

# Journal of Conflict Management & Sustainable Development



Mediating Energy Project Implementation Conflicts,  
a Learning Curve, the Case of Olkaria IV Geothermal, Kenya

Lilian Namuma  
S. Kong'ani  
Raphael G. Wahome  
Thuita Thenya

Exploring Alternative Sources of Energy in Kenya

Kariuki Muigua

Determining the Impact of Political Instability and National  
Security on Foreign Direct Investment in Kenya

Wilfred Mutubwa  
Ian Mwangi  
Beatrice Kavata  
Michelle Kananu  
Matthew Mbelenga

Actualising the National Policy on Gender and Development  
in Kenya

Kariuki Muigua

Mediation as A Tool of Conflict Management in Kenya:  
Challenges and Opportunities

James N. Njuguna

Volume 5

Issue 2

2020

ISBN 978-9966-046-15-4

---

# **Journal of Conflict Management and Sustainable Development**

---

## **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.

**© Glenwood Publishers Limited Kenya**

All rights reserved. No article published in this journal may be reproduced, transmitted in any form, stored in any retrieval system of any nature without prior written permission of the copyright holder. The views expressed in each article are those of the contributors and not necessarily those of the Glenwood Publishers, Kenya.

## **Editorial Board**

**Kariuki Muigua**  
*Managing Editor*

Ngararu Maina  
Endoo Dorcas Chepkemei  
Faith Nguti

## **Editorial Team**

Anthony Luganje  
Grace Chelagat-Tanah  
Anne Wairimu Kiramba  
James Ngotho Kariuki

## **Advisory Board**

James Ndung'u Njuguna  
Abdirazak Mohamed  
George Osanjo  
Silver Andrew Ouma  
Solomon Gatobu M'inoti

*This Journal should be cited as (2020) 5(2) Journal of cmsd*

**ISBN 978-9966-046-15-40**

## Editor's Note

Welcome to the latest edition of the Journal of Conflict management and sustainable Development, Volume 5 number 2.

The journal is peer reviewed and refereed so as to ensure highest academic standards. Since its inception, the Journal has developed into a leading academic platform for scholarly and intellectual discourse on the key subjects of conflict management and sustainable development.

The issue carries articles dealing with themes such as:-*Determining the impact of political Instability and national security in foreign direct investment in Kenya; Exploring alternative sources of energy in Kenya; Mediation as a tool of conflict management in Kenya; - challenges and opportunities; Actualizing the National Policy on Gender and Development in Kenya and Mediating energy project implementation conflicts, a learning curve, the case of Olkaria Geothermal, Kenya.*

The journal contributes to the debate touching on how to make the world a better place to live in through conflict management and sustainable development. We welcome our readers for a scholarly engagement and feedback to enable us continue improving the Journal.

I wish to thank our dedicated team of reviewers and editors for their immense efforts in making this publication possible.

The editorial team welcomes submission of articles, comments and book reviews based on the themes of conflict management and sustainable development and related fields of knowledge for intended publication in the journal. Submissions can be channeled to our official e-mail address ([editor@journalofcmsd.net](mailto:editor@journalofcmsd.net)) and copied to ([admin@kmco.co.ke](mailto:admin@kmco.co.ke))

**Dr. Kariuki Muigua, PhD, FCIArb (Chartered Arbitrator), Accredited Mediator.**

**Managing Editor,**

**October 2020**

# **Journal of Conflict Management and Sustainable Development**

## **Volume 5 Issue 2**

<b><u>Content</u></b>	<b><u>Author</u></b>	<b><u>Page</u></b>
Mediating Energy Project Implementation Conflicts, a Learning Curve, the Case of Olkaria IV Geothermal, Kenya	Lilian Namuma S. Kong'ani 1 Raphael G. Wahome Thuita Thenya	
Exploring Alternative Sources of Energy in Kenya	Kariuki Muigua	34
Determining the Impact of Political Instability and National Security on Foreign Direct Investment in Kenya	Wilfred Mutubwa Ian Mwangi Beatrice Kavata Michelle Kananu Matthew Mbelenga	60
Actualising the National Policy on Gender and Development in Kenya	Kariuki Muigua	78
Mediation as A Tool of Conflict Management in Kenya: Challenges and Opportunities	James Ndungu Njuguna	120

## **Mediating Energy Project Implementation Conflicts, a Learning Curve, the Case of Olkaria IV Geothermal, Kenya**

*By: Lilian Namuma S. Kong'ani\*, Raphael G. Wahome\*\* & Thuita Thenya\*\*\**

### **Abstract**

*Energy developmental projects in Kenya have elicited conflicts with local communities over their impacts, including relocation and compensation. Most conflicts remain unsolved and grievances unattended to. Mediation use is becoming increasingly popular in dealing with such conflicts. However, this initiative remains inadequately assessed and published. The Olkaria IV geothermal project conflicts were mediated, creating an opportunity to appraise mediation for enhancing its application in Kenya. Quantitative and qualitative data were collected from the project affected persons (PAPs) household heads, using questionnaires, focus group discussions (FGDs), key informant interviews (KIIs), and desk literature studies. Descriptive statistics were calculated from quantitative data, while NVIVO software was used to assess qualitative narrative information. Results suggested inadequate PAPs' knowledge, attitude, contribution, and practice in the mediation, protraction, and trust issues. The delegates lacked a clear pathway for information dissemination among community members. Mediation lessens suspicion within the PAPs and increases the community's exposure to different conflict resolution*

---

**\* MSc. (University of Nairobi), Wangari Maathai Institute for Peace and Environmental Studies**

**\*\* Ph. D (University of Nairobi),<sup>b</sup>Department of Animal Production, University of Nairobi, Kenya**

**\*\*\* Ph. D (University of Nairobi), Wangari Maathai Institute for Peace and Environmental Studies**

*opportunities. An awareness campaign preceding mediation as an effective preparation tool and appropriate engagement of the aggrieved parties, would improve the mediation process' efficacy.*

**Keywords:** conflicts, geothermal project implementation, lessons, mediation, PAPs

## **Introduction**

The growing petition to increase the availability and reliance of green energy for sustainability and addressing global concerns over climate change<sup>1</sup> has contributed to massive investment in the exploration of clean energy globally.<sup>2</sup> Demand for electricity in East Africa is projected to quadruple by 2033.<sup>3</sup> Geothermal energy in Kenya is preferred to wind, solar, and hydropower due to its insusceptibility to climate conditions.<sup>4</sup> The country intends to generate 50 percent of its

---

<sup>1</sup> Karytsas Spyridon and others, 'Towards Social Acceptance of Geothermal Energy Power Plants' 7

<[https://www.researchgate.net/publication/333974365\\_Towards\\_social\\_acceptance\\_of\\_geothermal\\_energy\\_power\\_plants](https://www.researchgate.net/publication/333974365_Towards_social_acceptance_of_geothermal_energy_power_plants)>.

<sup>2</sup> Chavot Philippe and others, 'Social Shaping of Deep Geothermal Projects in Alsace: Politics, Stakeholder Attitudes and Local Democracy' (2018) 6 Geothermal Energy 26 <<https://geothermal-energy-journal.springeropen.com/articles/10.1186/s40517-018-0111-6>> accessed 8 December 2019; Emmanuel Yeri Kombe and Joseph Muguthu, 'Geothermal Energy Development in East Africa: Barriers and Strategies' [2018] Journal of Energy Research and Reviews 1 <<http://www.journaljenrr.com/index.php/JENRR/article/view/29722>> accessed 26 February 2020; Sofia Vargas Payera, 'Understanding Social Acceptance of Geothermal Energy: Case Study for Araucanía Region, Chile' (2018) 72 Geothermics 138 <<https://linkinghub.elsevier.com/retrieve/pii/S0375650517300913>> accessed 18 February 2020.

<sup>3</sup> Hughes Lotte and Rogei Daniel, 'Feeling the Heat: Responses to Geothermal Development in Kenya's Rift Valley' [2020] Journal of Eastern African Studies 1 <<https://www.tandfonline.com/doi/full/10.1080/17531055.2020.1716292>> accessed 10 April 2020.

<sup>4</sup> Kubota Hiromi and others, 'Determining Barriers to Developing Geothermal Power Generation in Japan: Societal Acceptance by Stakeholders Involved in Hot Springs' (2013) 61 Energy Policy 1079

energy demand from geothermal sources by 2025.<sup>5</sup> However, the growth of such projects often expands into occupied land resulting in conflicts with the residents. Conflicts can be destructive and violent, especially in fragile countries like Kenya<sup>6</sup> where the system of governance is weak, with a high prevalence of political and ethnic tensions exacerbated by corruption. Conflicts constitute a vital part of development especially when resolved peacefully<sup>7</sup> through effective management approaches like mediation.

Mediation is considered an effective process for resolving conflicts including natural resource ones.<sup>8</sup> It is deemed helpful in cases where parties fail to resolve conflicts because of a lack of mutual trust and inequities among the negotiating parties.<sup>9</sup> While mediation has been

---

<<https://linkinghub.elsevier.com/retrieve/pii/S0301421513004394>> accessed 8 December 2019.

<sup>5</sup> Hughes Lotte and Rogei Daniel (n 3).

<sup>6</sup> Fund for Peace, 'Fragile States Index Annual Report 2019' (2019) <<file:///C:/Users/ACER/AppData/Roaming/Microsoft/Windows/Network%20Shortcuts/9511904-fragilestatesindex.pdf>>.

<sup>7</sup> Oli Brown and Michael Keating, 'Addressing Natural Resource Conflicts' [2015] Chatham House for the Royal Institute of International Affairs 34.

<sup>8</sup> Bercovitch Jacob and Lee Su-Mi, 'Mediating International Conflicts: Examining the Effectiveness of Directive Strategies' (2003) 8 International Journal of Peace Studies 1 <<http://www.jstor.org/stable/41852891>>; Dhiaulhaq Ahmad, De Bruyn Toon and Gritten David, 'The Use and Effectiveness of Mediation in Forest and Land Conflict Transformation in Southeast Asia: Case Studies from Cambodia, Indonesia and Thailand' (2015) 45 Environmental Science & Policy 132 <<https://linkinghub.elsevier.com/retrieve/pii/S1462901114002019>> accessed 15 November 2019; Muigua Kariuki, 'Managing Natural Resource Conflicts in Kenya through Negotiation and Mediation' 43 <[https://profiles.uonbi.ac.ke/kariuki\\_muigua/publications/managing-natural-resource-conflicts-kenya-through-negotiation-and-mediat](https://profiles.uonbi.ac.ke/kariuki_muigua/publications/managing-natural-resource-conflicts-kenya-through-negotiation-and-mediat)> accessed 15 November 2016; Yurdi Yasmi, Lisa Kelley and Thomas Enters, *Conflict over Forests and Land in Asia* (RECOFTC 2010) <[https://www.researchgate.net/publication/287508511\\_Conflict\\_over\\_forests\\_and\\_land\\_in\\_Asia](https://www.researchgate.net/publication/287508511_Conflict_over_forests_and_land_in_Asia)> accessed 15 November 2019.

<sup>9</sup> Jacob Bercovitch and Richard Jackson, 'Negotiation or Mediation?: An Exploration of Factors Affecting the Choice of Conflict Management in International Conflict' (2001) 17 Negotiation Journal 59 <<http://doi.wiley.com/10.1111/j.1571->

applied successfully to resolve conflicts, the process has not been immune to challenges.<sup>10</sup> In Jambi province, Sumatra, Indonesia, mediation over the forest resources had to adapt to the conditions on the ground, with successive mediators and over several years resulting in high financial and time costs.<sup>11</sup> In the Senyerang case, the government's excessive power over the forest areas<sup>12</sup> limited inhabitants' compensation for the land in kind. Thus, the community was directed by the Ministry of Environmental and Forestry (MoEF) to accept the offered benefit-sharing arrangement with the plantation.

Translation of agreements into action was a cross-cutting challenge in most mediation cases in South Asia.<sup>13</sup> Such was the case in Samba mediation, where instead of what was bargained for, the smallholder oil

---

9979.2001.tb00227.x> accessed 15 November 2019; Yurdi Yasmi, Lisa Kelley and Thomas Enters (n 8).

<sup>10</sup> Ahmad Dhiaulhaq, David Gritten and Toon De Bruyn, 'Mediating Forest Conflicts in Southeast Asia' [2014] The Center for People and Forests, Bangkok, Thailand. 32; Kressel, K., 'Mediation Revisited', *The handbook of conflict resolution: Theory and practice* (2006).

<sup>11</sup> Samsudin, Y.B. and Pirard, R., 'Conflict Mediation in Industrial Tree Plantations in Indonesia: Status and Prospects' (Center for International Forestry Research (CIFOR) 2014) <<http://www.cifor.org/library/5443/conflict-mediation-in-industrial-tree-plantations-in-indonesia-status-and-prospects>> accessed 15 November 2019.

<sup>12</sup> Nancy Lee Peluso and Peter Vandergeest, 'Genealogies of the Political Forest and Customary Rights in Indonesia, Malaysia, and Thailand' (2001) 60 *The Journal of Asian Studies* 761 <[https://www.cambridge.org/core/product/identifier/S0021911800009487/type/journal\\_article](https://www.cambridge.org/core/product/identifier/S0021911800009487/type/journal_article)> accessed 16 August 2020; Muhammad Alif K Sahide and Lukas Giessen, 'The Fragmented Land Use Administration in Indonesia – Analysing Bureaucratic Responsibilities Influencing Tropical Rainforest Transformation Systems' (2015) 43 *Land Use Policy* 96 <<https://linkinghub.elsevier.com/retrieve/pii/S0264837714002464>> accessed 16 August 2020.

<sup>13</sup> Ahmad Dhiaulhaq, John F McCarthy and Yurdi Yasmi, 'Resolving Industrial Plantation Conflicts in Indonesia: Can Mediation Deliver?' (2018) 91 *Forest Policy and Economics* 64 <<https://linkinghub.elsevier.com/retrieve/pii/S1389934117302162>> accessed 14 April 2020.

palm estate erected substandard quality roads. This is despite that the residents had to repay the loans used for their construction. Also, discontent was widespread in Kuantain Singigi and Tanjung Jabung Barat mediation cases in Indonesia,<sup>14</sup> although the community accepted the mediation agreement. These challenges could lead to unsustainable mediation results if the mediation is not properly conducted.<sup>15</sup>

In Africa, mediation is often donor-driven as most of the governments are unable or unwilling to appreciate it.<sup>16</sup> It is also, a potential threat to the income for lawyers, who benefit from conflict litigation.<sup>17</sup> The majority of the public is poorly informed of mediation as a legitimate method for resolving developmental conflicts. Also, resolutions can be forced on warring parties because of a lack of legal framework thus non-binding nature of a mediation agreement.<sup>18</sup> The process can be endless and time consuming with the unfair outcome due to power imbalances.<sup>19</sup>

---

<sup>14</sup> Afrizal, 'Third-Party Intervention in Terminating Oil Palm Plantation Conflicts in Indonesia: A Structural Analysis' (2015) 30 *Journal of Social Issues in Southeast Asia* 141

<[https://www.jstor.org/stable/24779832?casa\\_token=PL3JmEgSjQUAAAAA%3AqVLZFIsnTyO\\_iFABcz8sKuem9OQcqdzgkjE7UYhuJC\\_kps-ZHPq2o2\\_wzeSIy\\_afkTggnR9ToqlaGRjKF3LT1m3ue-wE9gqcRcUQg\\_2KxtGVqXszdw&seq=1#metadata\\_info\\_tab\\_contents](https://www.jstor.org/stable/24779832?casa_token=PL3JmEgSjQUAAAAA%3AqVLZFIsnTyO_iFABcz8sKuem9OQcqdzgkjE7UYhuJC_kps-ZHPq2o2_wzeSIy_afkTggnR9ToqlaGRjKF3LT1m3ue-wE9gqcRcUQg_2KxtGVqXszdw&seq=1#metadata_info_tab_contents)>.

<sup>15</sup> Samsudin, Y.B. and Pirard, R. (n 11).

<sup>16</sup> Ernest E Uwazie, 'Alternative Dispute Resolution in Africa: Preventing Conflict and Enhancing Stability' 6 <<https://www.semanticscholar.org/paper/Alternative-Dispute-Resolution-in-Africa-%3A-Conflict-ERNEST-E./72d38368660023a5091ca820ceaec5f311c662c7>> accessed 15 November 2019.

<sup>17</sup> *ibid*.

<sup>18</sup> Kariuki Muigua, 'Natural Resources and Conflict Management in East Africa' (2014).

<sup>19</sup> Muigua Kariuki (n 8); Owen M Fiss, 'Against Settlement' (1984) 93 *The Yale Law Journal* 1073 <<https://www.jstor.org/stable/796205?origin=crossref>> accessed 16 August 2020.

However, a researcher<sup>20</sup> saw an opportunity for mediation because of its ability to offer participatory and transparent resolutions for the involved parties. It also has the potential to reduce caseload in the overcrowded courts, hasten access to justice, and helps bridge the gap between the traditional conflict resolution strategies and form legal methods. Mediation also reduces the post-conflict hatred as everyone comes out a winner.

While the use of mediation is demonstrated to have increased across the globe,<sup>21</sup> its utility in addressing natural resources conflicts in developing countries including Kenya remains low.<sup>22</sup> The available information incomprehensively documents the procedural issues of mediation in the resolution of conflicts related to developmental projects as also observed by Nathan,<sup>23</sup> on the challenges of mediation in Africa.

This study evaluated the issues from the mediation that was applied successfully in resolving conflicts that were linked to the Olkaria IV geothermal project implementation in Kenya between 2015-2016. The outcome is intended to help upscale the application of mediation in conflicts associated with larger projects with complex conflicts.

---

<sup>20</sup> Samsudin, Y.B. and Pirard, R. (n 11).

<sup>21</sup> Amanda Kron and Jensen David, 'From Curse to Opportunity: Mediation of Natural Resource Conflicts' (*Voelkerrechtsblog, International Law and International Legal Thought*, 2016) <<https://voelkerrechtsblog.org/from-curse-to-opportunity-mediation-of-natural-resource-conflicts/>> accessed 15 November 2019; Cheung Sai On, 'Mediation for Improved Conflict Resolution' (2010) 2 *Journal of Legal Affairs and Dispute Resolution in Engineering and Construction* 135 <<http://ascelibrary.org/doi/10.1061/%28ASCE%29LA.1943-4170.0000035>> accessed 15 November 2019; James A Wall, John B Stark and Rhett L Standifer, 'Mediation: A Current Review and Theory Development' (2001) 45 *Journal of Conflict Resolution* 370 <<http://journals.sagepub.com/doi/10.1177/0022002701045003006>> accessed 15 November 2019.

<sup>22</sup> Muigua Kariuki (n 8).

<sup>23</sup> Laurie Nathan, 'The Challenges Facing Mediation in Africa' (2009) *AFRICA Mediators' Retreat* 2009.

## **Theoretical framework**

### **The theory of the rule of law and the place of mediation in solving conflicts created by the law**

The theory of the rule of law<sup>24</sup> fails when one of the parties feels aggrieved despite legal adjudication. In using the law, a competent authority decides in favor of one person at the expense of the other, resulting in a win-lose situation. A strong sense of the rightness of the law is required to accept such a decision on the part of the loser. In consequence, legal decisions do not accommodate reconciliation, and persons who result to the law can never live together harmoniously. Thus, a sense of injustice persists. This is bad as law, being rigid, does not brook negotiation although it may be subject to interpretation.

Progressively, parties may choose to negotiate despite the law. The more common form of such negotiation is arbitration (usually in regards to the distribution of specified benefits or penalties). The position reached is a compromise of what the law would award, reducing its bite. There are still winners and losers, but a balm is applied to the feeling of loss being a negotiated one. In both the first and this case, the authority, based on the law reigns supreme.

However, mediation is a more progressive approach that enables satisfaction and builds relationships. A simple mediation is facilitated by disinterested parties.<sup>25</sup> But, the parties negotiate themselves and

---

<sup>24</sup> Jean R Sternlight, 'Is Alternative Dispute Resolution Consistent with the Rule of Law? Lessons from Abroad' (2007) 56 Depaul Law Review 25 <[https://heinonline.org/HOL/Page?collection=journals&handle=hein.journals/deplr56&id=581&men\\_tab=srchresults](https://heinonline.org/HOL/Page?collection=journals&handle=hein.journals/deplr56&id=581&men_tab=srchresults)>; Robert S Summers, 'A Formal Theory of the Rule of Law\*' (1993) 6 Ratio Juris 127 <<http://doi.wiley.com/10.1111/j.1467-9337.1993.tb00142.x>> accessed 24 July 2020.

<sup>25</sup> Christopher W Moore, *The Mediation Process: Practical Strategies for Resolving Conflict* (4th Edition, Jossey-Bass, A Wiley Brand 2014); Nwazi Joseph, 'Assessing the Efficacy of Alternative Dispute Resolution (ADR) in the Settlement of

agree on the solution to their differences. The negotiating persons take responsibility for the decision to bring harmony from divergent views, interests, and values by permitting flexibility in their claims. At the core of mediation is the desire to maintain a healthy relationship with one another. This value is set above the interests being negotiated. Thus, each mediation agreement is unique and dependent on the value attached to the relationship. There are self-evaluation and discovery during the process and development of a will to lose to retain the relationship. The result is a win-win situation. Where the relationship has no value, then mediation is not possible, and the highest authority becomes the letter of the law.

In the case of Olkaria IV, both Kenya Electricity Generating Company (KenGen) and the PAPs sought resolution of the conflicts that were jeopardizing their co-existence and smooth implementation of the geothermal project through mediation. Conflicts ensued because of the different interests and positions the parties had over the geothermal well site at Olkaria IV. The government through KenGen, needed the land to expand geothermal production to attain its commitment to increase electricity supply and mitigate climate change via the production of green energy. The Kenyan government has the responsibility to protect the community from the potential negative impacts of projects, hence the need to relocate the community from the Olkaria IV site to alternative land of their choice. Compensation of community resources including livelihood support was contested. The community, on the other hand, was keen on keeping the traditional land, which it found hard to disassociate from since it had invested in cultural inputs and villages, whose value was difficult to calculate and hard to compensate in monetary terms.

---

Environmental Disputes in the Niger Delta Region of Nigeria' [2017] Journal of Law and Conflict Resolution; Vibeke Vindeløv, *Reflexive Mediation: With a Sustainable Perspective* (DJØF 2012).

They felt they had ancestral rights to the land and also livelihood interests attached to it. They had invested in the development of income-generating cultural activities, including performing traditional dances and trade in traditional curios and other items to tourists. These activities were not easily transferable from the Olkaria IV site, which is located inside a wildlife park, to the new site, far from the park. The resettlement area is outside this park, cutting the community from the hub of tourism activities exacerbated with additional transport costs for the community to the park.

Each part could have considered that they stood on the high ground and could win a legal battle. Instead, in the spirit of mediation, the government and the community agreed to negotiate relocation to allow KenGen to establish Olkaria IV geothermal plant. Whereas mediation helped mend the relationship, reduce conflicts, improve PAPs livelihoods, and smooth project operations, the process was not immune to procedural challenges. The study sought to understand the issues that arose from the Olkaria IV mediation.

## **Materials and methods**

### **Study Area**

The study was conducted among about 1,209 PAPs in 155 households in the relocated area at the Resettlement Action Plan (RAPland) village,<sup>26</sup> in the development area of Olkaria IV. RAPland is situated in the Olkaria geothermal block, in Naivasha, Nakuru County (Figure 1). Gazetted as a Geothermal Resource Area

---

<sup>26</sup> GIBB Africa, 'Olkaria IV (Domes) Geothermal Project in Naivasha District: Resettlement Action Plan for Olkaria IV Power Station' (2012) Resettlement Action Plan; Schade Jeanette, 'Kenya "Olkaria IV" Case Study Report: Human Rights Analysis of the Resettlement Process' 199 <<https://nbn-resolving.org/urn:nbn:de:0168-ssoar-51409-6>> accessed 29 November 2019.

in 1971,<sup>27</sup> the geothermal field is located in and around the Hell's Gate National Park on KenGen's land covering approximately 80 sq. km. The park lies at 0°54'57"S, 36°18'48"E, to the south of Lake Naivasha which is about 120 km north-west of Nairobi. Olkaria IV power plant has an installed capacity of 140 Megawatt (MWe) owned and is managed by Kenya Electricity Generating Company Ltd, (KenGen). Its establishment was financed by the European Investment Bank (EIB), World Bank (WB), and other international institutions.<sup>28</sup>

The development of Olkaria IV necessitated the relocation of four villages, namely, Cultural Centre, OlooNongot and OlooSinyat, and OlooMayana Ndogo<sup>29</sup>. GIBB Africa, a consultant firm was contracted by KenGen to develop a RAP to facilitate the resettlement process. The four villages were inhabited by the Maasai Community. PAPs were resettled on 1,700 acres, upon which they were to get title deeds, modern infrastructure, social services and grazing land. PAPs depended mainly on pastoralism and livestock trading while those from Cultural Centre relied majorly on ecotourism (selling of curios and tour guiding).<sup>30</sup>

---

<sup>27</sup> Sena Kanyinke, *Renewable Energy Projects and the Rights of Marginalised* (IWGIA 2015).

<sup>28</sup> Schade Jeanette (n 26).

<sup>29</sup> GIBB Africa, 'KenGen Olkaria IV (Domes) Geothermal Project in Naivasha District: Resettlement Action Plan for Olkaria IV Power Station' (2009).

<sup>30</sup> Schade Jeanette (n 26).



## Reconnaissance

11

features and interview procedures and etiquette. The research assistants were facilitated with notebooks, pens, flip charts, and strings. A sketched map of RAPland showing OlooNongot, OlooSinyat, OlooMayana Ndogo, and the Cultural Centre villages (Figure 1) was drawn with the help of these research assistants and with the input of a RAPland Chief Elder. The sketch map also portrayed significant landmarks on RAPland including, the two churches, the primary and secondary schools, community dispensary as well as the road infrastructure. The training was done at the RAPland Gospel Church with the subsequent pretesting of the semi-structured questionnaire for further adjustment.

### **Study Design, Sampling and Data Collection**

The study sought to capture the PAPs' input on the issues of mediation that were applied in the resolution of conflicts that were connected with the implementation of the Olkaria IV geothermal project. Data was collected between May 2019 and March 2020. The blended methodology was used to gather quantitative and qualitative data. Quantitative data included the respondents' age and the number of people per household and mediation participants. Qualitative data included the respondents' reflection on the mediation challenges and lessons.

### **Sampling**

The study targeted all the 155 households in the four villages including, Cultural Centre, OlooNongot and OlooSinyat, and OlooMayana Ndogo at RAPland, to facilitate incorporation of the individual households' experiences mediation issues. However, only 117 households were surveyed, as 24 households were not occupied by the time of the study. The occupants of these households had temporarily moved out of RAPland in search of greener pastures. The remaining representatives of 14 households were inaccessible because of work-related engagements outside

RAPland.

## **Data Sources**

Secondary data were obtained from reviews of published and unpublished literature from varied local, national, and international sources related to issues and lessons of mediating natural resource conflicts. The results from the reviews have been used to complement primary data collected through the household survey, FGDs, KIIs, and participant observations.

## **Data Collection**

### **Household Survey**

The semi-structured questionnaire was administered systematically on households at RAPland, starting from the furthest village, OloNongot, to collect quantitative and qualitative data. The questionnaire was administered to household heads and where absent on offspring above 18 years old to elicit their experiences on the subject matter. This data was supplemented by information gathered from the three FGDs, the eight key informant interviews, field observations, and literature review.

### **Focus Group Discussions**

A checklist guide was prepared based on the results of the questionnaire survey and used to collect qualitative data via three (elders, women, and youth) FGDs. The groups consisted of eight participants, each drawn from the four villages. The youth group consisted of four female and four male participants who actively participated in the discussions. The female elders were separated from males to facilitate free participation and discussion, especially among women, whose culture forbids women

from speaking openly among men.<sup>31</sup> The FGDs participants were purposively selected based on their ability to inform deep insight into the challenges and lessons of mediation. Consent was sought and granted to record the FGDs.

### **Key Informant Interviews**

Further qualitative data was collected via interviews conducted with eight key informants. These informants were also selected from those judged to have deeper insight and understanding of the mediation issues and lessons. The informants participated in the mediation process that was conducted successfully to resolve conflicts that persisted after the community's relocation. They included one mediator, two informants from the complaints group, two from the resettlement action plan implementation committee (RAPIC), two village elders, and one from Kenya Electricity Generating Company (KenGen). A standard interview guide for these key informants was prepared ahead of the interviews. Consent was not given to voice record the interviews in the eight cases, but meticulous notes were taken.

### **Field Observations**

Field observation of the topography and infrastructure at RAPland was made. This displayed deprived land occasioned with gullies and valleys. The standard two bed-roomed houses, social facilities including, dispensary, schools, churches, and water collection points were evident. Photographs of the RAPland and the facilities were also taken. Informal talks with random villagers encountered and, the research assistants were also held to supplement the observations made.

---

<sup>31</sup> Hodgson Dorothy L., 'Women as Children: Culture, Political Economy, and Gender Inequality among Kisongo Maasai' (1999) 3 *Nomadic Peoples* 115 <<http://www.ingentaconnect.com/content/10.3167/082279499782409451>> accessed 8 December 2019.

## **Data analysis**

The completed questionnaires were checked for adequacy and clarifications and coded. Quantitative data on the respondents' age, number of people per household, and participants of mediation were organized into MS. excel. This data was imported into the R programme<sup>32</sup> and analyzed using a combination of descriptive statistics including, percentages and frequencies. Qualitative data on respondents' reflection on mediation's issues and lessons gathered from the household survey open-ended questions, FGDs and KIIs notes were typed, and the interview recordings transcribed. The transcripts were imported into qualitative research software, NVIVO<sup>33</sup> for coding and analysis. The summaries of the narrations are used in the discussion in the subsequent section.

## **Results**

Mediation was successfully applied in reducing conflicts between KenGen and the PAPs, improving their relationships and the PAPs livelihoods in Olkaria IV geothermal project. However, the majority (45%) of the respondents acknowledged that the process was faced with myriad challenges. Respondents (34%) held a contrary opinion, while the rest were not aware of any challenges. The issues are presented as follows:

### **PAPs' involvement**

The non-resettled PAPs (NRPAPs) were hardly included in the EIB's mobilization for the acceptance of a mediation process. Since the community's expectations and opinions of mediation were gathered at this time, the views/concerns/grievances of the NRPAPs were not recorded. The mobilization meeting was apparently conducted at

---

<sup>32</sup> Gentleman, Robert, *Computer Science and Data Analysis Series. R Programming for Bioinformatics*. (CRC Press 2008).

<sup>33</sup> Bazeley, Patricia and Kristi Jackson Eds., *Qualitative Data Analysis with NVivo*. (2nd edn, SAGE publications limited 2013).

RAPland in the community's social hall, which was far from the area in which the NRPAPs were squatting. Also, as aptly stated by an informant, *'the complainants' minimal involvement was caused by the sour relationship between them and the RAPIC members for being excluded from the relocation benefits.'*

The larger community's contribution was also negligible during the induction meeting. Further, the latter held little say in the selection of representatives, as stated by an FGDs participant, *'During the election, we were not involved fully, I remember I was working and the election was held,'* This resulted in some level of dissatisfaction (35%) in the process, and claims of nepotism and corruption as several members of the same family were nominated to the mediation committee. In other words, there were claims of inadequate representation in the negotiation committee.

It was assumed that the representatives consulted and gave feedback to the larger community at meetings at RAPland's social hall. However, the feedback was reported to be minimal. The process design failed to allow for sufficient and exhaustive consultation and feedback on prickly issues. Further, this was complicated by the limited unpacking of issues, less understood by the illiterate representatives. Also, each delegate was required to report and receive input from their designated villages, yet some irresponsibly did not. They only responded to queries put to them by community members during unexpected or random encounters.

