) of .....
.....
.....
and after inquiry required to appear before the Judge/Magistrate at .....
and after inquiry called upon to enter into my own recognizance to appear when required hereby
myself to appear in the ..... Court at .....
o'clock in the fore/afternoon on the ..... day of 20 .....
or whenever required and so to continue to attend until otherwise directed by the C
to answer further to the said charge, and in case of my making default herein, I
myself to the forfeit the sum of Shillings .....
Dated this ..... day of ..... 20 .....

Witness ..... *Signature* .....

I, ... of .....
do hereby declare myself surety for the above-mentioned .....
..... that he shall attend at .....
at ..... on the ..... day of ..... 20 .....
(or on such day as he may hereafter be required to attend) further to answer to the charge pe
against him, and in case of his making default therein, I hereby bind m
to forfeit the sum of Shillings .....
Dated this ..... day of ..... 20 .....

Witness to Signature(s)

Signature .....

Appendix iv - Particulars of the surety.

REPUBLIC OF KENYA

IN THE CHIEF MAGISTRATE'S COURT No.....

AT MOMBASA

CRIMINAL/Mscr/TRAFFIC CASE No. ..... OF .....

ACCUSED'S NAME: -..... Accused No. .....

AMOUNT OF BOND Kshs .....No. OF SURETIES.....

PARTICULARS OF SURETY

NAME.....

RELATIONSHIP WITH THE ACCUSED .....

ID CARD No.....ISSUED AT.....

DISTRICT .....LOCATION .....

SUB – LOCATION .....VILLAGE .....

(NAME & CONTACT OF CHIEF.....

RESIDENTIAL ADDRESS..... P.O. BOX .....

STREET/NEAREST LANDMARK/INSTITUTION.....

.....

OCCUPATION .....EMPLOYER.....

PHYSICAL ADDRESS AT WORK .....

.....

TELEPHONE No. AND EXTENSION .....SURETY'S INCOME .....

SECURITY DEPOSITED IN COURT.....

SURETY: - ***I understand that if the said applicant fails to appear in court as and when required may be called upon to pay the court the sum of Kshs*** .....SURETY SIGNATURE.....

PREPARED BY.....COURT ASSISTANT.....

CHECKED BY EXECUTIVE OFFICER .....

SURETY APPROVED/NOT APPROVED.....

