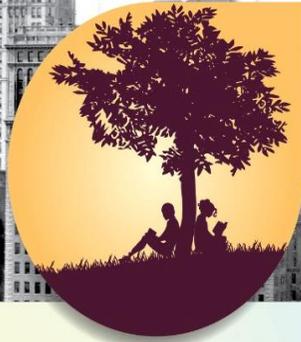


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Putting Children First: Prioritising Minors in the Application of ADR in Criminal Cases in Kenya

*By: Aaron Okoth Onyango**

Abstract

Among the hallmarks of Kenya's progressive 2010 constitution is the enshrined requirement that the best interests of the child be considered in any decision directly or indirectly affecting the child. This requirement has obligated courts to reshape its paradigm in approaching different legal matters inter-alia the child of tender ages presumption that favoured a mother's assumption of physical custody in the event that she was separated from the father and the child was of tender age. This paper shall highlight how the child's best interest requirement can be leveraged in advancing a pro alternative dispute resolution approach in criminal offences. Using landmark criminal cases as a case study, this paper shall underwrite the new opportunities available in the application of Alternative Dispute Resolution in the dispensing of criminal cases in Kenya's courts.

1. Introduction

Alternative Dispute Resolution refers to the body of methods and practices utilised by persons to solve disputes without resorting to the formal court system. It encompasses various methods including mediation, arbitration as well as traditional dispute resolution mechanisms (hereafter TDRMs) which were informal methods used in Kenya in the precolonial era and encompassed indigenous informal means of solving disputes.¹

In pre-colonial Kenya, native tribes relied on TDRMs to settle any arising disputes, a method that was passed from one generation to the next,² with its

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¹ R. Mac Ginty, "Indigenous peace-making versus the liberal peace," *Cooperation and conflict*, Vol.43, No. 2, 2008, pp.139-163.

² T. Tafese, 'Conflict management through african indigenous institutions: A study of the Anyuaa community,' (*World Journal of Social Science*, 2016) 3(1), 22-32.

main aim being to secure the penance and remorse of the perpetrator and their eventual reintegration into the community. The onset of colonialism ushered in a period when traditional African systems were deemed as backward and irrational with the colonial government going as far as encoding their repugnance to justice and morality, something which remained in Kenya's Judicature Act CAP 8, post-independence.³

Courts have further exacerbated the issue by continuing to rely on the repugnance clause to refuse the use of TDRMs in cases where parties in criminal cases have resorted to alternative means of solving their conflicts out of court as in *Republic v Abdulahi Noor Mohamed Alias Arab* where the court asserted that the use of TDRMs was unconstitutional.⁴

In cases where Kenyan courts have allowed the use of TDRMs, there have been numerous inconsistencies from one case to the next making the harmonization of circumstances permitting the use of TDRMs in Kenyan cases a difficult feat to achieve.⁵

The aforesaid scenario resulted in a lack of justice, especially in murder cases, where the victim's dependents, who are also victims by extension, fail to have their rights considered. The perpetrator is whisked to jail after being denied an opportunity to settle the matter out of court by compensating the victim's spouses(s) and children in a way that would accord them a dignified livelihood, resulting in the family of the victim falling into indigence because they lack a breadwinner.⁶

The promulgation of the constitution of Kenya 2010 gave TDRMs a new lease on life through its provisions that seek to promote ADR in solving disputes. Under Article 159 courts are mandated to resort to the use of ADR

³ Judicature Act 1957, s3(2)

⁴ *Republic v Abdulahi Noor Mohamed Alias Arab* [2016] eKLR

⁵ *Republic v Abdulahi Noor Mohamed Alias Arab* [2016] eKLR, *Republic v Mohamed Abdow Mohamed* [2013] eKLR; See also *Republic v Leraas Lenchura* [2011] eKLR

⁶ *Ibid*

in the interest of justice provided they are lawful.⁷ The Criminal Procedure Code similarly engenders the use of ADR to prevent a backlog of cases in courts and to fast track dispute resolution.⁸

