AN EXAMINATION OF THE LEGAL, INSTITUTIONAL AND POLICY FRAMEWORK REGULATING THE COST OF HEALTHCARE IN KENYA

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DECLARATION

I, JOYCE KHOYO NYAGOL, do hereby declare that this is my original work and that it has not been submitted for award of a degree or any other academic credit in any other University.

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This research project has been submitted for examination with my approval and knowledge as university supervisor(s),

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DR SCHOLASTICA OMONDI

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Finally, I thank my friend Rashid Abubakar for his constant moral support throughout this journey.

DEDICATION

I dedicate this work to my mother, Catherine Anyango Oduori.

ABBREVIATIONS AND ACRONYMS

AAAQ	-	Availability, Accessibility, Acceptability and Quality framework
ACHPR	-	African Charter on Human and Peoples' Rights
CEDAW	-	Convention on the Elimination of all Forms of Discrimination Against Women
CERD	-	International Convention on the Elimination of All Forms of Discrimination
CRC	-	Convention on the Rights of the Child
FBO	-	Faith-Based Organization
ICU	-	Intensive Care Unit
KEPH	-	Kenya Essential Health Package
KPMD	-	Kenya Medical Practitioners and Dentist Council
NGO	-	Non-Governmental Organization
NHIF	-	National Health Insurance Fund
OECD	-	The Organisation for Economic Co-operation and Development
UHDR	-	United Declaration of Human Rights
ICERD	-	International Convention on Economic, Social and Cultural rights
ICT	-	Information and Communications Technology
OOP	-	Out of Pocket

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Constitution of Kenya 2010

Health Act, 2017 (Act No. 21 of 2017)

Kenya Medical Practitioners and Dentists Act Chapter 253 Laws of Kenya

Medical Practitioners and Dentists (Professional Fees) Rules, 2016.

Public Health (Medical Officers Of Health And Health Inspectors) Rules, 1963

Public Health Act Chapter 242 Laws of Kenya (Act No. 21 of 2017)

INTERNATIONAL INSTRUMENTS

African Charter on Human and People's Rights, 1981

Convention on the Rights of the Child, 1989

International Convention on Elimination of All Forms of Racial Discrimination, 1979

UNCESCR General Comment 14, The Right to the Highest Attainable Standards of Health

International Covenant on Civil and Political Rights, 1966

UNCESCR General Comment 14, The Right to the Highest Attainable Standards of Health

World Health Constitution 1945

The United Nations, United Nations Charter, 1945

Universal Declaration of Human Rights, 1948

ABSTRACT

This study is an examination of the cost of healthcare in Kenya and the measures placed to regulate the cost of healthcare to ensure the accessibility of healthcare to all Kenyans throughout the years 2010 to 2020.

Although the accessibility to healthcare is a fundamental right that has been enshrined in the Constitution and the general assumption is that all Kenyans have access to healthcare nevertheless, many "Kenyans face challenges in accessing this right to the highest attainable standard of health, due to the steep medical fees charged by hospitals to receive basic health services.

This study will show that the direct and indirect costs of healthcare still pose a challenge in the access of healthcare for Kenyans and especially those of the low-income groups. The study will further demonstrate how people in Kenya are willing to only spend what they can afford on healthcare, which in turn is not a total reflection of what is needed to cater for the cost of health care.

Therefore, through socio-legal research, the study will systematically analyze the concept of regulation and then proceed to review the legal principals involved in the provision of universal health coverage with a view of providing a framework for the regulation of the cost of healthcare. Thereafter, the study will also undertake a rigorous analysis and critical evaluation of the legislative, policy and institutional framework so as to ascertain the rationale informing the principles of the provision of universal health coverage in Kenya and how they are addressing accessibility to healthcare by making it affordable.

This study seeks to provide a framework that will give the basis for the regulation of the cost of healthcare in Kenya through the strengthening of policy formulation towards achieving accessibility of healthcare in Kenya, creation of supportive frameworks pertaining to the cost of healthcare for both the public and private sector and to examine the accessibility of healthcare services to all Kenya.

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CHAPTER ONE: INTRODUCTION

This chapter provides an introduction to the problem and the purpose of the study, which is the universal health coverage and attaining the highest standard of health.

This chapter will also illustrate the statement of the problem and thereafter lay out the objectives of the research, the hypotheses, the theories underpinning the research, and the research methodology to be used.

1.0 Background Information

Health is a fundamental human right and every human being is entitled to the enjoyment of the highest attainable standard of health, that is rife for one to enjoy a life of dignity[1]. This international human right has further been embodied in the Constitution[2] and the concept of human rights in international human rights law. Health therefore a fundamental human right that deserves to be accorded the importance it deserves with regards to health issues[3].

Healthcare as discussed alongside health refers to the measures and preventive procedures taken to improve the well being of an individual, and ultimately, health[4]. Healthcare is therefore a public good and a human right that is premised on social justice and not a commodity to be purchased. It is therefore inalienable and implies duties on the government to ensure the provision of this human right[5].

[1] UNCESCR General Comment 14, The Right to the Highest Attainable Standards of Health (Article 12)
[2] Constitution of Kenya 2010
[3] Virginia A Leary. 'The Right to Health in International Human Right Law'. Health and Human Rights 1(24): 8/32[1994] <https://cdn1.sph.harvard.edu/wp-content/uploads/sites/2469/2014/03/5-Leary.pdf> accessed 11th December 2019
[4]Black's Law Dictionary
[5]Anja Rudeger and Benjamin Meier 'Right Based Approach to Healthcare Reform' [2010] < http://bmeier.web.unc.edu/files/2015/07/2010-Meier-et-al-Rights-Based-Approaches-to-Public-Health-Systems-Ch.4.pdf> accessed 11th December 2019

Healthcare in Kenya" is underpinned by the Constitutional right to health as envisaged by Article 43(1)[6]. The Constitution of Kenya provides for the right to the highest attainable standard of health as an economic and social right[7], which is inclusive of the right to healthcare services and reproductive health, and the right not to be denied emergency medical treatment.

According to the World Health Organization[8], proper health is fundamental for economic and social development and poverty reduction. Access to health services is therefore crucial for improving and maintaining health, while at the same time protecting people from being rendered poor because of the cost of healthcare.

Regionally, the African Union has taken measures to ensure that member states through their governments and equally the private sector support and invest in expanding access to quality health care services aimed towards achieving universal health coverage[9] .

In Kenya, the Constitution provides that every person is entitled to the highest attainable standard of health that also comprises of the right to healthcare services together with reproductive healthcare. By being a Constitutional provision, the right to health, therefore,is amongst the socio-economic rights which states are under obligation to fulfil under not only under the local legislation, but also under international law[10]

Leary argues that healthcare and all health-related issues should be approached through a rights perspective, therefore, awarding it the importance it deserves with regards to States ensuring that it is enjoyed across the country without any discrimination or favour[11].

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[6] Constitution of Kenya 2010

[7] Constitution 2010, Art 43 (1) (a)

[8] https://www.who.int/data/gho/data/major-themes/universal-health-coverage-major/GHO/universal-health-coverage <accessed 11th December 2019>

[9] https://au.int/sites/default/files/decisions/36461-assembly_au_dec_713_-_748_xxxii_e.pdf accessed 11th December 2019

[10] Evans, Tony 200. "A Human Right to Health?" Third World Quarterly 23(2)

[11] Virginia A Leary. 'The Right to Health in International Human Right Law'. Health and Human Rights 1(24): 8/32[1994] <https://cdn1.sph.harvard.edu/wp-content/uploads/sites/2469/2014/03/5-Leary.pdf> accessed 11th December 2019

Riding on this premise, the constitution further bestows the responsibility on the State to ensure the implementation of this fundamental right to the highest attainable standard of health and healthcare services by the enactment of the legislation, healthcare policies, establishment of institutions and facilities together with ensuring that there is adequate healthcare personnel, to achieve the progressive realization of the right to health[12].

It is, therefore, the obligation of the state parties to strive to increase resources to fulfil its obligation of the provision of healthcare services in the realization of the right to health, noting that this duty of progressive realization should still be fulfilled regardless of the status of resources the State has[13].

Upon establishing that this right to health has adequately been catered and established by the state, the question that then begs is the ability of Kenyans to access the healthcare services financially. In 2014, it was established that 37% of women between 15-49 years of age were not able to access healthcare services due to not being able to get money to seek medical treatment[14]. This was further confirmed by Njuguna and Wanjala[15] who reiterated that the issue of the cost of healthcare is a burden that continuously reduces the use and accessibility to medical care in general and measures should be taken to increase the availability and affordability of healthcare services especially for the poor. Further studies have shown that Kenya faces major challenges in realizing the universal health care coverage as access to affordable and quality health care still poses a major challenge for most Kenyans, especially in the low-income areas[16]

[12] Constitution of Kenya 2010 Article 21(2)

[13]Limburg Principles on the Implementation of the International Covenant on Economic and Social Rights https://www.right-to-education.org/resource/limburg-principles-implementation-international-covenant-economic-social-and-cultural <accessed on 11 December 2019>

[14] Kenya Demographic Health Survey 2014 https://dhsprogram.com/pubs/pdf/fr308/fr308.pdf <accessed 11th December 2019>

[15]David Njuguna &Pepela Wanjala,,'A Case for Increasing Public Investments in Health: *Raising Public Commitments to Kenya's Health Sector'* <accessed on 11 December 2019>

[16] G N.V Ramana, R Chepkoech& N. Walelign Workie: Improving Universal Primary Health Care by Kenya: A Case Study of the Health Sector Services Fund [2013]

Furthermore, in the discussion of healthcare and provision of healthcare services, the trends on healthcare expenditure must be examined in to determine what steps states can take to ensure the accessibility of healthcare to all.

"Globally, healthcare has been on the increase with healthcare spending growing faster than gross domestic product globally[17]. In the two years of the creation of the Sustainable Development Goals[18] in 2017, there has been a 10% rise in spending on health care from US$ 7.6 Trillion to US$ 7.8 Trillion. This has shown that spending on the health sector has been on the increase at a faster rate than the economy. Between the years of 2000 and 2017, health sector spending has expanded at an annual rate of 3.9%.

Lower and middle-income countries have shown a steady growth towards higher levels of health care spending at a rate of 6.3% between the year of 2000 and 2017 whereas low-income countries have shown an increase in health spending of 7.8%. Generally, the distribution of health spending remains unequal between low-income countries and high-income countries. Spending in low-income countries stands at US$ 41 per person in 2017 in comparison to higher-income countries whose spending on healthcare is at US$ 2,937.

High-income countries in turn devote more of their income to health more than lower-income countries. In 2017, spending on health care per capita in North America, Oceania and Europe stood at the highest levels of between US$ 2000-5000 whereas countries in Western, Central and East Africa stood at the lowest with spending per capita being at US$ 2.50 on healthcare.

Similarly, out of pocket spending in low and middle countries have continued to be on the increase between 2000 and 2017 with spending increasing from US$ 14 to US$ 18. The increased public

17 World Health Organization -Global Spending on Health: A World in Transition - 2019 https://apps.who.int/iris/bitstream/handle/10665/330357/WHO-HIS-HGF-HF-WorkingPaper-19.4-eng.pdf?ua=1 <11 December 2019>

18 Ibid. Global Goals that were adopted the by the Member States of the United Nations in 2015 universally to call to action the end of poverty, the protection of the planet and ensuring that all persons enjoy peace and prosperity by the year 2030.

funding on healthcare has lead to the average decline in out of pocket spending from 50% to 41% between 2000 and 2017 as governments have continued to account generally for half of the total health spending.

The question for interrogation, therefore, is, as there is a global increase of healthcare expenditure across various income spectrums, what measures are being taken to ensure that the cost of health care in Kenya is sufficiently regulated to ensure accessibility to all with a view of leading the country towards the realization of universal health coverage.

On 20th February 2019, the country woke up to the news that a man named Boniface Murage was caught trying to smuggle his newborn baby out of Kenyatta National Hospital due to his inability to pay medical fees that had accrued to Kshs. 56,937/-.

On 26th January 2019, Boniface's wife Agnes Elewo and their one-month-old baby were admitted to the hospital, after the baby developed a fever and breathing complications. Upon receiving the required treatment, on 11th February 2019, the baby was discharged from hospital, with a bill of kshs 46,000/-. Unable to settle the bill, Boniface conspired with his wife to smuggle the baby out of the hospital a week later on 16th February 2019 where the hospital bill had accrued to Kshs. 56,937/-.

While this case captured the nation's attention due to the father's extreme acts, it represented the plight of millions of poor people who are unable to fully enjoy the right to health due to the prohibitive costs involved.

The question that therefore arises is, what then informs and regulates the cost of healthcare services in Kenya? For Consultant Doctor's in private practice, the fees chargeable are governed by the Medical Practitioners and Dentists (Professional Fees) Rules, 2016[19] which specifies the fees

[19] Legal Notice Number 131 - The Medical Practitioners and Dentists Board Act 2016

payable for procuring medical or dental services. Such fees prescribed are to be adhered to by all practitioners and institutions registered under the Act.

Arguably, steps have been taken by the Government to ensure that Kenyans have access to healthcare by ensuring that healthcare facilities are available and within reach for Kenyans. However, the standard of the health care services provided within the facilities is a question for concern.

It is also arguable that the private sector has also taken steps to provide healthcare services, which they boast to be of the highest attainable standard. However, the issue of affordability of the healthcare services then comes into question. It is undeniable the healthcare services in Kenya is expensive, and therefore insurance players in the market have offered medical insurance services, which are regulated by the Insurance Act.

However, there has been wide outcry regarding the cost of medical insurance, whose purpose is to largely ensure that healthcare services are accessible to Kenyans. For instance, there is great decry about the cost of medical insurance in Kenya, not to mention, failure of the insurance companies to honour their products and paying off claims by made by their customers/clients. Furthermore more, even doctors have taken issue with insurance companies, who fail to pay Doctors who have provided healthcare services to patients under their schemes.

1.1 Statement of the Problem

Many Kenyans face challenges in accessing this right to the highest attainable standard of health, due to the steep medical fees charged by hospitals to receive basic health services. This has been

illustrated by the number of cases of patients being detained in hospitals for being unable to settle their bills[20]. This has resulted in attempts by patients to sneak out of the hospital.

Studies have found that the direct and indirect costs of healthcare still pose a challenge in the access of healthcare for Kenyans and especially those of the low-income groups[21] . It was found that people in Kenya are willing to only spend what they can afford on healthcare, which in turn is not a total reflection of what is needed" to cater for the cost of health care. As a result, it was estimated that 13% of individuals in Kenya forewent healthcare in 2013 as it would translate into an increase in the household level of funds[22].

In light of the current Corona Virus pandemic[23], the cost of healthcare remains a looming concern. Reason being, persons infected and suspected to be infected with the corona virus, are required to be quarantined for 14 days as tests are conducted and can only be discharged if they are found to be free of the virus.

