COURT ANNEXED MEDIATION AS A TOOL FOR ACCESS TO JUSTICE FOR CHILDREN IN KENYA

A CASE STUDY OF MILIMANI CHILDREN'S COURT.

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MASTERS OF LAW

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Declaration

STUDENT

I **CAROLYNE MUTHONI NJAGI** hereby declare this work to be a result of my own research efforts. Where I have made references to other people's work, due acknowledgement has been made in accordance to the faculty of law regulations.

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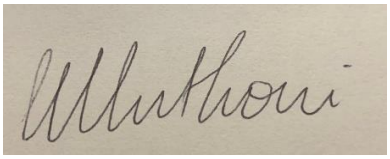

SIGN Date 8th November 2021

SUPERVISOR

I **Lady Justice (Rtd) Dr NANCY BARAZA** being a University of Nairobi Supervisor, confirm that this research study has been done and submitted under my supervision.

SIGN… DATE: 8th November, 2021.

Acknowledgment

When I look back across my two years of study for my LLM, I must say that this LLM journey has been quite an eventful learning experience. It really tested my patience, endurance and strength. Nonetheless, it has been one of the most exciting times of my life. The wealth of knowledge and experience I have gathered will go with me into my future.

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Dedication

I dedicate this thesis to my mother, Ann Njoki Njagi for the whole hearted social and emotional support during the period of my studies. Indeed, you have always been by my side, encouraging and rooting for me.

I also dedicate this thesis to my lovely daughters, Tamara Nzibe and Aiyana Nzibe. Together, you are my reason for living. I think of you in everything I do.

Abstract

Access to Justice in Kenya's courts has been epitomised by delays in delivery of judgments occasioned by backlog of cases. The Constitution of Kenya (2010) propagated the use of Mechanism for alternative dispute resolution as an alternative to court proceedings in pursuit of justice. One of these Mechanism for alternative dispute resolutions is mediation which the Judiciary has innovated to Court Annexed Mediation (CAM). The primary objective of CAM is to facilitate speedy resolution of disputes targeting conclusion of cases within an average of 66 days. Court Annexed Mediation mechanism was initially piloted at the Family and Commercial divisions of the High Court. CAM has subsequently been rolled out to other courts including magistrates' courts. This study appraised the concept of CAM as a tool for promoting Access to Justice. It demystified the concept of mediation as mechanism for enhanced Access to Justice. It analyses the sufficiency of the legal, policy and institutional framework in place to operationalize CAM in Kenya. As a case study, the researcher appraises the Children's Court at Milimani Law Courts which is one of the courts implementing CAM with the aim of establishing whether it has enhanced Access to Justice. The study finally makes conclusions on the implementation of the CAM so far. It then makes recommendations on enhancing effectiveness of CAM as a tool for promoting Access to Justice in the future.

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List of Abbreviations

ADR	Alternative Dispute Resolution
CAM	Court Annexed Mediation
CJRA	Civil Justice Reform Act
CPA	Civil Procedure Act
CRC	Convention on the Rights of the Child
ICCPR	The International Covenant on Civil and Political Rights
ICESR	The International Covenant on Economic Social and Cultural Rights
IDLO	International Development Law Organization
MAC	Mediation Accreditation Committee
MDR	Mediation Deputy Registrar
NCAJ	National Council on the Administration of Justice
NCIA	Nairobi Centre for International Arbitration
TDR	Traditional Dispute Resolution
TRC	Truth and Reconciliation Commission
UDHR	Universal Declaration of Human Rights
UK	United Kingdom
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
US/USA	United States of America

List of legal instruments and policy documents

National

Alternative Dispute Resolution Act, 2019

Children Act No. 8 of 2001

Children Rules 2002

Civil Procedure Act 2012

Civil Procedure Rules 2010

Commission on Administrative Justice Act No. 3 of 2011

Constitution of Kenya, 2010.

Environment and Land Court Act, No 19 of 2011

Gazette Notice No.7632 of 2018: Practice Directions on Court Annexed Mediation (Amendment) 2018.

Kenya Gazette, Vol CXVII-No 17, Gazette Notice No 1088. 2015

Land Act, No 6 of 2012

Legal Notice no 197 of 2015: Mediation (Pilot Project) Rules 2015

Nairobi Centre for International Arbitration (mediation) Rules, 2015

National Land Commission Act, 2012

Practice Directions (as amended in the Practice Directions on Court Annexed Mediation (Amendment) 2018) (Issued pursuant to provisions of article 159 of the Constitution of Kenya and section 59B (1) (a), (b) and (c) of the Civil Procedure Act (2010).