The constitution went on to introduce article 53(2) which demand that the best interests of a child should be considered in any decisions directly or indirectly affecting the life of a child. The court in *J.O v SAO* interpreted the provision to mean that no decision could be made with respect to all matters including family matters such as divorce, custody rights and child maintenance without first considering what was best for the child in every given case.⁹

This paper argues that the ‘Child’s best interest’ principle offers a unique opportunity in harmonizing the utilisation of TDRMs in criminal cases, specifically, murder and manslaughter cases by forcing courts to refer all cases, where children could be affected by the death of a breadwinner, to TDR where the victim’s dependents stand a chance of being compensated.

2. Legal Framework

The basis of the use of ADRMs in criminal cases and the integration of children’s interests in these mechanisms are enshrined in both international and Municipal laws.

2.1. International Instruments

As a consequence of Articles 2(5) and 2(6) of the constitution of Kenya 2010, International Treaties and Conventions form a fundamental part of Kenya’s body of laws¹⁰ This effectively means that the following instruments govern the body of ADRMs in Kenya:

⁷ Constitution of Kenya 2010, Article 159(2)

⁸ Criminal Procedure Code 1966, Sec 2

⁹ *J.O V S.A.O* [2016] eKLR

¹⁰ Constitution of Kenya 2010, Art 2(5),(6)

2.1.1 United Nations Charter

The United Nations Charter not only ascribes rights but also outlines corresponding duties to the rights owners.

The UN Charter under Article 33 of the encourages any parties in a dispute to seek peaceful means of conflict resolution that encompass mediation, negotiation and other pacific means of their choosing.¹¹

2.1.2 The United Nations Convention on the Rights of the Child

The preamble of the United Nations Conventions on The Rights of the Child restates that the rights outlined in the UN Charter are applicable to all persons regardless of their status, which encompasses children.¹²

Article 3(2) of the convention also asserts that any actions or decisions concerning children undertaken by both private or public bodies should take into account the best interests of the child. The envisioned institutions include courts of law, legislative assemblies and any administrative bodies.¹³

2.1.3 The Indigenous and Tribal People's Convention (ITPC)

The convention elevates TDRMs by placing an onus on its member states to ensure that Municipal laws are in congruence with the indigenous citizens' customary laws and traditions.¹⁴

It further enunciates that courts of law of respective member states should give due regard to traditional dispute resolution mechanisms that are consistent with national laws.¹⁵

¹¹ Charter of the United Nations 1945, Art 33

¹² United Nations Convention on the Rights of the Child 1989, Preamble

¹³ Ibid, Art 3(2)

¹⁴ Indigenous and Tribal Peoples Convention 1989, Art 8(1)

¹⁵ Ibid, Art 9,10

2.1.4 African Charter of Human and People's Rights (ACHmPR)

One of the core tenets of the charter is the engenderment of African autonomy through the elimination of colonial vestiges and the promotion of African culture and individualism.¹⁶

The ACHmPR entitles citizens of member state the freedom to willfully engage in any cultural activities of their community,¹⁷ and places a corresponding duty upon the member states to ensure that this right is promoted and protected.¹⁸

This provision hence provides a basis for the resolution of disputes via ADRMs and the inclusion of children where and when the culture permits.

2.2 Kenyan Legal Framework

The national legal framework buttressing the application of ADRMs in Criminal cases are:

2.2.1 The Constitution of Kenya 2010

Article 159(2) of the constitution indicates that the courts should promote ADRMs in the adjudication of disputes.¹⁹ It also highlights the need for justice to be done without hindrances brought on by procedural technicalities and without delay.²⁰ This provision does not draw limits on the types of cases where ADRMs can be applied save that they are consistent with the law and are not repugnant to justice and morality.

Article 55(2) states that the best interests of children should be considered when making decisions affecting them.