In the period of quarantine, such persons are expected to cater to their medical costs before being discharged. That is not to mention the costs of more serious health complications that result from the virus such as difficulty in breathing, chest pain or pressure and loss of speech or movement[24].

Therefore, in this discussion of the regulation of the cost of healthcare, a concern that needs to be addressed is how the healthcare costs that result from this pandemic can be mitigated to cushion

[20] https://www.nation.co.ke/news/Hope-for-patients-detained-in-hospitals-over-unpaid-bills/1056-4932696-11qtx6m/index.html <accessed on 3rd January 2020>

[21] Julie Zollmann and Nirmala Ravishankar: Struggling to Thrive: How Kenya's Low Income Families (Try to) Pay for their Healthcare [2016]

[22] 2013 Kenya Household Health Expenditure and Utilization Survey (KHHEUS)

[23] A new respiratory illness that is highly contagious and is spread through contact with the droplets that have been produced by an infected person through sneezing, coughing or through contact with contaminated objects or surfaces. https://www.who.int/health-topics/coronavirus#tab=tab_ <accessed 4th May 2020>

[24] https://www.who.int/health-topics/coronavirus#tab=tab_3 <accessed 4th May 2020>

Kenyans in a bid of ensuring the constitution provision of access to the highest attainable standard of health[25].

These instances are a highlight of the challenges faced by Kenyans in being able to access healthcare as it is now a common saying in Kenya that " you are one illness away from financial ruin"[26].

There is therefore an urgent need to regulate the cost of healthcare in Kenya to make it accessible and affordable for all, so as to allow each individual to enjoy the fundamental right to health.

1.2 Justification of the Study

This study seeks to examine the effects of regulation of the cost of health care on the accessibility of healthcare services for patients in Kenya.

The knowledge generated by the study will help in filling the gaps in the knowledge of this area, which will help in legislative reforms addressing the regulation of the cost of healthcare;

In addition, the findings of this study will help in the formulation of policies to allow for providing means that make healthcare more accessible to patients in Kenya, and finally, this study will help the government and the organizations concerned to develop appropriate mechanisms that will guide in the creation of regulatory frameworks on costs for both for-profit private health sector and public health sector.

1.3 General Objective of the Study

The main objective of this study is to examine the extent of regulation of the cost of health care in Kenya and any mechanisms that may be in place to effect the same. This will include an

[25] Constitution of Kenya Article 43 (1).
[26] https://www.nation.co.ke/health/Affordable-health-saving-Kenyans-from-high-costs/3476990-4666980-mp9ayw/index.html <accessed 4th May 2020>

investigation into the institutional and legal framework that governs the regulation of cost and thereafter, based on the outcomes of the study, recommendations shall be made to address the question of regulation of the cost of healthcare in Kenya, with a view of resulting in better access to health care services for Kenyans who want to access both public and private-for-profit health care services.

The objectives of this study therefore will be the following:

i. To examine the concept of regulation and health care towards the provision of the highest attainable standard of health
ii. To examine the adequacy and effectiveness of the existing legal and institutional framework and the healthcare system in addressing the provision of health care services in Kenya;
iii. To establish the efficacy of the implementation of and challenges faced in the regulation of the cost of healthcare services in Kenya;
iv. To make recommendations to enhance the accessibility of health care services in Kenya by cost regulation-making healthcare more affordable.

1.4 Research Questions

This research study shall endeavour to answer the following questions:

1. What is regulation in relation to healthcare and what are the concepts that underpin the provision of the highest attainable standard of health?
2. How adequate and effective are the existing legal and institutional frameworksthat govern healthcare professionals and health care systems in Kenya?
3. How efficient is the implementation of the regulatory framework and what challenges are faced in the regulation of the cost of healthcare services in Kenya?

4. What recommendations can be made to enhance the regulation of health care services in Kenya?

1.5 Theoretical Framework

The theoretical framework "of this study will be premised on various schools of thought to perpetuate the notion of the importance of regulation of the cost of healthcare in Kenya with a view of attaining the right to health as premised in Constitution[27].

Regulation aims to correct the negative effects of market failures for the benefit of consumers that prevent the maximization of social welfare[28]. Economic regulation, therefore, provides for intervention by the states in industries that provide essential services such as healthcare, intending to increase social welfare[29]. This study will therefore employ the public interest theory of regulation, the theory of regulatory capture, the economic theory of regulation, economic analysis of law and human rights theory.

The public interest theory was formulated on the assumption that markets are fragile and if left to operate autonomously it will result in inefficiency. Therefore, government regulation is necessary to correct the shortcomings of the markets and to mitigate welfare losses associated with market failures[30]. A.C Pigou, the proponent of this theory held that regulation aims to benefit the public through solving the collection action problems that arise and intervening when the private market fails to adequately allocate resources[31]. The theory further states through regulation, the government should correct these market failures for instance through taxation or subsidies that are designed to

[27] Constitution of Kenya Article 43 (1).
[28] Maria R. Borges: 'Regulation and Regulatory Capture' [2013] http://www.worldacademy.org/files/colloquium_2017/papers/Regulation_regulatory_capture_M.Borges.pdf <accessed 12 November 2020>
[29] Dal Bo ' Regulatory capture: a review' Oxford Review of Economic Policy [2006]
[30] Richard Posner 'Theories of Economic Regulation [1974] https://papers.ssrn.com/sol3/papers.cfm?abstact_id=259352 <accessed 4th May 2020>
[31] Henry N. Butler & Jonathan R Macey ' Healthcare reform: Perspectives from the economic theory of regulation and the economic theory of statutory interpretation [1994]

push the market towards reaching a socially optimal equilibrium. This theory, therefore, seeks to promote productive efficiency and adequate allocation of resources while allowing the conditions of economic viability and financial sustainability of the regulated industry and to equally protect the consumers from market abuse[32].

The theories of regulatory capture arose as the main criticisms of the public interest theories claiming that the mere existence of regulation does not ensure that the intended objectives are met[33]. The regulatory recapture theories take into consideration that, the poor performance of the regulation process does not result from the inadequacy of the regulation process or mismatched objectives, but may result due to insufficient performance of individuals or the procedures of implementation[34]. Regulatory capture, therefore, occurs when groups or individuals with interests in the outcome of the regulatory processes, policies or decisions make directed efforts to achieve certain desired outcomes from the said policies. However, Peltzman[35] further developed this economic theory of regulation by introducing the notion that, the economic interest of legislators or regulatory agencies are not captured with exclusivity. He finds that through regulation policies that reduce the total value of wealth available for distribution among interests groups tend to be avoided.

The theory of economic analysis of law which emerged in the 19th century propagated by Posner suggests that economics may be used as a determinant of the extent to which the law promotes

[32] Maria R. Borges, 'Regulation and Regulatory Capture' [2013] http://www.worldacademy.org/files/colloquium_2017/papers/Regulation_regulatory_capture_M.Borges.pdf <accessed 12 November 2020>

[33] ibid.

[34] Maria R. Borges, 'Regulation and Regulatory Capture' [2013] http://www.worldacademy.org/files/colloquium_2017/papers/Regulation_regulatory_capture_M.Borges.pdf <accessed 12 November 2020>

[35] S Peltzman 'The economic theory of regulation after a decade of deregulations' [1989] https://www.brookings.edu/wp-content/uploads/1989/01/1989_bpeamicro_peltzman.pdf <accessed 12 November 2020>

efficiency[36]. The law is therefore used to regulate economic activities and the economic attributes such as money, production and how the distribution of wealth influences the supply of service and products, for instance, healthcare. The economic analysis of law theory therefore finds that regulation facilitates the empirical legal studies to offer comprehensive and useful information on the legal reality to the legal fraternity and the government[37].

The final theoretical framework that this study is based on, is the Human Rights Theory. The concept of the human rights theory as outlined by John Rawl, states that law as a tool imposes moral obligations and duties the members of the society[38]. Basic human rights that each individual is entitled to includes among others, the right to life, right to security, personal property, freedom of association and right to the enjoyment of liberty. Right to life as a component of human rights, therefore infers that one should have access to proper and adequate healthcare and without proper regulation of the cost of healthcare, however, the realization of this basic human right is therefore jeopardized.

1.6 Research Methodology

For this study, the socio-legal research methodology will be employed. As the study appreciate the fact that the law does not operate in a vacuum, and therefore wider considerations have to be taken into account, the research will go beyond the black letter approachto adequately examine the framework regulating the cost of healthcare in Kenya.

The process of this study involved the formulation of research questions through the review of literature on healthcare in Kenya, identification of the relevant laws, institutions and policies that

[36]George Cohen 'Posnerian jurisprudence and economic analysis of law: The view from the Bench [1985] https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=4044&context=penn_law_review pdf <accessed 12 November 2020>
[37] R.APosner. *Economic Analysis of Law* (3rd Ed, Wolters Kluwer 1986)
[38] L.B Curzon - *Jurisprudence* (Cavendish Publishing Limited 1995)

govern healthcare and an examination of the laws, institutions and policies along with concepts that underpin healthcare to identify the gaps relating to the regulation of the cost of healthcare and formulation of recommendations thereafter.

Through a qualitative approach, the study will analyse and interpret both international and legal texts that include the Constitution of Kenya, Health Act 2017 National Hospital Insurance Act, Public Health Act, Medical Practitioners and Dentists Act, Universal Declaration of Human Rights, International Covenant on Economic, Social and Cultural Rights, Convention on the Elimination of All Forms of Discrimination against Women, Convention on the Rights of the Child, African Charter on Human and Peoples Rights, Convention on the Elimination of all Forms of Racial Discrimination. The study will also examine the policies that address healthcare which include the Vision 2030, Kenya Health Policy 2014-2030 and the Third Medium Term Plan 2018-2022.

The type of research to be conducted shall be a desk review. The study will be conducted in the mode of library research and internet searches which will seek to procure information that will enable the analysis of an investigation into regulation if any of health care in Kenya, and its effectiveness in the provision of healthcare services in Kenya.

A desk review aims to provide a complete and detailed description of the study in question[39], this study will be conducted with a view of deciphering a working and legal cultural process that will be beneficial to the regulation of healthcare in Kenya. Through the desk review,this study will be able to explore social relations in reality and experience concerningthe provision of healthcare. In addition, this study will attempt to elaborate and develop a theory to provide a more useful understanding on the need for regulation of healthcare in Kenya and its importance and to identify gaps in Kenya on the regulation of the cost of healthcare.

[39]Scholastica Omondi & Michael Sitwa: *Research Methodology Simplified (Law Africa Publishing* 2019)

1.7 Literature Review

In the interrogation of regulation of healthcare, one of the salient features that arise is the question of accountability in the quest of regulation, and the impact that accountability will have in the provision of the highest attainable standard of healthcare.

This literature reviewed in this study will look into the concept of regulation, the right to health and the principles of the highest attainable standard of health. Thereafter the literature will review the healthcare systems in" Kenya and finally, the legal, institutional and policy framework that addresses healthcare in Kenya, with a view of addressing the regulation of the cost of healthcare in Kenya.

Regulation of healthcare systems, regardless of the negative connotations associated with the term regulation, is now a common feature worldwide[40]. Regulation is important as it addresses the welfare losses that are associate with market failures and to provide protection to consumers. With regulation, there is government involvement in healthcare provision which has been as a result of market failures in health care provision. Therefore by regulating health care, there is a pursuit of various objectives such as equity for consumers and counteract strong professional interests that may be detrimental to the consumers of healthcare[41].

Evans Ayeima Mbicha[42] in his study enforcement of the right to health in Kenya acknowledges the importance of the right to health and its role in protecting the most vulnerable in society. In his study, Mbicha looks into the judicial enforcement of the constitutional right to health and finds that the Kenyan judiciary is in a position to contribute to the growing jurisprudence of enforcement of

[40] Charles Shaw, External assessment of health care, (2004) https://www.researchgate.net/publication/12042661_Shaw_CExternal_assessment_of_health_care_BMJ_322_851-854 <accessed 5th June 2020>
[41] Goddard M, Regulation of Healthcare Markets: Journal of Health Services & Research Policy;(2003); pp 193-195
[42] Evans Mbicha, Judicial enforcement of the right to health under the new constitution of Kenya (University of Nairobi 2014)

the right to health. He found that, although the justiciability of the right to health as provided in the Kenyan constitution is not in contention, the major challenge faced is the scarcity of resources that the government of Kenya has to ensure that the available resources are utilized to provide the basic primary healthcare for people. ,

What is, however, lacking in Mbicha's study is what provisions to regulate the cost of healthcare with a view of ensuring affordability, can be taken by the judiciary to further enforce the right to health as provided in the Constitution.

Richard Wamai[43]provides an in-depth evaluation of the reforms in the healthcare policy in Kenya, and the developments realized in the post-colonial era. In the paper, Wamai points out that for "quality healthcare to be realized in Kenya a holistic approach needs to be implemented, to give priority to the improvement of access and coverage healthcare through the improvement of facilities, provision of affordable and accessible healthcare services, increasing healthcare professionals and decentralization of the financial management and decision making in healthcare matters. However, notable is that Wamai did not address the cost of healthcare and the effect it had in contributing to the reforms in the healthcare policies.

In the Article titled New Kenya Law Ensures Access to Health Services[44] an insight is given into the Health Act[45] and the provisions that have been put in place to enforce the same. For instance, the Act makes provision for accessibility of healthcare services such as free maternity care, access for breastfeeding facilities at the workplace and vaccinations for children under the age of five.

[43] Richard G. Wamai, "Healthcare policy administration and reforms in post-colonial Kenya and challenges for the future [2009]
[44]New Kenya Law Ensures Acces s to Health Services http://www.hvealthpolicyplus.com/kenyaHealthRights.cfm (3 August 2017) <accessed 5th June 2020>
[45] Health Act, 2017

The Act further provides for the regulation and reorganization of the health sector in Kenya by the establishment of the Human Resource for Health Advisory Council and the Kenya Health Professions Oversight Authority which is aimed at safeguarding the health of workers and the healthcare staff together with the overseeing of the healthcare professionals and the regulatory bodies.

What however stands out is that there are no provisions for regulation of the cost of healthcare in Kenya and the effects that the regulation of the cost of healthcare will have on the access to healthcare for Kenyans as embodied in the Constitution[46].

Richard G Wamai[47] in his study of the health system in Kenya preliminarily pointed out that the healthcare system of a country must be analyzed based on the health infrastructure, the players and their roles and the financing mechanisms of the healthcare system. Wamai found that the cost of healthcare poses a burden on most households in Kenya and more needed to be done to ease that burden and to improve the health status of the population.