The delegates' feedback was discouraged by the mediators, to fast track the process. Therefore, some reactions from the larger community were not incorporated on the resumption of the subsequent mediation sessions. Mediation resolutions validation exercise happened ten days after agreement signing, yet the community would have appreciated giving input before the signing. This was against the mediation

protocols signed at the Elsa Mere Conservation center. The protocols required the endorsement of the resolutions before signing. Some families felt not represented, while those who believed that they had better ideas were excluded from the meetings.

### **The process**

Mediation began officially in August 2015, long after the inception meeting that took place in March 2015. It took time to have the community agree to mediation and an agreement to mediate drafted by the mediators. This was because *'mediation is not a commonly known process although it happens in the communities, where people conduct conflict resolution in the same manner in which mediation work but they do not call it mediation,'* as stated by an informant. The agreement provided a framework for mediation. However, it took some time to reach an agreement because of the back and forth as observed by a mediator:

*Mediation is a tedious process; it involved lots of back and forth since communities had to agree on each aspect. This called for consultation with other community members, particularly via barazas. It sometimes meant going back to the drawing board when an item was not agreed upon. We started the process in August 2015 and concluded on May 31, 2016.*

Mediation was conducted in three sessions. The mediation team agreed that whatever had been discussed could not go to the community to avoid delaying the completion of the process. Issues were discussed and agreed upon before they were presented to the community. No consultation could provide input to the agreed-on items. However, it was still difficult for some of the aggrieved PAPs to agree on certain issues, resulting in a further feeling of a sense of super entitlement and compensation by the PAPs, prolonging the process. They felt that the

process was rushed and with the subsequent dropping of some of the contentious issues.

There were numerous disagreements between KenGen and the PAPs and among the PAPs representatives themselves, who frequently threatened to quit, further delaying the process. The majority of the representatives (76%) were illiterate and did not speak English, the language that was used for the mediation. They reportedly missed a considerable number of facts as they often sought to understand from the literate delegates during each break and caucus negotiations. Much time was also spent in consultations outside the sessions.

## **Knowledge, Attitude and Practice**

### **Knowledge**

The respondents (59%) claimed not to have heard of mediation before the one in which they got involved. This was also confirmed during FGDs with claims that their involvement in the mediation process was neglected as specified, *'I can't really tell what mediation is since I'm a charcoal burner, I'm neglected because I am a Samburu and I don't have a husband.'* The community claimed that there was insufficient publicity and consultation at the initial stage and inadequate capacity building for the mediation process. Lack of the latter among the representatives resulted in improper sharing of information by some of them. They did not understand a few mediation issues and questions.

### **Attitude**

The community felt that mediation had been used to rubber-stamp KenGen's activities. Whereas, RAPIC was also being used to advance KenGen's agenda, following their collaboration in the implementation of RAP. RAPIC was deemed to have been made more powerful, overshadowing the Council of Elders (CAC) against the Maasai

customs that recognize CAC as the reigning authority. Also, the RAPIC chairmen were accused of impartiality and favoritism in determining the claimants leading to the possible exclusion of the genuine ones. Some leaders were apparently secretly bribed to compromise the process. The PAPs had a lot of expectations for mediation. They anticipated that mediation would have resolved all issues including, compensation of an estimated USD 5,000 as disturbance allowance, complete stabilization of the gullies as well as provision of additional grazing land. But they regretted that these items were never put on the table, never discussed, and the agreement forced exacerbated challenges in adapting to the new lifestyle at RAPland.

### **Practice**

A few delegates were irresponsible. They provided feedback and consulted with the community when asked by the members during accidental interactions. This was aggravated by divisions among them, resulting in their failure to behave in the manner prescribed by their discussions and the joint agreement on issues. One noted respondent stated, *'The team used to agree to do something but did not do as agreed. There were betrayals among themselves.'* There were divisions also between KenGen and the PAPs. These divisions were sometimes heightened by KenGen's refusal to talk and attempted oppression on the PAPs. The developer was reported to have quarreled and manipulated decision-making while the mediators were accused of dictatorship in some incidents. Since only married PAPs were compensated, some PAPs rushed into marriage. Still, some of the community leaders incorporated ineligible members of their families to the beneficiary list.

### **Trust issues in the process**

Whereas KenGen gladly accepted mediation, the PAPs were hesitant and distrusted the process' fairness because of the commercial association between KenGen and the financiers. Distrust was also

exhibited when the complainants felt that RAPIC had worked with KenGen on RAP's implementation. Their working relationship was perceived to have pecuniary benefits for the RAPIC members. Those not members were excluded from this gain. Thus, a section of the community believed that RAPIC would be opposed to their demands as it could jeopardize their personal interests. Therefore, 35% of the respondents were dissatisfied with the selection of representatives due to a lack of trust. Their input was not captured in the selection of the committee.

### **Addressing the issues:**

Mediation clinics were held to review grievances from the NRPAPs. These clinics facilitated the construction of five more houses for PAPs erroneously omitted. These houses were meant for calming the PAPs that had lamented relentlessly besides writing letters to project financiers. Numerous meetings were also held with the community where issues were discussed and elaborated resulting in resolution of the exiting divisions in the community.

To bridge the language barrier, a Maasai lady translator was engaged from a distant locality to translate English to Maa and vice-versa. However, the representatives noted that there were many issues that could have been inappropriately translated from English to Maa because Maa is loaded with diverse nuances.

The PAPs felt that no one was bothered about their complaints and some remained unaddressed including the resolution of complaints from those who were yet to be compensated. The community claimed that the District Commissioner was at some point asked to sweet talk them whereas some challenges were not addressed per se, but the team moved with the majority's opinion. Some representatives resigned from the committee, because they held contrary view.

Nonetheless, the community suggested that mediation could have been improved as follows:

1. Be inclusive with verifiable community feedback arrangements;
2. Negotiate and agree on doable things, not utopist constructs like leveling or stabilization of gulleys;
3. Livelihood issues should have been more comprehensively negotiated based on existing activities such as pastoral lifestyle and access to grazing lands, and;
4. Make arrangements for population growth.

As part of the learning curve, mediation was deemed good because it exposed the community to the outside world, increasing its network. Also, it helped to reduce conflicts between KenGen and the PAPs within a period of about 13 months. The vulnerability assessment resulted in the identification of eligible PAPs using agreed criteria that enabled the implementation of appropriate intervention measures. The PAPs were empowered by KenGen in March 2017 to form trading groups and cooperatives. Women traders were trained on the sustainable production of curios, advertising, and marketing of such wares. The PAPs were capacity built on alternative income beyond livestock and ecotourism and sensitized on available microfinance opportunities. The Community's Ewang'an Sinyati Welfare Society trustees were empowered on accountability and governance. Also, KenGen facilitated the hiring of community bus at commercial rates through the special conditions of the contract for Olkaria I AU 6.

## **Discussion**

The study aimed to develop an understanding of procedural issues of the mediation that was successfully applied in resolution of conflicts connected to Olkaria IV geothermal project. Like any other conflict

management approaches, results demonstrated that mediation also faced challenges,<sup>34</sup> including inadequate involvement of the PAPs, protraction, misinformation, negativity and trust issues. While effort was made to address the issues, probably to enhance sustainability of the resolutions, they present practical learning lessons for application elsewhere in the country.

Public involvement is one of the central values of democracy enshrined in the Constitution of Kenya, 2010.<sup>35</sup> Article 10, provides for a right for all citizens to have a say in decisions affecting their lives. In Olkaria IV, the community's relocation was necessitated by the results of the Environmental Social Impact Assessment that envisaged disruption of the PAPs livelihoods, with potential negative impacts on their health. Having undergone similar experiences, the input from all PAPs in mediation was paramount to tolerable results. Whereas, it is impractical to directly engage the entire community in mediation process, adequate representation should suffice. However, the results demonstrated failure in sufficient representation which resulted in in-exhaustive consultations with all the PAPs that might have threatened reaching agreement. Perhaps, pre-mediation should have ensured objective and representative selection of the delegates and their satisfactory empowerment to negotiate on community behalf. It is also possible that inadequate contribution was caused by power imbalance between the parties that enable the stronger party to subjugate the voice of the weaker. This is a challenge to the mediators' ability. It is also likely to result in rapid results, yet counter-productive as observed in Darfur peace talks.<sup>36</sup> The acceptance and compliance with resolutions by claimants is often increased when the disputants' positions are seriously

---

<sup>34</sup> Dhiaulhaq, McCarthy and Yasmi (n 13); Kressel, K. (n 10).

<sup>35</sup> 'The Constitution of Kenya, 2010' National Council for Law Reporting with the Authority of the Attorney General 194.

<sup>36</sup> Nathan (n 23).

considered,<sup>37</sup> and subsequent contentment with the resolutions is dependent on the buy-in to the process. Maybe, the well-trained delegates would have facilitated better community feedback and input, and more sustainable outcome.

Mediation exercises, in South Asia,<sup>38</sup> were often characterized by the need to have community consensus and this caused prolonged periods before decision could be reached.<sup>39</sup> While the community took long to agree to mediation, the indecision was likely prompted by the initial anxiety over lack of partiality on the part of mediators because of perceived pecuniary connection between KenGen, and the project financiers, who were driving the mediation process. Therefore, perception is important in determining acceptance of the process by the conflicting parties. This also demonstrates the need for an awareness campaign preceding mediation as an effective preparation tool, and appropriate engagement of the aggrieved parties. On the other hand, skillful mediators could greatly shorten the negotiation period and reach an earlier agreement.<sup>40</sup>

The community's limited awareness of the process is an indication of the little application of mediation in resolution of conflicts in the country. Moreover, the instigation and support of Olkaria IV mediation by EIB and WB, confirms unease over the likely little budgetary allocation for mediation and inadequate political goodwill in Kenya and across the continent.<sup>41</sup> Whereas, mediation has been used by the communities to resolve conflicts since time immemorial, the study agrees<sup>42</sup> that the concept was alien to majority of the public as a legal

---

<sup>37</sup> Uwazie (n 16).

<sup>38</sup> Dhiaulhaq, McCarthy and Yasmi (n 13).

<sup>39</sup> Muigua Kariuki (n 8).

<sup>40</sup> Uwazie (n 16).

<sup>41</sup> *ibid.*

<sup>42</sup> *ibid.*

method. To them, it was inconceivable that methods used to solve domestic conflicts would work in solving of developmental community and social conflicts, as the one in Olkaria, or elsewhere in marginalized areas.

Trust building in mediation improves the fairness of the process.<sup>43</sup> It addresses the negativity and enhance acceptability of the outcome. However, irrespective of the dreaded impartiality, the acceptability of mediators suggested by the financiers, could have been embraced mainly because of the parties' desire to resolve conflicts. Perhaps, the conflict had ripened, like in the successful negotiations in Mozambique and South Africa.<sup>44</sup> However, the assurance of long-term benefits of the mediation could have aided build the parties' trust and improve their attitude which saw it conducted to conclusion. In Indonesian mediations, it's clear that the acceptability of mediators was enabled by community's belief in their experience and ability to negotiate with the company's decision makers, besides their wish for solutions to end conflicts.<sup>45</sup> However, mediation trainings would perhaps help parties appreciate the process, build trust and improve attitude towards it, promoting compliance to resolutions.

The PAPs in Olkaria IV accepted the mediation results, regardless of claims of the process' failure to meet other expectations including compensation of about USD 5,000 as disturbance allowance. The PAPs high expectations for the mediation reveal the inadequacy of the process to predict ability to meet agreed upon demands and to manage

---

<sup>43</sup> Afrizal, A., & Anderson, P., 'Industrial Plantations and Community Rights: Conflicts and Solutions. In J. McCarthy & K. Robinson (Eds.)', *Land and Development in Indonesia: Searching for the People's Sovereignty* (ISEAS–Yusof Ishak Institute 2016) <<https://www.cambridge.org/core/books/land-and-development-in-indonesia/industrial-plantations-and-community-rights-conflicts-and-solutions/9E903D8C2F3B8097B0F65EDB10CC7BAE>>.

<sup>44</sup> Nathan (n 23).

<sup>45</sup> Samsudin, Y.B. and Pirard, R. (n 11).

community's hopes. Although mediation involves forfeiting some claims, the acceptability of outcome was primarily driven by desire for peace. The forest resource conflicts mediation in South Asia,<sup>46</sup> where the agreement was much less than community's original demands and terrestrial entitlements, shows ability of that community to manage expectations. The residents were also tired of the protracted conflicts. The claimed PAPs' oppression in Olkaria and some incidents of manipulation by the developer and mediator's dictatorship could have instilled panic among the delegates, weakening their will to continue negotiating. However, the disagreements and betrayals among the representatives may have hampered their bargaining authority failing to agree on disturbance allowance, for instance. Elsewhere, the power of continued collective-action and effective campaigns changed the power relations between parties and improved the parties negotiating power;<sup>47</sup> an enabling condition for resolution of conflict.<sup>48</sup> In contrast, some plantation conflicts in Indonesia remained unresolved occasioned by significant power asymmetries<sup>49</sup> demonstrating the importance of improving procedural fairness in mediation.

The Olkaria IV mediation provided a host of insights. The government or any company intending to carry out a project in a community, should conduct comprehensive assessment of property ownership and rights to communal resources such as pasture during baseline studies to enable

---

<sup>46</sup> Dhiaulhaq, McCarthy and Yasmi (n 13).

<sup>47</sup> Ahmad Maryudi and others, 'The Emerging Power of Peasant Farmers in the Tenurial Conflicts over the Uses of State Forestland in Central Java, Indonesia' (2016) 67 Forest Policy and Economics 70 <<https://linkinghub.elsevier.com/retrieve/pii/S1389934115300484>> accessed 16 August 2020.

<sup>48</sup> Anna Zachrisson and Karin Beland Lindahl, 'Conflict Resolution through Collaboration: Preconditions and Limitations in Forest and Nature Conservation Controversies' (2013) 33 Forest Policy and Economics 39 <<https://linkinghub.elsevier.com/retrieve/pii/S1389934113000762>> accessed 16 August 2020.

<sup>49</sup> Afrizal, A., & Anderson, P. (n 43).

manage potential conflicts and avoid such a process. Adequate contribution of the residents in the decision-making process is critical. The agreement thereafter, would leave the parties content, reducing possibility of recurrence of conflicts. The mediation process needs to ensure that community apprehensions are addressed well for sustainability of the outcome. But, no matter how well the community mediation process is undertaken, some members who may be unhappy with the process and the results. However, such is democracy, where majority have their way and minority have their say.

Mediation was effectively demonstrated by the reduced conflicts, improved relationships between KenGen and the PAPs and their livelihoods. Yet, the absolute translation of the agreement to action would determine the results' sustainability. Proper negotiation of practical items for implementation is therefore, important in determining the extent to which the agreement would be implemented. Although KenGen would have had its way in the conflict, given the power imbalances in its favour, its willingness to enter into mediation demonstrated the desire to establish the project in a peaceful community.

Mediation should perhaps be applied during RAP negotiations, to possibly help save the projects from conflicts and related costs. The successful use of mediation in Olkaria presents an opportunity for its upscaling in resolution of the unavoidable developmental conflicts. Its relevance of resolving conflicts is enshrined and recognized in the Constitution of Kenya, 2010.<sup>50</sup> Article 159, directs the Courts to promote alternate mechanisms of alternative dispute resolution including mediation. This would help decongest overcrowded courts and accelerate access to justice while contributing to security and

---

<sup>50</sup> Muigwa Kariuki (n 8).

economic growth in the country.<sup>51</sup> Also, mediation could profit from the existing community structures including among the Maasai community<sup>52</sup> which could be strengthened through capacity building to facilitate peaceful resolution of conflicts.

## **Conclusion**

Developmental projects continue to be undertaken in the country, with unavoidable conflicts arising from community displacement. While numerous studies elsewhere have confirmed the application and effectiveness of mediation in managing conflicts over natural resources, its use remains low in Kenya. Also, there is a little review of mediation processes with incomprehensive documentation of their procedural issues. This study presents issues from a mediation that was applied successfully in resolving conflicts that arose from the implementation of the Olkaria IV geothermal project. They included the inadequate contribution of the PAPs in the process, its protraction, misinformation, negativity, and trust issues. The delegates' lacked a clear pathway for information dissemination among the PAPs. Expectations were unsatisfactorily met because of the variations with the knowledge, attitude, and practice. Mediation lessens suspicion among the PAPs and increases the community's exposure to different conflict resolution opportunities. An awareness campaign before mediation as an effective preparation tool and suitable engagement of the aggrieved parties, would improve the efficacy of the mediation exercise.

## **Acknowledgement**

The authors wish to greatly thank KenGen officials in Olkaria for approving access to the study site and the PAPs cooperation. We also wish to thank the research assistants, including Brian Parsambura,

---

<sup>51</sup> Uwazie (n 16).

<sup>52</sup> Sena Kanyinke (n 27).

Francis Lopsekey Olekool, Monica Sakayian, and David Kipayion for their perseverance and passion throughout the field study. Prof. Karanja Njoroge and the Village Elders are also acknowledged and appreciated for their support during this study. Much thanks to anonymous reviewers and informants who provided further insight and shared experiences that enabled answers to the study objectives.

## References

Afrizal, 'Third-Party Intervention in Terminating Oil Palm Plantation Conflicts in Indonesia: A Structural Analysis' (2015) 30 *Journal of Social Issues in Southeast Asia* 141

<[https://www.jstor.org/stable/24779832?casa\\_token=PL3JmEgSjQUAAAAA%3AqVLZFIsnTyO\\_iFABcZ8sKuem9OQcqdzgkjE7UYhuJC\\_kps-ZHPq2o2\\_wzeSIy\\_afkTggnR9ToqlaGRjKF3LT1m3ue-wE9gqcRcUQg\\_2KxtGVqXszdw&seq=1#metadata\\_info\\_tab\\_contents](https://www.jstor.org/stable/24779832?casa_token=PL3JmEgSjQUAAAAA%3AqVLZFIsnTyO_iFABcZ8sKuem9OQcqdzgkjE7UYhuJC_kps-ZHPq2o2_wzeSIy_afkTggnR9ToqlaGRjKF3LT1m3ue-wE9gqcRcUQg_2KxtGVqXszdw&seq=1#metadata_info_tab_contents)>

Afrizal, A., & Anderson, P., 'Industrial Plantations and Community Rights: Conflicts and Solutions. In J. McCarthy & K. Robinson (Eds.)', *Land and Development in Indonesia: Searching for the People's Sovereignty* (ISEAS–Yusof Ishak Institute 2016) <<https://www.cambridge.org/core/books/land-and-development-in-indonesia/industrial-plantations-and-community-rights-conflicts-and-solutions/9E903D8C2F3B8097B0F65EDB10CC7BAE>>

Amanda Kron and Jensen David, 'From Curse to Opportunity: Mediation of Natural Resource Conflicts' (*Voelkerrechtsblog, International Law and International Legal Thought*, 2016) <<https://voelkerrechtsblog.org/from-curse-to-opportunity-mediation-of-natural-resource-conflicts/>> accessed 15 November 2019

Bazeley, Patricia and Kristi Jackson Eds., *Qualitative Data Analysis with NVivo*. (2nd edn, SAGE publications limited 2013)

Bercovitch J and Jackson R, 'Negotiation or Mediation?: An Exploration of Factors Affecting the Choice of Conflict Management in International Conflict' (2001) 17 *Negotiation Journal* 59 <<http://doi.wiley.com/10.1111/j.1571-9979.2001.tb00227.x>> accessed 15 November 2019

Bercovitch Jacob and Lee Su-Mi, 'Mediating International Conflicts: Examining the Effectiveness of Directive Strategies' (2003) 8 *International Journal of Peace Studies* 1 <<http://www.jstor.org/stable/41852891>>

Brown O and Keating M, 'Addressing Natural Resource Conflicts' [2015] Chatham House for the Royal Institute of International Affairs 34

Chavot Philippe and others, 'Social Shaping of Deep Geothermal Projects in Alsace: Politics, Stakeholder Attitudes and Local Democracy' (2018) 6 *Geothermal Energy* 26 <<https://geothermal-energy-journal.springeropen.com/articles/10.1186/s40517-018-0111-6>> accessed 8 December 2019

Cheung Sai On, 'Mediation for Improved Conflict Resolution' (2010) 2 *Journal of Legal Affairs and Dispute Resolution in Engineering and Construction* 135

*Mediating Energy Project Implementation Conflicts, (2020) Journal of cmsd Volume 5(2))*  
*a Learning Curve, the Case of Olkaria IV Geothermal,*  
*Kenya: Lilian Namuma S. Kong'an , Raphael G. Wahome*  
*& Thuita Thenya*

<<http://ascelibrary.org/doi/10.1061/%28ASCE%29LA.1943-4170.0000035>>  
accessed 15 November 2019

Dhiaulhaq A, Gritten D and Bruyn TD, 'Mediating Forest Conflicts in Southeast Asia'  
[2014] The Center for People and Forests, Bangkok, Thailand. 32

Dhiaulhaq A, McCarthy JF and Yasmi Y, 'Resolving Industrial Plantation Conflicts  
in Indonesia: Can Mediation Deliver?' (2018) 91 Forest Policy and Economics 64  
<<https://linkinghub.elsevier.com/retrieve/pii/S1389934117302162>> accessed 14  
April 2020

Dhiaulhaq Ahmad, De Bruyn Toon and Gritten David, 'The Use and Effectiveness of  
Mediation in Forest and Land Conflict Transformation in Southeast Asia: Case Studies  
from Cambodia, Indonesia and Thailand' (2015) 45 Environmental Science & Policy  
132 <<https://linkinghub.elsevier.com/retrieve/pii/S1462901114002019>> accessed 15  
November 2019

Fiss OM, 'Against Settlement' (1984) 93 The Yale Law Journal 1073  
<<https://www.jstor.org/stable/796205?origin=crossref>> accessed 16 August 2020

Fund for Peace, 'Fragile States Index Annual Report 2019' (2019)  
<<file:///C:/Users/ACER/AppData/Roaming/Microsoft/Windows/Network%20Shortcuts/9511904-fragilestatesindex.pdf>>

Gentleman, Robert, *Computer Science and Data Analysis Series. R Programming for  
Bioinformatics.* (CRC Press 2008)

GIBB Africa, 'KenGen Olkaria IV (Domes) Geothermal Project in Naivasha District:  
Resettlement Action Plan for Olkaria IV Power Station' (2009)

—, 'Olkaria IV (Domes) Geothermal Project in Naivasha District: Resettlement  
Action Plan for Olkaria IV Power Station' (2012) Resettlement Action Plan

Hodgson Dorothy L., 'Women as Children: Culture, Political Economy, and Gender  
Inequality among Kisongo Maasai' (1999) 3 Nomadic Peoples 115  
<<http://www.ingentaconnect.com/content/10.3167/082279499782409451>> accessed  
8 December 2019

Hughes Lotte and Rogei Daniel, 'Feeling the Heat: Responses to Geothermal  
Development in Kenya's Rift Valley' [2020] Journal of Eastern African Studies 1  
<<https://www.tandfonline.com/doi/full/10.1080/17531055.2020.1716292>> accessed  
10 April 2020

Kariuki Muigua, 'Natural Resources and Conflict Management in East Africa' (2014)

***Mediating Energy Project Implementation Conflicts, (2020) Journal of cmsd Volume 5(2))***  
***a Learning Curve, the Case of Olkaria IV Geothermal,***  
***Kenya: Lilian Namuma S. Kong'an , Raphael G. Wahome***  
***& Thuita Thenya***

Karytsas Spyridon and others, 'Towards Social Acceptance of Geothermal Energy Power Plants' 7  
 <[https://www.researchgate.net/publication/333974365\\_Towards\\_social\\_acceptance\\_of\\_geothermal\\_energy\\_power\\_plants](https://www.researchgate.net/publication/333974365_Towards_social_acceptance_of_geothermal_energy_power_plants)>

Kombe EY and Muguthu J, 'Geothermal Energy Development in East Africa: Barriers and Strategies' [2018] Journal of Energy Research and Reviews 1  
 <<http://www.journaljenrr.com/index.php/JENRR/article/view/29722>> accessed 26 February 2020

Kressel, K., 'Mediation Revisited', *The handbook of conflict resolution: Theory and practice* (2006)

Kubota Hiromi and others, 'Determining Barriers to Developing Geothermal Power Generation in Japan: Societal Acceptance by Stakeholders Involved in Hot Springs' (2013) 61 Energy Policy 1079  
 <<https://linkinghub.elsevier.com/retrieve/pii/S0301421513004394>> accessed 8 December 2019

Maryudi A and others, 'The Emerging Power of Peasant Farmers in the Tenurial Conflicts over the Uses of State Forestland in Central Java, Indonesia' (2016) 67 Forest Policy and Economics 70  
 <<https://linkinghub.elsevier.com/retrieve/pii/S1389934115300484>> accessed 16 August 2020

Moore CW, *The Mediation Process: Practical Strategies for Resolving Conflict* (4th Edition, Jossey-Bass, A Wiley Brand 2014)

Muigua Kariuki, 'Managing Natural Resource Conflicts in Kenya through Negotiation and Mediation' 43  
 <[https://profiles.uonbi.ac.ke/kariuki\\_muigua/publications/managing-natural-resource-conflicts-kenya-through-negotiation-and-mediat](https://profiles.uonbi.ac.ke/kariuki_muigua/publications/managing-natural-resource-conflicts-kenya-through-negotiation-and-mediat)> accessed 15 November 2016

Nathan L, 'The Challenges Facing Mediation in Africa' (2009) AFRICA Mediators' Retreat 2009

Nwazi Joseph, 'Assessing the Efficacy of Alternative Dispute Resolution (ADR) in the Settlement of Environmental Disputes in the Niger Delta Region of Nigeria' [2017] Journal of Law and Conflict Resolution

Peluso NL and Vandergeest P, 'Genealogies of the Political Forest and Customary Rights in Indonesia, Malaysia, and Thailand' (2001) 60 The Journal of Asian Studies 761

*Mediating Energy Project Implementation Conflicts, (2020) Journal of cmsd Volume 5(2))*  
*a Learning Curve, the Case of Olkaria IV Geothermal,*  
*Kenya: Lilian Namuma S. Kong'an , Raphael G. Wahome*  
*& Thuita Thenya*

<[https://www.cambridge.org/core/product/identifier/S0021911800009487/type/journal\\_article](https://www.cambridge.org/core/product/identifier/S0021911800009487/type/journal_article)> accessed 16 August 2020

Sahide MAK and Giessen L, 'The Fragmented Land Use Administration in Indonesia – Analysing Bureaucratic Responsibilities Influencing Tropical Rainforest Transformation Systems' (2015) 43 Land Use Policy 96  
<<https://linkinghub.elsevier.com/retrieve/pii/S0264837714002464>> accessed 16 August 2020

Samsudin, Y.B. and Pirard, R., 'Conflict Mediation in Industrial Tree Plantations in Indonesia: Status and Prospects' (Center for International Forestry Research (CIFOR) 2014)  
<<http://www.cifor.org/library/5443/conflict-mediation-in-industrial-tree-plantations-in-indonesia-status-and-prospects>> accessed 15 November 2019

Schade Jeanette, 'Kenya "Olkaria IV" Case Study Report: Human Rights Analysis of the Resettlement Process' 199 <<https://nbn-resolving.org/urn:nbn:de:0168-ssoar-51409-6>> accessed 29 November 2019

Sena Kanyinke, *Renewable Energy Projects and the Rights of Marginalised* (IWGIA 2015)

Sternlight JR, 'Is Alternative Dispute Resolution Consistent with the Rule of Law? Lessons from Abroad' (2007) 56 Depaul Law Review 25  
<[https://heinonline.org/HOL/Page?collection=journals&handle=hein.journals/deplr56&id=581&men\\_tab=srchresults](https://heinonline.org/HOL/Page?collection=journals&handle=hein.journals/deplr56&id=581&men_tab=srchresults)>

Summers RS, 'A Formal Theory of the Rule of Law\*' (1993) 6 Ratio Juris 127  
<<http://doi.wiley.com/10.1111/j.1467-9337.1993.tb00142.x>> accessed 24 July 2020

'The Constitution of Kenya, 2010' National Council for Law Reporting with the Authority of the Attorney General 194

Uwazie EE, 'Alternative Dispute Resolution in Africa: Preventing Conflict and Enhancing Stability' 6 <<https://www.semanticscholar.org/paper/Alternative-Dispute-Resolution-in-Africa-%3A-Conflict-ERNEST-E./72d38368660023a5091ca820ceaec5f311c662c7>> accessed 15 November 2019

Vargas Payera S, 'Understanding Social Acceptance of Geothermal Energy: Case Study for Araucanía Region, Chile' (2018) 72 Geothermics 138  
<<https://linkinghub.elsevier.com/retrieve/pii/S0375650517300913>> accessed 18 February 2020

Vindeløv V, *Reflexive Mediation: With a Sustainable Perspective* (DJØF 2012)

***Mediating Energy Project Implementation Conflicts, a Learning Curve, the Case of Olkaria IV Geothermal, Kenya: Lilian Namuma S. Kong'an , Raphael G. Wahome & Thuita Thenya*** (2020) *Journal of cmsd Volume 5(2)*

Wall JA, Stark JB and Standifer RL, 'Mediation: A Current Review and Theory Development' (2001) 45 Journal of Conflict Resolution 370 <<http://journals.sagepub.com/doi/10.1177/0022002701045003006>> accessed 15 November 2019

Yurdi Yasmi, Lisa Kelley and Thomas Enters, *Conflict over Forests and Land in Asia* (RECOFTC 2010) <[https://www.researchgate.net/publication/287508511\\_Conflict\\_over\\_forests\\_and\\_land\\_in\\_Asia](https://www.researchgate.net/publication/287508511_Conflict_over_forests_and_land_in_Asia)> accessed 15 November 2019

Zachrisson A and Beland Lindahl K, 'Conflict Resolution through Collaboration: Preconditions and Limitations in Forest and Nature Conservation Controversies' (2013) 33 Forest Policy and Economics 39 <<https://linkinghub.elsevier.com/retrieve/pii/S1389934113000762>> accessed 16 August 2020

## Exploring Alternative Sources of Energy in Kenya

By: **Kariuki Muigua\***

### **Abstract**

*The Kenyan Government has been preparing to set up nuclear reactors in the country as an alternative source of energy to add to the national grid as part of the plans to meet the country's development blueprint, Vision 2030 and the Big Four Agenda. Nuclear energy, while a plausible source of energy, comes with its good share of challenges. This paper critically evaluates the viability of different sources of energy including nuclear energy by drawing lessons from other countries where these sources have been explored and either succeeded or failed. The paper also offers recommendations on the possible sources of energy that are worth exploring in the Kenyan context.*

### **1. Introduction**

With the ever growing population, advanced technological developments and climate change, the world continues to face challenges as far as energy needs are concerned.<sup>1</sup> In order to meet its energy requirements, the Government of Kenya set out to install nuclear energy reactors as an alternative source of renewable energy in addition to hydropower, wind and geothermal power, among others, in the country.<sup>2</sup> The country's energy needs are expected to rise due to

---

\* **PhD in Law (Nrb), FCI Arb (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; CASELAP.**

<sup>1</sup> David Bodansky, 'Nuclear Energy: Principles, Practices, and Prospects' (CERN Document Server, 2008) <<https://cds.cern.ch/record/1109377>> accessed 19 August 2020.