¹⁶ African Charter on Human and Peoples' Rights 1981, Preamble

¹⁷ Ibid, Art 17(2)

¹⁸ Ibid, Art 17(3)

¹⁹ Constitution of Kenya 2010, Art 159 (2) (c)

²⁰ Ibid

The court in *Republic v Leraas Lenchura* rightly concluded that the death caused by the defendant was an unavoidable result of an old man attempting to defend himself and that by allowing the application of TDRMs between the deceased's family and the defendant's family, justice for all the parties involved, as well as their dependents, would be realized.²¹ The court in *Republic v Mohammed Abdow* echoed similar sentiments by allowing the withdrawal of the criminal case because a more expeditious disposal of the matter would have been achieved. Furthermore, the families of the concerned parties had communicated their satisfaction at the just outcome of the TDRMs.²²

2.2.2 The Judicature Act

Although the Judicature Act permits the utilisation of customs and traditions in the dispensation of cases, it places does so with a caveat that states that any such ADRMs may only be applied provided they are not repugnant to justice or morality.²³ This provision is problematic due to the expansive latitude it has left to adjudicators in deciding what can be termed as repugnant.

It also limits the limits the use of customary laws to civil case, the same being echoed by Justice Lesiit in *Republic v Abdulahi Noor Mohammed* when he stated that the application of TDRMs under the impugned law did not extend to capital offenses. The court however recognised a lack of clear guidelines on the application of TDRMs in murder cases and conceded that the request to resort TDRMs to adjudicate the matter would have succeeded if the applicant had followed the due process as in *Republic v Mohammed Abdow* where the request was made early and the court as well as Office of the DPP had been involved in the process.²⁴

²¹ *Republic v Leraas Lenchura* [2011] eKLR

²² *Republic v Mohamed Abdow Mohamed* [2013] eKLR

²³ Judicature Act 1957, Sec 3(2)

²⁴ *Republic v Abdulahi Noor Mohamed* [2016] eKLR

2.2.3 Criminal Procedure Code

Part IV of the Criminal Procedure Code provides for plea bargains which are defined as agreements between the prosecutor and accused person under the code.²⁵ The code empowers the prosecutor to enter into an agreement that could reduce the defendant's sentence,²⁶ result in the withdrawal of the charges, and even provide for the compensation and restitution of victims.²⁷ The only crimes expressly excluded from the ambit of plea bargains are crimes under the Sexual Offences Act, and those under the International Crimes Act.²⁸ This therefore implies that reasonable opportunity should be accorded for the pursuit of ADRMs whose favourable outcome can then be reduced into writing and presented before the courts as plea agreement. In *R v Leraas Lenchura* the court accepted a plea agreement that required the accused to give the deceased's family a female camel that would be a source of livelihood for his dependents, and issued a suspended sentence that would require him to report to the area chief every fortnight. This was after the charges were changed from murder to manslaughter, following the plea bargain.²⁹ The Criminal Procedure Code thus provides a framework that could be utilized in good faith to help utilise TDRMs that espouse more reconciliatory and compensatory outcomes.

2.2.4 The Children's Act

Section 4(2) The Children's Act re-affirms the 'best interests' principle by echoing the requirement that all judicial and administrative institutions and officer that act in matters concerning children shall give paramountcy to the best interests of the affected child.³⁰

²⁵ Criminal Procedure Code 1966, s 2

²⁶ *Ibid*, s 137A (1) (a)

²⁷ *Ibid*, s 137A (2)

²⁸ *Ibid*, s 137N

²⁹ *R v Leraas Lenchura* [2011] eKLR

³⁰ Children Act 2001, Sec 4(2)

The court in *Republic v Mohammed Abdow* echoed similar sentiments by allowing the withdrawal of the criminal case because TDRMs that catered for the needs of both affected families had been achieved out of court.³¹

3. How ADRMS Promote The Best Interests of the Child

Different authors have explored the positive traits of ADRMS and how these characteristics aid in the promoting a child's best interests. Some of these characteristics are outlined below.