Research has been conducted by various scholars regarding the implementation of public healthcare financing strategies in Kenya to establish what challenges are faced in its implementation. Gikonyo[48] noted that the main challenges faced herein are organizational systems and procedure, culture and traditions, technology, leadership and human resource and funding. In his study, he found that the Ministry of Health has put measures in place to control human resource challenges by employing more staff, to curb the challenges faced in leadership by liaising with donors to conduct training of the members of the Hospital Management Team and also to conduct wide training of

[46]Constitution of Kenya, 2010
[47] Richard G Wamai; The Kenya Health System - Analysis of the situation and enduring challenges (2009) <http://www.med.or.jp/english/pdf/2009_02/134_140.pdf> Accessed 15 November 2020
[48]Shadrack W. Gikonyo: Challenges Facing the Implementation of Public Healthcare Financing Strategies in Kenya. University of Nairobi 2011

managers on leadership skills across the country. What is however lacking though is, the challenges faced in the regulation of the cost of healthcare and what measures have been taken by the ministry to ensure access of healthcare to patients in Kenya.

Another scholar Karanja[49] in her study on the provision of Universal Health Care and the challenges faced by the NHIF in its provision, she found that among other factors, universal healthcare is not being fully realized in Kenya due to government budgetary resources, high poverty levels, misuse of resources and failure of reach to vulnerable people. In her study, Karanja concluded that the government can curb the challenges faced in the provision of health care through reforms throughout the country, by increasing the efficiency of revenue collection, initiating schemes for the informal sector and ensuring broad coverage through health reforms in the whole country.

Similarly, from this study, nothing has been said on the regulation of the cost of healthcare, and whetherit could result in better provision of Universal Health Care by the NHIF[50]. It is therefore essential for a study to be conducted on the regulation of the cost of healthcare in Kenya, and its effects on the accessibility of healthcare for patients in Kenya.

Karanja in her study on the challenges of the provision of universal health care[51] found that there was a shortage of government budgetary resources that affected the provision of health care. This in addition to weak existing health systems, high poverty levels, misuse of resources among other factors, posed a challenge in the provision of universal health care in Kenya. Again as seen from the studies above, there is no information on what measures need to be undertaken to regulate the cost of healthcare, to realize universal healthcare in Kenya.

[49]Jane Karanja, 'Challenges in Provision of Universal Health Care by the National Hospital Insurance Fund, Kenya' [2005]
[50] Ibid.
51Ibid

Finally, Timothy Wafula Makokha[52] argues that with regards to the legal framework, predominantly the Constitution of Kenyan, the Health Act and the NHIF Act the other multiple laws that regulate the health sector, create multiple regulatory and implementation authorities which risk the duplication of roles, thus posing a danger to achieving the policy objectives to realize universal health coverage. He further argues that the institutional framework is inadequate in realizing the universal health coverage, as the policies defined therein have not comprehensively defined the design of the universal health coverage. This as he points out, fundamentally lies with the policies on UHC" designating the NHIF to drive the initiative whereas the NHIF act has not been reviewed to reflect that initiative nor has it been reviewed to incorporate the constitutional principles concerning the right to health.

1.8 Limitations

Regulation of the cost of healthcare in Kenya is a fairly new concept, with a little literature in Kenya on its regulation and enforcement. For this reason, this study will mostly comprise of heavy reliance of external publications on the regulation of healthcare in Kenya and therefore concluding whether there is sufficient and adequate regulation of healthcare.

Also, the absence of detailed literature on the regulation of healthcare may hamper an incisive critique of the issues under discussion. Therefore, a note shall be made to undertake a legal critique of the regulatory and conceptual frameworks of any of this work and an initiative shall be made to commence in-depth discourse on this subject with a view of opening the discussion to other legal scholars.

[52] Timothy Makokha" An examination of the legal, policy and institutional framework for universal health coverage' [2018]

1.9 Hypothesis

This research will endeavour to prove the following assumptions:

1. That healthcare in Kenya needs to be regulated to provide accessible healthcare to all Kenyans
2. That there is a great fundamental flaw in the regulation of healthcare that renders it nearly impossible for patients to access proper and affordable healthcare.
3. That without proper mechanisms for regulation of healthcare, access to the highest attainable standard of healthcare under the premises of Article 43 (1) (a) of the Constitution of Kenya will not be realized.

1.10 Chapter Breakdown

Finally, this research will be broken down into the following chapters:

Chapter One

Chapter one will be an introduction to the problem. It will lay out the objectives of the research, the hypotheses, the theories underpinning the research, and the research methodology to be used.

Chapter Two

Chapter two will examine the concept of regulation and health care towards the provision of the highest attainable standard of health

Chapter Three

Chapter three will be an examination of the existing legal and institutional framework and the healthcare systems that address the provision of healthcare in Kenya to determine how adequate and effective the same is in ascertaining the provision of the highest attainable standard of health.

Chapter Four

This chapter will examine how efficient the implementation of the regulatory framework and what challenges are faced in the regulation of the cost of healthcare services in Kenya.

Chapter Five

The final chapter will make recommendations to enhance the accessibility of health care services in Kenya by cost regulation with a view making healthcare more affordable to all Kenyans.

CHAPTER TWO: INTRODUCTION

This chapter will comprise of an examination of the concept of regulation and health care and what the provision of the highest attainable standard of healthcare entails.

2.0 Regulation

Regulation as described in the Black's Law Dictionary[53] is the act or the process of controlling by rule or restriction.

The Ballentine's Law Dictionary[54] further defines regulation as control or direction made by restriction or rule of something that is permitted or suffered to exist. This concept is further illustrated in the case **Kepher v Commonwealth**[55] where it was found that regulation is the rules that order affairs, whether private or public by whether by statute, resolution or declaration. Further in the case **Boston & M.R. Co. v Hooker**[56]it was importantly pointed out that regulation is the control by an authority of a public service corporation about service, charges, and other matters in its operation that involve public interest.

"The Bloomsbury Dictionary of Law[57] points out that to regulate is to change or maintain something by law. Further, it states that regulation is the act of making sure that something works well, and therefore regulation essentially makes sure that something works according to the law.

Finally, the Essential Law Dictionary[58] defines regulation as a rule created and enforced by an authority. A rule that is created by a government agency to carry out the requirements of law.

[53]Blacks Law Dictionary 20th Edition
[54]Ballentines Law Dictionary 3rd Edition
[55] Kepher v Commonwealth 40 Pa ST 124 192
[56] Boston & M,R. Co v Hooker 223 US, 97, 58, L. ED 868 3 S Ct 526
[57] Bloomsbury Dictionary of Law 4th Edition
[58] Essential Law Dictionary 20th Edition

Having defined what regulation is and what it should be entailed of, it is essential to look into what principles should govern regulation to achieve the most out of any regulation. Principles of regulation act as a guide to actions or they set out objectives of the regulator[59]. Such principles include elements like, treating a consumer fairly or acting with due care. Principles of regulation require the use of sound judgment, therefore, should be guided and informed by actions that will achieve the objectives of the regulation most efficiently. Principles of regulation include:

Regulation should be fair and be seen as fair

As a principle of financial regulation, regulation being fair deals with due process. It has been argued that good regulation should follow the law, it should not be capricious nor arbitrary. In addition, the regulators' actions should be predictable and well understood by those it seeks to regulate. It is of essence to note that, regulatory statutes or decisions that contravene the constitutional principle to pair administrative action will not be beneficial to regulators as courts have been seen to nullify such decisions[60]

In addition, since the decisions of statutory bodies or administrative bodies have profound impacts on the people's lives as a result of financial regulation, it is paramount that the regulations be fair and indeed, be seen as fair.

Regulation should be efficient

Efficiency as a principle of sound financial regulation envisages that there should be no imposition of unnecessary costs on the business of customers.

Regulations should be decided to work with incentives for the benefit of customers, and not fight or frustrate customers.

[59]Philip Rawlings, Andromachi Georgosouli & Costanza Russo "*Regulation of Financial Service: Aims and methods"*, Centre for Commercial Law studies, Queen Mary University of London. (2014)

[60]See **Alnashir Popat & 8 others v Capital Markets Authority [2016] eKLR**

Regulation should be designed to redress some well-articulated problem

As regulation seeks to achieve several objectives such as quality of service, licensing, compliance with certain standards, it is essential that at the time of designing the regulation; whether it is through statutes or guidelines, that the industry problem at the time is well articulated.

This will, as a result, lead to the proper regulatory mechanisms to address problems fully and efficiently.

Regulations should not have overlaps

In a jurisdiction with a large number of regulators exercising jurisdiction over a different number of industries, there will inevitably be some degree of overlap amongst the regulators in the financial sector, thereby resulting in confusion[61].

As a principle, regulations should strive to have" minimized overlaps for institutions not to get conflicting guidelines or instructions from different regulators.

2.1. Healthcare

Health as defined by the Black's Law Dictionary, is any efforts made to maintain or restore physical, mental, or emotional well-being especially by trained and licensed professionals.

Healthcare on the other hand has been defined by the Blacks Online Law Dictionary[62] as taking the necessary medical and preventative procedures to improve well-being. It can be medical or change a lifestyle. The Essential Law Dictionary further defines healthcare as the prevention and treatment of diseases and injuries by medical professionals and institutions.

2.2. Right to Health

The right to health is a human right, that envisages its protection through various statues around the world.

[61] Ibid
[62] Blacks online law dictionary Ibid

The right to health is an all-inclusive right which encompasses the right of the access to health care together with buildings and hospitals in addition to the underlying determinants of health[63]. The underlying determinants of health as comprised in the Covenant on Economic, Social and Cultural Rights include the right to safe drinking water and adequate sanitation, safe food, adequate nutrition and housing, healthy working and environment conditions, health-related education and information and gender equality.

This right to health is also comprised of freedoms which include the freedom from non-consensual medical treatment in the form of medical research or sterilization and freedom from torture, cruelty inhuman or degrading treatment or punishment.[64] and entitlementssuch as the right to a system of health protection that provides equal opportunity to all to enjoy the right to the highest attainable level of health, the entitlement to the prevention and treatment of diseases and the access to "essential medicines and equal and timely access to basic health services.[65]which essentially infers that the right to health is fundamentally based on one consenting to health treatment and at the same time, being granted the equal opportunity to access healthcare.

The right to health internationally is provided through the following statutes:

World Health Organization[66]

The World Health Organisation in its Constitution which conforms to the Charter of the United Nations provides for principles that are deemed to be basic to the happiness, harmonious relations and the security of all people. The instrument, therefore, provides that, State Parties that conform to the instrument should ensure the enjoyment of the highest attainable standard of health, that is free from any distinction as to race, religion, political belief or social condition.

[63]CESR General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12) [2002] https://www.refworld.org/pdfid/4538838d0.pdf <accessed on 2nd March 2020>
[64]CESR General Comment No 14 ibid
[65]CESR General Comment No 14 ibid
[66] Preamble of the Constitution of the World Health Organisation

This instrument sets the basis of access to healthcare to all citizens of the State. The focus of this study lies on the enjoyment of the highest standard of health regardless of one's social condition. This proposes that healthcare should be accessible and affordable to all, to enable the enjoyment of the highest standard of attainable healthcare.

Universal Declaration of Human Rights[67]

This instrument under Article 25 (1) provides for the right to a standard of living that is adequate for the well being of one's health and that of his family, which includes food, clothing, housing, the right to security in the event of sickness and disability and most importantly, medical care.

International Covenant on Economic, Social and Cultural Rights[68]

The ICESR gives provisions for the Party States to recognize the right of every person to enjoy the highest attainable standard of health which includes both mental and physical health. It also provides that it is the duty of the State to ensure that necessary measures are taken to ensure that conditions are created in which all medical services and medical attention is ensured in the event of sickness.

This right to the highest attainable standard of health is to be achieved by States taking measures in making provisions for the reduction of still-birth and infant mortality, provide for measures for the healthy development of the child, to provide for the improvement of the environment and industrial hygiene, for the prevention, treatment and control of epidemic, endemic, occupational and other diseases, and the creation of conditions which would assure to all medical service and medical attention in the event of sickness.

[67] The Universal Declaration of Human Rights articulates the rights and freedoms to which each human being is inalienable and equally entitled to.

[68] International Covenant on Economic, Social and Cultural Rights Article 12 (1), 12 (2)(d)

Convention on the Elimination of All Forms of Discrimination against Women

Article 11(1)(f) of this conventions provides that, State Parties shall take all appropriate measures to eliminate discrimination against women in the enjoyment of the right to protection of health and safety in working conditions including the safeguarding of the function of reproduction.

Convention on the Rights of the Child

The Convention on the Rights of the Child[69] provides that, the State Parties do recognize that the enjoyment of the highest attainable standard of health and to the facilities for the treatment of any illnessand rehabilitation of health is a right that should be enjoyed by any child. It is further stated that the state must ensure that children are not deprived of their right of success to such healthcare services.

African Charter on Human and Peoples rights

This Charter[70], also known as the Banjul Charter provides for the right for each individual to enjoy the best attainable state of physical and mental health, further stating that the parties should take all measures necessary to ensure the protection of the health of their people; ensuring that they receive medical attention when unwell.

Convention on the Elimination of all Forms of Racial Discrimination

This Convention states that[71]racial discrimination in all forms is to be eliminated and prohibited to guarantee to everyone the enjoyment of the right to public health, medical care, social services and social security without any distinction as to the race, colour or ethnic origin.

Having considered the various international statutes and their provisions on the right to health, what features across all statutes, is the provision of the highest attainable standard of health. The next part

[69] Convention on the Rights of the Child Article 24
[70] African Charter on Human and People's Rights Article 16
[71] Convention on Elimination of all Form of Discrimination Article 5 (e)(iv)

of this study is therefore going to delve into what the highest standard of health entails and how States can venture to achieve it and provide it for its people.

2.3. Highest Attainable Standard of Health

The highest attainable standard of health as per the provisions of the World Health Organisation[72] is one of the fundamental rights of every human that should be enjoyed without any distinction of religion, race, political belief or economic and social condition.

In its quest to ensure the provision of the highest attainable standard of health, the World Health Organization has it in its mandate and function that, it aids Countries to achieve this objective upon request through assisting them in strengthening their health services and equally providing that it is the responsibilities of the Governments to provide adequate health and social measures to fulfil the health needs of its people.

The quest to therefore realize the highest attainable standard of health is therefore essentially realized through working towards the eradication of epidemics, endemics and other diseases, to take measures to provide for sanitary and quarantine procedures in order to prevent the spread of diseases[73], and in so far as possible, to remove the causes of ill health, by providing for measures that protect its Citizens from illnesses and any form of environmental situations that will lead to the deterioration of ill health[74].

To further understand the importance of the provision of the highest attainable standard of health, the General Comment No 14[75] this study will delve into the interpretation of Article 12 therein provided concerning the obligations of the state parties in ensuring the realization this standard.

[7272] World Health Organization Constitution - The Preamble
[73] World Health Organization Constitution Article 21
[74] Article 2 (i) ibid
[75] CESR General Comment No. 14: Right to the Highest Attainable Standard of Health General Comment of the Committee on Economic, Social and Cultural Rights

In its exploration of the Normative content of Article 12[76] the General Comment No. 14 appreciates the recognition of the right of all persons to enjoy the highest attainable standard of physical and mental health[77] and more importantly to ensure that conditions are created to ensure that all medical services and medical conditions are available in the event of one's sickness[78].