<sup>2</sup> Republic of Kenya, *National Energy Policy*, October, 2018 <[https://kplc.co.ke/img/full/BL4PdOqKtxFT\\_National%20Energy%20Policy%20October%20202018.pdf](https://kplc.co.ke/img/full/BL4PdOqKtxFT_National%20Energy%20Policy%20October%20202018.pdf)> accessed 30 September 2020.

population increase as well as the country's development blueprint, Vision 2030 and the Big Four Agenda.<sup>3</sup> Kenya expects peak demand to top 22,000 megawatts by 2031, partly due to industrial expansion, a component in Kenyatta's Big Four Agenda.<sup>4</sup>

Currently, it is estimated that hydropower accounts for 35 percent of Kenya's electricity generation, with the rest coming from geothermal, wind and diesel powered plants.<sup>5</sup> Notably, Kenya is not the only African country that is on the journey towards establishing their first nuclear plant, as way of diversifying the countries' energy mix to improve their electricity generation capacity.<sup>6</sup> However, while Kenya is at an advanced stage with the nuclear power plant establishment, there have been serious concerns relating to the technical issues associated with storage, transportation and the disposal of radioactive material and waste.<sup>7</sup> This is in view of the nuclear disasters that have occurred in the past and recently across the globe.<sup>8</sup> There is a need for the Government

---

<sup>3</sup> Kiprop, Eliud, Kenichi Matsui, and Nicholas Maundu. "Can Kenya supply energy with 100% renewable sources?." In *5th International Conference on Environment and Renewable Energy*, pp. 18-19. 2017 <[https://www.researchgate.net/publication/328925970\\_Can\\_Kenya\\_Supply\\_Energy\\_With\\_100\\_Renewable\\_Sources](https://www.researchgate.net/publication/328925970_Can_Kenya_Supply_Energy_With_100_Renewable_Sources)> accessed 30 September 2020.

<sup>4</sup> 'Kenya on Course for \$5 Billion Nuclear Plant to Power Industry' *Bloomberg.com* (4 August 2020) <<https://www.bloomberg.com/news/articles/2020-08-04/kenya-on-course-for-5-billion-nuclear-plant-to-power-industry>> accessed 19 August 2020.

<sup>5</sup> Republic of Kenya, *National Energy Policy*, October, 2018.

<sup>6</sup> 'A Case for Nuclear Energy in Kenya' (*The Star*) <<https://www.the-star.co.ke/opinion/columnists/2019-04-05-a-case-for-nuclear-energy-in-kenya/>> accessed 19 August 2020.

<sup>7</sup> 'A Case for Nuclear Energy in Kenya' (*The Star*) <<https://www.the-star.co.ke/opinion/columnists/2019-04-05-a-case-for-nuclear-energy-in-kenya/>> accessed 19 August 2020.

<sup>8</sup> 'A Brief History of Nuclear Accidents Worldwide | Union of Concerned Scientists' <<https://www.ucsusa.org/resources/brief-history-nuclear-accidents-worldwide>> accessed 6 October 2020; Daniel Bukszpan, '11 Nuclear Meltdowns and Disasters' (*CNBC*, 16 March 2011) <<https://www.cnbc.com/2011/03/16/11-Nuclear-Meltdowns-and-Disasters.html>> accessed 6 October 2020; 'Nuclear Reactor Accidents - History and Legacies' (*Atomic Heritage Foundation*) <<https://www.atomicheritage.org/history/nuclear-reactor-accidents-history-and-legacies>> accessed 6 October 2020; 'Chernobyl Was the World's Worst Nuclear

of Kenya and other stakeholders to be wary of the same even as the country ventures into nuclear energy production.

## **2. Energy Sources in Kenya: the Challenges**

The Ministry of Energy observes that energy is one of the key enablers of Kenya's Vision 2030 and the Big 4 Agenda development programs and thus, Kenya treats energy security as a matter of national priority.<sup>9</sup> This is based on the fact that the Third Medium Plan 2017-2022 identifies energy as the country's driver into "a newly-industrializing, middle-income economy, providing a high quality of life to all its citizens in a clean and secure environment," and as a result, Kenya considers access to competitively-priced, reliable, quality, safe and sustainable energy as an essential ingredient for the country's social – economic development.<sup>10</sup>

It has rightly been pointed out that in the past decade the country has grappled with the challenge of unreliable, expensive and unsustainable energy use supporting a stagnating industrial and manufacturing base. This is due to aging energy infrastructure that can no longer meet the modern day requirements as envisaged in the country's economic blueprint, the Kenya Vision 2030.<sup>11</sup>

As Kenya seeks to realize the national blueprint for development and the sustainable development agenda as far as energy generation is concerned, there has been efforts to diversify energy sources in the

---

Power Plant Accident. Here's How It Compares to Fukushima and Three Mile Island.' (*Business Insider Africa*, 12:20 200AD) <<https://africa.businessinsider.com/tech/chernobyl-was-the-worlds-worst-nuclear-power-plant-accident-heres-how-it-compares-to/1x12t91>> accessed 6 October 2020.  
<sup>9</sup> kawi, 'Background' (*Ministry of Energy*) <[https://energy.go.ke/?page\\_id=439](https://energy.go.ke/?page_id=439)> accessed 28 September 2020.

<sup>10</sup> Ibid.

<sup>11</sup> Owiro, D., G. Poquillon, K. S. Njonjo, and C. Oduor. "Situational analysis of energy industry, policy and strategy for Kenya." *Institute of Economic Affairs* (2015) <[https://media.africaportal.org/documents/Situational-Analysis-of-Energy-Industry-Policy-and--Strategy-for-Kenya\\_1.pdf](https://media.africaportal.org/documents/Situational-Analysis-of-Energy-Industry-Policy-and--Strategy-for-Kenya_1.pdf)> accessed 28 September 2020, p.5.

country. It has been observed that Kenya is moving towards procuring more of its additional power from wind and solar and with the substantial growth in hydro, wind and solar energy in the recent years, this has led to a decline in generation from oil, gas and coal sources and electricity imports.<sup>12</sup>

Indeed, Kenya is considered the world's 8th largest geothermal power producer, has the continent's largest wind farm, a vibrant off grid energy market, and an aggressive last mile campaign to connect every citizen.<sup>13</sup> As at 2015, it was estimated that the energy sector relies on three main sources of energy, biomass, petroleum and electricity, at 68%, 21% and 9% of total energy consumption in Kenya, with biomass constituting the largest source of energy consumed in Kenya in the form of wood fuel and charcoal, extensively used in the rural areas by mostly poor households for cooking and heating purposes, as well as small business, principally kiosks and restaurants within urban centres.<sup>14</sup>

Some reports show that Kenya has had one of the fastest increases in electrification rates within sub-Saharan Africa since 2013: by 2018, 75% of the population had access, with the Government aiming to reach full access by 2022.<sup>15</sup> Notably, Government's Kenya Vision 2030 aspires to transform Kenya from low income status into a middle-income country and a key element to this vision is a lower cost of power

---

<sup>12</sup> Research and Markets, 'Insights on the Energy Requirements of Kenya to 2050 - Moving Towards Procuring More Power from Wind and Solar' (*GlobeNewswire News Room*, 11 September 2020) <<http://www.globenewswire.com/news-release/2020/09/11/2092394/0/en/Insights-on-the-Energy-Requirements-of-Kenya-to-2050-Moving-Towards-Procuring-more-Power-from-Wind-and-Solar.html>> accessed 24 September 2020.

<sup>13</sup> 'Our Latest Thoughts on Kenya's Power Sector Challenges' (*Energy For Growth*) <<https://www.energyforgrowth.org/blog/our-latest-thoughts-on-kenyas-power-sector-challenges/>> accessed 21 September 2020.

<sup>14</sup> Owiro, D., G. Poquillon, K. S. Njonjo, and C. Oduor. "Situational analysis of energy industry, policy and strategy for Kenya." *Institute of Economic Affairs* (2015), p.7.

<sup>15</sup> 'Kenya Energy Outlook – Analysis' (*IEA*) <<https://www.iea.org/articles/kenya-energy-outlook>> accessed 21 September 2020.

reaching more broadly across the population.<sup>16</sup> As the African Continent seeks to invest in infrastructural development, including the power sector, Kenya is touted as one of the countries that have made notable progress. For instance, it is noted that the Programme for Infrastructure Development in Africa is forecasting an additional 140,000 MW of power over for the East African Power Pool where Kenya's share of this is 13,852 MW of planned peak demand by 2038 or an increase of just over 11,000 MW over this 20-year period.<sup>17</sup>

Despite this positive report, Kenya's energy sector is faced by a myriad of challenges. As far as the use of clean energy is concerned, it is estimated that two-thirds of Kenya's energy currently comes from bioenergy.<sup>18</sup> It has been observed that as Kenya seeks to move from non-renewable energy sources to renewable energy sources, moving an economy which relies heavily on wood fuel and biomass as its largest energy source, to achieve sustainable energy use through the gradual increase in the use of renewable energy sources that are often expensive due to the technology deployed, in the face of oil and coal discoveries that could be more readily accessible in spite of its known effects on the environment is a great challenge.<sup>19</sup>

While independent power producers have made considerable efforts to produce enough power to run the country, there have been challenges

---

<sup>16</sup> Research and Markets Ltd, 'Kenyan Energy Requirements Forecasted to 2050 - Research and Markets' <<https://www.researchandmarkets.com/reports/5136031/kenyan-energy-requirements-forecasted-to-2050>> accessed 24 September 2020.

<sup>17</sup> Research and Markets, 'Insights on the Energy Requirements of Kenya to 2050 - Moving Towards Procuring More Power from Wind and Solar' (*GlobeNewswire News Room*, 11 September 2020) <<http://www.globenewswire.com/news-release/2020/09/11/2092394/0/en/Insights-on-the-Energy-Requirements-of-Kenya-to-2050-Moving-Towards-Procuring-more-Power-from-Wind-and-Solar.html>> accessed 24 September 2020.

<sup>18</sup> 'Kenya Energy Outlook – Analysis' (*IEA*) <<https://www.iea.org/articles/kenya-energy-outlook>> accessed 21 September 2020.

<sup>19</sup> Owiro, D., G. Poquillon, K. S. Njonjo, and C. Oduor. "Situational analysis of energy industry, policy and strategy for Kenya." *Institute of Economic Affairs* (2015), p. 7.

with uptake of the same by the Kenya Power and Lighting Company Plc (KPLC). For instance, in the recent times and partly due to the Corona Virus (Covid-19) pandemic, there have been reports that measures to contain the pandemic have led to reduced demand for power especially among the commercial consumers who account for over 65% of the power use in the country.<sup>20</sup> Reports also indicate that KPLC has prioritized the uptake of geothermal at 39.5 per cent, hydro at 33.9 per cent, wind at 14 per cent, diesel at 9.7 per cent with other sources like solar, imports from Uganda and co-generation accounting for about three per cent.<sup>21</sup> This has thus left some of the producers with excess power.<sup>22</sup> This shows that Kenya's main consumers of electricity are commercial businesses and when these run into problems, the independent power producers are left stranded. This happens while there are still reports that there are homes still not connected to the grid despite the Government's best efforts to do so. Thus, even as the Government looks for ways to produce cleaner power, there is also a need to address the disconnect between production and take up of the power.

It is estimated that Kenya's Lake Turkana wind farm and its 365 turbines make for a generating capacity of more than 300MW, creating one of the most productive projects anywhere in the world.<sup>23</sup> Wind power has become a key contributor to the national grid to the extent that where

---

<sup>20</sup> 'Consumers Pay the Price as Covid Electricity Cuts Hit Turkana Project - The East African' Monday September 14 2020  
<<https://www.theeastafrican.co.ke/tea/business/consumers-pay-the-price-as-covid-electricity-cuts-hit-turkana-project-1939124>> accessed 1 October 2020.

<sup>21</sup> 'Consumers Pay the Price as Covid Electricity Cuts Hit Turkana Project - The East African' Monday September 14 2020  
<<https://www.theeastafrican.co.ke/tea/business/consumers-pay-the-price-as-covid-electricity-cuts-hit-turkana-project-1939124>> accessed 1 October 2020.

<sup>22</sup> Ibid.

<sup>23</sup> 'What's Driving Wind Power in Kenya and What Challenges Lie in Wait?' <<https://www.nsenenergybusiness.com/features/wind-power-kenya-challenges/>> accessed 24 September 2020.

there is interruption in its production, consumers have ended paying more for electricity in the country.<sup>24</sup>

Notably, the Lake Turkana Wind Power (LTWP) has been allocated a maximum production quota of 210MW, against an installed capacity of 310MW.<sup>25</sup> While this has been attributed to the Covid-19 pandemic that afflicted almost the whole world in 2020, it raises a concern as to whether the power producers' major customers are only the commercial users. This is because, it has already been pointed out that there are households that still mainly rely on kerosene and biomass as their main source of energy for their inability to afford electricity. Thus, even as we vouch for increased transition to renewable energy by way of increased production, this scenario points out the fact that there is more than availability of the renewable energy: the same must not only be made available but must also be made affordable to the local 'mwananchi' (citizen).

### **3. Nuclear Power as a Substitute for Fossil Fuels**

It has been noted that many countries are reconsidering the role of nuclear energy in their energy mix, as a means to alleviate the concerns over climate change, security of energy supply and the price and price volatility of fossil fuels.<sup>26</sup>

Thus, the need for alternative sources of energy has been fueled by the combination of climate change fears and a continued growth in energy

---

<sup>24</sup> 'Consumers Pay the Price as Covid Electricity Cuts Hit Turkana Project - The East African' <<https://www.theeastafrican.co.ke/tea/business/consumers-pay-the-price-as-covid-electricity-cuts-hit-turkana-project-1939124>> accessed 1 October 2020.

<sup>25</sup> 'Consumers Pay the Price as Covid Electricity Cuts Hit Turkana Project - The East African' <<https://www.theeastafrican.co.ke/tea/business/consumers-pay-the-price-as-covid-electricity-cuts-hit-turkana-project-1939124>> accessed 1 October 2020.

<sup>26</sup> Gordelier, Stan, and Ron Cameron. "Comparing nuclear accident risks with those from other energy sources." *Nucl Dev* (2010): 33-40, p.9; Strupczewski, A. "Accident risks in nuclear-power plants." *Applied Energy* 75 (2003): 79-86.

demand as a way of moving away from the global fossil fuel addiction.<sup>27</sup> Currently, it is estimated that nuclear fission as one such alternative accounts for 14% of global electricity generation and has the potential to generate significantly more.<sup>28</sup> The proponents of use of nuclear energy argue that it has the potential to reduce pollution, cut greenhouse gas emissions, and help countries attain more energy independence.<sup>29</sup> The global legal framework on production and use of nuclear energy governs key issues relating to the use and safety of nuclear energy and all countries venturing into this territory are expected to abide by the same. Specifically, the existing international nuclear liability regime is based on the Convention on Third Party Liability in the Field of Nuclear Energy of 29 July 1960, as amended by the Additional Protocol of 28 January 1964 and by the Protocol of 16 November 1982 (1960 Paris Convention) and the Vienna Convention on Civil Liability for Nuclear Damage (1963 Vienna Convention), which set forth the basic principles of nuclear liability law.<sup>30</sup> These principles include: the operator of a nuclear installation is exclusively liable for nuclear damage; strict (no fault) liability is imposed on the operator; exclusive jurisdiction is granted to the courts of one State, to the exclusion of the courts in other States; and liability may be limited in amount and in time.<sup>31</sup> The International Atomic Energy Agency is the main institution that oversees the implementation of these legal instruments among other functions.<sup>32</sup> Countries such as France have

---

<sup>27</sup> 'Nuclear Power: The Good, the Bad and the Ugly' <<https://sites.google.com/site/asaksdfuyhlaku/>> accessed 8 September 2020.

<sup>28</sup> Ibid.

<sup>29</sup> 'International Politics - Nuclear Energy' <<https://sites.google.com/a/ncsu.edu/nuclear-energy/politics/foreign>> accessed 8 September 2020.

<sup>30</sup> Gioia, Andrea, "The 1997 Vienna Convention on Civil Liability for Nuclear Damage and the 1997 Convention on Supplementary Compensation. Explanatory Texts." (2007): 5-99 <[https://www-pub.iaea.org/MTCD/Publications/PDF/P1768\\_web.pdf](https://www-pub.iaea.org/MTCD/Publications/PDF/P1768_web.pdf)> accessed 8 September 2020.

<sup>31</sup> Ibid, pp. 1-2.

<sup>32</sup> 'International Atomic Energy Agency | Nuclear Energy for Peaceful Uses | NTI' <<https://www.nti.org/learn/treaties-and-regimes/international-atomic-energy->

been using nuclear energy as their biggest contributor to domestic electricity needs.<sup>33</sup> However, it should be noted that even such countries as France and Germany that have far much advanced technology and regulatory frameworks in place for nuclear energy are also cutting down on their use of nuclear energy for its potential negative effects if not well handled.<sup>34</sup>

#### **4. Nuclear Energy in Kenya: Legal and Institutional Framework**

The preferred site for the nuclear plant in the country is Tana River County, near the Kenyan coast which was preferred after studies across three regions. The plant will be developed with a concessionaire under a build, operate and transfer model.<sup>35</sup> It is noteworthy that Kenya is still at a nascent stage in its plans to set up nuclear reactors, especially as far as regulatory frameworks are concerned.

##### **4.1 Nuclear Power and Energy Agency (NuPEA)**

The Nuclear Power and Energy Agency, formerly Kenya Nuclear Electricity Board (KNEB), is a State Corporation established under the Energy Act 2019.<sup>36</sup> The Agency is charged with, inter alia: being the nuclear energy programme implementing organization and promoting the development of nuclear electricity generation in Kenya; and

---

agency/> accessed 6 October 2020; See also Convention on Third Party Liability in the Field of Nuclear Energy and the Vienna Convention on Civil Liability for Nuclear Damage and the 1997 Vienna Convention on Civil Liability for Nuclear Damage and the 1997 Convention on Supplementary Compensation for Nuclear Damage.

<sup>33</sup> 'Nuclear Power in France | French Nuclear Energy - World Nuclear Association' <<https://www.world-nuclear.org/information-library/country-profiles/countries-a-f/france.aspx>> accessed 6 October 2020; Velasquez, Carlos E., Fidellis BGL e Estanislau, Antonella L. Costa, and Claubia Pereira. "Assessment of the French nuclear energy system—A case study." *Energy Strategy Reviews* 30 (2020): 100513.

<sup>34</sup> • Nuclear Reactors: Permanent Shutdowns by Country Worldwide 2020 | Statista' <<https://www.statista.com/statistics/513639/number-of-permanent-nuclear-reactor-shutdowns-worldwide/>> accessed 6 October 2020.

<sup>35</sup> 'Kenya on Course for \$5 Billion Nuclear Plant to Power Industry' *Bloomberg.com* (4 August 2020) <<https://www.bloomberg.com/news/articles/2020-08-04/kenya-on-course-for-5-billion-nuclear-plant-to-power-industry>> accessed 19 August 2020.

<sup>36</sup>

carrying out research, development and dissemination activities in the energy and nuclear power sector.<sup>37</sup> The Agency is therefore expected to work closely with the other stakeholders in the energy sector to oversee the setting up and successful running of nuclear energy production projects in the country.

## **4.2 Nuclear Regulatory Act 2019**

The Nuclear Regulatory Bill 2018 was first published by Parliament on November 19, 2018.<sup>38</sup> The Bill has since been enacted as law under *Nuclear Regulatory Act, 2019*<sup>39</sup> which was enacted to provide for a comprehensive framework for the regulation of safe, secure and peaceful utilization of atomic energy and nuclear technology; the production and use of radiation sources and the management of radioactive waste; the repeal of the Radiation Protection Act and for connected purposes.<sup>40</sup> While the Act is quite comprehensive, there will be need for constant review as the stakeholders identify what works and what challenges arise in the course of its implementation.

## **5. Nuclear Energy in Kenya: Getting it Right**

Some commentators on the issue have highlighted some of the issues that have made the general public uncomfortable with the idea of Kenya turning to nuclear energy including: lack of properly trained manpower, the overall cost of the project, suitability of the sites where nuclear plants are to be built and nuclear disaster management.<sup>41</sup> However, even as the Government proceeds with the project, there is a need to consider and continually address the issues discussed hereunder to minimize the

---

<sup>37</sup> Sec. 56, Energy Act, No. 1 of 2019, Laws of Kenya.

<sup>38</sup> Nuclear Regulatory Bill 2018, Kenya Gazette Supplement No.143 (National Assembly Bills No.27).

<sup>39</sup> Nuclear Regulatory Act, No. 29 of 2019, Laws of Kenya.

<sup>40</sup> Ibid, Preamble.

<sup>41</sup> 'A Case for Nuclear Energy in Kenya' (*The Star*) <<https://www.the-star.co.ke/opinion/columnists/2019-04-05-a-case-for-nuclear-energy-in-kenya/>> accessed 19 August 2020.

risk of coming face to face with the potential ugly consequences of mishandling the nuclear reactors.

### **5.1 Capacity Building**

Considering that there are hardly any nuclear engineers currently working for the Nuclear Power and Energy Agency, and despite it doing a lot to ensure the existing engineers are trained and mentored abroad, the Government of Kenya through the agency has been rolling out annual training programmes targeting Kenyans in various fields to build adequate capacity for the country's nuclear power programme.<sup>42</sup> The training mostly comprises of short and long term programmes in partnership with local and international institutions.<sup>43</sup> In the long run, the Government needs to invest in local institutions to enhance their capacity for training.

### **5.2 Public Awareness**

Considering that nuclear energy is a completely new concept among the Kenyan people, there is a need for authorities to sensitise the public on the same. It is commendable that there have been efforts by the relevant authorities to not only organise public forums but also organise primary and secondary schools' writing competitions on nuclear energy.<sup>44</sup> This should continue in order to address any concerns that the public may have and also for ensuring that there is clear communication among all stakeholders. A well informed public can process and appreciate any information that is disseminated and it also makes it easier for the

---

<sup>42</sup> 'A Case for Nuclear Energy in Kenya' (*The Star*) <<https://www.the-star.co.ke/opinion/columnists/2019-04-05-a-case-for-nuclear-energy-in-kenya/>> accessed 19 August 2020.

<sup>43</sup> 'A Case for Nuclear Energy in Kenya' (*The Star*) <<https://www.the-star.co.ke/opinion/columnists/2019-04-05-a-case-for-nuclear-energy-in-kenya/>> accessed 19 August 2020.

<sup>44</sup> 'NuPEA 2020 Essay Contest' <<https://nuclear.co.ke/index.php/en/nupea-2020-essay-contest>> accessed 20 August 2020; 'Library' <<https://nuclear.co.ke/index.php/en/library>> accessed 20 August 2020.

Government to tap into any potential talents out there seeking to pursue knowledge and expertise in the area of nuclear energy production.

## **6. Lessons from Elsewhere: Making the Best of Nuclear Power**

It is estimated that currently, over thirty countries produce and use nuclear energy, with some, like France, producing large portions of their electricity from nuclear power, and others like Brazil and the Netherlands producing small percentages of electricity by nuclear power.<sup>45</sup> Notably, some countries like China are investing heavily into construction of new plants and others like Germany have long term plans to phase out their plants.<sup>46</sup> However, a few of the major players as highlighted below demonstrate that even as Kenya seeks to start nuclear power project, the Government should consider moving more towards other sources of renewable energy. Kenya is already hailed as one of the notable producers of renewable energy such as wind power and geothermal power. There is a need to explore these at a higher scale because while they are not cheap to produce, nuclear energy may even prove more expensive and complicated to run due to the potential risks.

### **6.1 France**

As at September 2020, it was estimated that France derives about 75% of its electricity from nuclear energy, due to a long-standing policy based on energy security, making France one of the world's largest net exporter of electricity due to its very low cost of generation, and gains over €3 billion per year from this.<sup>47</sup> In addition, the country has been very active in developing nuclear technology such as reactors and especially fuel products and services have been a significant export.<sup>48</sup>

---

<sup>45</sup> 'International Politics - Nuclear Energy'

<<https://sites.google.com/a/ncsu.edu/nuclear-energy/politics/foreign>> accessed 8 September 2020.

<sup>46</sup> Ibid.

<sup>47</sup> 'Nuclear Power in France | French Nuclear Energy - World Nuclear Association'

<<https://www.world-nuclear.org/information-library/country-profiles/countries-a-f/france.aspx>> accessed 4 October 2020.

<sup>48</sup> Ibid.

According to the available data, the total country's electricity generation in 2017 was 562 TWh broken down as follows: nuclear 398TWh (71%); hydro 55.1 TWh (10%); natural gas 40.4 TWh (7%); wind 24.7 TWh (4%); coal 15.1 TWh (3%); biofuels & waste 10.2 TWh; (2%); solar 10.2 TWh (2%); oil 7.4 TWh (1%).<sup>49</sup> Despite this success in generation of nuclear power, reports from as recent as January 2020 indicate that the Government of France policy is to reduce reliance on nuclear energy from 75% to 50% of the country's electricity by 2035 by bringing in more renewable power.<sup>50</sup> In addition, some of the challenges that have led to the closure of some of the reactors include but are not limited to safety-related issues reported at some plants over the past several years, including non-lethal radioactive contamination of workers, electrical fault, cracks in a reactor cover, a chemistry error, water pollution, and a fuel leak.<sup>51</sup> France has also been reacting to pressure from its neighbours including Germany which has been arguing that "nuclear power is not a climate savior. It is risky, expensive and leaves behind radioactive waste for thousands of generations."<sup>52</sup>

Kenya should therefore anticipate and address similar concerns in time and periodic review of the country's performance is critical.

---

<sup>49</sup> Ibid.

<sup>50</sup> 'France to Cut Nuclear Energy Reliance by 2035: Minister | Reuters' <<https://www.reuters.com/article/us-france-nuclearpower/france-to-cut-nuclear-energy-reliance-by-2035-minister-idUSKCN1NN0OK>> accessed 4 October 2020; Darrell Proctor, 'Last Reactor at Oldest French Nuclear Plant Going Offline' (*POWER Magazine*, 28 June 2020) <<https://www.powermag.com/last-reactor-at-oldest-french-nuclear-plant-going-offline/>> accessed 4 October 2020; Jake Stones, 'French Strategy Boasts Largest 2030 Electrolyser Hydrogen Capacity' (*ICIS Explore*) <<https://www.icis.com/explore/resources/news/2020/09/11/10551839/french-strategy-boasts-largest-2030-electrolyser-hydrogen-capacity>> accessed 4 October 2020.

<sup>51</sup> Darrell Proctor, 'Last Reactor at Oldest French Nuclear Plant Going Offline' (*POWER Magazine*, 28 June 2020) <<https://www.powermag.com/last-reactor-at-oldest-french-nuclear-plant-going-offline/>> accessed 4 October 2020.

<sup>52</sup> Deutsche Welle ([www.dw.com](http://www.dw.com)), 'France Shuts down First Reactor of Fessenheim Nuclear Plant near German Border | DW | 22.02.2020' (*DW.COM*) <<https://www.dw.com/en/france-shuts-down-first-reactor-of-fessenheim-nuclear-plant-near-german-border/a-52466064>> accessed 4 October 2020.

## **6.2 Germany**

Germany itself currently has six nuclear power plants operating all of which are all scheduled to be shut down by the end of 2022.<sup>53</sup> The 2011 Fukushima nuclear disaster in Japan led to widespread anti-atomic-power protests across Germany after which it is reported that German Chancellor Angela Merkel announced that all plants would be closed over the next decade, making Germany the second country after Italy to shut down all of its atomic energy stations.<sup>54</sup> This is a pointer that nuclear energy may not always be the answer and there is a need to tap into more renewable sources of energy in the country.

## **6.3 Sweden**

The construction of Sweden's first commercial nuclear power plant started on 1 August 1966 and grid connection was carried out on 19 August 1971, namely Oskarshamn-1, which was retired in 2017 after an estimated generation of total of 110 TWh over its lifetime.<sup>55</sup> The shutdown of O1 left eight reactors operating in Sweden, one at Oskarshamn (O3), four at Ringhals and three at Forsmark where Ringhals-2 was scheduled to shut down in 2019, with Ringhals-1 to

---

<sup>53</sup> Deutsche Welle ([www.dw.com](http://www.dw.com)), 'France Shuts down First Reactor of Fessenheim Nuclear Plant near German Border | DW | 22.02.2020' (*DW.COM*) <<https://www.dw.com/en/france-shuts-down-first-reactor-of-fessenheim-nuclear-plant-near-german-border/a-52466064>> accessed 4 October 2020; 'Germany Shuts down Atomic Plant as Nuclear Phase-out Enters Final Stretch | News | DW | 31.12.2019' <<https://www.dw.com/en/germany-shuts-down-atomic-plant-as-nuclear-phase-out-enters-final-stretch/a-51845616>> accessed 4 October 2020.

<sup>54</sup> Deutsche Welle ([www.dw.com](http://www.dw.com)), 'Germany Shuts down Atomic Plant as Nuclear Phase-out Enters Final Stretch | DW | 31.12.2019' (*DW.COM*) <<https://www.dw.com/en/germany-shuts-down-atomic-plant-as-nuclear-phase-out-enters-final-stretch/a-51845616>> accessed 4 October 2020; 'Germany Demolishes Cooling Tower of Former Nuclear Power Plant | News | DW | 09.08.2019' <<https://www.dw.com/en/germany-demolishes-cooling-tower-of-former-nuclear-power-plant/a-49967279>> accessed 4 October 2020.

<sup>55</sup> Ihédate and ihédate, 'Sweden Retires First Commercial Nuclear Reactor (Oskarshamn-1)' (*World Nuclear Industry Status Report*, 20 June 2017) <<https://www.worldnuclearreport.org/Sweden-Retires-First-Commercial-Nuclear-Reactor-Oskarshamn-1.html>> accessed 5 October 2020.

follow in 2020.<sup>56</sup> The closure decision was taken for commercial reasons, and although the price of electricity has recovered since 2015, the assessment was that it would not be possible to continue operation of either of the two reactors, for both economic and practical reasons.<sup>57</sup>

## **7. Realizing the Right to Clean and Sustainable Energy for all**

It has been argued that since energy cannot be created or destroyed, one of the best ways of ensuring that all Kenyans have access to clean energy is promoting energy efficiency.<sup>58</sup>

Goal 7 of the Sustainable Development Goals (SDGs) seeks to ensure that there is access to affordable, reliable, sustainable and modern energy for all.<sup>59</sup> Particularly, countries are expected to ensure that by 2030, there is universal access to affordable, reliable and modern energy services; substantial increase in the share of renewable energy in the global energy mix and doubling the global rate of improvement in energy efficiency.<sup>60</sup> Thus, away from nuclear energy, the Government of Kenya needs to put in place other measures to enhance the efficiency

---

<sup>56</sup> Ibid; 'Ringhals 2 Nuclear Plant Shuts Down' (*Vattenfall*) <<https://group.vattenfall.com/press-and-media/news--press-releases/newsroom/2019/ringhals-2-nuclear-plant-shuts-down>> accessed 5 October 2020; 'Ringhals 2 Enters Retirement: Corporate - World Nuclear News' <<https://world-nuclear-news.org/Articles/Ringhals-2-enters-retirement>> accessed 5 October 2020; 'Sweden Closes Nuclear Reactor after over 40 Yrs of Operation' (*AP NEWS*, 30 December 2019) <<https://apnews.com/article/a08facfe81523e85083e21ffe1ded681>> accessed 5 October 2020.

<sup>57</sup> 'Ringhals 2 Nuclear Plant Shuts Down' (*Vattenfall*) <<https://group.vattenfall.com/press-and-media/news--press-releases/newsroom/2019/ringhals-2-nuclear-plant-shuts-down>> accessed 5 October 2020.

<sup>58</sup> Munene, Martin Brown, Janes Ouma Odongo, and Anne Nyambane. "Energy Efficiency in Kenya." (2019). Available at <[https://ke.boell.org/sites/default/files/energy\\_efficiency\\_in\\_kenya\\_study\\_.pdf](https://ke.boell.org/sites/default/files/energy_efficiency_in_kenya_study_.pdf)> Accessed on 1 September 2020.