3.1 Restorative

This refers to the quality of returning one to a position where they were prior to a point or event of reference. In stark contrast to Penal Code's retributive and deterrent punishments and sentences including inter-alia, life imprisonment and the death sentence,³² ADRMs restore the relationship of the victim and the perpetrator to the position it was before the injury was suffered. *Francis Kariuki* states that TDRMs do this by bringing the victims and offenders together to hold the offender accountable and allowing the victim to express themselves for closure.³³ In doing so, the victim is not only reconciled with the community but also allowed to take an active step in making amends for their misdeeds which aids in the restoration of relations among the parties involved.³⁴ Children are still in a process of physical, emotional and psychological growth and thus require a stable and consistent environment for the best developmental outcomes. By restoring all the victims to their previous positions, ADRMs help in maintaining the status quo in a child's environment beyond the perpetration of a crime, maintaining the stability a child needs.

³¹ *Republic v Mohamed Abdow Mohamed* [2013] eKLR

³² Penal Code 1948, s 204

³³ Francis Kariuki, 'Applicability of traditional dispute resolution mechanisms in criminal cases in Kenya', 210.

³⁴ Francis Kariuki, 'Applicability of traditional dispute resolution mechanisms in criminal cases in Kenya', 211.

3.2 Reconciliatory

Walter highlights the individualistic and self-interested capitalistic ideals imported into Africa by westerners during the European scramble for African real-estate.³⁵ *Muriithi* contrasts this with the prevailing African condition in the precolonial era whence a community's existence was marked by harmonious co-existence with any individuals or situations that could potentially lead to conflict being viewed as threats to the community's survival.³⁶ This is echoed by *Kariuki Muigua* who further propounds that in any typical traditional African society, communal living was highly valued and any societal division greatly abhorred.³⁷ *Mkangi* states that it is against the backdrop of this principle that mechanisms of TDRMs were established; the facilitation of dispute resolution mechanisms oriented towards reconciled parties and a harmonized communal living.³⁸ When children are victims of criminal acts, it is imperative that mechanisms are put in place to allow them to recover from the traumas of the crime. The first logical step, where possible is to ensure a reconciliatory tone is struck between the victims and perpetrators. Children are very impressionable, and likely to be willing to forgive. When they observe the community and older victims seeking reconciliation, the consequent harmony is likely to last inter generationally.

3.3 Affordable

Assefa & Pankhurst explore the application of Customary Dispute Resolution in Ethiopia. They highlight the instances where communal

³⁵ See generally, Walter, R., 'How Europe Underdeveloped Africa,' *Beyond borders: Thinking critically about global issues* (1972), pp. 107-125; see also Samir, A., 'Imperialism and globalization,' *Monthly Review*, Vol.53, No. 2, 2001, p.6; See also Bamikole, L.O., 'Nkrumah and the Triple Heritage Thesis and Development in Africana Societies,' *International Journal of Business, Humanities and Technology*, Vol. 2, No. 2, March, 2012.

³⁶ See generally, Murithi, T., 'Practical Peacemaking Wisdom from Africa: Reflections on Ubuntu,' (*Journal of Pan African Studies*, 2006), Vol.1, No. 4, pp.25-34

³⁷ Kariuki Muigua, 'Traditional conflict resolution mechanisms and institutions', 4

³⁸ Mkangi K, *Indigenous Social Mechanism of Conflict Resolution in Kenya: A Contextualized Paradigm for Examining Conflict in Africa*, available at www.payson.tulane.edu, [Accessed on 02/06/2012].

interventions like traditional mediation would be undertaken with very minimal pecuniary burden to the disputants. For instance, the parties would not be required to hire lawyers or legal experts, nor part with fare to and from courts, but instead cater for consumables like food and drinks that would be taken by the elders during the adjudication of the dispute.³⁹ *Kariuki Muigua* buttresses this proposition by highlighting that in addition to their flexibility, TDRMs are cost effective.⁴⁰

With a majority of Kenyans living below the poverty line, being part of expensive and protracted legal cases drains a family's resources that could otherwise be utilized by parties in providing for their children. Cheaper means such as communal mediation aid in mitigating litigation costs, resulting in the prioritization of children in the use of family resources.