Furthermore, General Comment No. 14 acknowledges the fact the, notion of the highest attainable standard of health is considerate of individuals social and economic disposition together with the availability of the State's resources to realize this right. Therefore, what should be understood is that the right to health is the right" to be able to access and enjoy facilities and services along with the necessary conditions to realize the highest attainable standard of health[79].

In addition, it is acknowledged by the Committee[80] that, the right to health defined in Article 12.1[81] being inclusive, also encompasses the right of persons to enjoy the underlying determinants of health which include access to safe and potable water, adequate supply of safe food, healthy occupational and environmental conditions, adequate sanitation and the access to health-related education and information.

Therefore, the Committee made provisions for the AAAQ Framework illustrated below, that comprises of the essential elements to which the precise application will be largely pegged on the conditions of the particular state party, in its application of the right to health as encompassed in Article 12[82].

[76] Convention on Economic, Social and Cultural Rights
[77] Article 12(1) ibid
[78] Article 12(2)(d) ibid
[79] CESR General Comment No. 14: Right to the Highest Attainable Standard of Health General Comment No. 14 Article 9
[80] CESR General Comment No. 14: Right to the Highest Attainable Standard of Health General Comment No. 14 Article 11
[81] ibid
[82] Convention on Economic, Social and Cultural Rights

Availability

As a provision of the right of the highest attainable standard of healthcare, General Comment No. 14 States should have public health and healthcare facilities that are functioning and provide goods services and programmes that are available in sufficient quality for use by its Citizenry. Understandably, the nature of the facilities and services is highly dependent on the level of the State Party's development which includes fundamental underlying determinants of health such as, safe and portable drinking water, adequate sanitation facilities, clinics, hospitals and health-related buildings, medical staff and professional personnel along with essential drugs[83].

In addition, all these provisions should be available to all communities and in all geographical areas rendering them available to all persons without discrimination[84].

Accessibility

Accessibility as a framework of the right to the highest attainable standard of health care makes provision for each person's access to health facilities, goods and services without any form of discrimination within the jurisdiction of the State Party[85] .

Accessibility in this instance is mindful that states ensure that the goods and services are available to all persons without any discrimination based on race, colour, language, sex, religion, political opinion, social or national origin, birth, health status, physical or mental disability or social status[86] .

In addition, accessibility also denotes the fact that health facilities, services and goods to be rendered to persons should be within safe and physical reach available to all the sections of the population with particular consideration to persons of vulnerable and marginalized groups of the

[83] General Comment No. 14 Article 12.1.a
[84] What is the Human Right to Health and Health Care https://www.nesri.org/programs/what-is-the-human-right-to-health-and-health-care <accessed on 27th March 2020>
[85] CESR General Comment No. 14: Right to the Highest Attainable Standard of Health General Comment No. 14 Article 12.b
[86] CESR General Comment No. 14: Right to the Highest Attainable Standard of Health Article 18

society. This includes ethnic minority groups, persons of indigenous populations, children, adolescents, women, persons living with disabilities, older persons and persons living with HIV/AIDS. Accessibility in this instance therefore means that the underlying determinants of health mentioned in the paper are within safe and physical reach to all persons including those in rural areas[87].

"Accessibility also denotes that health facilities, goods and services must be affordable to all and that payment of the healthcare services together with the underlying determinants of health should be based on the principle of equity, ensuring that they are available to all persons and that no household should be economically disadvantaged.

Finally, accessibility also provides that, accessibility also encompasses the right to seek, receive information[88] and ideas concerning health issues, to allow an individual to exercise their autonomy regarding receiving any form of healthcare[89].

Acceptability

Acceptability as a framework of the provision of the highest attainable standard of health provides that, in the provision of healthcare, all health facilities, goods and services must be mindful of medical ethics along with cultural appropriateness[90]. This means that the providers of health care services should ensure that respect is accorded to various cultural compositions, according to culturally appropriate care and being mindful to the minorities, in the administration of care. Acceptability and mindfulness of person's dignity provides that, healthcare is provided whilst being

[87] CESR General Comment No. 14: Right to the Highest Attainable Standard of Health General Comment No. 14 Article 12.b
[88] International Covenant on Civil and Political Rights Article 19.2
[89] 35 ibid
[90] CESR General Comment No. 14: Right to the Highest Attainable Standard of Health General Comment No. 14 Article 12. c

responsive to various ways of life, age, gender, culture, sexual orientations, language whilst all the same respecting medical ethics and protecting the confidentiality of individuals[91].

Quality

Finally, the last framework observed in the provision of the highest attainable standard of healthcare is ensuring that the healthcare being provided is scientifically and medically appropriate and of good quality[92]. This denotes that, the services being provided should be conducted by medically skilled personnel along with the facilities being equipped with the right drugs and essential equipment along with the underlying determinants of health.

In addition, the healthcare services should be provided to patients in a timely, safe and patient-centred manner, to ensure the provision of the highest attainable standard of health care.

2.5. Healthcare Systems

A healthcare system has been described by Roemer[93] as, the combination of resources, organization, financing and management that eventually results in the delivery of health services in the population. The World Health Organization further defines a healthcare system as all those activities which primarily promote, restore and maintain health, which definition encompasses wider various factors aside from health which include education, economics and politics.

According to Norman Daniels[94], a healthcare system should be based on equality and opportunity to all. He propositions for arrangements for social institutions that affect health care distribution to allow for each person to achieve a fair share of opportunities presented in that society. He further

[91] What is the Human Right to Health and Health Care https://www.nesri.org/programs/what-is-the-human-right-to-health-and-health-care <accessed on 23 March 2020>
[92] CESR General Comment No. 14: Right to the Highest Attainable Standard of Health General Comment No. 14 Article 12.d
[93] Milton Roemer: National Health Systems of the World: The Countries (Oxford University Press 1991)
94 5 Jennifer Ruger, 'Toward a Theory of a Right to Health: Capability and Incompletely Theorized Agreements' [2006] vol. 18(2) Yale Journal of Law & the Humanities <accessed 22nd August, 2019>

contends that a right claim to health is best construed as a demand for equality of access or entitlement to health services.

A health care system is comprised of all the organizations, people and actions that are specifically intent on the promotion, restoration or maintenance of health[95] . This consists of efforts to influence the determinants of health as well as more direct health-improving activities[96]. A health system is, therefore, more than a system of publicly owned facilities delivering personal health services, but it also includes the first point of contact for a sick person in the house, the availability of private healthcare providers vector-control campaigns; health insurance organizations; occupational health and safety legislation. It includes inter-sectoral action by health staff, for example, encouraging the ministry of education to promote female education, a well-known determinant of better health.

The World Health Organization[97] has described health systems as systems that comprises of six the following core components:

Service Delivery

This includes the delivery of interventions to ensure to reduce diseases, components that directly input into the health systems such as procurement and supplies, financing and workforce leading to improved delivery of services and comprises of the following characteristics: Comprehensiveness of services that appropriate to the needs of the targeted population, accessibility of services without any barriers as to costs, culture, language or geography, coverage to all persons in the defined targeted population, continuity of the delivery of services, services that are of high quality, effected and safe based on the patient's needs, person-centred services that are organised around the needs of the individual and not the person's financial standing or the disease, coordination across all

95 World health report 2000 Health Systems: Improving Performance
96 Health Systems: Principled Integrated Care
[97] http://www.aho.afro.who.int/profiles_information/index.php/Kenya:The_Health_System accessed on 27th August 2019

persons tasked to provide the services and accountability and efficiency of the services to achieve good service delivery with minimum wastage of resources[98]

In the wake of the COVID 19 pandemic in Kenya specifically, the issue of service delivery the government of Kenya to tackle the virus can be put to task. The Fourth Schedule of the Constitution of Kenya provides that health services in Kenya are under the power of the County Governments and not the national government. Health services under the county government include the provision of health facilities and the promotion of primary health care [99].

However, how the pandemic is being handled by the respective Counties is questionable since, out of 237 recommended ICU beds, the total number of counties in Kenya can only count for 38 and out of 157 recommended number of ventilator machines, there are only 29 machines available countrywide, with Nairobi City County accounting for the highest numbers of ICU beds and Ventilator machines at 25 and 29 respectively[100].

Health Workforce

Health workforce denotes the ability of a country to meet its health goals dependently on the skill, motivation, knowledge, and the deployment of the health care service providers that are responsible for the organization of the delivery of health services. These include physicians, nurses, doctors, dentists, management and support staff such as managers, accountants, ambulance drivers among others[101].This is essential to achieve the best health outcomes."

[98]. https://www.who.int/healthinfo/systems/WHO_MBHSS_2010_full_web.pdf <Accessed 7 May 2020>
[99] Constitution of Kenya.Schedule 4 [art 2(2) (a) and(b) Constitution of Kenya.
[100]Kenya Healthcare Federation , Covid 19 Treatment Centres http://khf.co.ke/covid-19-treatment-centers/ <accessed on 18 July 2020>
[101] World Health Organization ' Monitoring the Building Bloks of Health Systems- A Handbook of Indicators and Their Measurement Strategies. 2010 https://www.who.int/healthinfo/systems/WHO_MBHSS_2010_full_web.pdf <Accessed 18 July 2020>

On the 8th of April 2020, the Kenya Medical Association in their memorandum to the Senate of the COVID-19 situation called for the improvement of the welfare of doctors and the quality of health care in Kenya[102]. They sought for the provision of adequate and quality personal protection equipment to prevent the health workforce from COVID-19 exposure, as exposure of health care workers would result in them being removed from providing services resulting in a shortage of the already acute health care workforce. They further sought for medical insurance to cover treatment and follow up treatment in the event of contracting COVID -19, a compensation package to include a life cover, tax exemptions, education cover for dependants and a disability allowance.

In addition, the Association called for the recruitment of doctors- both general practitioners and specialists to tackle the disease and to continue with the provision of this essential service delivery, along with an increase of the medical capacity to enable the medical personnel work in clinical response teams to avoid fatigue and burnout and facilitate contact tracing of individual teams if any of them get infected.

Furthermore, in the attempt to mitigate the cost of healthcare, the Association called for the declaration of medical supplies as a public good by the government, to avoid price increase and making medical supplies accessible to health workers who may require it. They further asked for the government to recommend the retail prices that would be abided to by all traders, and finally, the Association called for psychological support for the families of frontline health workers to be instituted.

Unfortunately, "the state of the health workforce has however been brought to light during this COVID-19 pandemic. For instance, health workers are attending to patients without wearing the

[102] http://kma.co.ke/Documents/MEMORANDUM FOR SENATE ON COVI-19 SITUATION.pdf <Accessed 18 July 2020>

personal protective equipment putting their lives at risk, which has resulted in 526 health workers testing positive for COVID-19 and 1 fatality as of 20th July 2020.

This further continues to raise the concern of the cost of health care in Kenya. As of 21st August 2020, COVID-19 has infected 700 health workers and as many as 10 have succumbed to the disease according to the Doctor's Union[103].

Functional Health Information System

This enables the country to make sound decisions at all levels of the health system and to identify problems, needs and the making of decisions based on evidence for health policies and allocation of resources, access to essential medicines which included medical products, vaccines and technologies[104.] A health information system is an essential component of the health system as it provides the underpinnings that provide for key functions of the health system. These include data generation, a compilation of the data, analysis and synthesis of the data and the communication and use of the data. The data is collected from health and health-related sectors to ensure for quality, relevance and timeliness to result in the necessary information for health-related decision making. that are of assured quality, safety, efficacy and cost-effective use[105].

This COVID -19 pandemic has demonstrated the importance of a functional health information system. The daily compilation of data, analysis, synthesis of the data and communication of the data has managed to sensitize the importance of the disease and create awareness around it. Through the information systems, Kenyans have been able to keep track of the infections, deaths and recoveries thereby placing the responsibility on each person to help curb the spread of the disease by

[103] https://www.nytimes.com/2020/08/21/world/africa/kenya-doctors-strike-coronavirus.html - <Accessed 22 August 2020>

[104] Abdi Latif Dahir,' Kenya's Health Workers, Unprotected and Falling Ill, Walk Off Job' The New York Times https://www.who.int/healthinfo/systems/WHO_MBHSS_2010_full_web.pdf <Accessed 22 August 2020>

[105] World Health Organization ' Monitoring the Building Blocks of Health Systems- A Handbook of Indicators and Their Measurement Strategies. 2010 https://www.who.int/healthinfo/systems/WHO_MBHSS_2010_full_web.pdf <Accessed 18 July 2020>

employing the WHO COVID-19 spread prevention guidelines[106] such as regular and thorough hand washing with clean soap and water or an alcohol-based sanitizer, maintaining of a 6 feet social distance between oneself and others, avoiding crowded places, avoiding the touch of the face, following good respiratory hygiene and keeping up to date on the latest COVID-19 information.

Medical Products, Vaccines and Technology

As a fourth building block of a well-functioning health system, medical products, vaccines and technologies[107] should be ensured to result in assured quality, safety, efficacy and cost-effectiveness for the overall sound and cost-effective use. Essential medicines are required for a well-functioning health system. To achieve this, national policies, guidelines and regulations that support policy must be available and enforced, there should be enough information on the prices of essential medicines and the status of international trade agreements, that allow for the capacity to set and negotiate for competitive prices, there should be manufacturing practices that are reliable and allow for quality assessment of products, procurement and distribution systems that minimize wastage and the support for the rational use of medicines and equipment through set guidelines to assure the compliance, minimized resistance and room for patient safety and training.

Kenya's ability to meet this building block of a well functioning health system has yet again been tested during the COVID-19 pandemic. With the numbers of COVID 19 cases in Kenya being on the increase from when the first case in March was announced to 15th August 2020 with 29,334 confirmed cases and 465 deaths[108], Kenya has seen no initiative from the government to attempt to cushion the patients from the costs of medical products for those infected. Given that there is no

[106]World Health Organization 'Coronavirus Disease (COVID-19) Advise for the Public https://www.who.int/emergencies/diseases/novel-coronavirus-2019/advice-for-public <Accessed 18 July 2020>
[107]World Health Organization 'Strengthening Health Systems to Improve Health Outcomes, 2007 https://www.who.int/healthsystems/strategy/everybodys_business.pdf <Accessed 18 July 2020>
[108] World Health Organization <https://covid19.who.int/region/afro/country/ke> accessed 15 August 2020

cure yet for the virus, patients are left to their own devices to cater for the costs of medication which among others include vitamins such as vitamin C supplements to enable the recover.

Leadership and Governance

A sound healthcare system should also consist of leadership and governance. This ensures the existence of strategic policy frameworks that are combined with effective oversight, coalition-building, appropriate regulations and accountability[109]. This is a critical building block of a health system as it involves overseeing the entire public and private health system, to protect the public interest[110]. This involves policy guidance that identifies the roles of private, public and voluntary actors in the health system with defined goals and spending priorities across the services, intelligence and oversight which ensure that there are analysis and use of intelligence on trends in service access, coverage, responsiveness and the protection of health outcomes, collaboration and coalition building across the sectors in government that influence action on the key determinants of health and the access to health services, regulations of healthcare and ensuring the enforcement of such regulations and the accountability of all the actors in the health system and ensuring that transparency is observed to ensure accountability is achieved.