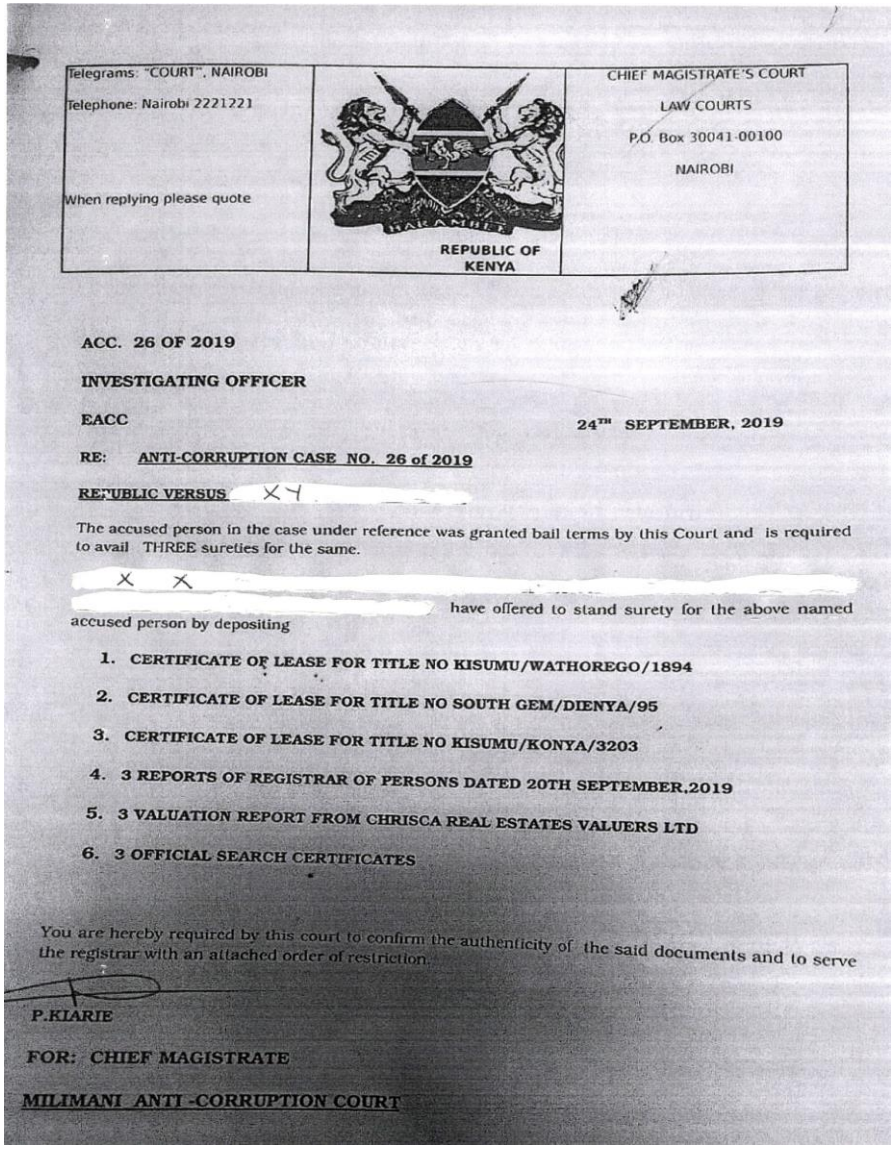
COURT'S DECISION .....

.....

Magistrate

DATED AT MOMBASA THIS .....Day of ..... 20.....

Appendix v – Letter requesting verification of documents



Telegrams: "COURT", NAIROBI
Telephone: Nairobi 2221221
When replying please quote

REPUBLIC OF KENYA

CHIEF MAGISTRATE'S COURT
LAW COURTS
P.O. Box 30041-00100
NAIROBI

ACC. 26 OF 2019

INVESTIGATING OFFICER

EACC

24TH SEPTEMBER, 2019

RE: ANTI-CORRUPTION CASE NO. 26 of 2019

REPUBLIC VERSUS X4

The accused person in the case under reference was granted bail terms by this Court and is required to avail THREE sureties for the same.

X X have offered to stand surety for the above named accused person by depositing

1. **CERTIFICATE OF LEASE FOR TITLE NO KISUMU/WATHOREGO/1894**
2. **CERTIFICATE OF LEASE FOR TITLE NO SOUTH GEM/DIENYA/95**
3. **CERTIFICATE OF LEASE FOR TITLE NO KISUMU/KONYA/3203**
4. **3 REPORTS OF REGISTRAR OF PERSONS DATED 20TH SEPTEMBER,2019**
5. **3 VALUATION REPORT FROM CHRISCA REAL ESTATES VALUERS LTD**
6. **3 OFFICIAL SEARCH CERTIFICATES**

You are hereby required by this court to confirm the authenticity of the said documents and to serve the registrar with an attached order of restriction.

P.KIARIE

FOR: CHIEF MAGISTRATE

MILIMANI ANTI -CORRUPTION COURT

Appendix vi – Release order.

Release Order

CRIMINAL 120

REPUBLIC OF KENYA

TO: THE OFICER IN-CHARGE
G. K. PRISON.....
.....SHIMO LA TEWA.....

SIR,

I have the honour to state that the fine of Kshs..... on behalf of prisoner ..... in Criminal/ Traffic Case No. .....has been paid today in this Court *vide* Court Fines Receipt No. .....of.....