3.4 Flexible

Assefa & Pankhurst propound that one of the salient features of ADRMs is their inherent flexibility in terms of rules, procedures and presentation of evidence. They support their assertion by highlighting how, unlike in formal justice systems, the applicable rules, ways evidence is presented, and even the types of punishment can be adapted suit particular cases and circumstances.⁴¹ They also assert that TDRMs have evolved over time to better suit changing times.⁴² This stands in contrast with the rigid predetermined sanctions under punitive statutes like the Penal Code wherein all persons convicted of a given crime face the same fate regardless of the

³⁹ Getachew Assefa and Alula Pankhurst, 'Facing the Challenges of Customary Dispute Resolution: Conclusion and Recommendations' (Penal Reform International, 2015) 257-273 <https://books.openedition.org/cfee/516?lang=en>

⁴⁰ Kariuki Muigua, 'Traditional Conflict Resolution Mechanisms and Institutions', (2017)14

⁴¹ Getachew Assefa and Alula Pankhurst, 'Facing the Challenges of Customary Dispute Resolution: Conclusion and Recommendations', (Penal Reform International 2001):5, p. 257-273 <https://books.openedition.org/cfee/516?lang=en>

⁴² Getachew Assefa and Alula Pankhurst, 'Facing the Challenges of Customary Dispute Resolution: Conclusion and Recommendations', (Penal Reform International 2001):5, pp 14 <https://books.openedition.org/cfee/516?lang=en>

circumstances involved.⁴³ *Njuguna* states that this flexibility is facilitated by the uncodified nature of TDRMs as opposed to tedious procedures and rigid rules of codified laws and set precedents which offer no room for flexibility and can only be changed after more tedious procedures and rigid rules are followed.⁴⁴

Children who are victims of crimes possess very unique needs. Some, whose breadwinners as in *Mohammed Abdow* require first financial stability, having their breadwinner untimely killed. A child facing the risk of indigence would thus require finances that would aid in securing their basic needs and education for a reasonable period as opposed to the death and/o imprisonment of the killer which would do nothing to aid their financial status.

4. The Benefits of Prioritising Minors in ADRMs

This section will highlight the advantages of prioritising minors in the application of ADRMs.

4.1 Expeditious Dispensation of Criminal Cases

Formal dispute resolution mechanisms are encumbered by arduous procedural technicalities and requirements that result in a huge backlog of cases which not only prolongs the attainment of justice for the victims, but also continually forces them to relieve the trauma bought on by the crime.⁴⁵ This stands in contrast with TDRMs like conciliation and mediation which are more expeditious, quickly disposing off cases to allow the healing process to commence, and prevent the escalation of conflicts.⁴⁶ This was demonstrated by the *Gacaca* and *Abunzi* methods of traditional dispute

⁴³ Francis Karioko Muruatetu & another v Republic [2017] eKLR

⁴⁴ Sarah Wairimu Njuuguna, 'Suitability of traditional dispute resolution mechanisms in criminal matters in Kenya' (Strathmore University Press, 2018) 38

⁴⁵ Kariuki Muigua & Francis Kariuki, 'ADR, access to justice and development in Kenya' *Strathmore Law Journal* (2014), 1.

⁴⁶ Getachew Assefa and Alula Pankhurst, 'Facing the Challenges of Customary Dispute Resolution: Conclusion and Recommendations', *Penal Reform International* 2001:5, pp 17 <https://books.openedition.org/cfee/516?lang=en>

resolution respectively. The *Gacaca* courts of Rwanda worked around the rigid procedural formalities of the formal court systems by allowing largely informal procedures that were flexible to cater to the needs of the both the perpetrators and victims.⁴⁷ Similarly, the flexible nature of the *Abunzi* mediation committees where all witnesses and victims were accorded an opportunity to be heard allowed faster dispensation of justice.⁴⁸ This position has also been solidified in various criminal cases in Kenya including in the proceedings of *Republic v Juliana Mwikali Kiteme & Another*.