Health Financing System

Health financing system refers to the ability a health system to raise funds to be channelled to health care that ensures accessibility of health services to all and ensuring that people are cushioned from grave financial burdens with regards to healthcare expenses. The realization of a sound financial system can be achieved collection of revenues from individuals, households, or companies and

[109] World Health Organization ' Monitoring the Building Blocks of Health Systems- A Handbook of Indicators and Their Measurement Strategies. 2010 https://www.who.int/healthinfo/systems/WHO_MBHSS_2010_full_web.pdf <Accessed 18 July 2020>

[110] https://www.who.int/healthsystems/strategy/everybodys_business.pdf World Health Organization 'Strengthening Health Systems to Improve Health Outcomes, 2007

pooling the pre-paid funds in ways that allow for risk-sharing including the extent of the benefit coverage and entitlement[111].

2.6. Healthcare System in Kenya

The healthcare system is comprised of both formal Healthcare which is composed of healthcare providers, organizations, policies and finance mechanisms that provide healthcare services and the informal healthcare which is composed of healthcare providers and systems that generally do not operate through the formal system.

In Kenya, the healthcare system is divided into three factions and are defined in 6 hierarchical stages from defined by the level of services offered[112] operated by the Government, Faith-Based Organizations (FBOs), Non-Governmental Organizations (NGOs) International Organizations and the private sector[113]. Health facilities in Kenya total to 7,795 with the government leading the ownership of the facilities amounting to more than 50% and the private sector facilities amounting to 37% and the faith-based organizations amounting to11%[114].

The public sector which encompasses major players in healthcare includes the ministry of health and parastatal organizations whereas the private system is made of private for-profit, NGOs and FBOs[115].

The Kenya health system is categorized into 6 levels that are informed by the Kenya Essential Package of Health (KEPH) which is a comprehensive package of services and interventions that all

[111] ibid
[112] World Health Organization 'Primary Health Care Systems (PRIMASYS) Case Study from Kenya' [2017]
[113] Ministry of Health, Health Sector- Human Resources Strategy 2014-2018 https://www.health.go.ke/wp-content/uploads/2016/04/Kenya-HRH-Strategy-2014-2018.pdf <Accessed 21 November 2019>
[114] Ministry of Health in Kenya healthcare facilities list 2016
[115] Richard Muga, Paul Kizito, Michael Mbayah, Terry Gakuruh, 'An assessment of healthcare delivery in Kenya under the devolved system [2018], < https://dhsprogram.com/pubs/pdf/spa8/02chapter2.pdf Accessed 15 November 2019>

service providers in health aim to offer[116]. The KEPH is a reflection of the progressive realization of the right to health for Kenyans as outlined in the Constitution, where the State should demonstrate that it is taking all steps possible within its available recourses to protect, fulfil and promote the right to health which includes allocating a sufficient budget on health matters[117]

Under the KEPS service" delivery structure, Level 1 forms the first stage of healthcare service. This is healthcare services at the community level[118] that is aimed at preventing affliction and promotion of good health, to avoid the needs for facility-based health care[119]. Healthcare at this community-level contains measures being taken by individuals and using the knowledge they have in their households to promote good health conduct such us, hand washing or sleeping under a treated net to prevent malaria.

Level 1 service unit is designed to serve a 5,000 population and it will work with volunteer community health workers who have been identified by the community, trained and supported by a health community extension worker, who is based at a facility[120].

When affliction arises at this level, the system expects the first port of call to be the dispensary (Level 2), These are also known as the primary care services and it is comprised of dispensaries, health centre and nursing homes by all public and non-public healthcare providers[121]. The primary healthcare services according to the Kenya Health Strategic Plan of 2013-2017 should exist for every 10,000 persons and provide an average of 30 outpatient services per day and the staff in

[116] Republic of Kenya Kenya Health Sector Strategic Plan and Investment Plan July 2013--June 2017 http://e-cavi.com/wp-content/uploads/2014/11/kenya-health-sector-strategic-investiment-plan-2013-to-2017.pdf < Accessed 15 November 2019>
[117] Promoting the Right to Health in the Kenyan Constitution 2010- Human Rights Advocacy Forum (HERAF)
[118] World Health Organization 'Primary Health Care Systems (PRIMASYS) Case Study from Kenya' [2017]
[119] Richard Muga, Paul Kizito, Michael Mbayah, Terry Gakuruh, 'An assessment of healthcare delivery in Kenya under the devolved system [2018], < https://dhsprogram.com/pubs/pdf/spa8/02chapter2.pdf <Accessed 15 November 2019>
[120] Wright, J., Health Finance & Governance Project. July 2015. Essential Package of Health Services Country Snapshot: Kenya. Bethesda, MD: Health Finance & Governance Project, Abt Associates Inc
[121] Ministry of Health, Health Sector- Human Resources Strategy 2014-2018

charge are Clinical Officers and Medical Officers. The primary healthcare services provided include antenatal care and treatment for simple medical issues during pregnancy, they conduct normal deliveries along with outpatient curative care[122]. Cases that require more specialized attention are referred tolevel 3 healthcare facilities.

Level 3 health care services are comprised of medical centres, maternity homes and nursing homes[123] which serves as a referral facility from level 2 health care centres. These health centres provide ambulatory services and generally offer preventive and curative services that are adapted to the needs of the local community[124]. As of 2013, there were 1,012 health centres, 186 nursing homes and 46 maternity homes that fell under this level in the hierarchy of healthcare in Kenya.[125]Level 3 healthcare facilities are manned by Medical Officers, Clinical Officers, Nurses, Lab Technicians and Pharmacy Technicians[126].

"Health Centres provide a wider range of services such as basic curative and preventive services for both children and adults, reproductive health services, minor surgical services such as drainage and incision[127]. Severe cases are referred to the next level of the hierarchy of healthcare which is the Level 4 health care services.

Level 4 health care facilities are comprised of district hospitals which are sub-county hospitals and medium-sized private hospitals[128]. These district hospitals provide clinical care at the district level and they form an integral part of the health system at the district level and are expected to provide

[122] Richard Muga, Paul Kizito, Michael Mbayah, Terry Gakuruh, 'An assessment of healthcare delivery in Kenya under the devolved system [2018], < https://dhsprogram.com/pubs/pdf/spa8/02chapter2.pdf Accessed 15 November 2019>
[123] World Health Organization 'Primary Health Care Systems (PRIMASYS) Case Study from Kenya' [2017]
[124] Richard Muga, Paul Kizito, Michael Mbayah, Terry Gakuruh, 'An assessment of healthcare delivery in Kenya under the devolved system [2018], < https://dhsprogram.com/pubs/pdf/spa8/02chapter2.pdf Accessed 15 November 2019>
[125] Ministry of Health, Health Sector- Human Resources Strategy 2014-2018
[126] World Health Organization 'Primary Health Care Systems (PRIMASYS) Case Study from Kenya' [2017]
[127] Richard Muga, Paul Kizito, Michael Mbayah, Terry Gakuruh, 'An assessment of healthcare delivery in Kenya under the devolved system [2018], < https://dhsprogram.com/pubs/pdf/spa8/02chapter2.pdf Accessed 15 November 2019>
[128] Richard Muga, Paul Kizito, Michael Mbayah, Terry Gakuruh, 'An assessment of healthcare delivery in Kenya under the devolved system [2018], < https://dhsprogram.com/pubs/pdf/spa8/02chapter2.pdf Accessed 15 November 2019>

specialized services concerning their infrastructure[129]. The services offered at this district level include the curative and preventive care and promotion of health for the community in that district, quality clinical care offered by a more skilled staff, surgical services that are not available at the health centres and dispensaries, laboratory techniques that are appropriate to the medical, surgical and outpatient activities at the district hospitals, inpatient care, training and supervision of health centres in addition to being a resource centre to the health centres at in the district, 24-hour services, obstetrics and gynaecology, child health, general medicine, surgery and anaesthesia, accidental and emergency services, non-clinical support services and referral services[130].

Provincial hospitals make up level 5 of healthcare in the healthcare system. Like the district hospitals, they form an integral part of the healthcare system as they provide services within a well defined geographical area that is specialized and is not available at the district level[131]. Level 5 hospitals make up the county referral hospitals which take up referrals from district hospitals, together with the large private hospitals[132]. These provincial hospitals act as an intermediary between the district level hospitals and the national level hospitals overseeing the implementation of health policies at the district level and ensuring the maintenance of quality standards and coordination of all the district health activities. Private hospitals at the provincial levels include the Aga Khan Hospitals in Kisumu and Mombasa[133] .

The personnel at the provincial hospitals are more offer more specialized care that involves skills and competence that is not available at the district level. The personnel include general surgeons, general medical physicians, paediatricians, specialized nurses and midwives, and public health staff.

[129] ibid
[130] ibid.
[131] Richard Muga, Paul Kizito, Michael Mbayah, Terry Gakuruh, 'An assessment of healthcare delivery in Kenya under the devolved system [2018], < https://dhsprogram.com/pubs/pdf/spa8/02chapter2.pdf Accessed 15 November 2019>
[132] ibid
[133] ibid

The specialized services offered aside from those that may be available at the district level include dental services, psychiatry, accident and emergency services, ear nose and throat, dermatology, ophthalmology, and intensive care unit together with high dependency unit services.

In addition to the medical services, the provincial hospitals also provide laboratory and diagnostic techniques were taken up as referrals from the district hospitals, teaching and training for health care personnel like nurses and medical officer interns, supervision and monitoring of district hospital activities and technical support to district hospitals. [134]

Finally, the last level of healthcare facilities in Kenya is level 6 which are the national referral hospitals and the private teaching hospitals[135]. The only hospitals at this level of the hierarchy are the Kenyatta National Hospital and the Moi Referral and Teaching Hospital. These hospitals provide complex healthcare that requires more complex technology and highly skilled personnel. At this level, there is a high concentration of resources that are expensive to run.

The teaching and referral hospitals are mandated with the following healthcare functions that include healthcare. These include complex and curative tertiary care, preventive care, participation in public health programmes for the local community, and primary care for the entire healthcare system [136]. They also take up referrals from district and provincial level, hospitals, and they have a specific role in the provision of information on various health problems and diseases, quality of care which comprises of taking up leadership in setting up the highest quality of clinical standard and treatment protocol [137], access to care which involves ensuring that patients throughout Kenya have access to the tertiary healthcare through a well established referral healthcare system [138],,

[134] ibid.
[135] World Health Organization 'Primary Health Care Systems (PRIMASYS) Case Study from Kenya' [2017]
[136] World Health Organization 'Primary Health Care Systems (PRIMASYS) Case Study from Kenya' [2017]
[137] Ibid
[138] Ibid

research which aims to contribute to the provision of solutions to local and national health problems through research and contribution to policy formulation [139] and finally, teaching and training which seeks to provide both basic and post-graduate training for health professionals.[140]

Other national referral institutions at this level include the psychiatric facilities and the National Spinal Injury Hospital.

Other public health institutions include in the Kenyan healthcare system includes the Kenya Medical Research Institute (KEMRI), Radiation Protection Board, Kenya Medical Supplies Agency (KEMSA), and Kenya Medical Training College (KMTC).

2.7. Price Setting and Price Regulation in Healthcare

In the quest to find ways to advance universal health coverage, the World Health Organization[141] alongside the OECD in their study to find out the experiences in price setting and how such pricing can be utilized to attain better health coverage, a better quality of health care and better health outcomes, were are able to appreciate salient features that are key in addressing the question of the cost of health care in Kenya.

Price setting is important as it falls within the broad spectrum of the implementation of universal health coverage which is a composition of what services are covered, what is the amount payable for such services and who is to be covered for such services. Therefore, to ensure the provision of health care, the regulation of the cost of healthcare is essential as pricing of health services is important in managing the financing of healthcare systems[142]. Managing the pricing and payment of

[139] Ibid
[140] Ibid
[141] Sarah L Barber, Luca Lorenzoni and Paul Ong: Price setting and price regulation in health care Lessons for advancing Universal Health Coverage https://www.oecd.org/health/health-systems/OECD-WHO-Price-Setting-Summary-Report.pdf <Accessed 16 June 2020>
[142]Ibid

healthcare is important as it provides incentives for healthcare providers to deliver quality healthcare.

Pricing of healthcare reflects the actual cost of healthcare services, and it takes into consideration the broader health system of a country, the goals of the country concerning the health system and the health outcomes projected.

Failure to manage and regulate pricing equally has negative consequences as it results in low prices for healthcare services which translates to low payments for doctors on account of the patients served, thereby resulting in low-quality health care. In addition, it may also lead to health care practitioners selecting healthier patients or referring complex cases to other healthcare service providers to have less work thereby compromising the provision of healthcare or equally providing additional services that are not necessary for patients, to increase the cost of the services provided.

Unfair low prices adversely affect the quality, efficiency and sustainability of healthcare as the service providers transfer informal costs to the patients and therefore causing the financial burden to fall in individuals.

Therefore, for governments to attain their commitments to universal health coverage, they are obligated to take reasonable regulatory measures to achieve the progressive realization of health. However, since unlike most commodities where pricing is based on supply and demand, consumers of healthcare know far less than the supplier of the health services for treatments, best option of medicines which supplier at the same time- has a financial interest in the ultimate decision or options to be selected by the patient. Therefore, the economic principles of supply and demand cannot be left to determine the price of healthcare thus calling for the governments to provide some regulation of the cost of healthcare.

It is also essential for there to be an intervention in pricing of healthcare as the value of healthcare services are difficult to assess due to unavailability of information on prices and the technical quality of the services provided. At the same time, the demand for essential and vital care and hospital services is less responsive to price due to the important nature of healthcare services thus justifying the need for regulation.

Furthermore, various externalities in health exist that that necessitates the need for investment in healthcare in terms of the broader benefit for the communities and the public. For instance, the treatment of patients with highly contagious infections such as the current Corona Virus disease in Kenya will benefit not only the patient but the entire community that the patient lives in. With price setting through the regulated cost of healthcare, it can be ensured that there is sufficient public funding for public health goods such as free testing for Covid-19, provision of supplements for Covid-19 patients, subsidized costs of soaps, hand sanitizers and disinfectants to prevent the spread of the virus.

This is important as, according to the Constitutional provisions of the right to health and healthcare, each Kenyan is entitled to access proper healthcare.

Therefore price setting can be utilized as a tool for regulation of the cost of healthcare, to increase or reduce certain services or treatments modalities, to control the cost of healthcare. Through the progressive realization of universal health coverage, it is implied that countries will strive to extend and ensure coverage amidst the technological progress, ageing population and the constant increase for good quality of healthcare. Thus with the increase in healthcare spending, policies makers are now pressured to maximize health resources towards meeting the expectations to provide proper healthcare throughout.”