The Legal Aid Act, No 6 of 2016 (Laws of Kenya)

The Statute Law (Miscellaneous Amendments) Act no 17 of 2012

International

Convention on the Settlement of Investment Disputes between States and Nationals of Other States (International Centre for Settlement of Investment Disputes [ICSID] 1965) 575 UNTS 159.

United Nations Charter 1945

United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958)

Foreign

Alternative Dispute Resolution Act No 105-315 of 1998 (Laws of USA)

Promotion of National Unity and Reconciliation Act 34 of 1995 (Laws of South Africa)

List of cases

Dudgeon vs. United Kingdom (1982)4 EHRR 149 European Court of Human Rights

Dunnett vs. Railtrack Plc (2001) EWCA (Civ) 1935

Halsey vs. Milton Keynes Gen. NHS Trust (2004) EWCA (CIV) 576

Kenya Plantation & Agricultural Workers Union V Maji Mazuri Flowers Ltd [2012] eKLR

Occupiers of 51 Olivia Road, Berea Township, and 197 Main Street, Johannesburg v City of Johannesburg 2008 (3) SA 208 (CC)

S v Makwanyane & Another 1995 (3) SA 391 (CC)

CHAPTER ONE: INTRODUCTION

1.1. Background

Access to Justice has been recognised as the cornerstone in fostering a peaceful, fair and inclusive society with functioning and accountable institutions.[1] Access to legal system refers to the capacity of individuals to obtain compensation from both formal and informal institutions where they have suffered a wrong.[2] As understood in its social conception, justice is understood in terms of distributive justice i.e. distribution of resources and opportunities among the entire members of the society.[3] Thus a society with unjust distribution of resources calls for redistributive justice. Access to legal system is said to be missing in situations such as : where the ordinary citizens do not have means to access it for example due to financial constraints; where individuals lack access to legal representation; where the justice system is weak or where they cannot obtain information on their rights.[4] Access to legal system in its normative sense implies the enabling of citizens to resolve their own disputes through informal mechanisms without the necessity to refer disputes to courts of law.[5]

John Rawls theory of justice which he styled 'justice as fairness', has been heralded as the most thought-provoking writing on political philosophy specifically on social justice of the 20th century.[6] Rawls objective was to develop a social contract theory that would ultimately offer a better option to utilitarianism. He identified two forms of conflict that exist in every society and that call for application of justice principles.[7] Firstly is that in every society and more so in liberal democracies there exists divergent views and beliefs with regard to moral, ethical, philosophical and religious aspects. Owing to these divergent views, the people's conception of the good and bad similarly differ and a consensus of these divergent views is difficult to strike. This situation

[1] 'Sustainable Development Agenda: Sustainable Development Goal (SDG) No 16 of the 2030'.
[2] UNDP, 'Access to Justice: Practice Note 9/3/2004' <https://www.un.org/ruleoflaw/blog/document/access-to-justice-practice-note/> accessed 5 November 2020.
[3] Margot A Hurlbert and James P Mulvale, 'Defining Justice' <https://fernwoodpublishing.ca/files/pursuingjustice.pdf> accessed 5 November 2020.
[4] HDR UNDP, 'Programming for Justice: Access for All. A Practitioner's Guide to a Human Rights-Based Approach to Access to Justice' [2005] Bangkok, Thailand: UNDP.
[5] Fernando Vieira Luiz, 'Designing a Court-Annexed Mediation Program for Civil Cases in Brazil: Challenges and Opportunities' (2015) 15 Pepperdine Dispute Resolution Law Journal 1.
[6] John Rawls, *A Theory of Justice* (Harvard University Press 2009).
[7] Paul Smith, 'John Rawls's Theory of Justice' in Paul Smith, *Moral and Political Philosophy* (Palgrave Macmillan UK 2008) <http://link.springer.com/10.1007/978-0-230-59394-7_12> accessed 5 November 2020.

calls for the imposition of coercive laws on every citizen, however for such coercive laws to be effective and legitimate, they ought to be based on principles that are generally acceptable to all citizens irrespective of their beliefs and background. The second conflict is that owing to uneven distribution of wealth and income and the scarcity of resources, a conflict arises over the distribution of the scarce resources. As to whether a right formula for distribution of those resources can be achieved, Rawls is of the view that the most appropriate principles for equitable distribution of the scarce resources are the principles on justice. The specific principles of justices that Rawls proposes are: reasonable people irrespective of their divergent views and beliefs tend to agree that each subject of the state should obtain certain basic rights and liberties; secondly that the inequalities in resources can be acceptable as just if there is equality of opportunity available to everyone.