4.2 Win-Win for all Parties

It is a universal right that children grow in a healthy and stable environment⁴⁹. Achieving this will be unlikely if a child is to be brought up in a post conflict environment where parties affected by a crime harbour simmering discontent. It would also be impossible to attain the healthiest possible environment where the child is a dependent who has lost their breadwinner, as in *Mohamed Abdow*.⁵⁰

Unlike the formal justice systems that are adversarial in nature, TDRMs are focused on outcomes acceptable to both offenders and victims. The *Gacaca* traditional courts of Rwanda provided the offenders the opportunity to recognize and apologize for their wrongdoing. In this manner, TDRMs the victims' indulgence and forgiveness was sought.⁵¹ In the *Juddiya* system of traditional dispute resolution practiced in Sudan, there was compensation provided by the perpetrator in an attempt to facilitate restitution. The gifting party would in turn be forgiven and the damage considered reversed.⁵² This

⁴⁷ Sarah Wairimu Njuuguna, 'Suitability of traditional dispute resolution mechanisms in criminal matters in Kenya' (Strathmore University Press, 2018), 31

⁴⁸ *Ibid*, 32.

⁴⁹ United Nations Convention on the Rights of the Child 1989, Preamble

⁵⁰ *Republic v Mohamed Abdow Mohamed* [2013] eKLR

⁵¹ Sarah Wairimu Njuuguna, 'Suitability of traditional dispute resolution mechanisms in criminal matters in Kenya' (2018) Strathmore University Press, 31

⁵² A. S. Wahab, 'The Sudanese indigenous model for conflict resolution: A case study to examine the relevancy and the applicability of the judiyya model in restoring peace within the ethnic tribal communities of the sudan'(2018). https://nsuworks.nova.edu/shss_dcar_etd/87/

characteristic was reiterated among the Acholi of Uganda. Their TDRMs were oriented towards enhancing reconciliation and improving societal relations which is beneficial for peaceful coexistence of all within the community.⁵³ In contrast, a victim seeking retribution can be the only winner and the convicted perpetrator incapable of getting a favourable outcome as courts are mandated under the law to issue them with a death sentence.⁵⁴

By utilising child-centric ADRMs in the disposal of disputes, the perpetrator's a just outcome acceptable to both parties will be achieved, providing a healthy and harmonious post conflict environment for the children affected. The victim's dependents may also be accorded appropriate compensation which would ensure dignified living even after their main breadwinner is rendered incapable of fulfilling their role.

5. Conclusion

This paper has established that there are positive attributes of the ADRMs that aid in upholding the best interests of the child doctrine well as the benefits of incorporating the best interests of the child in dispute resolution.

The restorative nature of TDRMs promotes social cohesion for all parties within the community by addressing the underlying issues in the conflict.⁵⁵ In all instances where courts allowed the application of ADRMs in criminal cases and given prominence to the best interests of the victim's dependents, they have been concluded expeditiously with the perpetrators exhibiting genuine remorse and a desire to change which guarantees a healthy post-conflict environment for all affected parties. In addition, the end result saw both the perpetrators and victims contented with the outcome and amicable relations between them restored.

⁵³ P. Tom. The acholi traditional approach to justice and the war in northern Uganda (2006) Retrieved from <https://www.beyondintractability.org/casestudy/tom-acholi>

⁵⁴ Penal Code, s 204

⁵⁵ Francis Kariuki, 'Conflict resolution by elders in Africa: successes, challenges and opportunities' (2015), 3.

Children are still in a process of physical, emotional and psychological growth and thus require a stable and consistent environment for the best developmental outcome. By restoring all the victims to their previous positions, ADRMs help in maintaining the status quo in a child's environmental beyond the perpetration of a crime and maintaining the stability a child needs. It also helps in securing a child's material future by ensuring that adequate provision has been made for the victim's dependents in the event that they lose their source of livelihood as a result of the crime.