<sup>59</sup> UN General Assembly, *Transforming our world: the 2030 Agenda for Sustainable Development*, 21 October 2015, A/RES/70/1, SDG Goal 7.

<sup>60</sup> Ibid.

of the available sources of renewable energy as well nonrenewable sources while minimizing any negative effects that these may have on the environment or the public's health.

### **7.1 Expanding infrastructure and upgrading technology for supplying modern and sustainable energy services**

SDG Goal 7.b seeks to ensure that by 2030, countries expand infrastructure and upgrade technology for supplying modern and sustainable energy services for all especially in developing countries, in particular least developed countries, Small Island developing States and landlocked developing countries, in accordance with their respective programmes of support.

In line with the 'Last Mile Project', there is a need for the Government of Kenya to continually invest in infrastructure as well as upgrading energy technology to ensure that all Kenyans have access to modern and sustainable energy. As things stand, there is a huge number of Kenyans who still rely on non-renewable energy such as kerosene, wood and charcoal (biomass), thus making it difficult to achieve the minimum 10% tree cover as provided for under Article 69 of the Constitution of Kenya 2010.<sup>61</sup>

Under Kenya's Vision 2030 and specifically the National Renewable Energy Master Plan, the Government of Kenya hopes to 'promote development of renewable energy as an alternative source of energy which will include generation of energy from solar, wind, biogas, development of bio-energy including bio-ethanol and diesel value

---

<sup>61</sup> 'How Kenya Can Transform the Charcoal Sector and Create New Opportunities for Low-Carbon Rural Development on JSTOR' <[https://www.jstor.org/stable/resrep02811?seq=1#metadata\\_info\\_tab\\_contents](https://www.jstor.org/stable/resrep02811?seq=1#metadata_info_tab_contents)> accessed 21 September 2020.

chains and promotion of the use of improved cooking stoves and charcoal kilns, and re-afforestation of water towers.<sup>62</sup>

While these aspirations come with social, economic and political challenges, if achieved, they can go a long way in achieving the right to affordable and sustainable energy for all.

## **7.2 Mainstreaming Gender Issues in Energy and Addressing Poverty**

Some authors have argued that if the right to energy for all Kenyans is to be realized, then gender issues ought to be tackled. This is because of the important role that women play when it comes to meeting the energy needs of families especially in the rural setting.<sup>63</sup> Facilitating access to clean energy for women not only contributes to strengthening families and their health but also creates business opportunities for them.<sup>64</sup>

There is also a need to address poverty levels in the country. An economically empowered household is likely to have more choices when it comes to energy use for their domestic needs. Enhancing energy production in the country without addressing the socioeconomic factors that make energy unavailable to most households in the first place may not achieve much as far as adoption of cleaner sources of energy is concerned.

## **7.3 Promoting Energy Efficiency in Kenya**

A number of studies have been carried out on factors that affect energy efficiency practices and how the stakeholders in the Kenyan energy sector can enhance energy efficiency in the country. Some of the energy demand and consumption aspects that influence the adoption of energy

---

<sup>62</sup> 'Development of New and Renewable Sources of Energy | Kenya Vision 2030' <<https://vision2030.go.ke/project/development-of-new-and-renewable-sources-of-energy/>> accessed 30 September 2020.

<sup>63</sup> 'Women in Energy Means More Clean Energy for All across Africa' <<https://www.esi-africa.com/industry-sectors/future-energy/women-in-energy-means-more-clean-energy-for-all-across-africa/>> accessed 28 September 2020.

<sup>64</sup> Ibid.

efficiency practices in the country that have been identified include: the different types of energy being used domestically in the household level; the respondents' knowledge of energy efficiency; household energy consumption monitoring/tracking trends; respondents' perception of energy efficiency; knowledge on the potential energy efficiency practices; benefits associated with energy efficiency; and their knowledge regarding climate change dynamics and how these compare with domestic energy use.<sup>65</sup>

Promoting energy efficiency practices has been hailed not only as a way to ensure that there is enough energy for all but also as a climate mitigation measure.<sup>66</sup> As a result, Kenya's Climate Change Action Plan 2018–2022 has prioritized enhancement of energy efficiency as one of the priority actions to mitigate climate change in the country.<sup>67</sup> It is important to point out that producing power without promoting efficient consumption of the same will mean that it may be counterproductive as it may never be enough for everyone. There is need for continued promotion of diverse methods of enhancing efficiency across use of all sources of energy and in all sectors such as through ensuring that energy

---

<sup>65</sup> Munene, Martin Brown, Janes Ouma Odongo, And Anne Nyambane, 'Energy Efficiency in Kenya: Public Awareness, Strategies, Challenges & Opportunities | Heinrich Böll Stiftung | Nairobi Office Kenya, Uganda, Tanzania, Somalia/Somaliland' (Heinrich-Böll-Stiftung)

<<https://ke.boell.org/en/2019/09/16/energy-efficiency-kenya-public-awareness-strategies-challenges-opportunities>> accessed 3 October 2020; Zaharia, Alina, Maria Claudia Diaconeasa, Laura Brad, Georgiana-Raluca Lădaru, and Corina Ioanăş. "Factors Influencing Energy Consumption in the Context of Sustainable Development." *Sustainability* 11, no. 15 (2019): 4147; Temiz Dinç, Dilek, and Ece C. Akdoğan. "Renewable energy production, energy consumption and sustainable economic growth in Turkey: A VECM Approach." *Sustainability* 11, no. 5 (2019): 1273; Jian, Jianhui, Xiaojie Fan, Pinglin He, Hao Xiong, and Huayu Shen. "The effects of energy consumption, economic growth and financial development on CO2 emissions in China: A VECM Approach." *Sustainability* 11, no. 18 (2019): 4850.

<sup>66</sup> 'Promoting Energy Efficiency as a Climate Change Mitigation Action in Kenya | UNDP in Kenya' (UNDP) <<https://www.ke.undp.org/content/kenya/en/home/stories/2019/lecrd-promoting-energy-efficiency.html>> accessed 4 October 2020.

<sup>67</sup> Ibid.

efficient appliances are not only available but also affordable, there is a wider use of efficient technology to take advantage of the available sources of energy such as biomass to come up with the most efficient and less polluting forms of the same and even use of biogas in villages for lighting and cooking. As already pointed out, biomass provides about 69% of the country's overall energy requirements while petroleum accounts for about 22% and electricity about 9% and as at June, 2017, 65.6% of the electricity component was generated using renewable energy sources with fossil fuels providing the balance of 34.4%.<sup>68</sup> There is a need to expand the use of these sources to generate more electricity.

Private persons may also be considered for funding to come up with larger scale biogas production projects to light villages.<sup>69</sup> This will not only create employment for more people but will also promote cleaner energy technologies and climate change mitigation.

#### **7.4 Capacity Building for Adoption of Nuclear Power**

It is commendable that the Government of Kenya already put in place the Nuclear Power and Energy Agency as envisaged under the Energy Act, 2019 and also enacted the Nuclear Regulatory Act 2019. However, it is true that the Agency requires to work closely with other stakeholders across the board. While the Government has shown some efforts towards training of personnel to create expertise in nuclear power, there is a need for sustained and long term efforts for capacity building through training of engineers in industry and consultants as well as developing localized university and polytechnic level training in the country.

---

<sup>68</sup> Republic of Kenya, *National Energy Policy*, October, 2018, para. 3.

<sup>69</sup> Huber, Sebastian. "Small-scale biogas production from organic waste and application in mid-income countries—a case study of a Lebanese community." (2019) < <http://www.diva-portal.org/smash/get/diva2:1334609/FULLTEXT01.pdf>> accessed 4 October 2020.

## **8. Conclusion**

Some of the existing studies have concluded that although the government of Kenya has done so much to turn around energy use practices in the country, and the take up of these is increasing, most citizens still use crude energy sources basically wood, charcoal and crude fuels. There also seems to be a disconnect between the reported government efforts and achievements vis-à-vis actual public energy use practices pointing to both a communication gap and inability of the citizens to quickly take up these projects. Thus, while this paper supports the government's efforts to diversify the available sources of renewable energy in Kenya, there is also a need for continued public awareness campaigns to sensitize the public on the need for practicing energy efficiency regardless of the energy source in question. It is not just about affordability and availability of energy but also how efficiently the same is utilized.

Such energy sources as nuclear power, while viable in the country require continued consultations, creating public awareness and immense investment in radioactive waste handling and disposal for the sake of public health and environmental protection. Indeed, some commentators have argued that African countries looking to invest in nuclear energy as a source of clean electricity should consider Europe's struggles with disposing of radioactive waste.<sup>70</sup> It is therefore important that the Government expands its choices while trying to meet the current and future energy needs of the country by investing more in the already available renewable sources of energy, enhance efficiency and also ensure affordability by a wider group. Exploring alternative sources of energy is a worthwhile exercise in line with Kenya's quest for Sustainable Development.

---

<sup>70</sup> Deutsche Welle ([www.dw.com](http://www.dw.com)), 'What Happens to Nuclear Waste from Power Plants? | DW | 13.11.2019' (*DW.COM*) <<https://www.dw.com/en/what-happens-to-nuclear-waste-from-power-plants/a-51216359>> accessed 4 October 2020.

## References

David Bodansky, 'Nuclear Energy : Principles, Practices, and Prospects' (*CERN Document Server*, 2008) <<https://cds.cern.ch/record/1109377>> accessed 19 August 2020.

Kiprop, Eliud, Kenichi Matsui, and Nicholas Maundu. "Can Kenya supply energy with 100% renewable sources?" In *5th International Conference on Environment and Renewable Energy*, pp. 18-19.

'Kenya on Course for \$5 Billion Nuclear Plant to Power Industry' *Bloomberg.com* (4 August 2020) <<https://www.bloomberg.com/news/articles/2020-08-04/kenya-on-course-for-5-billion-nuclear-plant-to-power-industry>> accessed 19 August 2020.

'A Brief History of Nuclear Accidents Worldwide | Union of Concerned Scientists' <<https://www.ucsusa.org/resources/brief-history-nuclear-accidents-worldwide>> accessed 6 October 2020.

Daniel Bukszpan, '11 Nuclear Meltdowns and Disasters' (*CNBC*, 16 March 2011) <<https://www.cnn.com/2011/03/16/11-Nuclear-Meltdowns-and-Disasters.html>> accessed 6 October 2020.

'Nuclear Reactor Accidents - History and Legacies' (*Atomic Heritage Foundation*) <<https://www.atomicheritage.org/history/nuclear-reactor-accidents-history-and-legacies>> accessed 6 October 2020.

'Chernobyl Was the World's Worst Nuclear Power Plant Accident. Here's How It Compares to Fukushima and Three Mile Island.' (*Business Insider Africa*, 12:20 200AD) <<https://africa.businessinsider.com/tech/chernobyl-was-the-worlds-worst-nuclear-power-plant-accident-heres-how-it-compares-to/1x12t91>> accessed 6 October 2020.

Kawi, 'Background' (*Ministry of Energy*) <[https://energy.go.ke/?page\\_id=439](https://energy.go.ke/?page_id=439)> accessed 28 September 2020.

Owiro, D., G. Poquillon, K. S. Njonjo, and C. Oduor. "Situational analysis of energy industry, policy and strategy for Kenya." *Institute of Economic Affairs* (2015) < [https://media.africaportal.org/documents/Situational-Analysis-of-Energy-Industry-Policy-and--Strategy-for-Kenya\\_1.pdf](https://media.africaportal.org/documents/Situational-Analysis-of-Energy-Industry-Policy-and--Strategy-for-Kenya_1.pdf)> accessed 28 September 2020.

‘Our Latest Thoughts on Kenya’s Power Sector Challenges’ (*Energy For Growth*) <<https://www.energyforgrowth.org/blog/our-latest-thoughts-on-kenyas-power-sector-challenges/>> accessed 21 September 2020.

‘Kenya Energy Outlook – Analysis’ (*IEA*) <<https://www.iea.org/articles/kenya-energy-outlook>> accessed 21 September 2020.

Research and Markets Ltd, ‘Kenyan Energy Requirements Forecasted to 2050 - Research and Markets’ <<https://www.researchandmarkets.com/reports/5136031/kenyan-energy-requirements-forecasted-to-2050>> accessed 24 September 2020.

Research and Markets, ‘Insights on the Energy Requirements of Kenya to 2050 - Moving Towards Procuring More Power from Wind and Solar’ (*GlobeNewswire News Room*, 11 September 2020) <<http://www.globenewswire.com/news-release/2020/09/11/2092394/0/en/Insights-on-the-Energy-Requirements-of-Kenya-to-2050-Moving-Towards-Procuring-more-Power-from-Wind-and-Solar.html>> accessed 24 September 2020.

‘Kenya Energy Outlook – Analysis’ (*IEA*) <<https://www.iea.org/articles/kenya-energy-outlook>> accessed 21 September 2020.

‘Consumers Pay the Price as Covid Electricity Cuts Hit Turkana Project - The East African’ Monday September 14 2020 <<https://www.theeastafrican.co.ke/tea/business/consumers-pay-the-price-as-covid-electricity-cuts-hit-turkana-project-1939124>> accessed 1 October 2020.

‘What’s Driving Wind Power in Kenya and What Challenges Lie in Wait?’ <<https://www.nsenergybusiness.com/features/wind-power-kenya-challenges/>> accessed 24 September 2020.

‘Consumers Pay the Price as Covid Electricity Cuts Hit Turkana Project - The East African’ <<https://www.theeastafrican.co.ke/tea/business/consumers-pay-the-price-as-covid-electricity-cuts-hit-turkana-project-1939124>> accessed 1 October 2020.

Gordelier, Stan, and Ron Cameron. "Comparing nuclear accident risks with those from other energy sources." *Nucl Dev* (2010): 33-40.

Strupczewski, A. "Accident risks in nuclear-power plants." *Applied Energy* 75 (2003): 79-86.

‘Nuclear Power: The Good, the Bad and the Ugly’ <<https://sites.google.com/site/asaksdfuyhlaku/>> accessed 8 September 2020.

‘International Politics - Nuclear Energy’  
<<https://sites.google.com/a/ncsu.edu/nuclear-energy/politics/foreign>> accessed 8 September 2020.

Gioia, Andrea, "The 1997 Vienna Convention on Civil Liability for Nuclear Damage and the 1997 Convention on Supplementary Compensation. Explanatory Texts." (2007): 5-99 <[https://www-pub.iaea.org/MTCD/Publications/PDF/P1768\\_web.pdf](https://www-pub.iaea.org/MTCD/Publications/PDF/P1768_web.pdf)> accessed 8 September 2020.

‘International Atomic Energy Agency | Nuclear Energy for Peaceful Uses | NTI’  
<<https://www.nti.org/learn/treaties-and-regimes/international-atomic-energy-agency/>> accessed 6 October 2020.

Convention on Third Party Liability in the Field of Nuclear Energy and the Vienna Convention on Civil Liability for Nuclear Damage.

1997 Vienna Convention on Civil Liability for Nuclear Damage.

1997 Convention on Supplementary Compensation for Nuclear Damage.

‘Nuclear Power in France | French Nuclear Energy - World Nuclear Association’  
<<https://www.world-nuclear.org/information-library/country-profiles/countries-a-f/france.aspx>> accessed 6 October 2020.

Velasquez, Carlos E., Fidélis BGL e Estanislau, Antonella L. Costa, and Claubia Pereira. "Assessment of the French nuclear energy system—A case study." *Energy Strategy Reviews* 30 (2020): 100513.

‘Nuclear Reactors: Permanent Shutdowns by Country Worldwide 2020 | Statista’  
<<https://www.statista.com/statistics/513639/number-of-permanent-nuclear-reactor-shutdowns-worldwide/>> accessed 6 October 2020.

‘Kenya on Course for \$5 Billion Nuclear Plant to Power Industry’  
*Bloomberg.com* (4 August 2020)  
<<https://www.bloomberg.com/news/articles/2020-08-04/kenya-on-course-for-5-billion-nuclear-plant-to-power-industry>> accessed 19 August 2020.

Energy Act, No. 1 of 2019, Laws of Kenya.

Nuclear Regulatory Bill 2018, Kenya Gazette Supplement No.143 (National Assembly Bills No.27).

Nuclear Regulatory Act, No. 29 of 2019, Laws of Kenya.

‘A Case for Nuclear Energy in Kenya’ (*The Star*) <<https://www.the-star.co.ke/opinion/columnists/2019-04-05-a-case-for-nuclear-energy-in-kenya/>> accessed 19 August 2020.

‘NuPEA 2020 Essay Contest’ <<https://nuclear.co.ke/index.php/en/nupea-2020-essay-contest>> accessed 20 August 2020; ‘Library’ <<https://nuclear.co.ke/index.php/en/library>> accessed 20 August 2020.

‘International Politics - Nuclear Energy’ <<https://sites.google.com/a/ncsu.edu/nuclear-energy/politics/foreign>> accessed 8 September 2020.

‘Nuclear Power in France | French Nuclear Energy - World Nuclear Association’ <<https://www.world-nuclear.org/information-library/country-profiles/countries-a-f/france.aspx>> accessed 4 October 2020.

‘France to Cut Nuclear Energy Reliance by 2035: Minister | Reuters’ <<https://www.reuters.com/article/us-france-nuclearpower/france-to-cut-nuclear-energy-reliance-by-2035-minister-idUSKCN1NN0OK>> accessed 4 October 2020.

Darrell Proctor, ‘Last Reactor at Oldest French Nuclear Plant Going Offline’ (*POWER Magazine*, 28 June 2020) <<https://www.powermag.com/last-reactor-at-oldest-french-nuclear-plant-going-offline/>> accessed 4 October 2020.

Jake Stones, ‘French Strategy Boasts Largest 2030 Electrolyser Hydrogen Capacity’ (*ICIS Explore*) <<https://www.icis.com/explore/resources/news/2020/09/11/10551839/french-strategy-boasts-largest-2030-electrolyser-hydrogen-capacity>> accessed 4 October 2020.

Darrell Proctor, ‘Last Reactor at Oldest French Nuclear Plant Going Offline’ (*POWER Magazine*, 28 June 2020) <<https://www.powermag.com/last-reactor-at-oldest-french-nuclear-plant-going-offline/>> accessed 4 October 2020.

Deutsche Welle (www.dw.com), ‘France Shuts down First Reactor of Fessenheim Nuclear Plant near German Border | DW | 22.02.2020’ (*DW.COM*) <<https://www.dw.com/en/france-shuts-down-first-reactor-of-fessenheim-nuclear-plant-near-german-border/a-52466064>> accessed 4 October 2020.

‘Germany Shuts down Atomic Plant as Nuclear Phase-out Enters Final Stretch | News | DW | 31.12.2019’ <<https://www.dw.com/en/germany-shuts-down-atomic-plant-as-nuclear-phase-out-enters-final-stretch/a-51845616>> accessed 4 October 2020.

Deutsche Welle (www.dw.com), 'Germany Shuts down Atomic Plant as Nuclear Phase-out Enters Final Stretch | DW | 31.12.2019' (DW.COM) <<https://www.dw.com/en/germany-shuts-down-atomic-plant-as-nuclear-phase-out-enters-final-stretch/a-51845616>> accessed 4 October 2020.

'Germany Demolishes Cooling Tower of Former Nuclear Power Plant | News | DW | 09.08.2019' <<https://www.dw.com/en/germany-demolishes-cooling-tower-of-former-nuclear-power-plant/a-49967279>> accessed 4 October 2020.

Ihédate and ihedate, 'Sweden Retires First Commercial Nuclear Reactor (Oskarshamn-1)' (*World Nuclear Industry Status Report*, 20 June 2017) <<https://www.worldnuclearreport.org/Sweden-Retires-First-Commercial-Nuclear-Reactor-Oskarshamn-1.html>> accessed 5 October 2020.

'Ringhals 2 Nuclear Plant Shuts Down' (*Vattenfall*) <<https://group.vattenfall.com/press-and-media/news--press-releases/newsroom/2019/ringhals-2-nuclear-plant-shuts-down>> accessed 5 October 2020.

'Ringhals 2 Enters Retirement : Corporate - World Nuclear News' <<https://world-nuclear-news.org/Articles/Ringhals-2-enters-retirement>> accessed 5 October 2020.

'Sweden Closes Nuclear Reactor after over 40 Yrs of Operation' (*AP NEWS*, 30 December 2019) <<https://apnews.com/article/a08facfe81523e85083e21ffe1ded681>> accessed 5 October 2020.

'Ringhals 2 Nuclear Plant Shuts Down' (*Vattenfall*) <<https://group.vattenfall.com/press-and-media/news--press-releases/newsroom/2019/ringhals-2-nuclear-plant-shuts-down>> accessed 5 October 2020.

UN General Assembly, *Transforming our world: the 2030 Agenda for Sustainable Development*, 21 October 2015, A/RES/70/1.

'How Kenya Can Transform the Charcoal Sector and Create New Opportunities for Low-Carbon Rural Development on JSTOR' <[https://www.jstor.org/stable/resrep02811?seq=1#metadata\\_info\\_tab\\_contents](https://www.jstor.org/stable/resrep02811?seq=1#metadata_info_tab_contents)> accessed 21 September 2020.

'Development of New and Renewable Sources of Energy | Kenya Vision 2030' <<https://vision2030.go.ke/project/development-of-new-and-renewable-sources-of-energy/>> accessed 30 September 2020.

‘Women in Energy Means More Clean Energy for All across Africa’  
<<https://www.esi-africa.com/industry-sectors/future-energy/women-in-energy-means-more-clean-energy-for-all-across-africa/>> accessed 28 September 2020.

Zaharia, Alina, Maria Claudia Diaconeasa, Laura Brad, Georgiana-Raluca Lădaru, and Corina Ioanăș. "Factors Influencing Energy Consumption in the Context of Sustainable Development." *Sustainability* 11, no. 15 (2019): 4147.

Temiz Dinç, Dilek, and Ece C. Akdoğan. "Renewable energy production, energy consumption and sustainable economic growth in Turkey: A VECM Approach." *Sustainability* 11, no. 5 (2019): 1273.

Jian, Jianhui, Xiaojie Fan, Pinglin He, Hao Xiong, and Huayu Shen. "The effects of energy consumption, economic growth and financial development on CO2 emissions in China: A VECM Approach." *Sustainability* 11, no. 18 (2019): 4850.

‘Promoting Energy Efficiency as a Climate Change Mitigation Action in Kenya | UNDP in Kenya’ (UNDP)  
<<https://www.ke.undp.org/content/kenya/en/home/stories/2019/lecrd-promoting-energy-efficiency.html>> accessed 4 October 2020.

Huber, Sebastian. "Small-scale biogas production from organic waste and application in mid-income countries—a case study of a Lebanese community." (2019) <<http://www.diva-portal.org/smash/get/diva2:1334609/FULLTEXT01.pdf>> accessed 4 October 2020.

Munene, Martin Brown, Janes Ouma Odongo, And Anne Nyambane, ‘Energy Efficiency in Kenya: Public Awareness, Strategies, Challenges & Opportunities | Heinrich Böll Stiftung | Nairobi Office Kenya, Uganda, Tanzania, Somalia/Somaliland’ (Heinrich-Böll-Stiftung)  
<<https://ke.boell.org/en/2019/09/16/energy-efficiency-kenya-public-awareness-strategies-challenges-opportunities>> accessed 3 October 2020.

Deutsche Welle (www.dw.com), ‘What Happens to Nuclear Waste from Power Plants? | DW | 13.11.2019’ (DW.COM) <<https://www.dw.com/en/what-happens-to-nuclear-waste-from-power-plants/a-51216359>> accessed 4 October 2020.

Republic of Kenya, *National Energy Policy*, October, 2018 <[https://kplc.co.ke/img/full/BL4PdOqKtxFT\\_National%20Energy%20Policy%20October%20%202018.pdf](https://kplc.co.ke/img/full/BL4PdOqKtxFT_National%20Energy%20Policy%20October%20%202018.pdf)> accessed 30 September 2020.

Republic of Kenya, *National Energy Policy*, October, 2018.

## **Determining The Impact of Political Instability and National Security on Foreign Direct Investment in Kenya**

*By: Wilfred Mutubwa\*, Ian Mwangi\*\*, Beatrice Kavata\*\*\*,  
Michelle Kananu\*\*\*\* & Matthew Mbelenga\*\*\*\*\**

### **Background**

Kenya was a prime choice for foreign investors seeking to establish a presence in East Africa during the 1960s and 1970s.<sup>1</sup> Because of politically driven economic policies, rampant corruption, government malfeasance, poor infrastructure and substandard public services during the 1980s, foreign direct investment (FDI) was discouraged.<sup>2</sup> Over the past three decades, Kenya has been an under-performer in attracting foreign direct investment with the middle of the last decade being marginally better in attracting FDI.<sup>3</sup>

Historically, Kenya has been faced with attacks, some of which include the US Embassy bombing in Nairobi in 1998<sup>4</sup> as well as the devastating

---

**\*Wilfred Mutubwa LL. D (Designate) FCI Arb Chartered Arbitrator**

**\*\*Ian Mwangi LL.B (Riara)**

**\*\*\*Beatrice Kavata LL.B (Riara)**

**\*\*\*\*Michelle Kananu LL.B (Riara)**

**\*\*\*\*\*Matthew Mbelenga LL.B (Riara)**

<sup>1</sup>Solomon Kinyanjui, 'The Impact of Terrorism on Foreign Direct Investment in Kenya', *International Journal of Business Administration* (2014) 5, pp 148-149.

<sup>2</sup>*Ibid* 1.

<sup>3</sup>*Ibid* 1.

<sup>4</sup>"The attack occurred in August 7, 1998 with over 200 people killed and another 5,000 injured in nearly simultaneous truck bomb explosion. This occurred in two East African cities, one at the United States Embassy in Dar es Salaam, Tanzania and the other at the United States Embassy in Nairobi, Kenya."

Cassandra Cooke, Remembering the 1998 Terrorist Attack in Nairobi, (U.S. Department of State, 11 August 2017), <<https://www.state.gov/remembering-the-1998-embassy-bombings-2/>> accessed 2 October 2020.

attack on Kenya's Westgate shopping mall on Saturday, September 21, 2013 that left 67 individuals dead.<sup>5</sup> During this period, Kenya's economy dwindled as Somalia being in the immediate geographical proximity, further posed as a threat to Kenya's national security.<sup>6</sup> During this time, the studies to the effects of national security on FDI were increasingly gaining popularity.<sup>7</sup> This was propounded by the devastating events in the United States on September 11, 2001 where a series of four coordinated terrorist attacks by the Islamic terrorist group al-Qaeda, resulted to the death of up to 2,996 people with multiple casualties that in turn caused over \$10 billion in infrastructure and property damage.<sup>8</sup> Moreover, in a study on the impact of terrorism on Foreign Direct Investment in Pakistan, the results indicated that due to the number of terrorist attacks, foreign investors posed negative interests to invest money in Pakistan.<sup>9</sup>

Khan, writing on the impact of political risk on foreign direct investment, accounting for 94 countries over a span of 24 years from 1986-2009, found that most of the political risk indicators resulted to a negative relationship with FDI.<sup>10</sup> This relationship affects the world entirely and, also, the high-income countries, with it being strongest for the upper middle-income countries.<sup>11</sup> All this negatively affected the 1980s, when the influx of FDI surged primarily due to the drying up of commercial

---

<sup>5</sup>*Ibid* 1.

<sup>6</sup>*Ibid* 1.

<sup>7</sup>*Ibid* 1.

<sup>8</sup> 'September 11 Attacks' (*History.com*, 2008) <<https://www.history.com/topics/21st-century/9-11-attacks>> accessed 08 April 2020.

<sup>9</sup> Mian Awais, 'Impact of Terrorism on Foreign Direct Investment in Pakistan', *American Book Review* (2013) 1, pp. 1.

<sup>10</sup> Mashrur Khan Mustaque and Mashfique Ibne Akbar, 'The Impact of Political Risk on Foreign Direct Investment' (*Mpra.ub.uni-muenchen.de*, 2013) <[https://mpira.ub.uni-muenchen.de/47283/1/MPRA\\_paper\\_47283.pdf](https://mpira.ub.uni-muenchen.de/47283/1/MPRA_paper_47283.pdf)> accessed 08 April 2020. pp 1.

<sup>11</sup>*Ibid* 10.

bank lending to the developing economies that forced most countries to ease restrictions and offer tax incentives and subsidies to attract foreign capital.<sup>12</sup> As this was a period when most African countries had transitioned into independence from their various colonies.<sup>13</sup> Today-political wrangles shake up the economy of a country as a whole, as this also poses a threat to the national security of a country that results to a decrease in the attraction of FDI as exhibited in Kenya during the 2007-2008 post-election violence.<sup>14</sup> Not only Kenya but also other African countries like South Africa, Zimbabwe, DR-Congo among others.

### **Conceptual Framework**

Foreign direct investment herein referred to as FDI is generally thought as outcome of mutual interest of multinational firms and host countries. It is defined as a form of long-term international capital movement, made for the purpose of productive activity and accompanied by the intention of managerial control or participation in the management of a foreign firm. The essence of FDI is the transmission of a package of capital, managerial, skill and technical knowledge to the host country. As per the International Monetary Fund definition, 'FDF is an investment made to acquire a lasting interest in an enterprise operating in an economy other than that of the investor.'<sup>15</sup> The investor's purpose being to have an effective voice in the management of the enterprise.

---

<sup>12</sup>*Ibid* 10, pp 2.

<sup>13</sup> Alistair Boddy-Evans, Chronological List of African Independence, (*Thought Co.* 25 January 2020), <<https://www.thoughtco.com/chronological-list-of-african-independence-4070467>>accessed 1 October, 2020.

<sup>14</sup> Mara J. Roberts, 'Conflict Analysis of the 2007 Post-election Violence in Kenya', (2009) pp. 2.

<sup>15</sup>Denters, Erik, "M.G. de Vries, Balance of Payments Adjustment, 1945 to 1986 – The IMF Experience, International Monetary Fund, Washington D.C. 1987, 336." (1989) 36 *Netherlands International Law Review*, pp.36.

A direct investment typically takes the form of a foreign firm starting a subsidiary or taking over control of an existing firm in the country in question. It is the direct type of investment, which is associated with Multinational Corporation because most of the FDI is transferred through firms and remains outside of the ordinary functioning of markets. It is noteworthy to note that FDI should not be confused with Profitability index herein referred to as PI because PI does not seek management control, but is motivated by profit.<sup>16</sup> PI occurs when individual investors invest, mostly through stockbrokers, in stock of foreign companies in foreign land in search of profitable opportunities.

FDI can be defined in both qualitative and quantitative bases. 'Qualitatively', it is about ownership and control. FDI is done by companies with the intent of having sufficient ownership to ensure a partial or total say on a lasting basis in the management of a corporate entity located in a foreign country. In other words, a company based in the home country has at least a meaningful long-term voice in shaping output, production and marketing strategies, constructing corporate budgets, selecting senior managers, dealing with labour relations and approving new product development in a company incorporated and doing business in the host country.<sup>17</sup> FDI is about long-term, perhaps permanent relationship that could have a significant financial impact (either good or bad) on the foreign company making the investment. It involves relatively large transfers of capital that cannot easily be reversed. While 'quantitatively' i.e. universally accepted definition of FDI is ownership of at least 10 per cent of common stock of a business enterprise operating in a country other than the one in which the investing company is headquartered.

---

<sup>16</sup>The concept of FDI <https://shodhganga.inflibnet.ac.in/bitstream/10603/53001/9/09>  
Accessed on 9th april, 2020

<sup>17</sup> Datt, N. 1983J; "Theories of FDI-A Review"; Foreign Trade Review, Vol. VXXVII,  
No, pp 4.