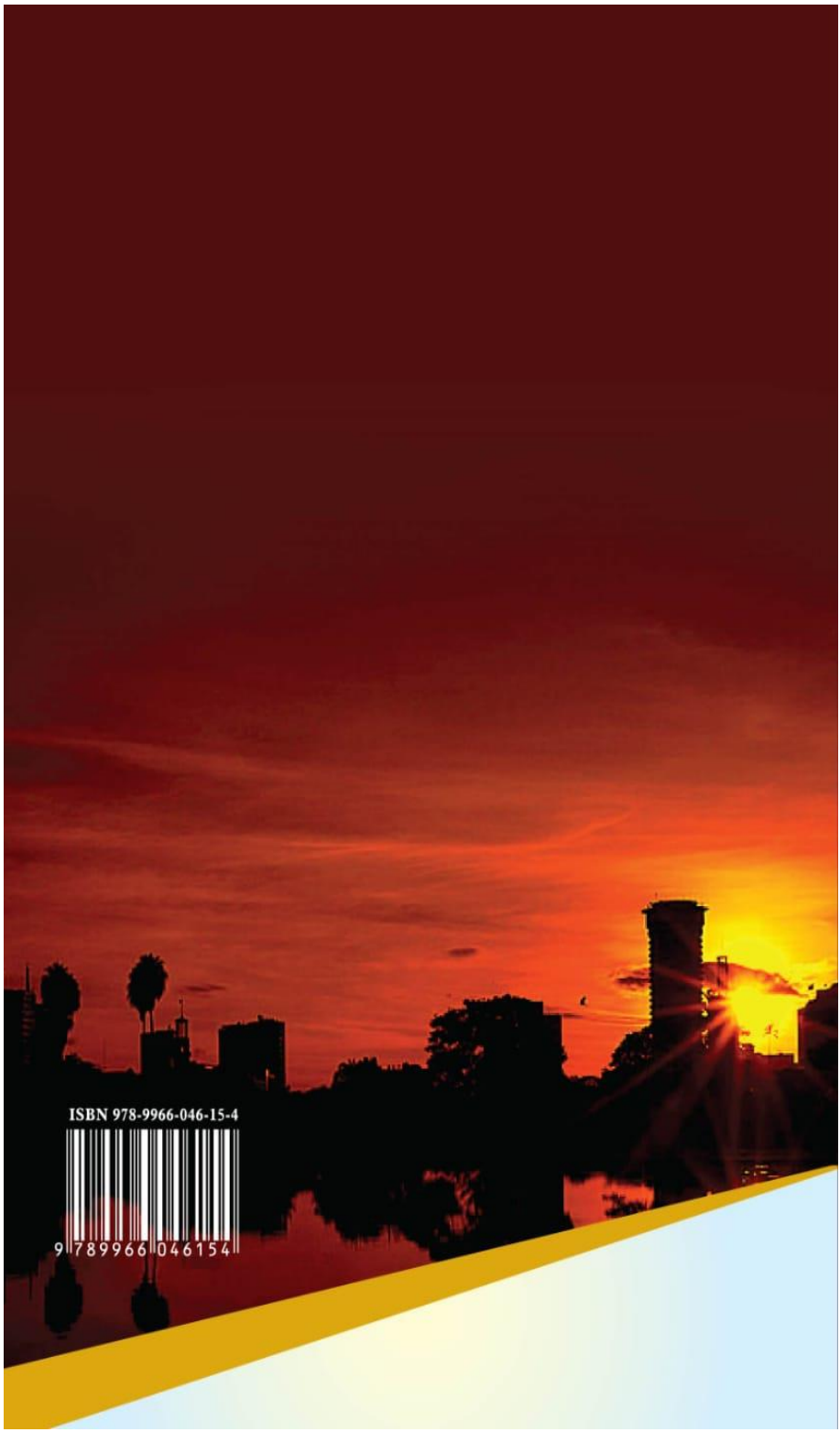
The said prisoner may therefore be released in respect of this charge.

SEAL

I have the honour to be,
Sir,
Your most obedient servant

.....
Magistrate

JKF – 9/99


ISBN 978-9966-046-15-4