This has led to governments to rely on the private sector to promote sustainability and optimal use of resources to increase the variety of healthcare services. For instance, in many developed countries, price schedules have been established which enable governments to purchase services from the private health sector due to the expanded access of healthcare. In Kenya, this can be translated to, the government expanding the access of the National Hospital Insurance Fund to private hospitals that provide services that may not be readily available in public hospitals, at an affordable rate that would have otherwise been impossible to attain without such an initiative.

CHAPTER THREE: LEGAL INSTITUTIONAL AND POLICY FRAMEWORKS RELATING TO REGULATION OF THE COST OF HEALTHCARE IN KENYA

3.0 Introduction

This chapter examines the existing legal, institutional and policy frameworks that address the provision of healthcare in Kenya. The aim is to determine how adequate and effective the same is in ascertaining the provision of the highest attainable standard of health as a constitutional right.

3.1 Legal Framework

The legal framework governing the healthcare and ultimately the regulation of the cost of healthcare include the following pieces of legislation:

The Constitution of Kenya

"The Constitution of Kenya as the supreme law of the Country is binding to all persons and all the State Organs both at the County Level and National Level[143]. The Constitution, therefore, makes provision for every person's right to the highest attainable standard of health and healthcare services[144] and further providing that, no person shall be denied the right to access emergency treatment[145].

The right to health and health care services being a constitutional right, the same constitution goes further to make provisions for the implementation of this human right and fundamental freedom by stating that, the State must take legislative measures, policy in nature that will contribute in the achievement of the progressive realization of the right to health and healthcare services[146].

[143] Article 2(1) Constitution of Kenya
[144] Article 43(1)(a) Constitution of Kenya
[145] Article 43(2) Constitution of Kenya
[146] Article 21(2) Constitution of Kenya

In line with the right to health and access to healthcare services, the right to human dignity is an inherent Constitutional right with the Constitution declaring that such right should be respected and protected[147] and close to the provision of the Constitution on freedom and security of a person, it is provided that no person shall be treated in a cruel, inhumane and degrading manner[148].

The World Health Organization describes hospital detention practices as the act of refusing release of medical patients after medical discharge has been clinically indicated or the refusal of the release of bodies of deceased patients to their families if they are unable to pay medical bills and action they have termed, is contrary to international law[149].

Detention of patients due to their inability to offset the medical costs is a global practice with 15 out of 54[150] countries in Africa including Kenya reporting cases of hospital detention practices as seen in the Boniface Murage case illustrated in earlier this study.

This, therefore, infers that all persons should not be subjected to inhumane treatment by being denied access to healthcare on the basis that they are not able to afford healthcare or patients being detained in hospitals for inability to pay their medical fees[151] .

Kenya has made progressive measures to ameliorate the cases of hospital detentions practices with being set in the High Court of Kenya petition no. 242 of 2018[152] where the petitioners sought a declaration from the court that the continued detention of the second petitioner by the respondent be deemed arbitrary and unlawful. Justice Okwany held that the continued detention of the petitioner

[147] Article 28 Constitution of Kenya 2010
[148] Article 29 Constitution of Kenya 2010
[149] World Health Organization ,'Right to Health' https://www.who.int/news-room/facts-in-pictures/detail/right-to-health <Accessed 14 August 2020>
[150] Krisna Handayani, Tras Sijbranda, Maurits Westenberg, Nuria Rossel, Mel Sitaresmi, Gertjan Kaspers, Saskia Mostert, ' Global Problem of Hospital Detention Practices ' 2020 International Journal of Health Policy Management https://www.ijhpm.com/article_3750_a28db94a0913c790dbee16ea771e42f5.pdf <Accessed Accessed 14 August 2020>
[151]Jonathan Cohen and Tamar Ezer, 'Human rights in patient care: A theoretical and practical framework' Health and Human Rights Journal [2013] https://www.hhrjournal.org/2013/12/human-rights-in-patient-care-a-theoretical-and-practical-framework/ <Accessed 14 August 2020>
[152] Gideon Kilundo & Daniel Kilundo Mwenga v Nairobi Women's Hospital [2018] eKLR

the respondent was arbitrary and unlawful and proceeded to give an order of mandamus compelling the respondent to release the second petitioner from the unlawful detention.

Similarly to the provision on human dignity and respect, the Constitution further provides that, the consumers of any good have a right to access goods and services that are reasonable quality and are to the protection of their health safety and economic interest[153]. In line with the provisions of General Comment No. 14[154] on the accessibility of health care, the consumers of healthcare should be provided with healthcare together with the underlying determinants of health that are affordable.

Finally, the Constitution under Schedule 4 provides for the need for legislative authority to be vested in county assemblies to make any laws that are necessary for the functions and exercise for the provision of health services. The county assemblies are the legislative authorities of a countywhich have the power to make laws that enable the county governments to the ensure the effective and efficient provision of healthcare services[155] and finally states that, measures shall be put in place to ensure that there are necessary resources for the performance and the function for the provision of healthcare services[156].

Health Act No. 21 of 2017

In line with the Constitutional provision for the state to take legislative measures to ensure the enjoyment of the highest attainable standard of, the Health Act that came into force on the 7th of July 2017 was enacted to establish a unified health system and to provide for the regulation of health care services, health care providers and health technologies for the intention of the provision of the highest attainable standard of health care.

[153] Article 46 Constitution of Kenya
[154] Article 12.b Constitution of Kenya
[155] Article 186 (1) which healthcare services comprise of: county health facilities and pharmacies, ambulance services, promotion of primary health care, cemeteries, funeral parlours and crematoria, and refuse removal, refuse dumps and solid waste disposal.
[156]Article 187(2)(a). Constitution of Kenya

In this instance, health has been defined by the Health Act as:

> "a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity"

and healthcare services have been defined as"

> "the prevention, promotion, management or alleviation of disease, illness, injury and other physical and mental impairments in individuals, delivered by health care professionals through the health care system's routine health services or its emergency health services"

In striving to ensure that it meets the constitutional mandate of realizing the provision of the highest attainable standard of health, the Health Act aims at establishing health systems in both public and private institutions both at the national and county level to facilitate the same progressively and equitably[157].

Furthermore, the Act strives to achieve the promotion, fulfilment and respect of the progressive realization of the highest attainable standard of health to all persons with particular regards to children and vulnerable groups whole noting to accord recognition of the health regulatory bodies that have been established under any written law[158].

There having been established a right to health care to all persons, responsibility is then bestowed on the state to fulfil the provision of the highest attainable standard of health[159]. This is done through the development of policies and laws and all measures required for the protection, improvement, promotion and maintenance of the health and well being of all persons.

[157] Section 3 Health Act
[158] Ibid
[159] Section 4 Health Act

In addition, it is the responsibility of the State to ensure that the right to health is accessible to all vulnerable groups. This includes women, the elderly persons with disabilities, marginalized communities, youth, children and members of particular ethnic or cultural communities. Furthermore, responsibility is also imposed on the state to ensure that there is a healthcare system that contains health services packages[160] which include prevention, curative, palliative and financial rehabilitation together with the financial and physical access for all to healthcare."

Finally, the Act also bestows duties on the ministry of the national government that is responsible for the provision of health to ensure that there are financial resources available to ensure uninterrupted access to quality health services countrywide[161]. This includes the development of policies that promote equitable access healthcare services to the entire population with the emphasis being placed on the elimination of any disparities and ensuring access of quality uninterrupted healthcare services to all persons, especially those in the disadvantaged areas.

From the analysis of the provisions of the Health Act in Kenya, it is notable that the Act has failed to provide directions on the measures to be directed towards universal health coverage, which is essential in addressing the cost of health care in a country. The Act merely makes recognition of the importance of the collaboration between the national and county governments, however, there is no indication or provision on how the achievement of universal health care will be facilitated as it is critical in dealing with the issue of cost as a barrier to access of health care.

[160] Section 5 Health Act
[161] Section 15 Health Act

Medical Practitioners and Dentists Act

The Medical Practitioners and Dentists Act [162] was enacted to make provisions for the registration of medical practitioners and dentists and any connected purposes thereto. For this study, reference will be made to this Act, with particular regard to measures the Act takes to ensure access to the provision of affordable healthcare services by medical practitioners and dentists.

The Act provides that, medical fees are chargeable for one attendance or performance as a medical practitioner or dentists, only if such a practitioner is licensed under section 15[163]. This section provides that, one has to be a licensed private practice and acquired suitable work experience in either medicine or dentistry to be able to charge for medical services. The licences are issued annually and the Kenya Dentists and Medical Council has the mandate to renew or refuse to renew the licence.

"The fees chargeable by doctors which translates to the costs of healthcare to patients in Kenya is informed by Legal Notice Number 131[164]. The legal notice is an exercise of the powers conferred by the Act and it specifies the fees chargeable for healthcare. The fees provided cover the minimum and maximum sums payable for consultation, hospital visits, specialists consultations, medical reports and surgery costs. For instance, the fee prescribed for consultation by general practitioners is placed at a minimum of Kshs. 1,800.00 and a maximum of Kshs. 5,000.00. Consultation for specialists is prescribed at a minimum of Kshs. 3,600.00 and a maximum of Kshs. 7,500.00. For complex major general surgery costs, on the other hand, the prescribed fee depending on the nature of surgery ranges from Kshs. 66,000.00 to a maximum of KShs. 180,000.00.

[162] Medical Practitioners and Dentists Act Chapter 253 Laws of Kenya
[163] Section 17 Medical Practitioners and Dentists Act
[164] The Medical Practitioners and Dentists (Professional Fees) Rules, 2016.

The above notwithstanding, the cost of healthcare continues to pose a significant challenge in accessing healthcare. For instance, in the latest available Kenya Demographic Health Survey Report of 2014[165], the ability to get money for treatment represented a significant percentage of women who were unable to access healthcare. For instance, it was reported in the Survey that 36.7% of women were unable to access maternal healthcare due to not being able to get money for treatment[166] .

National Hospital Insurance Fund Act

The National Hospital Insurance Fund Act[167] was enacted to establish the National Hospital Insurance Fund aimed at the provision of contributions to and the payments of benefits out of the fund.

The Fund comprises of contributions paid into it by Kenyan residents over the age of 18 years and is privy to an income, intending to receive benefits that are to be paid out of the same fund. The benefits are payable to the declared hospitals for expenses incurred at such hospitals by the contributor only covering expenses relating to drugs, laboratory tests, diagnostic services, surgical, dental or medical procedures and equipment, doctors fees, and boarding costs, though subject to limits, regulations and conditions set by the Board in consultation with the Cabinet Secretary of Health.

[165] Republic of Kenya, Kenya Demographic and Health Survey 2014
[166] ibid.
[167] National Hospital Insurance Fund Act Number 9 of 1998

The contributions payable by members of the public are as follows[168]:

Gross income (Kshs.)	**Monthly premium amount (Kshs.)**
Up to 5,999	150
6,000 - 7,999	300
8,000 - 11,999	400
12,000 - 14,999	500
15,000 - 19,999	600
20,000 - 24,999	750
25,000 - 29,999	850
30,000 - 34,999	900
35,000 - 39,999	950
40,000 - 44,999	1,000
45,000 - 49,999	1,100
50,000 - 59,999	1,200
60,000 - 69,999	1,300
70,000 - 79,999	1,400
80,000 - 89,999	1,500
90,000 - 99,999	1,600
100,000 and above	1,700
Self Employed (special)	500

Through the Kenya Demographic Survey Report of 2014, it was established that although this national insurance coverage is the most common insurance type for both men and women, only 14 percent of women and 18 percent of men have subscribed to the coverage.

The national insurance provider has endeavoured to provide various packages available to the public to realize the goal of universal health coverage. Services available include the following:

[168] http://www.nhif.or.ke/healthinsurance/ <Accessed 20 August 2020>

i. Linda Mama Maternity Scheme [169]

This maternity scheme was created following the directive by the President Uhuru Kenyatta in 2013 where announced the removal of maternity fees in public health facilities countrywide. This directive follows Kenya's long term national development agenda as is outlined in Vision 2030 with a focus of ensuring affordable and quality health care for all.

Through the Linda Mama Maternity scheme health care providers that are licensed to operate by the Ministry of Health and the relevant regulatory authorities which encompasses both public and private healthcare facilities are contracted by the Government of Kenya to offer the free maternity healthcare. These facilities are then reimbursed for the services provided at a rate of Kshs. 1,200/- for outpatient services, between Kshs. 2500/- and 5,000/- for delivery rates in public primary health facilities and hospitals respectively and Kshs. 3,500/--6,000/- for not for profit and for-profit private healthcare providers.

The services offered under this scheme are antenatal care which caters for any outpatient services and monitoring of conditions and complications that may arise during pregnancy. It also caters for delivery services and postnatal outpatient services and care for the infant for children under the age of 1 year.

This scheme is available for pregnant Kenyan Citizens who can be beneficiaries through registration through various easily accessible NHIF points available.

[169] Linda Mama Boresha Jamii - Implementation Manual for Programme Managers 2016

ii. Edu Afya[170]

Edu Afya is an initiative by the Ministry of Education and the National Health Insurance Fund formed on the 13th of April 2018 to provide medical insurance to all Public Secondary School students for the duration of their study."

The service is available for students of a school and is registered on the bothNational Education Management Information System that is managed by the Ministry of Health. The service is only available to students and not their parents or dependants.

This package offers a wide range of services to the students in the range of outpatient services, inpatient services, dental cover, optical cover, emergency road rescue, emergency air rescue and overseas treatment .

iii. Civil Servants Scheme[171]

Another product of the NHIF is the Civil Servants Scheme Benefits Package that was introduced on the first of January 2012 for civil servants at the National Government and Staff that perform functions devolved to the Counties and their dependants courtesy of negotiations by the Government and the NHIF.

This scheme caters for inpatient, outpatient and specialized treatment in government, Mission and Private facilities across the country that have been accredited by the NHIF. The inpatient treatment under the scheme is unlimited in Amenity Wards in Government, Mission and some private hospitals for officers who fall under the job group A-K, whereas members of job group L-T have specialized limited in high-cost private hospitals and their eligible dependents.

[170] http://www.nhif.or.ke/healthinsurance/eduafyaServices <accessed 20 August 2020>
[171] Comprehensive Medical Insurance Scheme for Civil Servants and Disciplined Services Handbook http://www.nhif.or.ke/healthinsurance/uploads/manuals/CIVIL_SERVANTS_HANDBOOK.pdf < accessed 20 August 2020>

"The full benefits contained in the package includes comprehensive inpatient and outpatient covers comprising of consultation, laboratory investigations, drugs administration and dispensing, dental health care services, radiological examinations, nursing and midwifery services, maternal child health and family planning, minor surgical procedures, optical care, rehabilitation services, annual medical check-up, referral for specialized services, ambulance services and day-care services.

iv. NHIF SUPA Cover Product

The NHIF SUPA cover product is considered to be Kenya's most reliable, affordable and accessible medical insurance cover costing Kshs. 500/-[172] for the principle members and beneficiaries.