In order to understand the concept of FDI in a simple manner, it is imperative here to give an outline about the various Components of FDI. These components are as follows:

1. Equity Capital,
2. Re-invested Earnings,
3. Other Capital (mainly intra-company loans)

FDI has been the most prominent source of international financing which has been instrumental in creating assets in an economy. The advocates of increased volumes of FDI argue that in terms of foreign investment, it is the direct investment that should be actively sought for and doors should be thrown wide open to FDI. FDI brings huge advantages with little or no downside.

FDI is perceived superior to other types of capital inflows because of some specific reasons that are listed below:

- i. FDI inflows are less volatile and easier to sustain at times of crisis in comparison to portfolio investors and foreign lenders because foreign direct investor typically have a longer-term perspective when making investment in a country.
- ii. FDI is most prominently used for productive purposes while debt inflows may finance consumption rather than investment in the host country.
- iii. FDI is expected to have relatively strong positive effects on economic growth of the host country because besides providing capital, it offers access to internationally available technology, capital goods, raw materials, technical know-how etc.

The risk-sharing properties of FDI are undisputed. For example, in India where they depend on external funding from foreign states. This

suggests that FDI is the appropriate form of external financing for developing countries. Moreover, the volatility of FDI remained exceptionally low in 1990s, when several emerging economies were hit by financial crises. FDI is widely considered an essential element for achieving sustainable development. Even former critics of Transnational Corporation (e.g. UNCTAD) expect FDI to provide a stronger stimulus to income growth in host countries than other types of capital inflows. Especially, after the recent financial crises in Asia and Latin America, developing countries are strongly advised to rely primarily on FDI, in order to supplement national savings by capital inflows and promote economic development.

Foreign investment, particularly FDI has significant advantages over external loans and other forms of financing the resource gap. Generally, the repayment of FDI is cheaper in comparison to loans and commercial borrowings. <sup>18</sup>For Instance, FDI takes the form of repatriation of a certain percentage of earnings in the form of dividend of an enterprise only when it reaches at the stage of commercial profitability.

Foreign investment in Kenya and other African countries has already been unpacked and its various components like capital, technical know-how, management, marketing skill, etc. have been absorbed. That is why, in certain cases, FDI is considered to be much less expensive and much more productive than commercial borrowings where repayment starts normally from the second year, further which is at very high rate of interest. In addition, the type of technology imported through FDI is likely to be up-to-date technology, as the foreigners would have interest in follow up action since their financial stock is involved. In addition to

---

<sup>18</sup>Denters, Erik, "M.G. de Vries, Balance of Payments Adjustment, 1945 to 1986 – The IMF Experience, International Monetary Fund, Washington D.C. 1987, 336." (1989) 36 Netherlands International Law Review, pp.47.

technology, FDI is accompanied by management expertise in manufacturing and quality culture, all in a single package.<sup>19</sup>

Therefore, it should be noted that FDI can open up export markets because of the marketing expertise, global contacts and outlets of the parent firms. In the case of FDI, the risk of fluctuations in the value of currency is also borne by the foreign investor. The sequencing and prior generation of resources by a Joint venture can usually reduce the strain of higher inflow of foreign exchange over time. Thus, it can be said that there is a growing global realization that it is much better to rely on foreign equity investment, rather than on external commercial loans and foreign portfolio investment, especially when major structural changes are being introduced in the economy.<sup>20</sup>

### **National Security and Foreign Direct Investment**

Foreign Direct Investment is considered as a blessing in most developing countries. The current trends of globalization are encouraging the developing countries to increasingly focus on how more to attract more Foreign Direct Investment to boost up their economies. This is possible only when investors are ready to invest in a particular economy. Foreign investors prefer to invest in countries where they their investment is secure and that which will generate higher returns than other possible countries. Therefore, countries facing

---

<sup>19</sup>Mistura, F. and C. Roulet (2019), "The determinants of Foreign Direct Investment: Do statutory restrictions matter?" *OECD Working Papers on International Investment*, No. 2019/01, OECD Publishing, Paris, [https://www.oecd-ilibrary.org/finance-and-investment/the-determinants-of-foreign-direct-investment\\_641507ce-en](https://www.oecd-ilibrary.org/finance-and-investment/the-determinants-of-foreign-direct-investment_641507ce-en) accessed April 10, 2020, pp.7-11.

<sup>20</sup> Publishing OECD and International Monetary Fund, *OECD Benchmark Definition of Foreign Direct Investment 2008* (Organization for Economic Co-operation and Development 2009), pp.44

the problem of terrorism are hardly attractive to overseas investors due to the issue of insecurity.<sup>21</sup>

Terrorism being a worldwide crime makes it a transnational issue, which needs to be tackled in totality. The following are some of the terrorist attacks that happened in Kenya since 1980-2019; Norfolk Hotel Bombing, United States Embassy Bombings, Kikambala Hotel Bombing, Al-Shabaab Attacks, Westgate Mall Shooting, Mpeketoni Attacks, Garissa Attack and finally the Nairobi Dusit d2 Complex Attack. These actions of terrorism not only have severe economic, political, social and psychological implications in the country but also there is the withdrawal of Foreign Direct Investment FDI by countries and countries due to the direct destruction of infrastructure and the rise of operational costs as a result of high demand for security.<sup>22</sup>

The economic dimension of terrorism concerns losses in Foreign Direct Investment, damages infrastructure, output losses, security costs, reduced economic growth, reduced tourism and trade losses which in developing countries it is more likely to have more impact on the country's economy than terrorism in a developed country. On affecting tourism, even if the companies themselves aren't targeted, the risk of terrorism forces investors to implement more security measures and offer compensation to the personnel, thus reducing their returns. For that reason, the investors would opt to redirect their business to safer countries even if salaries are higher. Insecurity may also direct economic resources for highly productive sectors to less productive

---

<sup>21</sup> Mumtaz Hussain, 'Terrorism and Foreign Direct Investment: An Empirical Analysis of SAARC Countries', (M.A Thesis, University of Peshawar, 2015.) pp 3.

<sup>22</sup> Frey Bruno, 'Calculating Tragedy: Assessing the Costs of Terrorism. *Journal of Economic Surveys*, pp 1-24.  
[https://www.researchgate.net/publication/4991848\\_Calculating\\_Tragedy\\_Assessing\\_the\\_Costs\\_of\\_Terrorism](https://www.researchgate.net/publication/4991848_Calculating_Tragedy_Assessing_the_Costs_of_Terrorism) accessed 11 April 2020.

sectors thereby crowding out investment. This will not only reduce the GDP of the country and fuel inflation but also reduce the flow of foreign direct investment.<sup>23</sup>

Terrorism being costly, not only stagnates the growth of Foreign Direct Investment but also the development of any country. One of the non-economic arguments as to the importance of International Trade is that it brings peace meaning that countries that are at peace, are likely to establish a trade relationship. This goes the same for the vice-versa. This in turn means, on the conflict between countries and its relationship with trade, more war leads to less trade, which will in turn affect the Foreign Direct Investment of a country.<sup>24</sup>

The Kenyan government has been losing finances on security measures caused by the terrorist attacks. Evidently, this can be seen in 2011 when the country launched an operation in Somalia which was dubbed as operation 'Linda Inchi' which turned out to be a very expensive operation that was undertaken without regard for the cost that was going to be incurred. The purpose of the operation was to safeguard the country against attacks by the Al-Shabaab who were taking hostages of the ships carrying the goods through the Indian Ocean to the port of Mombasa. In doing this, the Kenyan government hoped to provide assurances to the West and lucrative tourism industry, which pumped in

---

<sup>23</sup>Adesegun, Oniru, 2015. Insecurity and Foreign Direct Investment in Nigeria. *International Journal of Sustainable Development & World Policy*, p.63. [https://www.researchgate.net/publication/299478180\\_Insecurity\\_and\\_Foreign\\_Direct\\_Investment\\_in\\_Nigeria](https://www.researchgate.net/publication/299478180_Insecurity_and_Foreign_Direct_Investment_in_Nigeria) accessed 12 April 2020.

<sup>24</sup>Joseph, E & Barikui, T (2015). The Impact of National Security on Foreign Direct Investment (FDI) in Nigeria. *IOSR Journal of Business and Management*. (IOSR-JBM), 17(5), pp 70

a great amount into the country's economy since the attack, was causing a lot of decrease on the country's revenue.<sup>25</sup>

The Westgate Shopping Mall shooting left a significant negative economic crisis. This forced the Government of Kenya to launch an investigation to determine who the perpetrators were and the extension of their attack. The shopping mall always being a constant flow by foreign customers, the attack's direct effect was that there was a reduction of visits to the country, which in turn led to the decrease of foreign direct investment from the global firms that were donors, or investors of the mall.

In conclusion, Terrorist attacks economically affects a country negatively. In the Kenyan situation, the country has been subjected to terror attacks, which target foreign interests that eventually end up harming the country more than the intended targets, which in turn affects the Smooth flow of Foreign Direct Investment of the country. This means that investors will most of the time be reluctant to inject their money into the country's economy because of the fear of the terrorist acts, which do not guarantee a safe and peaceful environment in which business can be conducted.<sup>26</sup> Therefore, we can see that there is a direct relationship between Foreign Direct Investment and terrorism. This is to show that if a country has high levels of security, there will be an increase in the Foreign Direct Investment while the vice-versa would be a higher level of insecurity (terrorism) would lead to the reduction of Foreign Direct Investment of a country. Therefore, measures need to be taken up which will help combat insecurity that

---

<sup>25</sup> Esther Mbula, 'Impact of Terrorism on Economic Development in Africa: A Case Study of Kenya's Foreign Direct Investment' (M.A International Studies Thesis, University of Nairobi, 2016), pp 34.

<sup>26</sup> Ibid 20, pp 38.

will in turn attract investments from foreigners which hence will lead to an increase of Foreign Direct Investment in the country.

### **Impact of Political Instability on Foreign Investment**

Political instability is defined as the potential for sudden and significant change in the leadership of a country. The widespread occurrence of political instability in several countries across time and its negative effects on their economic performance has arisen the interest of several economists. Political instability is the tendency of a government collapse. This may either be due to the conflicts or extensive competition between various political parties.<sup>27</sup> The index of Political Stability and Absence of Violence/Terrorism measures perceptions of the likelihood that the government will be destabilized or overthrown by unconstitutional or violent means, including politically-motivated violence and terrorism.<sup>28</sup> Without a shadow of doubt, this affects the foreign investment in that country.

In general, political instability affects the investment climate negatively which in turn reduces Foreign Direct Investment (FDI) inflows and would result in slow growth of the economy. Many developing countries in the world are not politically stable and mostly they suffer from poor quality of governance. A country's political risks is a crucial factor which is considered by foreign investors while making an investment decision. Today's political risks are not the classic risks associated with communist takeovers or post-colonial outbursts of anti-foreign sentiment. They are more subtle, arising from legal and regulatory changes, government transitions, environmental and human rights issues, currency crises and terrorism. Because these risks are

---

<sup>27</sup> Nazeer Mansur, "Impact of Political Instability on Foreign Direct Investment and Economic Growth: Evidence from Malaysia" (2017) INCEIF p. 2.

<sup>28</sup> <[https://www.theglobaleconomy.com/rankings/wb\\_political\\_stability/](https://www.theglobaleconomy.com/rankings/wb_political_stability/)> accessed April 13, 2020.

subtle (often occurring at the same time as the government is declaring the country “open for business” they are often hard to manage.<sup>29</sup> International law that has arisen over time to protect foreign investors’ rights from exploitation by the host Nations serves to mitigate these factors but only to a certain extent.

Political risk that affects foreign direct investment is linked to several factors;

1. Confiscation or damage to property.

A distinction must be made between expropriation, confiscation and nationalization of property belonging to foreign investors. Confiscation is the capricious taking of property by the ruler or the ruling coterie of the State for personal gain. Mostly common in States ruled by dictators or oligarchies. Much of the law on state responsibility was developed in the context of confiscation of property, which had no benefit to the State but only helped to enrich the ruling elite.<sup>30</sup> The situation in modern times has changed as the investors more often than not are large multinational corporations with backing from even greater home States and international law hence host states would be slow to confiscate or damage goods for their individual gain. In a country with political instability or a shifting political regime however, sometimes government officials do confiscate property belonging to foreign investors for personal gain. Given that at the time the Judiciary of such countries is not as independent, then recourse to those investors can never be achieved domestically.

---

<sup>29</sup> Alba Kruja, Blerta Dragusha, ”The Impact of Political Risk on Foreign Direct Investment” (2014) pp.78

<sup>30</sup> M. Sonarajah, ”The International Law on Foreign Investment” Cambridge University Press, pp. 364.

2. Production disruption.

Disruptions are defined as major breakdowns in the production or distribution nodes that comprise a supply chain. These may include events such as a fire, a machine breakdown, an unexpected surge in capacity that creates a bottleneck, quality problems, natural disasters, customs delays, or any other number of different problems. These production disruptions can be caused by political instability by intentionally sabotaging processes for either economic gain or other politically inspired gains. This has a large impact on foreign investment in a country, as investors would be shy to invest in a country with such a reputation. Production disruption causes loss of money to the investors.

3. Threats to personnel including operational restrictions that impede the investors' ability in undertaking certain actions.

Restrictions on foreign ownership are the most obvious barriers to FDI. They typically take the form of limiting the share of companies' equity capital in a target sector that non-residents are allowed to hold, e.g. to less than 50 percent, or even prohibit any foreign ownership.<sup>31</sup> A common example of majority domestic ownership include airlines and examples of exclusive domestic ownership often applied to natural resource sectors with the aim of giving citizens access to the associated rents. For example, foreign ownership is banned in the fishing and energy sectors in Iceland. Approval procedures can also be used to limit FDI. Stipulations that foreign investors must show economic benefits can increase the cost of entry and therefore may discourage the inflow of foreign capital.<sup>32</sup> These are some of the

---

<sup>31</sup> Foreign Direct Investment Restrictions in OECD Countries (2002) pp.2.

<sup>32</sup> *Ibid* 31, p.3.

operational restrictions imposed by host nations to foreign investors either to protect the domestic markets or otherwise. In countries suffering from political instability, the State always acts in its discretion and can impose as many restrictions as it pleases to investors. Therefore, foreign investors consider these when choosing to invest in a particular country.

#### 4. Riots and changes in the regulatory environment.

The regulatory environment is the set of taxes, rules and laws or regulations that businesses must adhere to. In a politically unstable State, and sudden shifts in government, come with it new regulations imposed by rulers disregarding the existing ones. These adversely inconvenience investors. Changes in laws, which automatically bind the foreign investors, and sometimes not in favorable terms and increased tax burdens eventually force foreign investors out of the country to a more suitable one. Moreover, as a general rule, riots are bad for business, either domestic or foreign because they lead to vandalism and closure of businesses which affect the conduct of business and profit margins. Given that politically unstable countries attract more riots, they tend to be bad for business and many foreign investors would not invest in such nations.

In conclusion, political stability is important in attracting foreign investors to a country. African countries have become more accommodating toward foreign direct investment (FDI) over the last decade or so evidenced by changes in their regulatory regimes. While it is fair to say that in terms of overall statutory FDI regulation African countries are on average less restrictive than other developing nations, some of the remaining obstacles are both severe and particular to the continent. One of the major obstacles is political instability in countries.

This is because of a messy handover of power, refusal to leave power, forms of dictatorship and resistance groups. As a result, despite having favorable conditions for investors, they would shy from investing in these countries because of the factors mentioned above. Stability yields results for investments.

Hence, for a stable and progressive growth of FDI within a country it is evident on the importance of protecting the National Security and Political Stability of a country.

## **Recommendations**

1. Insecurity being a major issue in the country, the government should advance and find strict policies that will help curb terrorism, which happen to be less costly.
2. Conduct other non-military mode of conflict resolutions such as negotiations to avoid using of violence to solve violence.
3. Ratify more treaties concerning combating terrorism in the country.
4. Transparency of regulation – consult all the relevant parties before making key changes in legislation.
5. Consistency of implementation – in countries where regulations are implemented selectively in favour of others to the detriment of others. There should be consistency all through to attract investors.

## **Bibliography**

Awais M, 'Impact of Terrorism on Foreign Direct Investment in Pakistan', American Book Review (2013) 1, pp. 1.

Boddy-Evans A., Chronological List of African Independence, (*Thought Co.* 25 January 2020), <<https://www.thoughtco.com/chronological-list-of-african-independence-4070467>> accessed 1 October, 2020

Bruno. F, 'Calculating Tragedy: Assessing the Costs of Terrorism. *Journal of Economic Surveys*, pp 1-24 [https://www.researchgate.net/publication/4991848\\_Calculating\\_Tragedy\\_Assessing\\_the\\_Costs\\_of\\_Terrorism](https://www.researchgate.net/publication/4991848_Calculating_Tragedy_Assessing_the_Costs_of_Terrorism) accessed 11 April 2020

Cooke C., Remembering the 1998 Terrorist Attack in Nairobi, (*U.S. Department of State*, 11 August 2017), <<https://www.state.gov/remembering-the-1998-embassy-bombings-2/>> accessed 2 October 202

E. Joseph, (2015), The Impact of National Security on Foreign Direct Investment (FDI) in Nigeria. *IOSR Journal of Business and Management*. (IOSR-JBM), 17 (5), pp 70.

Erik D, "M.G. de Vries, Balance of Payments Adjustment, 1945 to 1986, The IMF Experience, International Monetary Fund, Washington D.C. 1987, 336." (1989) 36 *Netherlands International Law Review*, pp 47

Foreign Direct Investment Restrictions in OECD Countries (2002) pp.2. Hussain. M, 'Terrorism and Foreign Direct Investment: An Empirical Analysis of SAARC Countries', (M.A Thesis, University of Peshawar, 2015.) pp 3.

Kinyanjui S, 'The Impact of Terrorism on Foreign Direct Investment in Kenya', *International Journal of Business Administration* (2014), pp 148

Kruja Alba," The Impact of Political Risk on Foreign Direct Investment" (2014), pp 78

Mansur Nazeer, "Impact of Political Instability on Foreign Direct Investment and Economic Growth: Evidence from Malaysia" (2017) INCEIF pp. 2

Mbula. E. 'Impact of Terrorism on Economic Development in Africa: A Case Study of Kenya's Foreign Direct Investment' (M.A International Studies Thesis, University of Nairobi, 2016). pp 34

Mistura, F. and C. Roulet (2019), "The determinants of Foreign Direct Investment: Do statutory restrictions matter?" *OECD Working Papers on International Investment*, No. 2019/01, OECD Publishing, Paris, pp 7-11. [https://www.oecd-ilibrary.org/finance-and-investment/the-determinants-of-foreign-direct-investment\\_641507ce-en](https://www.oecd-ilibrary.org/finance-and-investment/the-determinants-of-foreign-direct-investment_641507ce-en) accessed April 10, 2020.

Mustaque K.M., and Akbar I.M., 'The Impact of Political Risk On Foreign Direct Investment' (*Mpra.ub.uni-muenchen.de*,2013) pp1-2. <[https://mpira.ub.uni-muenchen.de/47283/1/MPRA\\_paper\\_47283.pdf](https://mpira.ub.uni-muenchen.de/47283/1/MPRA_paper_47283.pdf)> accessed 08 April 2020.

N Datt, 1983J; "Theories of FDI-A Review"; *Foreign Trade Review*, Vol. VXXVII, No, pp 4

Oniru. A, 2015. Insecurity and Foreign Direct Investment in Nigeria. *International Journal of Sustainable Development & World Policy*, pp.63

*Determining The Impact of Political  
Instability and National Security on Foreign  
Direct Investment in Kenya: Wilfred Mutubwa,  
Ian Mwangi, Beatrice Kavata, Michelle Kananu &  
Matthew Mbelenga*

**(2020) Journal of cmsd Volume 5(2)**

<https://www.researchgate.net/publication/299478180> Insecurity and Foreign Direct Investment in Nigeria accessed 12 April 2020  
Publishing, OECD and International Monetary Fund; *OECD Benchmark Definition of Foreign Direct Investment 2008* (Organization for Economic Co-operation and Development 2009), pp.44

Roberts J.M., 'Conflict Analysis of the 2007 Post-election Violence in Kenya', (2009) 'September 11 Attacks' (*History.com*, 2008) <https://www.history.com/topics/21st-century/9-11-attacks> accessed 08 April 2020, pp 2. 'September 11 Attacks' (*History.com*, 2008) <https://www.history.com/topics/21st-century/9-11-attacks> accessed 08 April 2020

Sonarajah M, "The International Law on Foreign Investment"  
Cambridge University Press, pp. 364 The concept of FDI  
<https://shodhganga.inflibnet.ac.in/bitstream/10603/53001/9/09>  
accessed 9 April, 2020.

## **Actualising the National Policy on Gender and Development in Kenya**

***By: Kariuki Muigua\****

### ***Abstract***

*Kenya and the African continent have for a long time struggled with the issue of gender equality and equity across societies especially with regard to economic, social and political spheres, with the women sometimes bearing the biggest brunt of this inequality and equity and occasionally men in some areas. The global community has always come up with international and regional legal instruments meant to offer guidelines to countries on the measures to be taken to streamline gender issues in all areas of their people's lives and development agenda. It is in line with this that Kenya, in order to show its commitment not only to the international and regional instruments but also the Constitution of Kenya, has already come up with National Policy on Gender and Development. This is a commendable step towards addressing the gender concerns at play. As a result, this paper offers brief review of the Gender Policy with the aim of identifying any gaps therein as well as the opportunities that the Policy presents in making gender equality and equity a reality in Kenya.*

### **1. Introduction**

This paper offers a critical review of the gender issues in development agenda and specifically looks at the 2019 National Policy on Gender and Development<sup>1</sup> with the aim of highlighting its strengths and

---

**\* PhD in Law (Nrb), FCI Arb (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; CASELAP.**

<sup>1</sup> Republic of Kenya, Sessional Paper No. 02 of 2019 on National Policy on Gender and Development, October 2020 < <http://psyg.go.ke/wp->

weaknesses, if any. The paper offers a brief background on the gender debates in Kenya, identifying the current challenges as well as the looking at the plausible solutions offered by the National Policy, and their possibility to address these issues once and for all.

The author also offers a general overview of current legal and institutional framework meant to streamline gender concerns in the national development agenda and all other areas of the Kenyan communities. The *National Gender and Equality Commission Act, 2011*<sup>2</sup> defines “gender” to mean the social definition of women and men among different communities and cultures, classes, ages and during different periods in history.<sup>3</sup>

Gender mainstreaming has been defined as: “...the process of assessing the implications for women and men of any planned action, including legislation, policies or programmes, in all areas and at all levels. It is a strategy for making women’s as well as men’s concerns and experiences an integral dimension of the design, implementation, monitoring and evaluation of policies and programmes in all political, economic and societal spheres so that women and men benefit equally and inequality is not perpetuated. The ultimate goal is to achieve gender equality and equity.”<sup>4</sup> On the other hand, the Act defines “gender mainstreaming” to mean ensuring that the concerns of women and men form an integral dimension of the design of all policies, laws and administrative procedures including budgeting and budget implementation, and the monitoring and evaluation of programmes implementing such policies, laws and administrative procedures in all political, economic and

---

content/uploads/2019/12/NATIONAL-POLICY-ON-GENDER-AND-DEVELOPMENT.pdf > Accessed 9 October 2020.

<sup>2</sup> National Gender and Equality Commission Act, No.15 of 2011, Laws of Kenya.

<sup>3</sup> National Gender and Equality Commission Act, sec. 2.

<sup>4</sup> United Nations. *Gender Mainstreaming an Overview*. Office of the Special Adviser on Gender Issues, 2002 < <https://www.un.org/womenwatch/osagi/pdf/e65237.pdf>> Accessed 9 October 2020.

societal spheres; so as to ensure that women and men benefit equally, and that inequality is not perpetuated.<sup>5</sup>

Indeed, it has been observed that while mainstreaming is clearly essential for securing human rights and social justice for women as well as men, it also increasingly recognized that incorporating gender perspectives in different areas of development ensures the effective achievement of other social and economic goals.<sup>6</sup> Past studies have revealed that most Kenyans are still lagging behind as far as understanding of their human rights is concerned. Many still think that different rights apply to men and women. For instance, in 2018, a survey carried out by IPSOS revealed that about 53 per cent of Kenyans were unable identify any human rights violations in their home areas.<sup>7</sup>

The 2019 National Policy on Gender and Development which is seen as a step towards mainstreaming of gender issues in Kenya was recently drafted in an effort to offer the guidelines on drafting of a national gender law. It is therefore imperative to review the Policy in order to identify any prospects as well as weakness of the Policy.

The United Nations 2030 Agenda for Sustainable Development Goals (SDGs)<sup>8</sup> recognises the place of gender equality and equity in development. SDG Target 20 states that: “Realizing gender equality and the empowerment of women and girls will make a crucial contribution to progress across all the Goals and targets. The achievement of full human potential and of sustainable development is not possible if one

---

<sup>5</sup> National Gender and Equality Commission Act, sec. 2.

<sup>6</sup> United Nations. *Gender Mainstreaming an Overview*. Office of the Special Adviser on Gender Issues, 2002.

<sup>7</sup> Hillary Orinde, ‘Survey Reveals How Kenyans Are Ignorant of Their Human Rights’ (*The Standard*)

<<https://www.standardmedia.co.ke/kenya/article/2001276119/kenyans-in-the-dark-about-their-rights>> accessed 14 October 2020.

<sup>8</sup> UN General Assembly, *Transforming our world: the 2030 Agenda for Sustainable Development*, 21 October 2015, A/RES/70/1.

half of humanity continues to be denied its full human rights and opportunities. Women and girls must enjoy equal access to quality education, economic resources and political participation as well as equal opportunities with men and boys for employment, leadership and decision-making at all levels”.

Goal 5 of the SDGs seeks to achieve gender equality and empower all women and girls. UN Women acts to empower women and girls across all its programmes and advocacy.<sup>9</sup>

## **2. The Policy, Legal and Institutional Framework on Gender Issues in Kenya**

### **2.1 International and Regional Legal Instruments Relating to Gender Equality and Mainstreaming**

Article 2(5) and (6) of the Constitution of Kenya 2010 provides that ‘the general rules of international law shall form part of the law of Kenya’ and that ‘any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution’ respectively.<sup>10</sup> In *Re The Matter of Zipporah Wambui Mathara [2010] eKLR* the High Court held that by virtue of the provisions of Section 2 (6) of the Constitution of Kenya 2010, International Treaties, and Conventions that Kenya has ratified, were imported as part of the sources of the Kenyan Law and thus the provisions of the International Covenant on Civil and Political Rights (ICCPR) which Kenya ratified on 1st May 1972 were part of the Kenyan law. The court went on to hold that the provisions of the ICCPR superseded those contained in the Banking Act.<sup>11</sup>

---

<sup>9</sup> ‘Sustainable Development Goal 5: Gender Equality’ (*UN Women*) <<https://www.unwomen.org/news/in-focus/women-and-the-sdgs/sdg-5-gender-equality>> accessed 15 October 2020.

<sup>10</sup> See also Treaty-Making and Ratification Act, No. 45 of 2012, Laws of Kenya.

<sup>11</sup> See also *David Njoroge Macharia v Republic [2011] eKLR*, Criminal Appeal 497 of 2007; see also *Samuel Kamau Macharia & Another vs Kenya Commercial Bank Limited & 2 Others Sup. Ct. Application No. 2 of 2011; [2012] eKLR*.

It is in line with the country's international obligations on human rights and gender issues that Article 59 (2) (g) of the Constitution of Kenya provides that one of the functions of the Kenya National Human Rights and Equality Commission is to act as the principal organ of the State in ensuring compliance with obligations under treaties and conventions relating to human rights. It is however noteworthy that the National Gender and Equality Commission Act, 2011 has since established the National Gender and Equality Commission as the successor in title to the Kenya National Human Rights and Equality Commission established by Article 59 of the Constitution, pursuant to clauses (4) and (5) of that Article.<sup>12</sup> Its functions however remain the same. It is in line with the Commission's mandate on international treaties and conventions that the *Sessional Paper No. 02 of 2019 on National Policy on Gender and Development* outlines the national agenda for gender equality and how Kenya intends to realise these ideals; details the overarching principles, which will be adopted and integrated into the National and County Government sectoral policies, practices and programmes and by all state and non-state actors; and it specifically takes cognizance of, inter alia: international and regional treaties on gender equality that Kenya has ratified such as the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW) and the Maputo Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa.<sup>13</sup>

### **2.1.1 Universal Declaration of Human Rights**

The *Universal Declaration of Human Rights*<sup>14</sup> guarantees that all human beings are born free and equal in dignity and rights. They are

---

<sup>12</sup> National Gender and Equality Commission Act, 2011, sec. 3(1) (2).

<sup>13</sup> Republic of Kenya, *Sessional Paper No. 02 of 2019 on National Policy on Gender and Development*, Chapter one, para. 1.1.

<sup>14</sup> UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III).

endowed with reason and conscience and should act towards one another in a spirit of brotherhood.<sup>15</sup>

It also provides that each individual is entitled to enjoy their rights and freedoms ‘...without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status’.<sup>16</sup> Article 7 therein also guarantees that ‘all persons are equal before the law and are entitled without any discrimination to equal protection of the law’.

### **2.1.2 Convention on the Elimination of All Forms of Discrimination against Women**

The *Convention on the Elimination of All Forms of Discrimination against Women*<sup>17</sup> (CEDAW) defines the term "discrimination against women" to mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.<sup>18</sup>

CEDAW also provides that States Parties should condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake: to embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the

---

<sup>15</sup> *Universal Declaration of Human Rights*, Article 1.

<sup>16</sup> *Universal Declaration of Human Rights*, Article 2.

<sup>17</sup> UN General Assembly, *Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979, United Nations, Treaty Series, vol. 1249, p. 13.

<sup>18</sup> *Ibid*, Article 1.

practical realization of this principle; to adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women; to establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination; to refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation; to take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise; to take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women; and to repeal all national penal provisions which constitute discrimination against women.<sup>19</sup>

CEDAW also obligates States Parties to take in all fields, in particular in the political, social, economic and cultural fields, all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men.<sup>20</sup>

CEDAW also provides that States Parties should take all appropriate measures: to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the

---

<sup>19</sup> *Convention on the Elimination of All Forms of Discrimination against Women*, Article 2.

<sup>20</sup> *Convention on the Elimination of All Forms of Discrimination against Women*, Article 3.

inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.<sup>21</sup>

CEDAW also provides that States Parties should take all appropriate measures to eliminate discrimination against women in rural areas in order to ensure, on a basis of equality of men and women, that they participate in and benefit from rural development and, in particular, shall ensure to such women the right: to participate in the elaboration and implementation of development planning at all levels; to have access to adequate health care facilities, including information, counselling and services in family planning; to benefit directly from social security programmes; to obtain all types of training and education, formal and non-formal, including that relating to functional literacy, as well as, inter alia, the benefit of all community and extension services, in order to increase their technical proficiency; to organize self-help groups and co-operatives in order to obtain equal access to economic opportunities through employment or self-employment; to participate in all community activities; to have access to agricultural credit and loans, marketing facilities, appropriate technology and equal treatment in land and agrarian reform as well as in land resettlement schemes; and to enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply, transport and communications.<sup>22</sup>

Thus, the CEDAW covers civil rights, the legal status of women, the dimension of human reproduction and the impact of cultural factors on gender relations. Unlike other legal instruments, it acknowledges that different factors affect the relationships and interactions between men and women and thus outlines some obligations for State Parties to address all these factors.

---

<sup>21</sup> *Convention on the Elimination of All Forms of Discrimination against Women*, Article 5.

<sup>22</sup> *Convention on the Elimination of All Forms of Discrimination against Women*, Article 14(2).

### **2.1.3 International Covenant on Civil and Political Rights**

The *International Covenant on Civil and Political Rights*<sup>23</sup> (ICCPR) guarantees that ‘all peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development’.<sup>24</sup> ICCPR also provides that each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.<sup>25</sup>

In addition, ICCPR provides that the States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant.<sup>26</sup>

Article 26 of the *ICCPR* further provides that ‘all persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status’.