Whereas the traditional method of Access to legal system in the Judiciary is litigation, due to administrative challenges such as shortage of judicial staff, mechanisms for alternative dispute resolution (ADR) have been recognised as a legitimate way of obtaining justice. Mediation has been identified as the most popular form of ADR,[8] and as such courts should accommodate parties who wish to explore this mechanism to resolve their disputes.[9] In order to achieve the objective of expeditious Access to legal system, courts in various parts of the world are exploring co-opting Court Annexed Mediation mechanisms.[10] Germany for instance amended its legislation (*Zivilprozessordnung*) in the year 2000 to allow all German states to initiate mandatory Court Annexed Mediation programmes. India on its part has established court connected mediation centres including Bangalore Mediation Centre and Delhi Mediation Centre.[11]

As a mechanism for alternative dispute resolution, Mediation is generally aimed at among others: enhancing Access to legal system for all; reduction of number of cases; expeditious conclusion of of disputes; reduction of costs; promoting willingness of parties to abide with resolutions and

[8] Nadja Alexander, 'Global Trends in Mediation: Riding the Third Wave' [2003] Singapore Management University <https://ink.library.smu.edu.sg/cgi/viewcontent.cgi?referer=https://scholar.google.com/&httpsredir=1&article=3853&context=sol_research> accessed 20 August 2020.
[9] Steve Gizzi, 'Judging Mediation' (2004) 10 John F. Kennedy University Law Review 135.
[10] Laila Ollapally and others, 'Mediation Training Manual of India Mediation and Conciliation Project Committee Supreme Court of India, Delhi' (Supreme Court of India, Delhi) <http://bombaychamber.com/admin/uploaded/mediation_training_manual_of_india.pdf> accessed 5 November 2020.
[11] ibid.

restoring pre-dispute relationships. Mediation however is not only useful in managing backlog of cases but it also has innate virtues like being more humane, less traumatic and more likely to reconcile and heal warring parties than litigation.[12]

In Kenya, Court Annexed Mediation is a new idea that entails the use of alternative platforms to resolve conflicts in a faster, cheaper, and peaceful manner while remaining within the purview of the Judiciary. In 2016, the Commercial and Family Divisions of the High Court at Milimani Law Courts in Nairobi launched the Court Annexed Mediation (Pilot) programme.[13] To operationalize the pilot project, a Judiciary Mediation Manual was developed. The manual standardized operating procedures for the processing of matters referred to the mediation process and also defined the roles for all the actors involved in the process. To further operationalize the project, the Civil Procedure Act was amended to give courts discretion to refer a dispute to mediation upon the request of parties.[14] The outcome of the pilot project confirmed the significance of court assisted mediation in dispute resolution. It is particularly credited with the attribute of affording contending parties an opportunity to generate home grown solutions to their problems which in turn bolsters long term relationships between parties.

In July 2017, a Mediation Taskforce was gazetted with the purpose of monitoring a national rollout of Court Annexed Mediation following the completion of the pilot phase.[15] The Practice Directions on Mediation, 2017[16] revoked the Mediation (Pilot Project) Rules, which were later changed to apply to all civil proceedings filed in the High Court, Environment and Land Court, Employment and Labour Relations Court, and subordinate courts and tribunals across the country.[17] The roll out phase also encompassed other functions include: identifying accredited and qualified mediators; training judicial officers and staff on mediation; setting up registries to receive mediation matters;

[12] Robert A Baruch Bush, 'Mediation and Adjudication, Dispute Resolution and Ideology: An Imaginary Conversation' (1989) 3 Journal of Contemporary Legal Issues 1.
[13] Legal Notice no 197 of 2015: Mediation (Pilot Project) Rules 2015.
[14] Civil Procedure Act 2012, Section 59(a) Civil Procedure Act(2010) introduced by the Statute Law (Miscellaneous Amendments Act) 2012 gives the court the discretion to refer a matter to mediation at the request of the parties, where it deems it appropriate or if the law so requires.
[15] Legal Notice no 197 of 2015: Mediation (Pilot Project) Rules 2015.
[16] Practice Directions (as amended in the Practice Directions on Court Annexed Mediation (Amendment)2018) (Issued pursuant to provisions of article 159 of the Constitution of Kenya and section 59B(1)(a),(b) and (c) of The Civil Procedure Act (2010).
[17] Gazette Notice No.7632 of 2018 : Practice Directions on Court Annexed Mediation (Amendment) 2018.

provision of mediation rooms; screening of all civil matters filed at the court and monitoring and evaluation of mediation processes.[18]

The overall goal of Court Annexed Mediation is the expeditious disposal of cases in sixty-six days.Successful implementation of court assisted mediation is premised on sensitization of all concerned parties including judicial officers, court users' committees, mediators, public, media and community leaders. During the pilot phase, a mediation settlement week was conducted in December 2017 in Nairobi involving the Family division, Commercial Division, ELC division, ELRC division and the Children's Court. During the one-week exercise, over three hundred settlements were reached out of the over six hundred matters that were referred. It was reported that during the settlement week, Kshs. 2.9 billion was released to the economy through the cases that were resolved.[19]

This study explored the attributes of Court Annexed Mediation as a tool of Access to legal system and a mechanism for conflict resolution. It specifically examined the conceptual and theoretical prospects of court assisted mediation in enhancing Access to legal system and particularly in respect to children's matters. As a case study, the researcher conducted a case study of the Milimani Children's Court which is one of the courts in which court assisted mediation has been operationalized.