The SUPA cover comprises of outpatient services at the member's preferred outpatient hospitals which cover a range of predesigned services aimed at attaining Universal Health Coverage. The services covered include consultations laboratory, investigations, day-care procedures, health educations, wellness and counselling, physiotherapy services, immunizations and vaccines as per the KEPI[173] schedule, radiological services, oncology packages, renal dialysis and kidney transplant packages, surgical packages and maternity packages for both normal and caesarean deliveries.

Inpatient services covered on the other hand comprise of maternal care for both antenatal and prenatal care, reproductive health services, renal dialysis, overseas treatment for specialized surgeries that are not locally available, rehabilitation for drugs and substance abuse, surgical procedures, emergency road evacuation services, radiology imaging services and cancer treatments.

From the information found in the KDHS of 2014, it was established that 82% of women and 79% of men have not health insurance. Out of the 12% and 21% of women and men who have health insurance, 14% and 18% respectively were insured under the NHIF cover. 3.6 % of men and 2.4%

[172] http://www.nhif.or.ke/healthinsurance/supacoverServices# <accessed 20 August 2020>
[173] Kenya Expanded Programme For Immunizations established in June 1980 by the Kenya Government to oversee and monitor vaccinations to all children in Kenya against the five common diseases at the time.

of women had employer-based insurance and 1.3% of men and 1.1% of women had privately purchased insurance [174].

On the other hand, from the discussion provided above on the services offered by the national insurer- the NHIF, we can appreciate the broad pool of eligibility for services is wide with packages such as Edu-Afya for secondary students, Linda Mama for maternity services, Civil Servants Scheme for government employees and the Supa Cover for all Kenyans.

In addition, we can also appreciate the fact that NHIF has taken measures to make it easy for members of the public to register for the insurance cover through their office located countrywide, through their website, through the NHIF phone application and through the USSD code for those who do not have smart phones.

As seen in the table listed above, the premiums payable are affordable for both those that are employed and those that are unemployed for the range of services covered under the insurance scheme of the national health service provider.

Suffice it to say, through the national insurer, health care in Kenya has been made affordable. Unfortunately, then the number of subscriptions to the health insurance services is very low. There should therefore be measures taken to create awareness of the services provided by the national insurer to encourage more Kenyans to enrol. This will increase the number of Kenyans getting the needed healthcare, in as long as they pay the relevant premiums.

[174] Republic of Kenya, Kenya Demographic and Health Survey 2014

3.2 Institutional Framework Relating Regulation of the Cost of Healthcare

Kenya Medical Practitioners and Dentists Council

The Kenya Medical Practitioners and Dentists Council is constituted by Section 4 of the Act[175]

The Kenya Medical Practitioners and Dentists Council is constituted by Section 4 of the Act[176]. The core functions of the council include offering training[177], registration[178], licensing[179], inspections[180], and advice[181] on matters of medical and dental institutions that are tasked with the provision of healthcare services into patients in Kenya.

To achieve this, the Council ventures to be effective, efficient and accessible as a world-class health regulatory body in Kenya. Furthermore, the Council strives to ensure that there is a provision of quality and ethical health care through regulation of training, licensing, inspections and professional practice, by the regulation of training, practice and licensing of medicine, dentistry and healthcare institutions in Kenya[182].

It is however notable that Act establishing the Council is silent of the issue of the setting of fees and regulation of the medical fees payable by patients, Oduor Maurice [183] argues that as private providers of health run the said business for profit, it would therefore affect the market competition

[175] Kenya Medical Practitioners and Dentists Act Chapter 253 Laws of Kenya
[176] Kenya Medical Practitioners and Dentists Act Chapter 253 Laws of Kenya
[177] Approval of training institutions for medical and dental practitioners and curriculum and training facilities for undergraduate and post graduate training in medicine and dentistry along with the accreditation of continuous professional development providers https://medicalboard.co.ke/about-us/core-functions
[178] Registration of eligible medical and dental practitioners and the registration of eligible private, community and faith based medical and dental institutions. https://medicalboard.co.ke/about-us/core-functions
[179] Issuance of licences for general practice, issuance of annual licences to private, community and faith based health care institutions and annual licences for private practice and specialists practice. https://medicalboard.co.ke/about-us/core-functions <accessed 20 August 2020>
[180] Inspection and supervision of public, private, community and faith based training institutions and the premises of medical and dental practice
[181] To offer advice to the Cabinet Secretary for health on matters that pertain to health care and training, medical and dental institutions, institutions that provide health care and any research on human subjects
[182] Kenya Medical Practitioners and Dentists Council "https://medicalboard.co.ke/about-us/mission-vision/" <accessed 20 August 2020>
[183] Maurice Oduor https://www.nation.co.ke/oped/opinion/Doctors-cannot-legally-set-medical-fees <accessed 20 August 2020>

to set prices for their services. He further contends that setting price in such an arrangement would require an exemption under the Competition Act and if such consent is not obtained, any such attempt to police the costs, would result in a crime and therefore rendering it unenforceable.

County Governments

The creation of the county governments is one of the most salient features of the Constitution of Kenya 2010. Through the fourth schedule of the Constitution, a devolved system of government was created and was assigned different functions from that of the national government. Among the functions assigned to the county governments, is the provision of health services to ensure the realization of the right to health.

Devolution of health services was aimed to promote the access to health services throughout Kenya, to address the discrimination of the low potential areas which did not access adequate health care services, to address the problems that resulted from the bureaucracy in the provision of health services, to promote efficiency in the delivery of health services and to address the problems of low-quality health services.

The responsibility of the county governments in terms of health care includes the provision the bulk of health care services which include the county health facilities such as county hospitals, sub-county hospitals, rural health centres, dispensaries, rural training and demonstration centres, rehabilitation and maintenance of county health facilities[184]. The county governments are also tasked with the provision of pharmaceutical" facilities which include specifications, quantifications, storage, distribution and dispensing and rational use of medical commodities[185] along with ambulance services and the promotion of primary health care consisting of health education, health

[184] Council of Governors (CoG) and Kenya Law Reform Commission (KLRC) [2018]
[185] Ibid

promotion, community health services, reproductive health, child health, tuberculosis, HIV, malaria among others.

From this, it is clear that a majority of the health services is devolved to the county governments, with the national government retaining the function of setting and implementing the required standards through policy and management of national referral facilities. The counties thus have a responsibility to implement that national health policies and standards, to deliver health services at the county level, to ensure staffing of the health facilities and to procure and manage health supplies.

From the proceeding, it is therefore evident that the county government plays a critical role in regulating the cost of health care and thereby ensuring accessibility to all.

3.3 Policy Framework Relating to Regulation of the Cost of Healthcare

Kenya Health Policy 2014-2030

The Kenya Health Policy 2014-2030 in one of its main objectives, strives to attain the highest standard of health responsively, achievable through supporting equitable, affordable and high-quality health along with health-related services at the highest attainable standards for all Kenyans

In order to attain their main objectives, the policy has put in place a basic expandable package - the Kenya Essential Package for Health (KEPH) is to consist of the most cost-effective priority healthcare interventions and services that address the high disease burden, services that are acceptable and affordable within the total resource that surround the health sector.

With regards to health financing, the Kenya Health Policy commits to facilitate the access to services to all progressively by ensuring that social and financial risk protection through the adequate mobilization, allocation and the efficient use of financial resources for health service

delivery. The policy also seeks to minimize the financial barriers that hinder access to services for all persons that require health and health-related services, through the guide of the concepts of Universal Health Coverage and Social Health protection.

It is important to point out that the policy notes that the provision of the financing required to meet the right to health primarily lies with the national and the county government.

Kenya Vision 2030

"The Kenya Vision 2030[186], the long term development program for the Country was launched in 2008 to transform Kenya into a newly industrializing, middle-income country that provides a high quality of life to all its citizens in a clean and secure environment.

The social pillar, one of the key pillars that the Kenya Vision 2030 is anchored on aims to create a just, cohesive and equitable social development in a clean and secure environment.

The health sector which falls under the social pillar, the Vision 2030 aims to provide equitable and affordable healthcare at the highest affordable standard. This pillar aims at reducing health-related inequalities through the provision of a robust health infrastructure network that includes the improvement of the quality of health service delivery to the highest standards, the promotion of partnerships with the private sector and the government providing access to health to those excluded from healthcare for financial reasons.

The flagship project for the health sector under the vision 2030 that relate to addressing the cost of healthcare include the creation of a National Health Insurance Scheme aimed at promoting equality in Kenya's healthcare financing, the channelling of funds directly to hospitals and Community Health Centres as opposed to district health quarters and to scale up the output-based approach

[186] Government of Kenya (GOK) Kenya Vision 2030: A Globally Competitive and Prosperous Kenya [2007]

systems to enable the financially disadvantaged persons to access healthcare from their preferred institutions.

The healthcare financing mechanisms are aimed at making healthcare accessible to all and as a strategy of Kenya Vision 2030, which seeks to promote affordable and equitable healthcare financing that will reduce the out of pocket expenditure on medical care for Kenyans by 25%.

Third Medium Term Plan (2018-2022): The Big Four Agenda

The "Big Four" Agenda is an outline of the main policies, legal and institutional reforms together with programmes and projects that the Government intends to implement during the period of 20018-2022. Among the four major initiatives prioritized under this policy is the achievement of 100 per cent Universal Health Coverage in Kenya.

The Big Four Agenda in the attempt to attain the Universal Health Coverage proposes social health protection schemes that will incorporate a harmonized benefit package to targeted populations and to ensure that Kenyans have access to health insurance mainly through the NHIF BY 2020. In addition, the policy aims to ensure that all persons get access to a fully equipped health centre within an 8-kilometre radius; which therefore includes the establishment of 10 new referral hospitals and an increase in the number of health facilities at the community level.

The key projects to be undertaken to implement the policy include the Health Insurance Project for Elderly People and Persons with Severe Disabilities (PWSDs) to cover 1.7 million people by the year 2020; Linda Mama Project to cover 1.36 million mothers and babies by 2020; Formal Sector Medical Insurance (Medical Insurance Cover for Civil Servants and Retirees) to cover 4.2 million workers by 2022; Elimination of user fees in public primary healthcare facilities; Health Insurance

Subsidy Programme (HISP) for the orphans ad poor to cover about 1.5 million people by 2022 and Informal Sector Health Insurance Coverage to cover 12 million informal sector workers by 2022[187].

Therefore, to achieve 100% Universal Health Coverage the Big Four Agenda proposes the following reforms to be undertaken:

At the policy level, the Big Four Agenda Proposes to Implement Sessional Paper No. 2 of 2017 on the Kenya Health Policy 2014-2030; to develop a Medical Tourism Strategy; to Implement the National Food and Nutrition Security Policy 2012 and the Nutrition Plan of Action; to Develop the Emergency Medical Care Policy; to Implement the Kenya Environmental Sanitation and Hygiene Policy 2016-2030, and to Implement the Community Health Policy.

For legal reforms, the Big Four Agenda proposes to review the NHIF Act, 1998; to implement the Health Act, 2017, to develop the National Public Health Institute (NPHI) Bill; to develop the National Research for Health Bill; to finalize the Environmental Health and SanitationBill 2017' and to develop the Food Drug and Authority Bill.

Finally, for the institutional reforms, the Big Four Agenda proposes to develop and implement an effective partnership framework for health service delivery to promote the delivery of efficient, cost-effective and equitable health services; to establish the Kenya Institute of Health Systems Management and to establish the institutions as provided in the Health Act 2017.

From the policy framework, we can appreciate that there is guide directed to realize the achievement of Universal Health Coverage in Kenya, which in turn has a trickle-down effect on the access to healthcare services and ultimately the cost of health care, through the mechanisms to be implemented at a national level.

[187] Government of Kenya' Third Medium Term Plan 2018-2022 Transforming Lives: Advancing socio-economic development through the "Big Four"' 2018

CHAPTER FOUR: RESEARCH FINDINGS

4.0 Introduction

This chapter will be an examination of the efficacy of the implementation of the regulatory framework of health in Kenya, and what challenges, therefore, arise in the regulation of the cost of healthcare in Kenya.

The basis of determining whether there is sufficient regulation of the cost of healthcare lies in the examination of what forms the proper parameters of a health system and how far Kenya has gone in meeting those parameters through its legal institutional and policy framework to adequately regulate the cost of healthcare.

4.1. Legal Framework

4.1.1. Constitution

It can be appreciated that the legal framework in Kenya has taken sufficient strides to meet the provisions of General Comment No. 14[188] that provides for there being the need of public health facilities to address health care needs that arise in Kenya and addressing the fundamental underlying determinants of health.

For instance, the Constitution of Kenya makes provisions for the right to health being a fundamental right, stating that every person has the right to the highest attainable standard of health and healthcare.

[188]CESR General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12) [2002] https://www.refworld.org/pdfid/4538838d0.pdf <accessed on 2nd March 2020>

The only legislation in Kenya the adheres to this framework of healthcare is the Constitution as it provides that people should not be treated in an inhumane or degrading matter, which includes the provision of healthcare

The Constitution of Kenya in addressing the question of accessibility of healthcare, outlaws the unlawful detention of persons[189] which can therefore be construed to include the unlawful detention of patients for their inability to pay their hospital bills. Furthermore, the Constitution further provides for the right of emergency treatment under the provision of the right to healthcare, which is essential to the accessibility of healthcare.

In adhering to this provision, the Constitution of Kenya via Article 46 provides for consumer rights meaning that patients are entitled to good quality healthcare services.

4.1.2. Health Act

The Health Act in supporting the provisions of the Constitution regarding the access of healthcare to all persons makes provision for the dissemination of information regarding the accessibility of healthcare services[190]. In addition, Health Act provides that through the County Governments, it should be made information on the type of health facilities and services available should be made known to the public and therefore enhancing accessibility to healthcare to all persons including vulnerable persons.

Finally, in the quest to make healthcare accessible to all persons, the Act provides for the provision of the regulation of the fees payable in public health facilities for healthcare services and that.

[189] Article 29 Constitution of Kenya
[190] S10 ealth Act

health services that address the promotion, preventive, curative and palliative healthcare along financial access to healthcare is available at all levels of the healthcare system[191].

The Health Act[192]further makes provision for the County Governments to make healthcare available to all persons through according the County Governments the power to facilitate the regulation, licensing and accreditation of healthcare facilities. Furthermore, the County Governments are mandated to formulate policies that will ensure the underlying determinants of health are properly addressed and met.

In ensuring the provision of quality healthcare, the Health Act provides for a forum for complaints to be made on the manner that patients receive in health facilities[193]. Furthermore, the Act has made provisions for the national and necessary county governments to establish and publish procedures for addressing complaints."

The Health Act is also very pronounced on the question of service delivery as a component of healthcare. For instance, it provides for the regulation of the procurement of health products and technology[194]. It further provides that the National Government is tasked with the procurement of health goods and that procurement is to be done in line with the Public Procurement and Disposal Act [195] through the guidelines of procurement provided under Section 67(4) of the Health Act.