---

<sup>23</sup> UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171.

<sup>24</sup> *International Covenant on Civil and Political Rights*, Article 1.

<sup>25</sup> *International Covenant on Civil and Political Rights*, Article 2 (1).

<sup>26</sup> *International Covenant on Civil and Political Rights*, Article 3.

## **2.1.4 Nairobi Forward looking Strategies for the Advancement of Women**

The *Nairobi Forward looking Strategies for the Advancement of Women*<sup>27</sup> captured the concern that the resources available to the programme on the advancement of women of the Secretariat were insufficient to ensure adequate support to the Committee on the Elimination of Discrimination against Women and effective implementation of other aspects of the programme, especially the preparations for the Fourth World Conference on Women, held in 1995.<sup>28</sup> The delegation that called again upon Member States to give priority to policies and programmes relating to the subtheme "Employment, health and education", in particular to literacy, for the empowerment of women, especially those in the rural areas, to meet their own needs through self-reliance and the mobilization of indigenous resources, as well as to issues relating to the role of women in economic and political decision-making, population, the environment and information.<sup>29</sup>

The delegates also emphasized, in the framework of the Forward-looking Strategies, the importance of the total integration of women in the development process, bearing in mind the specific and urgent needs of the developing countries, and calls upon Member States to establish specific targets at each level in order to increase the participation of women in professional, management and decision-making positions in their countries.<sup>30</sup>

---

<sup>27</sup> UN General Assembly, *Implementation of the Nairobi Forward-looking Strategies for the Advancement of Women: resolution / adopted by the General Assembly, 16 December 1991, A/RES/46/98.*

<sup>28</sup> *Implementation of the Nairobi Forward-looking Strategies for the Advancement of Women*, Preamble.

<sup>29</sup> *Implementation of the Nairobi Forward-looking Strategies for the Advancement of Women*, Para. 4.

<sup>30</sup> *Implementation of the Nairobi Forward-looking Strategies for the Advancement of Women*, Para. 15.

## **2.1.5 Fourth World Conference on Women, Beijing Declaration and Platform for Action**

The Fourth World Conference on Women met in Beijing, China, from 4 to 15 September 1995 where delegates discussed and adopted the *Beijing Declaration and Platform for Action*<sup>31</sup>. The objective of the Beijing conference was to review the achievement of the goals of equality, development and peace, as outlined in the Nairobi Forward Looking Strategies for the Advancement of Women to the Year 2000 in 1985, and to establish a strategy for removing the remaining obstacles to the achievement of these goals.<sup>32</sup>

The Declaration recognized that the status of women had advanced but that inequalities and obstacles remained. It reaffirmed commitments to: equal rights in a number of existing agreements; ensuring full implementation of human rights of women and the girl child; and empowerment and advancement of women, including the right to freedom of thought, conscience, religion and belief.<sup>33</sup> Delegates also stated their conviction that: women's empowerment and full participation are fundamental to equality, development and peace; equal rights and responsibilities are critical to families; women's involvement is required to eradicate poverty; peace is linked to the advancement of women; and gender-sensitive policies are essential to foster women's

---

<sup>31</sup> United Nations, *Beijing Declaration and Platform of Action, adopted at the Fourth World Conference on Women*, , A/CONF.177/20 and A/CONF.177/20/Add.1 Date of adoption: 15 September 1995.

<sup>32</sup> Organisation for Economic Co-operation and Development, "The Implications Of The Fourth World Conference On Women for Bilateral Development Co-Operation: Report From The DAC Expert Group On Women In Development Seminar, Held In Paris On 25-26 January 1996, *Working Party on Gender Equality*, DCD/DAC/WID(99)4<

[http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DCD/DA C/WID\(99\)4&docLanguage=En](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DCD/DA C/WID(99)4&docLanguage=En)> Accessed 13 October 2020.

<sup>33</sup> Doran, P., V. Hulme, L. Wagner, W. Yang, and S. Wise. "Summary of the Fourth World Conference on Women: 4-15 September 1995." *Earth Negotiations Bulletin* 14, no. 21 (1995): 1 < <https://enb.iisd.org/download/pdf/enb1421e.pdf>> Accessed 13 October 2020.

empowerment and advancement.<sup>34</sup> Governments also affirmed their determination to: intensify efforts to achieve goals from the Nairobi strategies; ensure the full enjoyment by women and the girl child of human rights; eliminate discrimination and remove obstacles to equality; encourage men to participate in actions towards equality; promote women's economic independence; promote sustainable development and education; prevent and eliminate violence against women and girls; ensure full participation; and ensure equal access to economic resources.<sup>35</sup>

### **2.1.6 United Nations Declaration on the Elimination of Violence against Women**

The United Nations *Declaration on the Elimination of Violence against Women*<sup>36</sup> (DEVAW) provides that women are entitled to the equal enjoyment and protection of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. These rights include, inter alia: the right to life; the right to equality; the right to liberty and security of person; the right to equal protection under the law; the right to be free from all forms of discrimination; the right to the highest standard attainable of physical and mental health; the right to just and favourable conditions of work; the right not to be subjected to torture, or other cruel, inhuman or degrading treatment or punishment.<sup>37</sup> DEVAW also obligates States to condemn violence against women and should not invoke any custom, tradition or religious consideration to avoid their obligations with respect to its elimination.<sup>38</sup>

---

<sup>34</sup> Doran, P., V. Hulme, L. Wagner, W. Yang, and S. Wise. "Summary of the Fourth World Conference on Women: 4-15 September 1995." *Earth Negotiations Bulletin* 14, no. 21 (1995): 1.

<sup>35</sup> Doran, P., V. Hulme, L. Wagner, W. Yang, and S. Wise. "Summary of the Fourth World Conference on Women: 4-15 September 1995." *Earth Negotiations Bulletin* 14, no. 21 (1995): 1.

<sup>36</sup> UN General Assembly, *Declaration on the Elimination of Violence against Women*, 20 December 1993, A/RES/48/104.

<sup>37</sup> *Ibid*, Article 3.

<sup>38</sup> *Ibid*, Article 4.

### **2.1.7 African Charter on Human and Peoples Rights (Banjul Charter)**

The *African Charter on Human and Peoples' Rights* (also known as the *Banjul Charter*)<sup>39</sup> is an international (African region) human rights instrument that is intended to promote and protect *human rights* and basic freedoms in the *African* continent.<sup>40</sup> The Banjul Charter obligates the Member States of the Organization of African Unity parties to the present Charter to recognize the rights, duties and freedoms enshrined in this Charter and that they should undertake to adopt legislative or other measures to give effect to them.<sup>41</sup>

The Charter also guarantees that every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, color, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status.<sup>42</sup>

Some authors have however questioned the commitment of African states in upholding human rights or even the effectiveness of the Charter itself in achieving protection of human rights. For instance, it has been observed that while the African Charter is defined as an application of the UN Declaration of Human Rights to the African perspective, and a legal instrument 'written by Africans for Africans', it is evident that African governments are less than willing to condemn human rights violations in their own states as demonstrated not only by the emphasis on development and political stability at the expense of human rights but also in the drafting of the African Charter itself.<sup>43</sup>

---

<sup>39</sup> Organization of African Unity (OAU), *African Charter on Human and Peoples' Rights* ("*Banjul Charter*"), 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982).

<sup>40</sup> 'African Commission on Human and Peoples' Rights Legal instruments' <<https://www.achpr.org/legalinstruments/detail?id=49>> accessed 15 October 2020.

<sup>41</sup> *African Charter on Human and Peoples' Rights*, Article 1.

<sup>42</sup> *African Charter on Human and Peoples' Rights*, Article 2.

<sup>43</sup> 'The African Charter on Human and Peoples' Rights: how effective is this legal instrument in shaping a continental human rights culture in Africa?' (*Le petit juriste*,

### **2.1.8 Southern African Development Community (SADC), 1997 Declaration on Gender and Development and 2008 Protocol on Gender and Development**

The Southern African Development Community (SADC) Declaration on Gender and Development was made in 1997 on the basis that SADC Member States undertook, in the SADC Treaty Article 6(2), not to discriminate against any person on the grounds of inter alia, sex or gender. In addition, SADC Member States committed to mainstream gender into the SADC Programme of Action and Community Building initiatives as a prerequisite for sustainable development.<sup>44</sup>

SADC Member States acknowledged gender equality as a fundamental human right and therefore signed the Declaration on Gender and Development on 8th September 1997 to promote closer regional cooperation and collective action as a means of fostering gender equality and as a reaffirmation of SADC's commitment to eliminating gender discrimination and mainstreaming gender issues in Southern Africa.<sup>45</sup>

SADC Heads of State and Government signed and adopted the *SADC Protocol on Gender and Development* in August 2008 with the exception of Botswana and Mauritius. The Objectives of the Protocol are among others to provide for the empowerment of women, to eliminate discrimination and to achieve gender equality and equity through the development and implementation of gender responsive legislation, policies, programmes and projects. It also seeks to

---

21 December 2014) <<https://www.lepetitjuriste.fr/the-african-charter-on-human-and-peoples-rights-how-effective-is-this-legal-instrument-in-shaping-a-continental-human-rights-culture-in-africa/>> accessed 15 October 2020.

<sup>44</sup> 'Southern African Development Community : Gender' <<https://www.sadc.int/issues/gender/>> accessed 15 October 2020.

<sup>45</sup> 'Southern African Development Community: Show' <[https://www.sadc.int/documents-publications/show/Declaration\\_on\\_Gender\\_Development\\_1997.pdf](https://www.sadc.int/documents-publications/show/Declaration_on_Gender_Development_1997.pdf)> accessed 15 October 2020.

harmonise the various international, continental and regional gender equality instruments that SADC Member States have subscribed to.<sup>46</sup> Generally, the principle objectives of the gender-mainstreaming programme in SADC are to: put in place the necessary institutional mechanisms, operational guidelines and to promote a culture that will facilitate gender mainstreaming in the Secretariat; build the capacity of the staff of the Secretariat and SADC Member States to systematically develop, implement and sustain gender mainstreamed plans, strategies and programmes on an ongoing basis; ensure that the necessary human and financial resources for gender mainstreaming are mobilized for training; capacity building and programme implementation; and ensure that the commitments of the integration and development objectives to gender equality and women's empowerment are effectively implemented at the Member State level.<sup>47</sup>

While Kenya is not a Member State of SADC, the above objectives though not fully implemented by the members offer some guiding principles for Kenya to consider.

### **2.1.9 African Union (AU), Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa**

The *Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa*<sup>48</sup> requires that States Parties should combat all forms of discrimination against women through appropriate legislative, institutional and other measures. In this regard the Protocol requires State Parties to: include in their national constitutions and other

---

<sup>46</sup> 'Southern African Development Community: Show'

<[https://www.sadc.int/documents-publications/show/Declaration\\_on\\_Gender\\_Development\\_1997.pdf](https://www.sadc.int/documents-publications/show/Declaration_on_Gender_Development_1997.pdf)> accessed 15 October 2020.

<sup>47</sup> 'Southern African Development Community: Gender Mainstreaming'

<<https://www.sadc.int/issues/gender/gender-mainstreaming/>> accessed 15 October 2020.

<sup>48</sup> African Union, *Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa*, 11 July 2003.

legislative instruments, if not already done, the principle of equality between women and men and ensure its effective application; enact and effectively implement appropriate legislative or regulatory measures, including those prohibiting and curbing all forms of discrimination particularly those harmful practices which endanger the health and general well-being of women; integrate a gender perspective in their policy decisions, legislation, development plans, programmes and activities and in all other spheres of life; take corrective and positive action in those areas where discrimination against women in law and in fact continues to exist; and support the local, national, regional and continental initiatives directed at eradicating all forms of discrimination against women.<sup>49</sup>

States Parties are also obligated to commit themselves to modify the social and cultural patterns of conduct of women and men through public education, information, education and communication strategies, with a view to achieving the elimination of harmful cultural and traditional practices and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes, or on stereotyped roles for women and men.<sup>50</sup>

#### **2.1.10 African Union Solemn Declaration of Gender Equality in Africa, 2004**

The *African Union Solemn Declaration on Gender Equality in Africa*<sup>51</sup> was a Member State's reaffirmation of their commitment to the principle of gender equality as enshrined in Article 4 (1) of the Constitutive Act of the African Union, as well as other existing commitments, principles, goals and actions set out in the various

---

<sup>49</sup> *Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa*, Article 2(1).

<sup>50</sup> *Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa*, Article 2(2).

<sup>51</sup> African Union, *Solemn Declaration on Gender Equality in Africa*, adopted by the AU Assembly in 2004.

regional, continental and international instruments on human and women's rights, including the Dakar Platform for Action (1994), the Beijing Platform for Action (1995), the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW -1979), the African Plan of Action to Accelerate the Implementation of the Dakar and Beijing Platforms for Action for the Advancement of Women (1999); the Outcome Document of the Twenty-third Special Session of the United Nations General Assembly Special Session on the Implementation of the Beijing Platform for Action (2000); UN Resolution 1325 (2000) on Women, Peace and Security; and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (2003).<sup>52</sup>

The Members agreed to ensure the active promotion and protection of all human rights for women and girls including the right to development by raising awareness or by legislation where necessary.<sup>53</sup>

### **2.1.11 African Union Gender Policy, 2009**

The overall goal of the African Union Gender Policy<sup>54</sup> is to adopt a rights based approach to development through evidence-based decision-making and the use of sex-disaggregated data and performance indicators for the achievement of gender equality and women's empowerment in Africa. It seeks to promote a gender responsive environment and practices and undertake commitments linked to the realisation of gender equality and women's empowerment in Member States, and at the international, continental, regional and national levels.<sup>55</sup>

---

<sup>52</sup> *Solemn Declaration on Gender Equality in Africa*, Preamble.

<sup>53</sup> *Solemn Declaration on Gender Equality in Africa*, Para. 6.

<sup>54</sup> African Union Gender Policy, Rev 2/Feb 10, 2009.

<sup>55</sup> *Ibid*, p.10.

## **2.2. National Legal Instruments and Institutions Relating to Gender Equality and Mainstreaming in Kenya**

Kenya has been on a journey towards achieving gender equality and equity, a goal that has remained elusive over the years. There have been policies aimed at promoting the same and they have always been reviewed or replaced by new ones in a bid to improve on the framework and address any gaps. There have been positive steps that have been realized along the way such as recognition of equality of men and women rights to own property or inherit property and fair labour practices, among others. Despite this, Kenya cannot boast of an impressive track record as gender inequality is still manifest.<sup>56</sup>

### **2.2.1 National Policy on Gender and Development, 2000**

Notably, the first National Policy on Gender and Development was adopted in 2000 and was meant to provide a legitimate point of reference for addressing gender inequalities at all levels of government and by all stakeholders, and further provided an avenue for gender mainstreaming across all sectors in order to generate efficient and equitable development outcomes for all Kenyans.<sup>57</sup>

The National Policy on Gender and Development of 2000 has since been reviewed in order to align it to the new legal framework including

---

<sup>56</sup> Njogu, Kimani, and Elizabeth Orchardson-Mazrui. "Gender inequality and women's rights in the Great Lakes: Can culture contribute to women's empowerment." *New York: UNICEF* (2013); Jagoe, Kirstie, Madeleine Rossanese, Dana Charron, Jonathan Rouse, Francis Waweru, MaryAnne Waruguru, Samantha Delapena, Ricardo Piedrahita, Kavanaugh Livingston, and Julie Ipe. "Sharing the burden: Shifts in family time use, agency and gender dynamics after introduction of new cookstoves in rural Kenya." *Energy Research & Social Science* 64 (2020): 101413; Flowe, Heather D., Sarah Rockowitz, James Rockey, Wangu Kanja, CATHERINE KAMAU, Melissa Colloff, Jasmin Kauldar, Jessica Woodhams, and Kari Davies. "Sexual and Other Forms of Violence During the COVID-19 Pandemic Emergency in Kenya." (2020).

<sup>57</sup> Republic of Kenya, *Sessional Paper No. 02 of 2019 on National Policy on Gender and Development*, October 2019, p. 9.

the Constitution of Kenya.<sup>58</sup> This was superseded by the Sessional Paper No. 2 of 2006 on Gender Equality and Development which was meant to promote women empowerment and mainstreaming the needs of women, men, girls and boys in all sectors of development in Kenya so that they can participate and benefit equally from development initiatives.<sup>59</sup>

### **2.2.2. National Policy for Prevention and Response to Gender Based Violence, 2014**

The National Policy for Prevention and Response to Gender Based Violence's main purpose was to put in place a framework to accelerate implementation of laws, policies and programmes for prevention and response to Gender Based Violence (GBV) by state and non – state actors for the realization of a society where men, women, boys and girls are free from all forms violence.<sup>60</sup> This Policy sought to achieve the following objectives: to facilitate a coordinated approach in addressing GBV and to ensure effective programming; to improve enforcement of laws and policies towards GBV prevention and response; to increase access to quality and comprehensive support services across sectors; and to improve sustainability of GBV prevention and response interventions.<sup>61</sup>

The Policy also acknowledged that while it is women and girls who suffer the greatest share of GBV in the country, men and boys also experience the same.<sup>62</sup>

---

<sup>58</sup> Republic of Kenya, *Sessional Paper No. 02 of 2019 on National Policy on Gender and Development*, October 2019, p. 10.

<sup>59</sup> Ibid, p. 12.

<sup>60</sup> Republic of Kenya, National Policy for Prevention and Response to Gender Based Violence, November, 2014, p. 12 <  
<http://psyg.go.ke/docs/National%20Policy%20on%20prevention%20and%20Response%20to%20Gender%20Based%20Violence.pdf> > accessed 10 October 2020.

<sup>61</sup> Republic of Kenya, National Policy for Prevention and Response to Gender Based Violence, November, 2014, pp. 12-13.

<sup>62</sup> Ibid, p. 11.

Land Laws such as the Land Act and Land Registration Act acknowledge the right of women to acquire, inherit and hold or dispose land. However, the reality on the ground is that women and girls are still being dispossessed of property especially when it comes to inheritance.

### **2.2.3 Constitution of Kenya 2010**

The Constitution of Kenya 2010 was the culmination of the recognition of the need to streamline gender issues in the country's development agenda. It not only guarantees equality and non-discrimination of all persons regardless of gender, but also has outlined some remedial measures to address the existing inequality in the country. It forms the basis of all other efforts since the year 2010.

### **2.2.4 National Gender and Equality Commission**

The National Gender and Equality Commission is established under the National Gender and Equality Commission Act, 2011<sup>63</sup> which 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.<sup>64</sup> The functions of the Commission are, 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 equality and freedom from discrimination and relating to special interest groups including minorities and marginalized persons, women, persons with disabilities, and children; and co-ordinate and facilitate mainstreaming of issues of gender,

---

<sup>63</sup> National Gender and Equality Commission Act, 2011, Laws of Kenya, Sec. 3(1).

<sup>64</sup> Ibid, Preamble.

persons with disability and other marginalised groups in national development and to advise the Government on all aspects thereof.<sup>65</sup>

### **2.2.5 State Department for Gender Affairs**

The State Department for Gender Affairs falls under the Ministry of Public Service, Youth and Gender Affairs. The Ministry of Public Service and Gender was created under the re-organization of the National Government in November 2015.<sup>66</sup>

The mandate of the State Department of Gender is hinged on the Constitution of Kenya and Executive Order of June, 2018. It is responsible for: Gender Policy Management; Special Programmes for Women Empowerment; Gender Mainstreaming in Ministries, Departments and Agencies (MDAs); Community Mobilization; Domestication of International Treaties and Conventions on Gender; and Policy and Programmes on Gender Violence.<sup>67</sup>

### **3. Gender and Development in Kenya: The Challenges**

The 2014 National Policy for Prevention and Response to Gender Based Violence identified the following as the greatest contributing factors to GBV in Kenya: unequal power relations between men and women; socio-cultural norms that normalize GBV, discriminatory practices and changing gender roles; poverty; illiteracy; breakdown of the family unit and support systems; insecurity; alcohol and substance abuse; uncensored media content; and conflict; political instability as well as poor enforcement of laws and policies.<sup>68</sup>

---

<sup>65</sup> Ibid, sec. 8.

<sup>66</sup> 'Background' (Ministry of Public Service And Gender)

<[http://www.psyg.go.ke/?page\\_id=241](http://www.psyg.go.ke/?page_id=241)> accessed 10 October 2020.

<sup>67</sup> Republic of Kenya, *Sessional Paper No. 02 of 2019 on National Policy on Gender and Development*, October 2020, pp. 12-13.

<sup>68</sup> Republic of Kenya, *National Policy for Prevention and Response to Gender Based Violence*, November, 2014, p. 14.

While it is worthy pointing out that the 2014 Policy was geared towards dealing with GBV, the above factors contribute to much more than just GBV; they hamper the equal participation of both men and women in development matters in the country. Indeed, one of the guiding principles of the 2014 Policy was recognition of the importance of gender equity and gender equality in national development.<sup>69</sup>

*In the Matter of the Principle of Gender Representation in the National Assembly and the Senate [2012]eKLR*<sup>70</sup>, the advisory opinion related to two discrete elements in respect of which the Attorney-General thus moved the Court: “The Advisory Opinion of the Court is sought on the following issues:

- A. *Whether Article 81(b) as read with Article 27(4), Article 27(6), Article 27(8), Article 96, Article 97, Article 98, Article 177(1) (b), Article 116 and Article 125 of the Constitution of the Republic of Kenya require progressive realization of the enforcement of the one-third gender rule or requires the same to be implemented during the general elections scheduled for 4<sup>th</sup> March, 2013?*
- B. *Whether an unsuccessful candidate in the first round of Presidential election under Article 136 of the Constitution or any other person is entitled to petition the Supreme Court to challenge the outcome of the first round of the said election under Article 140 or any other provision of the Constitution?”*

---

<sup>69</sup> Republic of Kenya, National Policy for Prevention and Response to Gender Based Violence, November, 2014, p. 13.

<sup>70</sup> In the Matter of the Principle of Gender Representation in the National Assembly and the Senate [2012]eKLR, Advisory Opinions Application 2 of 2012.

Regarding the one-third gender rule, the Attorney-General moved the Supreme Court seeking an opinion as to whether the terms of Article 81(b) apply in respect of the very next general elections, to be held on 4 March 2013, or on the contrary, apply *progressively* over an extended period of time.

The Supreme Court observed as follows:

*[47] This Court is fully cognisant of the distinct social imperfection which led to the adoption of Articles 27(8) and 81(b) of the Constitution: that in elective or other public bodies, the participation of women has, for decades, been held at bare nominal levels, on account of discriminatory practices, or gender-indifferent laws, policies and regulations. This presents itself as a manifestation of historically unequal power relations between men and women in Kenyan society. Learned counsel Ms. Thongori aptly referred to this phenomenon as “the socialization of patriarchy”; and its resultant diminution of women’s participation in public affairs has had a major negative impact on the social terrain as a whole. Thus, the Constitution sets out to redress such aberrations, not just through affirmative action provisions such as those in Articles 27 and 81, but also by way of a detailed and robust Bill of Rights, as well as a set of “national values and principles of governance” [Article 10].*

While there was no unanimous decision on whether implementation of the one-third Two-thirds gender rule was to be realised immediately or progressively, Kenya is still grappling with the question of gender representation in the elective posts in Kenya, with the recent advisory opinion from the Chief Justice directed to the President on the need to dissolve Parliament for failure to uphold the gender equity

constitutional requirements complicating the debate even further.<sup>71</sup> The Deputy Chief Justice has since appointed a special bench of judges to decide on the constitutional status of the advisory opinion as issued by the Chief justice.<sup>72</sup>

The upshot of the above is that despite Kenya's progressive constitutional and statutory framework on achieving gender mainstreaming, the country is far from enjoying gender equality and equity especially in relation to women's position in leadership and national development roles, with representation of women in Kenya's Parliament remaining minimal over the years despite the promulgation of the current Constitution of Kenya in 2010.<sup>73</sup> Indeed, despite its leading economic position in the East African region, Kenya ranks the lowest among the East African countries when it comes to the place of women in leadership positions.<sup>74</sup> For instance, in 2016, it was reported that women held 64 percent of seats in the lower house of Rwanda's national legislature, the largest share of any country.<sup>75</sup> However, despite

---

<sup>71</sup> 'Chief Justice's Advice to the President on Dissolution of Parliament for Failure to Enact the Gender Rule | Kenya Law' <<http://kenyalaw.org/kenyalawblog/chief-justices-advice-to-the-president-on-dissolution-of-parliament/>> accessed 15 October 2020.

<sup>72</sup> Japheth Ogila, 'DCJ Mwilu Forms Five-Judge Bench to Hear Maraga's Parliament Dissolution Advice' (*The Standard*) <<https://www.standardmedia.co.ke/nairobi/article/2001390110/mwilu-forms-judge-bench-to-hear-cjs-parliament-dissolution-advice>> accessed 15 October 2020; 'Fate of Parliament Lies in the Hands of Five Judges' (*People Daily*, 14 October 2020) <<https://www.pd.co.ke/news/fate-of-parliament-lies-in-the-hands-of-five-judges-55560/>> accessed 15 October 2020; John Osoro, '5 Judges Appointed to Hear Petitions on CJ Advise to Uhuru to Dissolve Parliament' *Capital News* (*Capital News*, 14 October 2020) <<https://www.capitalfm.co.ke/news/2020/10/5-judges-appointed-to-hear-petitions-on-cj-advise-to-uhuru-to-dissolve-parliament/>> accessed 15 October 2020.

<sup>73</sup> 'Actualization and Implementation of the "Two-Thirds Gender Principle" in Kenya | Wwww.Sidint.Net' <<https://www.sidint.net/content/actualization-and-implementation-two-thirds-gender-principle-kenya>> accessed 15 October 2020.

<sup>74</sup> *Ibid.*

<sup>75</sup> 'It's The No. 1 Country for Women in Politics — But Not In Daily Life' (*NPR.org*) <<https://www.npr.org/sections/goatsandsoda/2016/07/29/487360094/invisibilia-no-one-thought-this-all-womans-debate-team-could-crush-it>> accessed 15 October 2020.

this commendable state of affairs in Rwanda, there are conflicting reports on the status of women rights in everyday life, with some reporters saying that the political state of affairs is very different from every day community life of women in Rwanda.<sup>76</sup> It is therefore possible to have a politically empowered group of men and women but without guaranteeing them enjoyment of other fundamental rights. As things stand, it is therefore safe to argue that the problem of gender inequality and inequity in Kenya goes beyond availability of statutory and constitutional framework. It is for this reason that the 2019 National Policy on Gender and Development was drafted in order to enable the stakeholders take practical steps towards addressing the existing challenges.

#### **4. 2019 National Policy on Gender and Development: Overview**

The National Policy on Gender and Development seeks to create a just, fair and transformed society free from gender based discrimination in all spheres of life practices.

The National Policy highlights the fact that the patriarchal social order supported by statutory, religious and customary laws and practices; and the administrative and procedural mechanisms for accessing rights have continued to hamper the goal of attaining gender equality and women's empowerment.<sup>77</sup> The Gender Policy was informed by the observation that although the Kenyan law and the Constitution contain progressive provisions that were expected to address gender inequality, they have not delivered gender equality in practice, thus raising the need to develop a policy that addresses the variety of manifestations of gender

---

<sup>76</sup> Ibid; Azad Essa, 'The Mixed Tale of Women's Empowerment in Rwanda' <<https://www.aljazeera.com/features/2018/9/20/the-mixed-tale-of-womens-empowerment-in-rwanda>> accessed 15 October 2020; 'How Women Are Stepping up to Remake Rwanda' (Culture, 15 October 2019) <<https://www.nationalgeographic.com/culture/2019/10/how-women-are-remaking-rwanda-feature/>> accessed 15 October 2020.

<sup>77</sup> Republic of Kenya, *Sessional Paper No. 02 of 2019 on National Policy on Gender and Development*, October 2019, p. 9.

discrimination and inequality.<sup>78</sup> The 2019 Policy builds on the National Policy for Gender and Development of 2000, and Sessional Paper No. 2 of 2006 on Gender Equality and Development which were meant to promote women empowerment and mainstreaming the needs of women, men, girls and boys in all sectors of development in Kenya so that they can participate and benefit equally from development initiatives.<sup>79</sup>

The 2019 Policy rightly points out that while there has been emphasis by the Kenyan Government on promoting gender equality in all aspects of its activities, evaluations point to clear gaps in promoting gender equality such as disparities in education and economic opportunities, representation, participation, and adequate access to health, all of which present new opportunities and challenges in the pursuit of gender equality and women's empowerment.<sup>80</sup> As a result, the Policy has been designed to guide and ensure that all planning, programming, budgeting and implementation of development programmes include a gender perspective both at National and County levels.<sup>81</sup>

The Policy has promised the following focus areas: improved livelihoods, promotion and protection of human rights, participation in decision-making and governance, recognition of gender and promotion of women empowerment in macro-economic management among others.<sup>82</sup> The Scope of the National Gender and Development Policy application is specifically and directly to all Government Ministries, Independent Bodies, Quasi-autonomous entities, and Departments and Agencies both at the national and county levels of government. It is also expected that the principles, strategies and approaches in the policy

---

<sup>78</sup> Republic of Kenya, *Sessional Paper No. 02 of 2019 on National Policy on Gender and Development*, October 2019, pp. 9-10.

<sup>79</sup> Republic of Kenya, *Sessional Paper No. 02 of 2019 on National Policy on Gender and Development*, October 2019, p. 12.

<sup>80</sup> Republic of Kenya, *Sessional Paper No. 02 of 2019 on National Policy on Gender and Development*, October 2019, p. 13.

<sup>81</sup> *Ibid*, p. 13.

<sup>82</sup> *Ibid*, p.13.

shall also apply to the, private sector and civil society.<sup>83</sup> The Policy also aims at achieving equality of opportunity and outcomes with respect to access to and control of national and county resources and services; and equality of treatment that meets the specific and distinct needs of different categories of women and men.<sup>84</sup>

However, while the Policy is concerned with all categories and aspects of gender, it has put a special focus on the empowerment of women who are currently considered the marginalized gender.<sup>85</sup> The Policy has identified a set of factors that will act as indicators for measuring the implementation and effectiveness of the gender and development agenda.<sup>86</sup> In addition, the Policy points out that if concerted efforts are made and adequate resources are allocated to the processes of institutionalizing gender equality and the empowerment of women as proposed in this policy, the result will be a fairer and transformed society in which women and men will benefit in the following ways: Equality of treatment and Freedom from Discrimination as provided for under Article 27 of the Constitution; Equality in the political, social, economic and cultural development spheres for women and men; Respect for the human rights of women, men, boys and girls; Respect for provisions on equality in the Bill of Rights in civil, administrative and judicial regulations and procedures and customary, cultural and religious practices; Enforcement of statutory, religious and customary laws within the framework of this policy and the Constitution; and Duty bearers at the National and County levels of Government will be equipped with relevant gender responsive requirements for planning, budgeting and implementing development programmes.<sup>87</sup>

---

<sup>83</sup> Republic of Kenya, *Sessional Paper No. 02 of 2019 on National Policy on Gender and Development*, October 2019, p. 13.

<sup>84</sup> Republic of Kenya, *Sessional Paper No. 02 of 2019 on National Policy on Gender and Development*, October 2019, p. 13.

<sup>85</sup> *Ibid*, p. 13.

<sup>86</sup> *Ibid*, p. 13.

<sup>87</sup> *Ibid*, pp. 13-14.