1.2.Statement of the Problem

The sacred nature of children's matters has been accentuated in the Constitution of Kenya at Article 53(2) which provides that a child's best interests are of paramount importance in every matter concerning the child. One of the key impediments to achievement of the right to Access to legal system in Kenya is delay in disposal of cases by courts. The cause of this huge backlog has been attributed to a myriad of challenges including the adversarial nature of Kenya's judicial system. Court Annexed Mediation has recently been introduced into Kenya's legal system and been touted as the likely panacea to solve the perennial problem of backlog. The Children Court is one of the courts that has suffered from huge backlog and thus Court Annexed Mediation has

[18] The Judiciary of Kenya, 'Judiciary Rolls out Court Annexed Mediation to Other Regions' (2018) <https://www.Judiciary.go.ke/Judiciary-rolls-out-court-annexed-mediation-to-other-regions/> accessed 5 November 2020.
[19] ibid.

been introduced to attempt to solve the problem. This study therefore sought to appraise whether the mechanism of Court Annexed Mediation is the most ideal conceptual and practical mechanism for addressing the question of Access to legal system in civil proceedings in which the child's rights and interests are at stake and to establish whether the concept has been widely embraced. To actualize the study, the researcher appraised the theoretical and conceptual framework of Court Annexed Mediation, analysed the legal, institutional and policy framework in place and conducted a case study of Milimani Children's court.

1.3. Research Justification

The study was coincidentally undertaken when CAM had just rolled out in commercial courts in Kenya. The researcher thus appraised the system to forecast the glitches that may be faced along the way and to propose possible remedial mechanisms. It is noteworthy that research topic is novel and therefore there is scarce literature on it. The researcher was motivated by the desire to contribute to knowledge in this novel area. It is desired that the outcomes and recommendations of the study shall be a useful resource in influencing and shaping the legal and policy reforms. The study should also prompt other researchers to venture deeper into this relatively novel area. As such at the end of the study, the researcher shall propose areas calling for further research in the subject.

1.4. Research Objectives

The researcher's objectives are surmised as follows:

1. To appraise the conceptual and theoretical underpinnings of Court Annexed Mediation as a tool for accessing justice in Kenya.
2. To analyse the legal, policy and institutional framework in place for Mechanism for alternative dispute resolutions and especially Court Annexed Mediation in Kenya.
3. To appraise the utilization of Court Annexed Mediation at the Milimani Children's Court.
4. To draw conclusions and make recommendations on best practices that can enhance Court Annexed Mediation as a tool for Access to legal system.

1.5. Hypothesis

The research was based on the hypothesis that the novel Court Annexed Mediation has been touted as a useful tool for Access to legal system in Kenya's Judiciary, nonetheless it has not achieved one of its objectives of ensuring expeditious disposal of cases in the Children's Court.

1.6. Research Questions

1. What are the conceptual and theoretical underpinnings of Court Annexed Mediation as a tool for Access to legal system in Kenya?
2. What is the legal, policy and institutional framework in place for facilitation of court assisted mediation in Kenya?
3. What is the set-up and utilization of court assisted mediation programme at the Milimani Children's Court?
4. What conclusions can be drawn and what recommendations can be made to further enhance the effectiveness of court assisted mediation programme?

1.7. Theoretical Framework

This study was guided by the following two theories: Sociological theory and African Jurisprudence also known as Ubuntu. The sociological jurisprudence theory has been chosen as the lead theory owing to the relevance of one of its underlying principle that recognises social conflicts as being inherent to human nature and favours the use of mediation in response to conflict.