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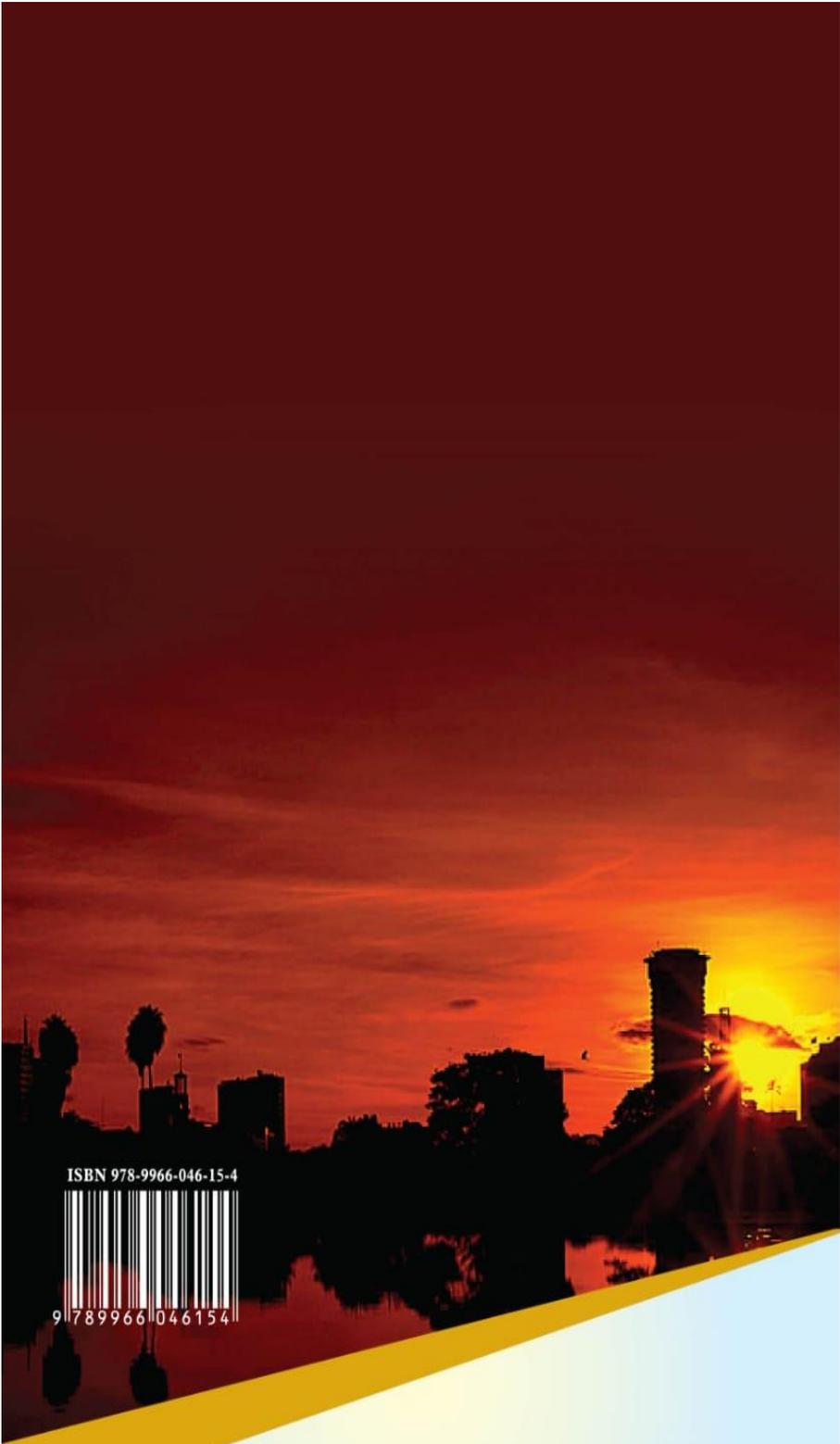
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