Chapter Two of the Policy dwells on situational analysis and key aspects which impact on Kenya's progress towards gender equality.<sup>88</sup> The Chapter highlights the following as the major challenges that affect realization of gender equality in Kenya: Poverty; Access to Labour and the Economy; Access to Education; Access to Health Care; Land, Housing and Agriculture; Access to Environment and Natural Resources; Peace and Security; Governance, Power and Decision-Making; Information and Communications Technologies (ICT); Respect of Human Rights for All; Sexual and Gender Based Violence (SGBV); Access to Justice; Discrimination between the Girl Child and Boy Child; Intersectional Discrimination; Media Influence; and Institutional Mechanisms for the advancement of Gender Equality and Empowerment of Women.<sup>89</sup>

Chapter Two highlights the specific concerns that arise under each of the foregoing thematic areas affecting the gender debate in Kenya.

Chapter three of the Policy document captures that Policy goal, principle and objectives, which are all aimed at ensuring gender equality and women empowerment in the social, economic, political and cultural spheres as envisaged in the Constitution. The framework also seeks to establish and strengthen Affirmative Action efforts aimed at reducing gender inequalities and geographical disparities in the distribution of natural resources and access to productive resources such as land, labour, finances, information and technology.<sup>90</sup>

The overall goal of this policy is to achieve gender equality by creating a just society where women, men, boys and girls have equal access to

---

<sup>88</sup> Ibid, p. 14.

<sup>89</sup> Republic of Kenya, *Sessional Paper No. 02 of 2019 on National Policy on Gender and Development*, October 2019, Chapter Two.

<sup>90</sup> Republic of Kenya, *Sessional Paper No. 02 of 2019 on National Policy on Gender and Development*, October 2019, Chapter Three, p. 28.

opportunities in the political, economic, cultural and social spheres of life.”<sup>91</sup>

The objectives of the Policy are to: Facilitate implementation of the Constitution and domesticate the international and regional obligations and commitments that promote gender equality and freedom from discrimination; Provide a framework to integrate and mainstream gender into the National and County Government development planning and budgeting as well as resultant policies, programmes and plans including those of non-state actors; Promote and support the rights-based approach when dealing with gender related matters; and, Define institutional framework and performance indicators for effective tracking, monitoring, evaluation and reporting implementation of gender equality and women empowerment.<sup>92</sup>

In order to achieve the foregoing, the following approaches will be used: Gender mainstreaming and integration in all planned interventions; Affirmative Action to ensure that temporary special measures are used to address past gender inequalities and injustices; Empowerment of women, men, boys and girls to facilitate equality, equity and non-discrimination; Involvement of men in addressing gender issues; Institutional and human capacity building; Gender responsive development planning budgeting; and, Generating data and indicators that are disaggregated by sex, age and disability.<sup>93</sup>

The 2019 Policy anticipates to achieve the following outcomes: Equality and economic empowerment will be achieved; Diversity of all Kenyans will be acknowledged and respected; Women men, boys and

---

<sup>91</sup> Republic of Kenya, *Sessional Paper No. 02 of 2019 on National Policy on Gender and Development*, October 2019, Chapter Three, para. 3.2.

<sup>92</sup> Republic of Kenya, *Sessional Paper No. 02 of 2019 on National Policy on Gender and Development*, October 2019, Chapter Three, para. 3.3.

<sup>93</sup> Republic of Kenya, *Sessional Paper No. 02 of 2019 on National Policy on Gender and Development*, October 2019, Chapter Three, para. 3.5.

girls will have equal rights and access to education, health, housing, employment, and other services and resources; Women and men will have equality of opportunity to participate in decision making and to contribute to the political, social, economic and cultural development agenda; Promotion of equal rights at the time of, during and on the dissolution of the marriage for spouses; and, Sexual and Gender based Violence will abate and men, women, boys and girls will live with dignity.<sup>94</sup>

Chapter four of the Policy outlines the policy priority areas the Ministry in charge of Gender Affairs will oversee and implement through the institutional arrangements discussed chapter five thereof.<sup>95</sup> Chapter four offers recommendations on the challenges identified in chapter two of the Policy document.

Chapter five of the Policy document presents the institutional and implementation framework for implementing the National Gender and Development Policy, where the institutions identified will facilitate integration and mainstreaming of gender concerns as part of their mandates in implementing the policy. According to the Policy document, therefore, implementation of the policy will thus take a multi-sectoral approach cutting across both the state and non-state actors at all levels. The Ministry in charge of Gender Affairs will however take the leading role of coordinating all the other players in the country so as to enhance harmony and avoid duplication.<sup>96</sup>

The Policy document points out that different aspects of the policy will be implemented by various actors including Ministries, Counties,

---

<sup>94</sup> Republic of Kenya, *Sessional Paper No. 02 of 2019 on National Policy on Gender and Development*, October 2019, Chapter Three, para. 3.6.

<sup>95</sup> Republic of Kenya, *Sessional Paper No. 02 of 2019 on National Policy on Gender and Development*, October 2019, Chapter Four, para. 4.1.

<sup>96</sup> Republic of Kenya, *Sessional Paper No. 02 of 2019 on National Policy on Gender and Development*, October 2019, Chapter Five, para. 5.1.

Departments and Agencies, Constitutional Commissions and Independent Offices in collaboration with the private sector, Civil Society Organizations, Faith Based Organizations, among other key actors.<sup>97</sup>

Chapter six on monitoring and evaluation envisages that Monitoring and evaluation shall be an essential strategy in the implementation of the Policy in order to ensure that results frameworks on each policy action detailing outputs, outcomes, impacts and key actors shall be developed to facilitate annual plans and development planning processes in all sector at all levels.<sup>98</sup>

## **5. Actualising the National Policy on Gender and Development in Kenya: Prospects**

The 2019 National Policy on Gender and Development is a commendable document that is quite detailed in not only identifying the challenges but also offering solutions as well as an oversight framework. It is however noteworthy that there is still the challenge of drafting the actual Act in a way that ensures that the spirit of the Policy and the approaches envisaged will be possible to implement. The institutional framework will be critical in realization of the same. However, there is a need to work very closely with communities in order to ensure that there is a continued change of practices and behaviour especially those related to gender roles in the society.<sup>99</sup>

---

<sup>97</sup> Ibid, para. 5.2.

<sup>98</sup> Republic of Kenya, *Sessional Paper No. 02 of 2019 on National Policy on Gender and Development*, October 2019, Chapter six, para. 6.1.

<sup>99</sup> Koburtay, Tamer, Jawad Syed, and Radi Haloub. "Implications of religion, culture, and legislation for gender equality at work: Qualitative insights from Jordan." *Journal of Business Ethics* 164, no. 3 (2020): 421-436; Glas, Saskia, Niels Spierings, and Peer Scheepers. "Re-understanding religion and support for gender equality in Arab countries." *Gender & Society* 32, no. 5 (2018): 686-712; Wood, Hannelie J. "Gender inequality: The problem of harmful, patriarchal, traditional and cultural gender practices in the church." *HTS Theological Studies* 75, no. 1 (2019): 1-8.

The Constitution of Kenya 2010 recognises culture as the foundation of the nation and as the cumulative civilization of the Kenyan people and nation.<sup>100</sup> It also guarantees the right of every person to use the language, and to participate in the cultural life, of the person's choice.<sup>101</sup> However, the Constitution also provides that no person shall be compelled by another person to perform, observe or undergo any cultural practice or rite.<sup>102</sup>

It is also noteworthy the Constitution provides for equality of all persons and non-discrimination. It prohibits discrimination by either state or any other person directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.<sup>103</sup> While some traditions have been instrumental in preserving the heritage of the people of Kenya, there are others that are admittedly discriminative especially against women and are also used to hamper their progress in all spheres of life.<sup>104</sup>

There is a need for a sustained debate aimed at changing communities' mentality on the culturally-specific gendered roles and responsibilities

---

<sup>100</sup> Constitution of Kenya 2010, Article 11(1).

<sup>101</sup> Constitution of Kenya 2010, Article 44 (1).

<sup>102</sup> Constitution of Kenya 2010, Article 44 (3).

<sup>103</sup> Constitution of Kenya 2010, Article 27 (4) (5).

<sup>104</sup> Rivière, François, ed. *Investing in cultural diversity and intercultural dialogue*. Vol. 2. Unesco, 2009; Martin Wamalwa, 'Culture And Women Empowerment In Kenya: A Philosophical Analysis' (2007); Nozomi Kawarazuka, Catherine Locke and Janet Seeley, 'Women Bargaining with Patriarchy in Coastal Kenya: Contradictions, Creative Agency and Food Provisioning' (2019) 26 Gender, Place & Culture 384; Ongong'a, Jude J. "African traditional cultural conundrums which make women prone to hiv/aids infections: a case of the Maasai of Kenya." *International Journal of Education and Research*, Vol. 1 No. 8 August 2013 (2013) < <https://www.ijern.com/journal/August-2013/18.pdf> > Accessed 10 October 2020.

since these tend to affect how men and women interact both at household level as well as professionally.<sup>105</sup>

For as long as the deep-seated culturally inspired mentality on the supposed role of men and women, formal legal, policy and institutional frameworks may not do much in terms of transformation.<sup>106</sup> However, these frameworks alongside public awareness on the importance of acknowledging that both men and women should be afforded equal opportunities to contribute to the national development debate.<sup>107</sup> For instance, the UN Women Report (A/75/274), *Intensification of efforts to eliminate all forms of violence against women: Report of the Secretary-General (2020)*, submitted pursuant to UN General Assembly resolution 73/148<sup>108</sup>, provides information on measures taken by Member States and activities carried out within the United Nations system to eliminate violence against women and girls in the context of COVID-19 as well as reporting on advances in eliminating sexual harassment.<sup>109</sup> This Report is evidence of the heavy burden that women

---

<sup>105</sup> Nozomi Kawarazuka, Catherine Locke and Janet Seeley, 'Women Bargaining with Patriarchy in Coastal Kenya: Contradictions, Creative Agency and Food Provisioning' (2019) 26 Gender, Place & Culture 384.

<sup>106</sup> Eisend, Martin. "Gender roles." *Journal of Advertising* 48, no. 1 (2019): 72-80; Olsson, Maria, and Sarah E. Martiny. "Does exposure to counterstereotypical role models influence girls' and women's gender stereotypes and career choices? A review of social psychological research." *Frontiers in psychology* 9 (2018): 2264; Couprie, Hélène, Elisabeth Cudeville, and Catherine Sofer. "Efficiency versus gender roles and stereotypes: an experiment in domestic production." *Experimental Economics* 23, no. 1 (2020): 181-211; Godsil, Rachel D., Linda R. Tropp, Phillip Atiba Goff, J. A. Powell, and J. MacFarlane. "The effects of gender roles, implicit bias, and stereotype threat on the lives of women and girls." *The Science of Equality* 2, no. 1 (2016): 14-15; Ellemers, Naomi. "Gender stereotypes." *Annual review of psychology* 69 (2018): 275-298.

<sup>107</sup> Ibid.

<sup>108</sup> Resolution adopted by the General Assembly on 17 December 2018 [on the report of the Third Committee (A/73/582)] 73/148: *Intensification of efforts to prevent and eliminate all forms of violence against women and girls: sexual harassment*.

<sup>109</sup> 'Intensification of Efforts to Eliminate All Forms of Violence against Women: Report of the Secretary-General (2020) | Digital Library: Publications' (UN Women) <<https://www.unwomen.org/digital-library/publications/2020/07/a-75-274-sg-report-ending-violence-against-women-and-girls>> accessed 15 October 2020.

and girls still have to bear in society even as at 2020. It has been reported that while everyone is facing unprecedented challenges, women are bearing the brunt of the economic and social fallout of COVID-19. Women who are poor and marginalized face an even higher risk of COVID-19 transmission and fatalities, loss of livelihood, and increased violence.<sup>110</sup> Gender equality and equity awareness should be inculcated into children, both boys and girls from an early age in order to foster positive change. Both men and women need to start appreciating the need for gender equality and equity from an early age for sustained transformation of the society.<sup>111</sup>

## **6. Conclusion**

The National Policy on Gender and development, 2019 is a great leap towards addressing the challenges affecting achievement of gender equality and equity in the country. It has detailed and plausible recommendations on how to move forward. However, its actualization requires the effort of every person and all ages. If the Policy's spirit and recommendations can be captured in an Act of Parliament, followed by concerted efforts and campaign by every member of the society to bring a wind of change, then Kenya will not struggle with achieving the one-third/two-third gender rule since both men and women will be able to compete fairly for economic, political and social opportunities.<sup>112</sup> The

---

<sup>110</sup> 'COVID-19 and Its Economic Toll on Women: The Story behind the Numbers' (UN Women) <<https://www.unwomen.org/news/stories/2020/9/feature-covid-19-economic-impacts-on-women>> accessed 15 October 2020.; see also 'The COVID-19 Shadow Pandemic: Domestic Violence in the World of Work - A Call to Action for the Private Sector | WEPS' <<https://www.weps.org/resource/covid-19-shadow-pandemic-domestic-violence-world-work-call-action-private-sector>> accessed 15 October 2020.

<sup>111</sup> Blum, Robert Wm, Jo Boyden, Annabel Erulkar, Caroline Kabiru, and Siswanto Wilopo. "Achieving Gender Equality Requires Placing Adolescents at the Center." *Journal of Adolescent Health* 64, no. 6 (2019): 691-693; Aturu, J. O. "Gender Equality, Education and Sustainable Development in Nigeria: An Assessment." *International Journal of Education and Evaluation* 4, no. 1 (2018): 70-77.

<sup>112</sup> United Nations Department of Economic and Social Affairs Division for Social Policy and Development, 'ONLINE SURVEY ON Promoting Empowerment of People in achieving poverty eradication, social integration and full employment

gender debate should not be treated as an isolated question because as it has been demonstrated in the Policy document, achieving gender equality and equity will require the stakeholders to address different challenges: Gender equality and equity will look like just a by-product of developing society.<sup>113</sup> It is indeed possible to achieve gender equality and equity if the Policy document of 2019 can be implemented and supported by good will from all groups of persons and all levels of government.

If Kenya is to achieve the sustainable development goals as well as its national development plans such as the Vision 2030, then gender equality and equity must be addressed as a matter of priority since development requires concerted efforts of both men and women. Actualising the National Policy on Gender and Development in Kenya is indeed possible.

---

integration and full employment and decent work for all.’ <<https://www.un.org/esa/socdev/publications/FullSurveyEmpowerment.pdf>>

Accessed 14 October 2020; In the Matter of the Principle of Gender Representation in the National Assembly and the Senate [2012]eKLR, Advisory Opinions Application 2 of 2012.

<sup>113</sup> Dugarova, Esuna. *Gender equality as an accelerator for achieving the Sustainable Development Goals*. Discussion Paper, UNDP & UN Women, 2018; Beatrice Akala, ‘Gender Inequality in Education Is Still an Issue in Kenya and South Africa’ (*The Conversation*) <<http://theconversation.com/gender-inequality-in-education-is-still-an-issue-in-kenya-and-south-africa-125747>> accessed 15 October 2020; North, Amy, and Helen Longlands. "Gender, Poverty and Educational Equality." *The SAGE Handbook of Inclusion and Diversity in Education* (2019): 103; Fredman, Sandra, Jaakko Kuosmanen, and Meghan Campbell. "Transformative equality: Making the sustainable development goals work for women." *Ethics & International Affairs* 30, no. 2 (2016): 177-187; Nurhaeni, I. D. A., and Y. Kurniawan. "Developing training and vocational education for achieving gender equality." (2017): 97.

## References

‘Actualization and Implementation of the “Two-Thirds Gender Principle” in Kenya | Wwww.Sidint.Net’ <<https://www.sidint.net/content/actualization-and-implementation-two-thirds-gender-principle-kenya>> accessed 15 October 2020.

‘African Commission on Human and Peoples’ Rights Legal instruments’ <<https://www.achpr.org/legalinstruments/detail?id=49>> accessed 15 October 2020.

‘Background’ (*Ministry of Public Service And Gender*) <[http://www.psyg.go.ke/?page\\_id=241](http://www.psyg.go.ke/?page_id=241)> accessed 10 October 2020.

‘Chief Justice’s Advice to the President on Dissolution of Parliament for Failure to Enact the Gender Rule | Kenya Law’ <<http://kenyalaw.org/kenyalawblog/chief-justices-advice-to-the-president-on-dissolution-of-parliament/>> accessed 15 October 2020.

‘COVID-19 and Its Economic Toll on Women: The Story behind the Numbers’ (*UN Women*) <<https://www.unwomen.org/news/stories/2020/9/feature-covid-19-economic-impacts-on-women>> accessed 15 October 2020.

‘Fate of Parliament Lies in the Hands of Five Judges’ (*People Daily*, 14 October 2020) <<https://www.pd.co.ke/news/fate-of-parliament-lies-in-the-hands-of-five-judges-55560/>> accessed 15 October 2020.

‘How Women Are Stepping up to Remake Rwanda’ (*Culture*, 15 October 2019) <<https://www.nationalgeographic.com/culture/2019/10/how-women-are-remaking-rwanda-feature/>> accessed 15 October 2020.

‘Intensification of Efforts to Eliminate All Forms of Violence against Women: Report of the Secretary-General (2020) | Digital Library: Publications’ (*UN Women*) <<https://www.unwomen.org/digital-library/publications/2020/07/a-75-274-sg-report-ending-violence-against-women-and-girls>> accessed 15 October 2020.

‘It’s The No. 1 Country for Women in Politics — But Not In Daily Life’ (*NPR.org*) <<https://www.npr.org/sections/goatsandsoda/2016/07/29/487360094/invisible-no-one-thought-this-all-womans-debate-team-could-crush-it>> accessed 15 October 2020.

‘Southern African Development Community: Gender’  
<<https://www.sadc.int/issues/gender/>> accessed 15 October 2020.

‘Southern African Development Community: Gender Mainstreaming’  
<<https://www.sadc.int/issues/gender/gender-mainstreaming/>> accessed 15 October 2020.

‘Southern African Development Community: Show’  
<[https://www.sadc.int/documents-publications/show/Declaration\\_on\\_Gender\\_Development\\_1997.pdf](https://www.sadc.int/documents-publications/show/Declaration_on_Gender_Development_1997.pdf)>  
accessed 15 October 2020.

‘Sustainable Development Goal 5: Gender Equality’ (*UN Women*)  
<<https://www.unwomen.org/news/in-focus/women-and-the-sdgs/sdg-5-gender-equality>> accessed 15 October 2020.

‘The African Charter on Human and Peoples’ Rights: how effective is this legal instrument in shaping a continental human rights culture in Africa?’ (*Le petit juriste*, 21 December 2014) <<https://www.lepetitjuriste.fr/the-african-charter-on-human-and-peoples-rights-how-effective-is-this-legal-instrument-in-shaping-a-continental-human-rights-culture-in-africa/>> accessed 15 October 2020.

‘The COVID-19 Shadow Pandemic: Domestic Violence in the World of Work - A Call to Action for the Private Sector | WEPs’  
<<https://www.weps.org/resource/covid-19-shadow-pandemic-domestic-violence-world-work-call-action-private-sector>> accessed 15 October 2020.  
African Union Gender Policy, Rev 2/Feb 10, 2009.

African Union, *Protocol to the African Charter on Human and People’s Rights on the Rights of Women in Africa*, 11 July 2003.

African Union, *Solemn Declaration on Gender Equality in Africa*, adopted by the AU Assembly in 2004.

Aturu, J. O. "Gender Equality, Education and Sustainable Development in Nigeria: An Assessment." *International Journal of Education and Evaluation* 4, no. 1 (2018): 70-77.

Azad Essa, ‘The Mixed Tale of Women’s Empowerment in Rwanda’  
<<https://www.aljazeera.com/features/2018/9/20/the-mixed-tale-of-womens-empowerment-in-rwanda>> accessed 15 October 2020.

Beatrice Akala, 'Gender Inequality in Education Is Still an Issue in Kenya and South Africa' (*The Conversation*) <<http://theconversation.com/gender-inequality-in-education-is-still-an-issue-in-kenya-and-south-africa-125747>> accessed 15 October 2020.

Blum, Robert Wm, Jo Boyden, Annabel Erulkar, Caroline Kabiru, and Siswanto Wilopo. "Achieving Gender Equality Requires Placing Adolescents at the Center." *Journal of Adolescent Health* 64, no. 6 (2019): 691-693.

Couprie, Hélène, Elisabeth Cudeville, and Catherine Sofer. "Efficiency versus gender roles and stereotypes: an experiment in domestic production." *Experimental Economics* 23, no. 1 (2020): 181-211.

David Njoroge Macharia v Republic [2011] eKLR, Criminal Appeal 497 of 2007.

Doran, P., V. Hulme, L. Wagner, W. Yang, and S. Wise. "Summary of the Fourth World Conference on Women: 4-15 September 1995." *Earth Negotiations Bulletin* 14, no. 21 (1995): 1.

Dugarova, Esuna. *Gender equality as an accelerator for achieving the Sustainable Development Goals*. Discussion Paper, UNDP & UN Women, 2018.

Eisend, Martin. "Gender roles." *Journal of Advertising* 48, no. 1 (2019): 72-80; Olsson, Maria, and Sarah E. Martiny. "Does exposure to counterstereotypical role models influence girls' and women's gender stereotypes and career choices? A review of social psychological research." *Frontiers in psychology* 9 (2018): 2264.

Ellemers, Naomi. "Gender stereotypes." *Annual review of psychology* 69 (2018): 275-298.

Flowe, Heather D., Sarah Rockowitz, James Rockey, Wangu Kanja, Catherine Kamau, Melissa Colloff, Jasmin Kauldar, Jessica Woodhams, and Kari Davies. "Sexual and Other Forms of Violence during the COVID-19 Pandemic Emergency in Kenya." (2020).

Fredman, Sandra, Jaakko Kuosmanen, and Meghan Campbell. "Transformative equality: Making the sustainable development goals work for women." *Ethics & International Affairs* 30, no. 2 (2016): 177-187.

Glas, Saskia, Niels Spierings, and Peer Scheepers. "Re-understanding religion and support for gender equality in Arab countries." *Gender & Society* 32, no. 5 (2018): 686-712.

Godsil, Rachel D., Linda R. Tropp, Phillip Atiba Goff, J. A. Powell, and J. MacFarlane. "The effects of gender roles, implicit bias, and stereotype threat on the lives of women and girls." *The Science of Equality* 2, no. 1 (2016): 14-15.

Hillary Orinde, 'Survey Reveals How Kenyans Are Ignorant of Their Human Rights' (*The Standard*)

<<https://www.standardmedia.co.ke/kenya/article/2001276119/kenyans-in-the-dark-about-their-rights>> accessed 14 October 2020.

In the Matter of the Principle of Gender Representation in the National Assembly and the Senate [2012] eKLR, Advisory Opinions Application 2 of 2012.

Jagoe, Kirstie, Madeleine Rossanese, Dana Charron, Jonathan Rouse, Francis Waweru, MaryAnne Waruguru, Samantha Delapena, Ricardo Piedrahita, Kavanaugh Livingston, and Julie Ipe. "Sharing the burden: Shifts in family time use, agency and gender dynamics after introduction of new cookstoves in rural Kenya." *Energy Research & Social Science* 64 (2020): 101413.

Japheth Ogila, 'DCJ Mwilu Forms Five-Judge Bench to Hear Maraga's Parliament Dissolution Advice' (*The Standard*)

<<https://www.standardmedia.co.ke/nairobi/article/2001390110/mwilu-forms-judge-bench-to-hear-cjs-parliament-dissolution-advice>> accessed 15 October 2020.

John Osoro, '5 Judges Appointed to Hear Petitions on CJ Advise to Uhuru to Dissolve Parliament' » *Capital News*, 14 October 2020)

<<https://www.capitalfm.co.ke/news/2020/10/5-judges-appointed-to-hear-petitions-on-cj-advise-to-uhuru-to-dissolve-parliament/>> accessed 15 October 2020.

Koburtay, Tamer, Jawad Syed, and Radi Haloub. "Implications of religion, culture, and legislation for gender equality at work: Qualitative insights from Jordan." *Journal of Business Ethics* 164, no. 3 (2020): 421-436.

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

Njogu, Kimani, and Elizabeth Orchardson-Mazrui. "Gender inequality and women's rights in the Great Lakes: Can culture contribute to women's empowerment." *New York: UNICEF* (2013).

North, Amy, and Helen Longlands. "Gender, Poverty and Educational Equality." *The SAGE Handbook of Inclusion and Diversity in Education* (2019): 103.

Nozomi Kawarazuka, Catherine Locke and Janet Seeley, 'Women Bargaining with Patriarchy in Coastal Kenya: Contradictions, Creative Agency and Food Provisioning' (2019) 26 *Gender, Place & Culture* 384.

Nurhaeni, I. D. A., and Y. Kurniawan. "Developing training and vocational education for achieving gender equality." (2017): 97.

Ongong'a, Jude J. "African traditional cultural conundrums which make women prone to hiv/aids infections: a case of the Maasai of Kenya." *International Journal of Education and Research*, Vol. 1 No. 8 August 2013 (2013) < <https://www.ijern.com/journal/August-2013/18.pdf> > Accessed 10 October 2020.

Organisation for Economic Co-operation and Development, "The Implications Of The Fourth World Conference On Women for Bilateral Development Co-Operation: Report From The DAC Expert Group On Women In Development Seminar, Held In Paris On 25-26 January 1996, *Working Party on Gender Equality*, DCD/DAC/WID (99)4< [http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DCD/DAC/WID\(99\)4&docLanguage=En](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DCD/DAC/WID(99)4&docLanguage=En)> Accessed 13 October 2020.

Organization of African Unity (OAU), *African Charter on Human and Peoples' Rights ("Banjul Charter")*, 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982).

Republic of Kenya, National Policy for Prevention and Response to Gender Based Violence, November, 2014. < <http://psyg.go.ke/docs/National%20Policy%20on%20prevention%20and%20Response%20to%20Gender%20Based%20Violence.pdf> > accessed 10 October 2020.

Republic of Kenya, *Sessional Paper No. 02 of 2019 on National Policy on Gender and Development*, October 2020< <http://psyg.go.ke/wp->

content/uploads/2019/12/NATIONAL-POLICY-ON-GENDER-AND-DEVELOPMENT.pdf > Accessed 9 October 2020.

Resolution adopted by the General Assembly on 17 December 2018 [on the report of the Third Committee (A/73/582)] 73/148: *Intensification of efforts to prevent and eliminate all forms of violence against women and girls: sexual harassment*.

Rivière, François, ed. *Investing in cultural diversity and intercultural dialogue*. Vol. 2. Unesco, 2009; Martin Wamalwa, 'Culture And Women Empowerment In Kenya: A Philosophical Analysis' (2007).

Samuel Kamau Macharia & Another vs Kenya Commercial Bank Limited & 2 Others Sup. Ct. Application No. 2 of 2011; [2012] eKLR.

Treaty-Making and Ratification Act, No. 45 of 2012, Laws of Kenya.

UN General Assembly, *Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979, United Nations, Treaty Series, vol. 1249, p. 13.

UN General Assembly, *Declaration on the Elimination of Violence against Women*, 20 December 1993, A/RES/48/104.

UN General Assembly, *Implementation of the Nairobi Forward-looking Strategies for the Advancement of Women: resolution / adopted by the General Assembly*, 16 December 1991, A/RES/46/98.

UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171.

UN General Assembly, *Transforming our world: the 2030 Agenda for Sustainable Development*, 21 October 2015, A/RES/70/1.

UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III).

United Nations Department of Economic and Social Affairs Division for Social Policy and Development, 'Online Survey on Promoting Empowerment of People in achieving poverty eradication, social integration and full employment integration and full employment and decent work for all.' < <https://www.un.org/esa/socdev/publications/FullSurveyEmpowerment.pdf> > Accessed 14 October 2020.

United Nations, *Beijing Declaration and Platform of Action, adopted at the Fourth World Conference on Women*, A/CONF.177/20 and A/CONF.177/20/Add.1 Date of adoption: 15 September 1995.

United Nations. *Gender Mainstreaming an Overview*. Office of the Special Adviser on Gender Issues, 2002 <  
<https://www.un.org/womenwatch/osagi/pdf/e65237.pdf>> Accessed 9 October 2020.

United Nations. *Gender Mainstreaming an Overview*. Office of the Special Adviser on Gender Issues, 2002.

Wood, Hannelie J. "Gender inequality: The problem of harmful, patriarchal, traditional and cultural gender practices in the church." *HTS Theological Studies* 75, no. 1 (2019): 1-8.

## **Mediation as a Tool of Conflict Management in Kenya: Challenges and Opportunities:**

*By: James Ndungu Njuguna\**

### ***Abstract***

*Mediation is one of the Alternative Dispute Resolution mechanisms that have been practiced for a long time and among the most preferred modes of conflict management. This can be attributed to the fact that mediation can resolve various disputes of varying nature and the outcome is based on mutual consensus. In Kenya, mediation has become an effective method of resolving political, family, commercial and civil disputes, among others. It is deemed to be a suitable mechanism because of its distinct attributes like voluntariness, cost effectiveness, informality, less time consuming, focusing on the interest and not the rights, allowing for creative solutions and enhancing party autonomy.*

*However, despite having all these features, mediation faces a myriad of challenges which undermine its efficacy. Of major concern is the fact that mediation is non-binding. Further mediation can lead to endless proceedings where parties fail to agree. It is in light of the foregoing that this paper seeks to discuss the challenges facing mediation as a conflict management mechanism in Kenya and advocates for reforms so as to enhance the practice and outcome of the process.*

### **1. Introduction**

Mediation refers to a voluntary conflict resolution process in which a third party known as a mediator assists parties to a conflict to reach tangible and mutually acceptable agreements.<sup>1</sup> In mediation, the mediator does not make a

---

**\*Advocate of the High Court of Kenya; LLB (Hons), LLM (UON), PG Dip. (KSL), Dip. Management (KIM), Dip. Law (CILEX), ACI Arb. CPM (MTI)**

<sup>1</sup> Moore, C.W, *The mediation process: Practical strategies for resolving conflict*, (John Wiley & Sons, 2014), p. 1.

decision on behalf of the parties but facilitates the process and assists the disputants to reach a consensus. Mediation has been in practice for a long time and has been seen to be efficient because of the long lasting solutions parties agree on based on mutual consensus and without any coercion. Mediation has been heralded due to its ability to help parties to a conflict to restore, redefine and transform their interactions and attitudes towards each other with the ultimate goal of reconciliation and enhancing peaceful relationships.<sup>2</sup>

Notably, at the international level, Alternative Dispute Resolution (ADR) mechanisms are recognized as viable means of dispute management. The *Charter to the United Nations* is one such treaty that recognizes the important role of ADR mechanisms in management of interstate disputes and it provides that the parties to any dispute should first seek a solution by negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement and other peaceful means of their own choice.<sup>3</sup> They are seen as viable means of promoting peace in and among states.

With the promulgation of the Constitution of Kenya 2010, mediation as a form of ADR was given Constitutional recognition. The Constitution requires courts and tribunals while exercising judicial authority to be guided by a number of principles which include promotion of alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms.<sup>4</sup> However, the traditional dispute resolution mechanisms should not be used in a way that contravenes the Bill of Rights, is repugnant or results in outcomes that are repugnant to justice and morality, or is inconsistent with the Constitution or any written law.<sup>5</sup>

Mediation is meant to be a voluntary, informal, consensual, confidential, flexible, cost-effective, speedier and non-binding conflict management process. It can be said that mediation is an aspect of the general structure and process of negotiation, since it is considered as negotiation with the help of a

---

<sup>2</sup> Ibid.

<sup>3</sup> United Nations, Charter of the United Nations, 24<sup>th</sup> October 1945, Article 33.

<sup>4</sup> Constitution of Kenya 2010, Article 159 (2) (c), (Government Printer, Nairobi, 2010).