1.7.1. The Sociological Jurisprudence Theory

This study shall be partly based on the sociological school of jurisprudence and more specifically Roscoe Pound's Social Engineering. Whereas some scholars have reckoned that sociological school of thought is not strictly speaking, a legal theory and that instead it is a method which employs various theories to study and give meaning to the role of law in the society.[20] The

[20] James A (I) Gardner, 'The Sociological Jurisprudence of Roscoe Pound (Part I)' (1962) 7 Villanova Law Review 1.

sociological jurist thus views law as a tool for controlling society that may be improved through deliberate efforts.[21]

1.7.2. Roscoe Pound's Social Engineering Theory

Among the renown proponents of the sociological school is Roscoe Pound (1870-1964), he advocated for viewing the law in practice rather than in its abstract nature. He viewed law as a body of knowledge and experience of which social engineering is carried on.[22] He introduced the theory of interests which describes law as social engineering. To facilitate social engineering, Pound identified interest that must be safeguarded, these are: an individual's interests of personality including their reputation, freedom of conscience and physical integrity; individual's domestic relations including marriage and family.[23] Pound viewed law as a body of knowledge and experience under which a greater part of social engineering takes place. That it has rules, standards, conceptions, principles that aid decision making and also modes of professional thoughts. He posits that like an engineer's formulae, laws represent scientific formulations of experience and logical development of formulations as well as inventive skill in coming up with new devices and formulating their requirements by means of a developed technique. This process is what he referred to as the theory of social engineering.[24]

Pound set out the technique with which a jurist ought to follow while conducting 'social engineering'. That first and foremost is that the jurist ought to study the societal conditions of an institution, history of the society and the judicial mechanisms in place. Pound's theory propagates for creation of equity among the competing interests in society with the aim of obtaining the greatest good for the greatest number. That the objective of the legal system ought to be attainment of justice for the greater number in the society.

1.7.2.1.Legal Interests

Pound propagated three classes of interests necessary for achieving social harmony, these are individual, public and social interests. He defined individual interests as those desires and demands

[21] Julius Stone, 'A Critique of Pound's Theory of Justice' (1934) 20 Iowa Law Review 531.
[22] Roscoe Pound, *Interpretations of Legal History* (Harvard University Press 2013).
[23] ibid.
[24] Roscoe Pound, 'The Scope and Purpose of Sociological Jurisprudence. I. Schools of Jurists and Methods of Jurisprudence' (1911) 24 Harvard Law Review 591.

in an individual's life necessary for the individual's well-being.[25] As such since these interests revolve around the individual they are private in nature. Public interests on the other hand are those demands and wants of a political institution that is viewed as a legal body. Whereas there may be interfaces between public and individual interests, public interests are generally classified under public law.[26] As for social interests, Pound described them as claims and interests in the social life and asserted as such in that life. These rights have affinity to the concept of security which requires that there be an organised legal system within the political organization.[27]

A divergence of these interests is sought with the aim of each being balanced against the other which is the essence of social jurisprudence. Pound however did not place much emphasis on the distinctions due to the ultimate overlap of the three interests and their co-existence and independence. Although he believed that heftier benefits ordinarily tend to triumph, he doesn't believe in the possibility of absolute judgment, instead he favours compromise and balancing whose ultimate aim is to secure interests.[28] Pound also considered the issue of when securities come into being against the time when the legal systems comes into being. Whereas the common assumption is that interests precede the law which comes to regulate and protect them, it is not always the case as some laws may come into existence as a result of claims based on developing interests.[29]

1.7.2.2.Jural Postulates

To explain how harmonizing and resolving conflicts between benefits should take place, Pound introduced the concept of Jural Hypothesizes. Through this concept, interests are tested and appraised so as to resolve any conflict that may arise out of the competing interests. Jural Postulates assumes legal thinking on rights and obligations at diverse levels putting into consideration what humans ordinarily presume in a civilised society.[30] Pound recognises that some of these

[25] A Roscoe Pound, 'Survey of Social Interests, 57 Harv' (1943) 1 L. Rev.
[26] ibid.
[27] ibid.
[28] Roscoe Pound and Marshall L DeRosa, *An Introduction to the Philosophy of Law* (Routledge 2017).
[29] FMDA Lord Lloyd and MDA Freeman, 'Lloyd‟ s Introduction to Jurisprudence' [2001] London, Sweet and Maxwell.
[30] Elise Nalbandian, 'Introductory Concepts on Sociological Jurisprudence: Jhering, Durkheim, Ehrlich' (2010) 4 Mizan Law Review 7.

assumptions may vary form one legal jurisdiction to another out of ethno cultural differences, however some are relatively uniform regardless of the legal system.