Further, the Health Act provides that is the responsibility of the state to fulfil the right to the highest attainable standard of health by the prioritizing and adequately investing in research for health to promote technology and innovation in the delivery of health care[196].

[191]S4 Health Act.
[192] S15 Health Act Laws of Kenya
[193] Section 14 Health Act
[194]Section 112 Health Act.
[195] Section 67 of Public Procurement and Disposal Act No. 33 of 2015
[196] Section 4 Health Act

The Health Act stipulates that the department of health should ensure progressive and financial access to universal health care by developing mechanisms for an integrated National Health Insurance System. It further provides for collaboration of the department of health with other departments responsible for the financial oversight mechanisms for the regulation of health insurance providers and the definition of public financing of health care framework.

The Health Act stipulates that the Ministry of Health is to establish and maintain a health information system that is comprehensive and integrated with regards to the undertaking of health functions by the National Government. The County functions, on the other hand, the Ministry of Health is to lay out the standards applicable, the data to be captured by the county governments and interconnectivity between the national government and the county government in the collection and synthesis of health data.

"For the provision of a health workforce, the Health Act where it is provided that the national government is responsible for the development of the standards of training and institutions to provide quality education and to meet the needs of service delivery[197] and through Section 86(1)(E) the Health Act provides for the actual allocation to reimburse healthcare professionals who respond to disaster and emergencies.

In addition, the Act provides for E-health service delivery, M-Health, E-learning and telemedicine which isthe incorporation of electric communication in the delivery of health care services.

[197] Section 15(1)(g) Health Act

4.1.3. Public Health Act

The Public Health Act in an attempt to ensure that healthcare is available to all persons makes certain provisions to address the underlying determinants of health. For instance, through Section 129[198]the local authorities must protect water supplies throughout and prevent water pollution. In in complying with ensuring service delivery in healthcare provides that local authorities should protect water supplies keeping water health and safe from pollution to ensure safe water consumption. This is essential in service delivery as access to clean water is a key determinant of health.

In addition, though, the Act provides for inspection and advice on the adequacy and safety of public water supplies in a particular area[199].

The Act further provides that, local authorities must maintain cleanliness and to prevent any dangers that may arise from unsuitable dwelling.

The Public Health Act also provides for the proper inspection, sampling and examination by the medical department of imported or manufactured vaccines that are intended to be used for treatment[200]. In addition, the municipal councils with sanctions from the medical board can provide a temporary supply of medicine for the poorer habitants of their constituencies and charge for the same at their discretion.

The Public Health Act under Section 10, in turn, provides that, the medical department through the ministry of health should guard against the introduction and infectious diseases through obtaining and publishing on relevant information regarding health matters in Kenya.

On the other hand, the Public Health Act provides for the duties of a medical practitioner in handling both infectious and venereal diseases. This, therefore, infers that the government must

[198] Public Health Act - Laws of Kenya
[199] Public Health (Medical Officers Of Health And Health Inspectors) Rules, 1963
[200] Section 158 Public Health Act

ensure for safety, skill, motivation and proper deployment of the health workforce but unfortunately the Act is silent on the same.

We can appreciate the steps taken by the legal framework in Kenya to address service delivery. For instance, the Constitution of Kenya makes the right to health a constitutional right, providing that the access to healthcare along with the right to human dignity[201] regardless of one's financial standing[202].

4.1.4. NHIF Act

The NHIF Act makes the adequate provision of the availability and accessibility of healthcare through various schemes formulated under the act. For instance, through the Linda Mama and NHIF SUPA cover health schemes, maternal healthcare has been more accessible to Kenyans in line with the Presidential directive of 2013 for the removal of maternity fees in public health facilities countrywide and widely ensuring accessibility to health care countrywide.

The NHIF Act in ensuring accessibility of healthcare has made healthcare more accessible and affordable to the public. It provides for a wide range of service coverage and easy access to such services by rendering registration to the health scheme easy through USSD codes or visiting the NHIF offices which are located countrywide.

The National Hospital Insurance Fund in ensuring it adheres to service delivery as a component of health provides that the use of funds collected through member contributions shall be used to procure essential medical equipment for provision to hospitals.

[201] Article 28 Constitution of Kenya
[202] Ibid

4.1.5. Medical Practitioners and Dentists Act

The Medical Practitioners and Dentist Act in providing for accessibility of healthcare services, make provision for the licensing and registration of healthcare institutions upon application by applicants across the country[203].

Service delivery as a component of a functional and efficient healthcare system is concerned with the delivery of interventions to directly input improving the health system. These include procurement and supplies, financing and workforce that are appropriate to the need of the targeted population.

The Medical Practitioners and Dentists Act in ensuring service delivery with specific attention to workforce, caters for the registration of institutions for the training of medical and dental practitioners along with the registration of internship and training centres.

The Medical Practitioners and Dentists Act provides registration of training institutions in order to ensure the sufficient workforce" for medical skills required to meet the requirement of health workforce as a component of a functional healthcare system.

Unfortunately, the legal framework in Kenya in addressing health workforce as a component of a well-functioning health system is weak in addressing the same, as the health workforce as a component of a functional healthcare system, highlights the ability of a country to meet its health goals in reliance of the skill, knowledge and deployment of healthcare service providers.

[203] S15 Medical Practitioners and Dentists Act

4.2. Institutional Framework

4.2.1. Kenya Medical Practitioners and Dentists Council

With regards to the institutional framework in place, the Kenya Medical Practitioners and Dentists Council provides for the registration and inspection of medical institutions, both those providing medical services and those providing training for medical skills, which eventually will lead to the availability of institutions that provide for healthcare services.

“As an institution, the Council tries to ensure accessibility through the provision of ethical healthcare services to all persons without discrimination. The Kenya Medical Practitioners and Dentists Council is mandated with the licensing of institutions that ensure the same. In addition, the Council is tasked with the setting of standards of the learning of medicine in Kenya and the accreditation, inspection of institutions together with the accreditation of continuous professional development providers.

Institutionally, the Council also plays a role in addressing functional health information system as a component of healthcare by the maintaining of an annual database comprising of all training institutions, private, community and faith-based health care institutions. In addition, it also creates the curriculum for medical and dental students and maintains a database of internship centres.

The Council as an institution in its quest to adhere to ensuring quality in the provision of healthcare to attain the highest standard of healthcare provides for the approval of training facilities of medical and dental practitioners, registration of healthcare practitioners, issuance of licences and the inspection of institutions. This as a result ensures for quality in the provision of healthcare.

For institutions, the Council is the only institution that provides a form of the framework in ensuring that the health workforce as a component of a functional health care system is effected by providing

for private healthcare practice rules. It also provides for training, assessment and registration of all the major specialities in medicine along with addressing admission requirements and internship. Furthermore, the Council ensures the continuing professional development training for the health care practitioners and it maintains a record of the medical students to ensure a smooth transition of the students into the workforce.

As an institution, unfortunately, the Council is silent on ensuring accessibility of healthcare services.

4.2.2. County Governments

The Health Act ensures for this provision through the county governments being tasked with the duty to ensure and coordinate the participation of communities in the governance of health services at a county level, and to promote a participatory approach in healthcare governance. The county governments in line with ensuring the provision of quality healthcare as tasked with providing health education and promoting community health.

In addition, the county government is tasked with the maintenance, financing and the development of health services and healthcare institutions and the implementation of activities related to the enhancement of service delivery.

The county governments address the issue of discrimination of low political areas that do not have access to health care facilities by making the provision of healthcare through the various levels of healthcare facilities along with providing for the rehabilitation of the healthcare facilities when the need arises.

County Governments as an institution also ensures for proper availability of healthcare by being mandated to provide for the bulk of health care services through county hospitals, sub-county hospitals, rural health centres and dispensaries.

In addition, the county governments address the provision of culturally appropriate administration of healthcare by addressing harmful cultural practices such as female genital mutilation and child pregnancies through the abolition of child marriages.

4.3. Policy Framework

4.3.1. Kenya Health Policy

The Kenya Health Policy is committed to the realization of the right to health, most importantly through the progressive facilitation of access to services by all through ensuring that social and financial risk protection through the adequate mobilization, allocation and efficient utilization of financial resources for health service delivery.

The policy aims to minimize the barriers that hinder access to services for all persons requiring health and related services, under the guidance of the concepts of Universal Health Coverage and Social Health Protection which are comprised in the AAAQ framework and the sound building blocks of a health system discussed earlier.

Importantly, the policy notes that the primary responsibility of providing the financing required to meet the right to health lies with the national and county governments.

4.3.2. Kenya Vision 2030

Anchored on the three key pillars of economic, social and political governance, the health sector under the Kenya Vision 2030 seeks to provide equitable and affordable healthcare at the highest affordable standards to Kenyans.

It is important to note that, the Kenya Vision 2030 acknowledges that to provide efficient, equitable, affordable and high-quality healthcare, it is paramount that a functional health delivery infrastructure is put in place. The Vision notes that this can be achieved through the increase of access to health facilities, strengthening of the Kenya Medical Supplies Agency to be a strategic procurement unit for the health sector, the establishment and strengthening of health facility-community linkages, to build the capacity of community extension workers and community-owned resource persons.

This policy also acknowledges that to ensure accessibility of healthcare to Kenyans which ultimately means affordable healthcare, the AAAQ framework and the sound building blocks of a healthcare system must be in place and functional.

4.3.3. Third Medium Term Plan (2018-2022): The Big Four Agenda

The Big Four Agenda as the Third Medium Term Plan of the Kenya Vision 2030 outlines the policies, legal and institutional reforms along with various projects and programmes that the Government intends to implement from 2018 through 2022.

Notably, one of the initiatives proposed under the Big Four Agenda is the achievement of 100% Universal Health Coverage. To achieve this, the Big Four Agenda proposes to expand social health protection schemes to cover harmonized benefit packages to targeted populations to ensure that Kenyans have access to health insurance. This is to be done mainly through the use of NHIF.

Under this plan, similar to the previous policies mentioned, the Big Four Agenda also strives to ensure that the AAAQ framework is realized through ensuring that the building blocks to a sound healthcare system are realized. These, as provided for by the policy, include a medical tourism programme that will market Kenya as a hub for specialized healthcare, support training and retain specialized health expertise; development of key infrastructure components through the Health

Infrastructure Programme; implementation of components that include the usage of community health workers to scale up health insurance coverage through Community Health High Impact Interventions Programme; Quality Care/Patient and Health Worker Safety Programme aimed at ensuring the provision of quality services and safety for the environment in which the services are provided; a Digital Health Programme to digitize services and adopt technologies that promote e-medicine and Human Resource for Health Programmes aimed at addressing capacity gaps within specialized and sub-specialized areas in the health sector and to reduce shortages in the health workforce.

CHAPTER FIVE: CONCLUSION AND RECOMMENDATIONS

Introduction

The purpose of this study was to look into the framework that regulates the cost of healthcare in Kenya and what measures have been taken by through legislative action, institutions and policies to ensure affordable access of healthcare to all Kenyans.

Conclusion

From the study conducted, it has been established that to have proper regulation of the cost of healthcare, it is paramount the core elements informed by the AAAQ framework and the building blocks of a healthcare system illustrated above are fully addressed by the legal and institutional frameworks.

Notable is that the legislative framework has made commendable efforts to address the above factions. For instance, the Constitution of Kenya being the supreme law of the country makes the fundamental provision of making the provision of healthcare a fundamental right to all Kenyans.

Further, the Health Act has made commendable efforts to address the availability of healthcare to all persons, to ensure accessibility of healthcare and to inform the quality of healthcare being provided, save for addressing the acceptability of the healthcare ensuring proper administration and appropriateness.

The Public Health Act also makes notable provisions that address the underlying determinants of health which are" essential to the provision of healthcare such as, provision of clean water by the local authorities or the medical department being tasked to guard against infections and diseases in Kenya.

The Medical Practitioners and Dentists Act addresses the licensing and registration of health institutions and healthcare practitioners, along with making the provision of the fees to be payable for healthcare services provided by private healthcare providers.

Finally, the most commendable piece of legislation that addresses the framework of healthcare is the NHIF Act. Through this Act, several schemes have been made available to provide healthcare to all Kenyans, especially the less privileged Kenyans through their affordable schemes such as the Linda Mama, Edu Afya and NHIF SUPA cover.

The institutional framework investigated in this study has also made attempts to address the elements that require to be fully functional to regulate the cost of healthcare in Kenya. The Council has made strides to implement the provisions of the MPD Act with regards to the registration and licensing of healthcare institutions and healthcare practitioners and maintenance of a database for healthcare practitioners.

“However, there is a visible gap between the legal provisions and the implementation of the provisions to ensure a sound healthcare system that will ultimately lead to the regulation of the cost of healthcare.

For instance, despite the legal provision ofthe AAAQ framework in various legislation, and policies governing healthcare, the implementation of the same has not been fully effected. For instance, the availability of both healthcare and health care professionals centres in certain parts of the country is still lacking. Access of healthcare is still unattainable to most persons due to factors such as unattainable costs or the distance of the said healthcare facilities.

The Parliamentary Health Committee in their 2019 report averred that the referral hospitals in Kenya were found to be in neglect with the facilities being rundown and dilapidated. Shortage of

staff was also a common factor that featured across the referral hospitals for the Moi Teaching and Referral Hospital in Eldoret, for instance, bearing the burden to serve patients from 21 counties in the rift valley and western regions.

Lack of funding and outdated equipment has also been witnessed across health facilities in Kenya including the Kenyatta National Referral hospital. Staff inadequacy and industrial action by the workforce has also been witnessed with the latest case being the strike by Doctors during this Corona Virus pandemic.

Devolution of healthcare is also a huge contributor to the compromised state of healthcare in Kenya that has resulted in the unregulated cost of the same. Devolution healthcare has seen the largest service sector devolved to the county governments. This has unfortunately seen monumental challenges that include human resource deficiency, rampant corruption, conflicting relations between the national and county government, and capacity gaps.

These issues arise due to various competing interests within the counties that lead to the failure to prioritize healthcare with subsequently results in a failed healthcare system and immense costs of healthcare for the patients.

Recommendations

Based on the above findings and conclusions, this study recommends the following:

i. Centralization of the healthcare function to the national government for it to meet its obligation to provide healthcare facilities, equipment, doctors and infrastructure.
ii. Provide norms and standards for benchmarking to be adopted by health facilities in all levels of the healthcare system

iii. Have more policies to ensure the implementation of the building blocks of a sound health system as because if such factors are fully functional, it will ultimately lead to the reduction of the cost of healthcare.

iv. Have more innovative financing towards healthcare. For instance, having levies on sugary drinks, alcohol, tobacco, and fast foods and redirecting thee levies to health care as such consumables are what" contribute directly to lifestyle diseases.

v. Raising of sufficient resources for healthcare through revenue collection and prioritization of government budgets to address healthcare shortcomings such as infrastructure and workforce.

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