<sup>5</sup> Ibid, Article 159 (3).

third party called a mediator where the negotiators have hit a deadlock.<sup>6</sup> It owes its widespread application in the management of conflicts and disputes in the contemporary world to these attributes that have made it possible to resolve disputes of a varied nature which have resulted in potentially binding and long lasting settlements between disputants.<sup>7</sup>

## **2. Accessing Justice through Mediation in Kenya**

Justice is considered among the basic rights which everyone should access and it is a fundamentally important element of stability and Rule of Law.<sup>8</sup> Equal access to justice is a right based on human rights obligations and it is to be guaranteed for all including the people living in poverty. Access to justice means people are capable of claiming their rights or seek a remedy against exploitation.<sup>9</sup>

Access to justice can and should be enhanced by both access to the courts as well as through Alternative Dispute Resolution mechanisms or forums for reaching consensual outcomes outside the courts.<sup>10</sup> It is also generally accepted that popular notions of access to justice are focused on empowering individuals to exercise their legal rights in the civil justice system.<sup>11</sup>

The meaning of the word justice can vary between countries and cultures. However, the idea of justice is common to all and generally depicts notions of fairness, accountability and equity. Access to justice is a broad concept,

---

<sup>6</sup> Mwagiru, M., *Conflict in Africa; Theory, Processes and Institutions of Management*, (Centre for Conflict Research, Nairobi, 2006), pp. 115-116.

<sup>7</sup> Muigua, K., *“Resolving Conflicts Through Mediation in Kenya”*, (2<sup>nd</sup> Ed., Glenwood Publishers Ltd, 2017), p. 4.

<sup>8</sup> See generally, Muigua, K. & Kariuki, F., ‘ADR, Access to Justice and Development in Kenya,’ *Strathmore Law Journal*, Vol. 1, No. 1, June 2015.

<sup>9</sup> Muhanda, P., *“The Advocate: Access to Justice”*, The LSK Magazine | Volume 1, Issue 6 | March - June, 2016, p. 24.

<sup>10</sup> Aina, K., *“Court Annexed Mediation: Successes, Challenges and Possibilities”*, *Lessons from Africa Session* (Nigeria) Available at <http://www.conflictdynamics.co.za/files/217/mediation--lessons-from-Nigeria--Mandela-Institute-Presentation.pdf> (Accessed on 20/05/2018).

<sup>11</sup> *Ibid*.

encompassing people's effective access to the formal and informal systems, procedures, information and locations used in the administration of justice.<sup>12</sup> People who feel wronged or mistreated in some way usually turn to justice systems including in relation to civil, administrative and criminal law for redress.<sup>13</sup>

The barriers can be encountered in relation to a country's normative framework or national laws, or be faced in terms of a country's institutional framework for justice, which includes law enforcement and court systems.<sup>14</sup> With regard to the latter, barriers and impediments are often complex, involving combined forms of inaccessibility as well as other forms of discrimination. The implications of such barriers are significant, as lack of access to justice can compound the disadvantages faced by different groups of persons in the society. Equally, justice delayed is justice denied, so timely access to justice is important.<sup>15</sup>

The right of access to justice in Kenya is constitutional and it gives the mandate to the State to ensure that this right is accessible to every person without due regard to procedural technicalities, and, if any fee is required, it should be reasonable and should not impede access to justice.<sup>16</sup>

The Constitution of Kenya also provides that every person has the right to institute court proceedings claiming that a right and fundamental freedom in the Bill of Rights has been denied, violated, infringed or is threatened.<sup>17</sup> There is the provision that every person is equal before the law and has the right to equal protection and equal benefit of the law.<sup>18</sup> In an effort to implement these

---

<sup>12</sup> United Nations, *"Access to Justice for Persons with Disabilities: Toolkit on Disability for Africa"*, Module 8.

<sup>13</sup> Ibid.

<sup>14</sup> Haley, J., *"Mediation and Access to Justice in Africa: Perspectives from Ghana"*, Harvard Negotiation Law Review, Vol. 21, 59, Fall 2015, page 59.

<sup>15</sup> Ibid.

<sup>16</sup> The Constitution of Kenya, 2010, op cit pg 4, , Article 48.

<sup>17</sup> Ibid, Article 22 (1).

<sup>18</sup> Ibid, Article 27.

provisions of access to justice, the State through Article 48 has implemented various measures to ensure that justice is brought closer to the people.

The State is in the process of promoting the use of Alternative Dispute Resolution mechanisms through various ways such as introduction of Court Annexed Mediation which is mediation under the supervision of the courts. This has led to reduction of court cases and quick dispensation of justice to the people of Kenya. Highlighting this point, the World Bank reports that mediation has reduced the time it takes to resolve a dispute in Kenya from 24 months to 66 days.<sup>19</sup> The practice of mediation has become effective because of its flexibility and versatility in handling a variety of disputes. It would be necessary to point out that mediation can be used in conflict management as well as in dispute prevention. An example of this would be in facilitating the process of contract negotiation. Mediation can be used in many areas to resolve disputes. The areas include workplace disputes, commercial disputes, family disputes, public disputes that evolve around environmental or land-use, school conflicts, violence prevention among many other areas.<sup>20</sup>

---

<sup>19</sup> The World Bank, 'Court Annexed Mediation Offers Alternative To Delayed Justice for Kenyans.' Available at, <http://www.worldbank.org/en/news/feature/2017/10/05/court-annexed-mediation-offers-alternative-to-delayed-justice-for-kenyans> Accessed on 28/05/2018

<sup>20</sup> Nyaribo, J. and Ouma, E., "*Keeping disputes out of Court...Mediation gaining ground in Kenya*" Available at <http://mman.co.ke/content/keeping-disputes-out-court%E2%80%A6mediation-gaining-ground-kenya> (Accessed on 22/05/2018); See also Edelman, L.B., Erlanger, H.S. and Lande, J., "Internal dispute resolution: The transformation of civil rights in the workplace" *Law and Society Review*, 1993, pp.497-534; Hensler, D.R., "Our Courts, Ourselves: How the Alternative Dispute Resolution Movement Is Reshaping Our Legal System," *Penn St. L. Rev.*, 108, 2003, pp.165-1295; Lipsky, D.B. and Seeber, R.L., "In Search of Control: The Corporate Embrace of ADR," *University of Pennsylvania Journal of Business Law*, Vol. 1, No.1, 1998, p.133; Crowfoot, J.E. and Wondolleck, J.M., *Environmental Disputes: Community Involvement in Conflict Resolution*, (Island Press, 1990); cf. Lerman, L.G., "Mediation of Wife Abuse Cases-The Adverse Impact of Informal Dispute Resolution on Women," *Harvard Women's Law Journal*, Vol.7, No. 1, 1984, pp.57-113.

One reason why disputants would choose mediation as a means of resolving their disputes is the fact that mediation increases the control which parties have in the resolution of disputes unlike in litigation. Parties appoint a mediator and decide on the rules and procedures to govern the process. This is unlike litigation where parties obtain a settlement but control resides with a judge. As a result, mediation is likely to produce a result that is mutually agreeable to the parties as they both participate and have control of the decision-making process. Further, the cost payable to a Mediator is incomparable to that one would pay an Advocate in litigation as the mediation process generally takes much less time than moving a case through the standard legal channels. In addition, mediation is private and confidential and only limited to the parties unlike court hearings which are public in nature. No one but the parties and the Mediator know what has happened. This creates confidence in the process. Lastly, in mediation, there is an element of mutuality in that the parties to a mediation process are typically ready to work mutually towards a resolution.<sup>21</sup> Therefore, it is important to address the barriers hindering the effective dispensation of justice through mediation both in and out of Kenya so that we can pave way for a better future for the practice of mediation.

### **3. Challenges Facing Mediation in Kenya**

Mediation has become a popular means for resolving disputes for a variety of reasons. A primary reason is because mediation works and more often than not produces a resolution or begins a dialogue that results in a resolution.<sup>22</sup> It

---

<sup>21</sup> Ibid; See also Faridkian, S. and Bahar, M.M., "The Definition of Mediation with an Emphasis on Family Mediation," *Social Research Quarterly*, Vol. 6, No. 4, Winter 2014. available at

<http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.1018.1381&rep=rep1&type=pdf> ; See also Goodman, A., "Specialist mediation advocates," *Counsel*, February, 2016, available at

<https://www.counselmagazine.co.uk/articles/specialist-mediation-advocates>

<sup>22</sup> Resolution of conflicts is believed to give rise to an outcome based on mutual problem-sharing in which the conflicting parties cooperate in order to get an outcome that is enduring, non-coercive, mutually satisfying, addresses the root cause of the conflict and rejects power-based outcomes. For difference between settlement and resolution, see Muigua, K., *Resolving Conflicts through Mediation in Kenya*, (2<sup>nd</sup> Ed., Glenwood Publishers, 2017), Chapter six, pp. 66-76; See Cloke, K., *The Culture of Mediation: Settlement vs. Resolution*, The Conflict Resolution Information Source, Version IV, December 2005; See also Mwagiru, M., *Conflict in Africa: Theory*,

has been regarded as the most effective conflict management mechanism in Kenya and its widespread practice is because of its attributes and flexibility which favour the parties to the dispute. However, the process is affected by a number of challenges which have hindered the effectiveness of the mediation process.<sup>23</sup>

### **3.1 Inadequate Information on Mediation as A Form of Conflict Management**

To begin with, there is limited information among most Kenyans on mediation as a mechanism for conflict management. This can be clearly seen from the fact that most Kenyans resort to litigation whenever a dispute arises as it is the most recognized mechanism for settlement of disputes. The Judiciary in its annual report has noted that there were 533,350 pending cases at the end of the Financial Year 2016/2017 an increase of 7% from 499,341 pending cases at the close of the Financial Year 2015/2016.<sup>24</sup> This high number of cases in the judiciary is a pointer to the fact that most Kenyans lack adequate information on alternative forms for conflict management, which include mediation. This limits the right of access to justice as a result of the ensuing backlog of cases. Access to information is an essential element of access to justice since it enables citizens to make informed decisions on the course of actions to take in case of infringement of their rights and fundamental freedoms. This is highlighted by Article 35 of the Constitution that enshrines the right to access information held by the state or any person necessary for

---

*Processes and Institutions of Management* (Nairobi: Centre for Conflict Research, 2006), p. 42; See also Bercovitch, J., *Mediation Success or Failure: A Search for the Elusive Criteria*, Cardozo Journal of Conflict Resolution, Vol.7.289, p.296; See also Bloomfield, D., *Towards Complementarity in Conflict Management: Resolution and Settlement in Northern Ireland*, Journal of Peace Research, vol. 32 no. 2 May 1995, pp. 151-164).

<sup>23</sup> FennP.,” Introduction to Civil and Commercial Mediation” (Chartered Institute of Arbitrators, London, 2002), Available at <http://www.adrgroup.co.uk/DisputeResolution/civil-and-commercial-mediation> Accessed on 23/05/2018).

<sup>24</sup> The Judiciary, ‘State of the Judiciary and the Administration of Justice’ Annual Report 2016-2017, Available at <https://www.judiciary.go.ke/.../state-of-the-judiciary-and-the-administration-of-justice-> Accessed on 31/05/2018

the protection of any right or fundamental freedom. For the country to fully reap the benefits of mediation and other Alternative Dispute Resolution mechanisms, it is essential for citizens to be aware of such mechanisms, the processes involved and their benefits over the adversarial nature of litigation.

Further, there is limited public information and awareness on the existence of Court Annexed Mediation largely owing to the young nature of the project. It is therefore the role of professionals such lawyers who are better placed to understand Court Annexed Mediation to educate the public about this novel concept.<sup>25</sup>

It is very important that the Kenyan citizen gets to know and access the available conflict management processes such as mediation and the other mechanisms so that they can have diverse means by which they can seek remedy for the violation of their rights. Mediation has come to the aid of such persons as it is readily available even in the communities. The reason for this assertion is because mediation is a flexible conflict management process which can be conducted anywhere so long as the parties to the dispute appoint a neutral third party such as elders, to assist them in resolution of their disputes.<sup>26</sup>

The State is also obligated to make known to the public on the various ways they can access justice in Kenya pursuant to Article 48 of the Constitution of Kenya 2010. The Article states that the State shall ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice.<sup>27</sup>

---

<sup>25</sup> Joy Kubai Namachi, “*Court Annexed Mediation: Dawn of a New Era in the Kenya Judicial System*” LawQuery Blog, Available at <https://www.lawquery.co.ke/our-blog/court-annexed-mediation-dawn-of-a-new-era-in-the-kenyan-judicial-system> (Accessed on 22/05/2018).

<sup>26</sup> R. Dawson, “*5 Basic Principles for Better Negotiation Skills*”, Available at <http://www.creonline.com/principles-for-better-negotiation-skills.html> (Accessed on 23/05/2018).

<sup>27</sup> Ibid (n 11).

### **3.2 Non-Binding Nature of Mediation**

The non-binding nature of mediation presents another challenge with regard to its efficacy. It is a voluntary process that depends on the good will of the parties to a dispute for its acceptance.<sup>28</sup> This poses the danger of non-compliance with settlements with the consequence that disputes may remain unresolved even after the mediation process. There is need to guarantee the enforceability of the mediated agreement to ensure that mediation competes meaningfully with the formal and binding dispute settlement mechanisms such as courts and arbitral tribunals.<sup>29</sup> The introduction of court annexed mediation seeks to cure this problem since the settlement arrived at through mediation can be enforced as a court order. This urges disputants to prefer court annexed mediation over the traditional form of mediation in order to create certainty in the outcome of the process. It has also been argued that the enforcement of a mediation settlement should not be left to the goodwill of the parties. Rather, it should be conferred on a public authority while at the same time being delinked from the requirements of form or process.<sup>30</sup>

### **3.3 Adversarial Aspects of Mediation**

The seemingly limited understanding of the nature and purpose of mediation by professionals especially lawyers has also hampered the success of mediation in the country. The professionals have ended up transferring their adversarial skills from the courtroom to the mediation room. Consequently, mediation is now facing similar challenges to those of litigation which parties sought to avoid when they resorted to it. Advocates costs and adjournments which occasion delay in conclusion of disputes are increasingly becoming part and parcel of mediation. In addition, taking adversarial skills to the mediation process based on arguments and desire to win undermines the nature of

---

<sup>28</sup> Muigua, K., 'Resolving Conflicts Through Mediation In Kenya' 2<sup>nd</sup> Ed., 2017, op cit., p. 4

<sup>29</sup> Ibid.

<sup>30</sup> Bettina, K. & Zach, E., *"Taking the Best from Mediation Regulations: The EC Mediation Directive and the Austrian Mediation Act"* (Arbitration International, 2007) page 686. Available at [https://hl=en&as\\_sdt=0%2C5&q=Knotlz+B.+%26+Zach+E.%2C+%E2%80%9CTaking+the+Best+From+Mediation+Regulation%22&btnG=](https://hl=en&as_sdt=0%2C5&q=Knotlz+B.+%26+Zach+E.%2C+%E2%80%9CTaking+the+Best+From+Mediation+Regulation%22&btnG=) (Accessed on 21/05/2018).

mediation which aims at restoring relationships based on consensus that creates a win-win situation. This challenge may end up leading to ineffectiveness of the mediation process.<sup>31</sup>

The problems of adversarial litigation imported lawyers into the mediation process is also evident from the fact that in some court cases, parties litigate for many years without any exchange of communication about an out of court settlement. Many lawyers avoid settlement initiatives to dispel any suggestion of weakness. This becomes a challenge when such a matter is referred to resolution through a mediation process. Hence, a skilled mediator is required so as to facilitate good communication about settlement in cases where the parties are reluctant to do so, on their own.<sup>32</sup> Settlements can occur, sometimes rather easily if the parties communicate earlier and more openly.

Differences between an advocate and the client can create barriers to resolution of a dispute. In many mediation processes, parties are unprepared to make realistic assessments because advocates have overstated the likelihood of success at the outset of the dispute or failed to communicate with the client on an adequate basis. Mediators are in a good position to determine and deal with any disconnect between an advocate and a client.

### **3.4 Lack of an Effective National Regulatory Framework on Mediation**

It can also be argued that the lack of an effective national regulatory framework that controls the practice and process of mediation such as an Act of Parliament hinders the success of mediation. The only regulatory frameworks that exist in mediation are different sets of rules of procedure formulated by various institutions such as the Judiciary, the Nairobi Centre for International Arbitration and the Chartered Institute of Arbitrators which only make provision on how to conduct mediations administered in the particular institution. These rules include the Mediation (Pilot Project) Rules, 2015<sup>33</sup> which govern Court-Annexed Mediation and the Nairobi Centre for

---

<sup>31</sup> Ibid.

<sup>32</sup> K. Muigua, *“Alternative Dispute Resolution and Access to Justice in Kenya”* (Glenwood Publishers Limited, 2015) ISBN 978-9966-046-07-9, page 31.

<sup>33</sup> *Mediation (Pilot Project) Rules, 2015*, Legal Notice No. 197 of 2015, *Kenya Gazette Supplement No. 170*, 9<sup>th</sup> October, 2015, (Government Printer, Nairobi, 2015).

International Arbitration (Mediation) Rules, 2015 which govern mediations conducted in that Centre. Such a fragmented approach creates problems such as lack of uniformity and certainty in mediation. The enactment of an Act of Parliament to govern mediation would contribute widely to its efficacy due to the ensuing certainty as to its nature, process and decisions.

It is observed that Court Annexed Mediation faces a myriad of challenges affecting the mediation process. First, mediation is a voluntary and consensual process of resolution of disputes. However, Court Annexed Mediation ousts this basic attribute because the parties' choice is limited to appointment of a mediator whereby the Mediation Deputy Registrar nominates three mediators from among whom the parties will choose one. There is a likelihood of a challenge arising regarding the sustainability of the project in future due to funding problems. Furthermore, there is a likelihood that if more cases go the mediation way in court without an accompanying increase in the court's capacity to handle the matters. If the two are not well handled, especially now that there has been roll out of the project to the rest of the country, Court-Annexed Mediation may be weighed down by the procedural processes such as initial screening of files and filing the settlement arrived at in the mediation proceedings which may occasion delay and costs on the disputants. Because the process is court-annexed, settlements are formally registered and get the force of a court order. Despite the fact that this is the way to go for sustainable settlements in disputes resolved through the process, failure to ensure that delays do not arise and the processes remain affordable to the majority may defeat the underlying values and principles of mediation which include cost effectiveness and timeliness, amongst others.<sup>34</sup>

---

<sup>34</sup> Shantam, K., "Promoting Alternative Dispute Resolution to Reduce Backlog Cases and Enhance Access to Justice of the Poor and Disadvantaged People Through Organizing Settlement Fairs in Nepal", (Asia-Pacific Rights and Justice Initiative, July 2003.

## **4. Recommendations on the Way Forward**

### **4.1 Creating Awareness on Mediation and Other Alternative Dispute Resolution Mechanisms**

Disputes are bound to occur in any given society due to competing interests between individuals, groups and organizations in such societies. The manner in which the disputes are handled determine the overall well-being and co-existence in the society. In the Kenyan context, statistics have shown that many disputes are settled through the court process.<sup>35</sup> However, as seen in the foregoing discussion, litigation has many demerits and may not be the right tool for most disputes especially where there is need to preserve underlying relationships. Kenyans should thus be encouraged to embrace mediation as an alternative to litigation due to its inherent benefits. It is the role of professionals especially advocates, upon being approached by parties to a dispute to encourage them to resolve their disputes through mediation rather than immediately instituting court proceedings. Further, the Judiciary should refer more disputes to mediation especially those which relate to the family unit so as to preserve relationships and ensure harmonious co-existence in the society.

### **4.2 Streamlining Court-Annexed Mediation to Enhance Party-Autonomy and Voluntariness**

Court-Annexed Mediation has been criticized as going against the cardinal principles of mediation which are voluntariness and party autonomy. It has been observed that court ordered mediation interferes with the voluntary nature of the process.<sup>36</sup> However, Court-Annexed Mediation guarantees the enforceability of settlements since they are adopted and enforced in the same

---

<sup>35</sup> The Judiciary, 'State of the Judiciary and the Administration of Justice' Annual Report 2016-2017, Available at <https://www.judiciary.go.ke/.../state-of-the-judiciary-and-the-administration-of-justice-> Accessed on 31/05/2018

<sup>36</sup> Muigua, K., 'Court Sanctioned Mediation in Kenya-An Appraisal.' Available at <http://www.kmco.co.ke/attachments/article/152/Court%20Sanctioned%20Mediation%20in%20Kenya-An%20Appraisal-By%20Kariuki%20Muigua.pdf> Accessed on 05/06/2018

manner as a court order.<sup>37</sup> Hence, the process should be streamlined to enhance party autonomy and voluntariness. Parties' control of the process should be seen on aspects such as referring the dispute to mediation, selection of the mediator(s) and the negotiation process. Court's involvement should only come in at the final stage of the enforcing of the settlement.

#### **4.3 Institutionalization of Mediation**

Institutions such as the Nairobi Centre for International Commercial Arbitration (NCIA), the Chartered Institute of Arbitrators, Kenya Branch (CI Arb (K)) and the Mediation Training Institute (I) East Africa, amongst others, present great opportunities that can be explored for the success of mediation in Kenya. The NCIA and the CI Arb (K) have their own mediation rules and list of accredited mediators. The existence of the institutional rules and database of mediators creates certainty in the procedure and outcome of the mediation process. Further, the Mediation Training Institute (I) East Africa offers great opportunities such as the training and certification of mediators. These efforts should be appreciated and supported. Disputants ought to be persuaded to seek their services. Mediators should thus be encouraged to undertake such courses so as to sharpen their skills and ensure competence during the process.

#### **4.4 Consolidation of Mediation Rules and Regulations into an Act of Parliament.**

The approach towards mediation in Kenya is currently a fragmented one with no clear and definite rules governing the process unlike arbitration which is governed by the Arbitration Act, No. 4 of 1995. Mediation in Kenya can be classified as institutional mediation (conducted by institutions such as the NCIA and CI Arb (K)), informal mediation and court annexed mediation. Each category is governed by its own rules and procedures. While this might not in any pose a risk on the success of mediation conducted under any of these categories, there is need to create certainty as to the overall principles, rules and procedure governing the mediation process regardless of the institutional rules governing the process, that is, minimal or general guidelines on the same. This creates the need for enactment of a Mediation Act to address the

---

<sup>37</sup> Civil Procedure Act, Cap 21, S 59 (B) (4)

challenges posed by the fragmented approach. Mediation conducted under any of the categories will thus be governed by the Act and parties will have a definite recourse where such mediation deviates from the objectives, rules and procedures as stipulated under the Act.

## **5. Conclusion**

Despite the challenges highlighted above, mediation still remains an effective mechanism for conflict management due to its inherent benefits. It is confidential, cost-effective, flexible and easily accessible to parties in the conflict. Sustainability of settlements reached under mediation is high and almost guaranteed because settlements are owned by the parties.

Mediation and other alternative dispute resolution mechanisms are meant to reduce backlog of cases in court. This will in turn improve the efficiency in courts and the case clearing rate. It is therefore important to deal with the challenges that affect the just resolution of disputes using mediation so as to make the process more effective and efficient. Concerted efforts from different stakeholders in implementing the suggested recommendations can go a long way in enhancing the practice of mediation in Kenya, as a tool for access to justice for all.

## **References**

### **Books**

J. Haley, “*Mediation and Access to Justice in Africa: Perspectives from Ghana*”, Harvard Negotiation Law Review, Vol. 21, 59, Fall 2015, page 59.

J.K. Gakeri, “*Placing Kenya on the Global Platform: An Evaluation of the Legal Framework on Arbitration and ADR*,” International Journal of Humanities and Social Science, Vol. 1 No. 6; June 2011, 219-241 at page 219.

K. Muigua, “*Alternative Dispute Resolution and Access to Justice in Kenya*” (Glenwood Publishers Limited, 2015).

K. Muigua, “*Resolving Conflicts Through Mediation in Kenya*”, (2<sup>nd</sup> ed., Glenwood Publishers Ltd, 2017).

K. Shantam, “*Promoting Alternative Dispute Resolution to Reduce Backlog Cases and Enhance Access to Justice of the Poor and Disadvantaged People Through Organizing Settlement Fairs in Nepal*”, (Asia-Pacific Rights And Justice Initiative, July 2003.

Pauline Muhanda, “*The Advocate: Access to Justice*”, The LSK Magazine | Volume 1, Issue 6 | March - June, 2016, page 24.

Moore, Christopher W. *The mediation process: Practical strategies for resolving conflict*. John Wiley & Sons, 2014

### **Constitution and Conventions**

The Constitution of Kenya 2010, Article 159 (2) (3).

United Nations, Charter of the United Nations, 24<sup>th</sup> October 1945, Article 33.

### **Articles**

Jomo Nyaribo and Edel Ouma, “*Keeping disputes out of Court...Mediation gaining ground in Kenya*” Available at <http://mman.co.ke/content/keeping-disputes-out-court%E2%80%A6mediation-gaining-ground-kenya> (Accessed on 22/05/2018)

Joy Kubai Namachi, “*Court Annexed Mediation: Dawn of a New Era in the Kenya Judicial System*” LawQuery Blog, Available at

**Mediation as A Tool of Conflict Management (2020) Journal of cmsd Volume 5(2))**  
**in Kenya: Challenges and Opportunities:**  
**James Ndungu Njuguna**

<https://www.lawquery.co.ke/our-blog/court-annexed-mediation-dawn-of-a-new-era-in-the-kenyan-judicial-system> (Accessed on 22/05/2018).

K. Aina, “*Court Annexed Mediation: Successes, Challenges and Possibilities*”, *Lessons from Africa Session* (Nigeria) Available at <http://www.conflictdynamics.co.za/files/217/mediation--lessons-from-Nigeria--Mandela-Institute-Presentation.pdf> (Accessed on 20/05/2018).

K. Bettina & E. Zach, “*Taking the Best from Mediation Regulations: The EC Mediation Directive and the Austrian Mediation Act*” (Arbitration International, 2007) page 686. Available at [https://hl=en&as\\_sdt=0%2C5&q=Knotlz+B.+%26+Zach+E.%2C+%E2%80%9C9CTaking+the+Best+From+Mediation+Regulation%22&btnG=](https://hl=en&as_sdt=0%2C5&q=Knotlz+B.+%26+Zach+E.%2C+%E2%80%9C9CTaking+the+Best+From+Mediation+Regulation%22&btnG=) (Accessed on 21/05/2018).

P. Fenn,” *Introduction to Civil and Commercial Mediation*” (Chartered Institute of Arbitrators, London, 2002), Available at <http://www.adrgroup.co.uk/DisputeResolution/civil-and-commercial-mediation> Accessed on 23/05/2018).

P. Ngotho, “*Challenges Facing Arbitrators in Africa*,” Paper presented at the Chartered Institute of Arbitrators (Kenya Branch) & Centre For Alternative Dispute Resolution (CADR), An East Africa International Arbitration Conference held at The Norfolk Hotel, Nairobi on 28<sup>th</sup> and 29<sup>th</sup> July 2014. Available at <http://www.ngotho.co.ke/assets/challenges.norfolk.july2014.pdf> (Accessed on 22/05/2018).

R. Dawson, “*5 Basic Principles for Better Negotiation Skills*”, Available at <http://www.creonline.com/principles-for-better-negotiation-skills.html> (Accessed on 23/05/2018).

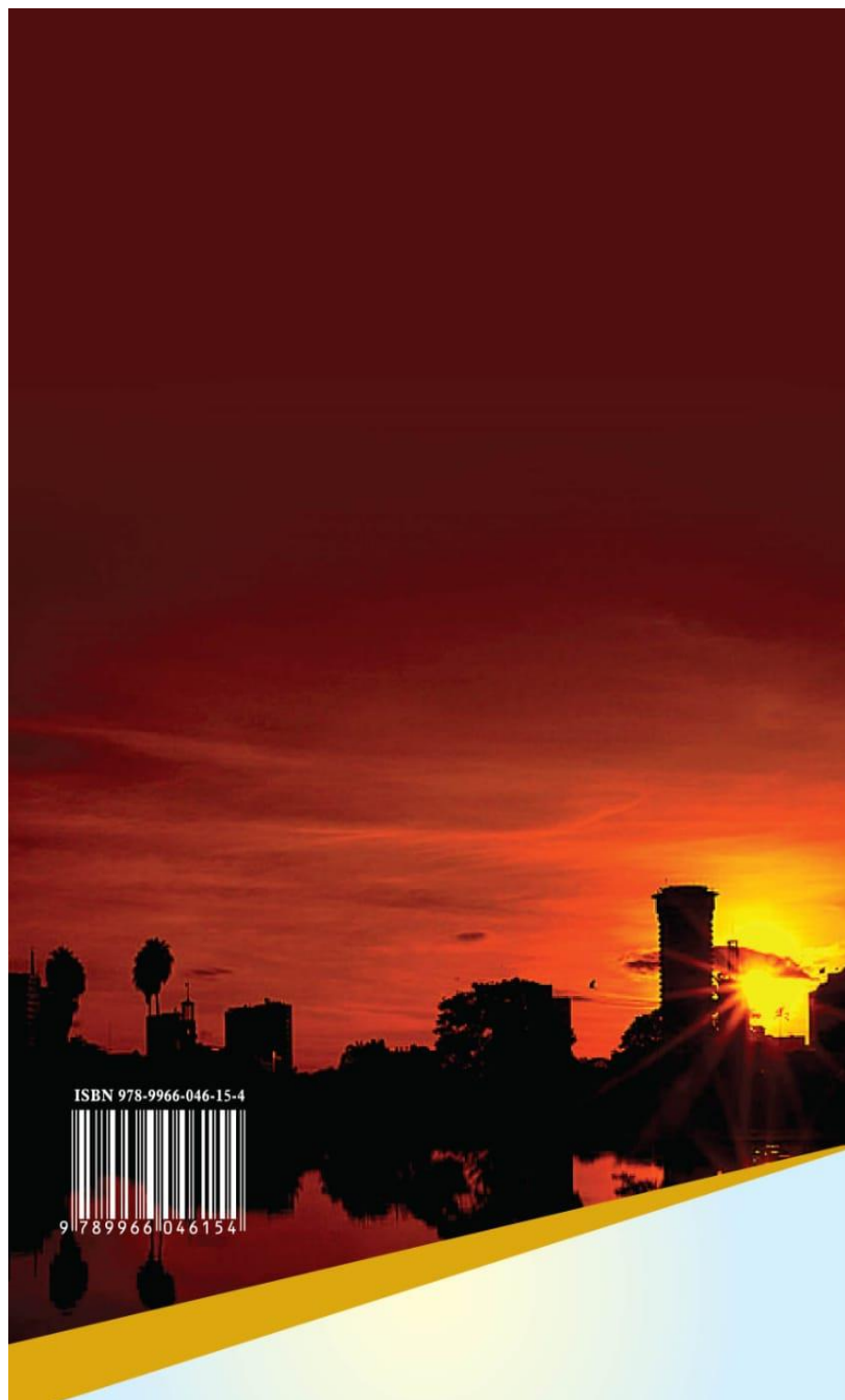
United Nations, “*Access to Justice for Persons with Disabilities: Toolkit on Disability for Africa*” Module 8.

The World Bank, ‘*Court Annexed Mediation Offers Alternative To Delayed Justice for Kenyans.*’ Available at, <http://www.worldbank.org/en/news/feature/2017/10/05/court-annexed-mediation-offers-alternative-to-delayed-justice-for-kenyans>, Accessed on 28/05/2018

## **Reports**

***Mediation as A Tool of Conflict Management (2020) Journalofcmsd Volume 5(2)***  
***in Kenya: Challenges and Opportunities:***  
***James Ndungu Njuguna***

The Judiciary, '*State of the Judiciary and the Administration of Justice*' Annual Report 2016-2017, Available at <https://www.judiciary.go.ke/.../state-of-the-judiciary-and-the-administration-of-justice-> Accessed on 31/05/2018



ISBN 978-9966-046-15-4



9 789966 046154