Pound developed some juristic postulates out of some values protected by law in the American Legal System. Some of these postulates include: assumption that a person will not be intentionally aggressive towards others; assumption that a person who has discovered or created something will have legitimate control over it; assumption that people will honour their undertakings; assumption that people will act with due diligence not to cause harm and injury to others.[31] Roscoe Pound's summarised his view on the functions of law in the society with regards to fulfilling individual, public and social interests with the following words:

> "For the purposes of understanding today's law, I'm content to think of it as a social institution that satisfies social wants , the claims and demands that come with the existence of civilised society by giving effect to as much as we need with the least amount of sacrifice, to the extent that such wants or claims can be satisfied or claims given effect by an ordering of human conduct through a politically organized society. For the time being, I'm satisfied to see in legal history a record of a continually broader recognition and satisfaction of human wants"[32]

1.7.2.3.Relevance of Sociological theory to Court Annexed Mediation

Sociological scholars assert that social conflicts are inherent to human nature and as such intermediaries should aspire to bring the disputants to the realization that conflict are part of human nature and they ought to empower each other in their response to conflict.[33] As such the intermediary's function in resolution of disputes ideally rests at encouraging the gatherings to transform their perception or attitudes to social conflicts towards preserving pre-existing relationships.[34] Sociological scholars train mediators to assist warring parties to deconstruct their hard-line positions and to construct shared workable relationships.[35]

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[31] JW Harris, *Legal Philosophies* (Lexis Nexis 1997).
[32] Roscoe Pound, 'The Role of the Will in Law' (1954) 68 Harvard Law Review 1.
[33] Robert A Baruch Bush and Joseph P Folger, *The Promise of Mediation: Responding to Conflict through Empowerment and Recognition* (Jossey-Bass 1994).
[34] ibid.
[35] John Winslade and Gerald D Monk, *Narrative Mediation: A New Approach to Conflict Resolution* (John Wiley & Sons 2000).

1.7.3. African Jurisprudence/Ubuntu Theory

Ubuntu has been defined in one aspect to refers to a life philosophy that encompasses humanity, personhood, and morality in its most fundamental form. It is mainly used to describe group solidarity which is essential for communities with little resources that heavily depend on each other for survival.[36]. From the definition, emphasis has been placed on the concepts of tolerance, love, harmony and togetherness which forms the fabric of the African thinking.

Ubuntu was tested in South Africa during the establishment of the Truth and Reconciliation Commission (TRC)[37]. The TRC proceeded on the African communitarian way of life as its platform to unearth the wrongs that had been committed in the apartheid era with an aim of establishing the truth then beginning a reconciliation journey with the perpetrators being made to take responsibility for their actions. Ubuntu was emphasised in the healing and reconciliation process for both the perpetrators and the victims. Ubuntu ethos was credited for not only unearthing the truth but also reminding the people of their common purpose and unity.[38]

1.7.3.1.Specificity of Ubuntu jurisprudence

According to Walsh, "In a social equality system, the law cannot afford to ignore the moral accord of the community. If the law is out of touch with the moral majority of the community, whether by being too far below, too high, or too far above it, it is regarded in contempt."[39] Courts have been advised to consider "African law and legal thinking as a source of legal ideas, principles, and practice to guide African jurisprudence" in the African environment. Courts have been advised to consider "African law and legal thinking as a source of legal ideas, principles, and practice to guide African jurisprudence" in the African environment..[40]

Ubuntu has evolved leading to the birth of the concept of meaningful engagement in which warring parties are encouraged to engage each other with the aim of finding a sustainable solution for their dispute without necessarily going to court. For instance in the South African case of ***Olivia Road***

[36] Dalene M Swanson, 'Ubuntu: An African Contribution to (Re) Search for/with a "Humble Togetherness"' (2007) 2 Journal of Contemporary Issues in Education 53.
[37] Promotion of National Unity and Reconciliation Act 34 of 1995 (Laws of South Africa).
[38] Swanson (n 36).
[39] *Dudgeon vs. United Kingdom 1982* (1982) 4 EHRR 149 (European Court of Human Rights).
[40] *S v Makwanyane* (1995) 3 SA 391.

vs. City of Johannesburg[41], the City of Johannesburg sought a court order to evict residents of Olivia Road who were living in houses which the Municipality deemed as being unsafe. The court asked the Municipality to meaningfully engage the residents to come up with an amicable solution. The municipality ceded to the call and after meaningful engagements, it was agreed by the parties that buildings shall be made safe and alternative shelter would be provided to illegal occupiers.

African/Ubuntu jurisprudence is epitomised by a '*legal subject as a living and lived experience*'.[42] It seeks a balance, fairness and equity in human relations. It is characterized by flexible rules that seek to build social harmony by ensuring that judgments and decisions are responsive to a particular situation by providing pragmatic solutions. It has been heralded as placing great importance on the creativity of a judge that furthers social cohesion and harmony.[43] Further Ubuntu ignores the concept of prescription which it deems as being a hindrance to achieving the truth. As such it does not place any limitation on the time in which a matter can be taken to court.[44]

1.7.4. Ubuntu jurisprudence as a facilitator to mediation

Mediation is generally understood as a form of informal justice administered through informal institutions.[45] The informal institutions of administering justice modify and apply certain norms in the course of resolving conflicts.[46] Ideally mediation institutions are decentralized, non-coercive and removed from state power, further they are ad-hoc and flexible driven by the desire to reach a resolution outside the constraints of the conventional formal law[47].ADR mechanisms such as mediation are a response to the deficiencies in the judicial system. Whereas national courts are viewed as symbols of the existence of the rule of law in a particular jurisdiction, the courts sometimes lack the capacity to solve all manner of disputes.[48] Such situations call for the use of

[41] *Occupiers of 51 Olivia Road, Berea Township, and 197 Main Street, Johannesburg v City of Johannesburg* (2008) 3 SA 208.
[42] Mogobe B Ramose, *African Philosophy through Ubuntu* (Mond Books 2005).
[43] ibid.
[44] Adolf Sprudzs and others, 'The International Encyclopaedia of Comparative Law: A Bibliographical Status Report' (1980) 28 The American Journal of Comparative Law 93.
[45] Petra Hietanen-Kunwald, 'Mediation and the Legal System : Extracting the Legal Principles of Civil and Commercial Mediation' <https://helda.helsinki.fi/handle/10138/243949> accessed 5 November 2020.
[46] Richard L Abel, *The Politics of Informal Justice: Volume 2: Comparative Studies* (Elsevier 2014).
[47] ibid.
[48] Hazel Genn, Shiva Riahi and Katherine Pleming, 'Regulation of Dispute Resolution in England and Wales: A Sceptical Analysis of Government and Judicial Promotion of Private Mediation' [2013] Regulating dispute resolution: ADR and Access to Justice at the crossroads 135.

Mechanism for alternative dispute resolutions. Consequently the obligation to enforcing rights tend to be assigned to institutions outside the formal justice systems and especially tribunals.[49] Therefore to understand the nexus between the law and ADR requires one to establish the function of law in the society.

1.7.5. Interface of Sociological Jurisprudence and Mediated Outcomes.

The objective of a mediation process is that the outcome resolves the parties' conflicts through balancing the interests of the parties through employing rationality different from legal rationality.[50] However some mediation models do not consider the settlement of a dispute as the successful outcome of mediation. Alberstein has identified three forms of mediation successes which he based on different mediation models.[51] The first criterion he provides is that of transformative mediation which to him views a successful mediation outcome not in terms of resolution of a dispute but the influence and impact it has on the relationship between the disputing parties. The second model is that of narrative mediation that enables the parties to have an equality platform as opposed to a dominant setting which facilitates the mediation process. The third model referred to as pragmatic or problem solving mediation model which views an optimal solution to a dispute that addresses parties' interests as being a successful outcome.[52] Thus the underlying theme of mediation is that it should result in an outcome that settles the parties' dispute and maintains their current and future relationship at the end of the mediation process.[53] As such a mediation outcome may take the form of an apology, change in communication style, acknowledgement and agreement to change one's behaviour and reaction to situations.[54]

1.7.6. Conclusion on Theoretical Framework

Overall, Roscoe Pound's theory and the African Jurisprudence/Ubuntu theorists share some basic conceptions on the theory which include: that law is not unique in its functionality in society but

[49] Brendan Edgeworth, *Law, Modernity, Postmodernity: Legal Change in the Contracting State* (Routledge 2019).
[50] Roger Fisher, William L Ury and Bruce Patton, *Getting to Yes: Negotiating Agreement without Giving In* (Penguin 2011).
[51] Michal Alberstein, 'Forms of Mediation and Law: Cultures of Dispute Resolution' (2006) 22 Ohio State Journal on Dispute Resolution 321.
[52] ibid.
[53] Kenneth W Thomas, 'Conflict and Conflict Management: Reflections and Update' (1992) 13 Journal of Organizational Behavior 265.
[54] ibid.

is only one of the methods of social control; that law must be amenable to modification depending on prevailing circumstances and social factors; that emphasis should be placed more on actual operation of the law rather than on theoretical aspects; that law is a socially constructed reality rather than relying on absolute values and that law bases itself on social customs that governments must enforce.[55]

1.8. Literature Review

In this section, the researcher evaluated scholarly writings to gain more insights and understanding of the topic under research. The researcher also hoped to identify gaps which previous scholars have not plugged and thus seek solutions for those gaps. The review was undertaken thematically to cover the objectives of the study.

1.8.1. Conceptualizing mediation as an ADR mechanism for Access to legal system

According to Brown & Marriott, all forms of ADR aim at facilitating a settlement. That the advantages of ADR include: less time spent and cheaper; the finality can be anticipated; transaction costs are limited; parties are spared the agony commonly experienced in litigation and there is a high of possibility of parties retaining their previous good relationship.[56] According to Bengt Lindell, there are cases that ADR is not preferred, for instance : where one of the parties ha a power advantage; where security measures may be required for presentation of evidence; where parties would wish a precedent to be set; where a party anticipates an unfavourable outcome and wishes to make the court a scapegoat.[57] Bengt Lindell further posits that in court proceedings, the focus is on parties' rights and obligations and ultimately a judgment is delivered where one party is declared the winner and the other party loses. In mediation on the other hand, it is possible to create a win-win situation, through expounding each parties' interests and needs and then crafting a solution for both of them instead of restricting the dispute to the rights and obligations according to existing law.[58] Bengt study focussed on the attributes of mediation generally while the researcher herein narrowed on Court Annexed Mediation.

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[55] Harris (n 31).
[56] Henry J Brown and Arthur L Marriott, *ADR Principles and Practice* (2nd edn, Sweet and Maxwell 2005).
[57] Bengt Lindell, 'Alternative Dispute Resolution and the Administration of Justice–Basic Principles' (2007) 51 Scandinavian Studies in Law 311.
[58] ibid.

Kariuki Muigua in his Phd thesis titled 'Resolving Environmental Conflicts through Mediation in Kenya,"[59] he posits that ADR and particularly mediation is a reassertion of customary jurisprudence since under customary law, disputes and conflict resolutions was a people driven process which involved elders acting as mediators.[60] He cites the averment by P Fenn[61] that ADR mechanisms such as mediation, conciliation and negotiation due to their nature of being flexible and informal facilitate parties' autonomy enhancing the chances of parties finding solutions to their problems. Muigua's study was however completed prior to implementation of Court Annexed Mediation in Kenya. More significant is that it dwelt more on mediation in environmental conflicts. This study shall seek to appraise the prospects of Court Annexed Mediation after its recent operationalization. The researcher shall analyse the legal and institutional framework that has been put in place for Court Annexed Mediation. To test the efficacy of the new mechanism, the researcher shall conduct a case study of the Children's Court at Milimani, one of the courts where Court Annexed Mediation has been operationalized. Purveyor

According to Mbote and Akech**,** one of the means of enhancing Access to legal system is through creation of ADR mechanisms, traditional justice systems and through local administration.[62] They called upon the government to institutionalize ADR mechanisms to ease backlog of cases and enhance the speedy resolution of justice. Whereas their study did not expressly vouch for Court Annexed Mediation, it called upon the government to implement the Constitution of Kenya(2010) and the recommendations of the Task Force on Judicial Reforms related to Access to legal system which included incorporation of ADR mechanisms in resolution of disputes.[63] This study went beyond the overall realm of ADR and focussed on CAM.

Bondy and Doyle credits mediation as leading to outcomes that can be deemed as flexible as and more creative than the courts would ordinarily offer. Further that the interaction between warring parties with the involvement of the mediator preserves cordial relations as well as restoring

[59] D Kariuki Muigua, 'Resolving Environmental Conflicts through Mediation in Kenya' (Thesis, University of Nairobi 2011) <http://erepository.uonbi.ac.ke/handle/11295/16130> accessed 29 November 2019.
[60] ibid.
[61] Peter Fenn, 'Introduction to Civil and Commercial Mediation' [2002] Chartered Institute of Arbitrators, Workbook on Mediation.
[62] Patricia Kameri-Mbote and JM Migai Akech, *Kenya: Justice Sector and the Rule of Law: A Review by AfriMAP and the Open Society Initiative for Eastern Africa* (Open Society Initiative for Eastern Africa 2011).
[63] ibid.

strained relationships.[64] According to Niranjan J Bhatt, proper implementation of Court Annexed Mediation is effectively carried out, it provides a nation with the impetus for the growth of industry and commerce.[65] More so Court Annexed Mediation is slowly gaining global acceptance. In India for instance, mediation got legislative recognition in 1947 through Industrial Disputes Act, 1947. The law provides for conciliators who are charged with the responsibility of settling industrial disputes.[66] Niranjan Bhatt's study was a study of implementation of CAM in India while the researcher herein focussed on Kenya's jurisdiction.

According to C Pollack, one of the benefits of mediation is that it gives the parties to a conflict an opportunity to play a lead role in the mediation exercise which ultimately leads to the parties to a conclusion that addresses the aggregate of their interests in the conflict.[67] As such mediation is said to work best in situations where the parties to a conflict have had prior relationship and there is a desire to continue the relationship in the future. Pollack's study largely focussed on mediation as a concept while the researcher herein zeroed in on CAM.

1.8.2. Literature review on the Legal Framework on Mediation in Kenya

According to Gakeri**,** Kenya has had laws on arbitration since 1914, having been a signatory of the New York[68] and Washington[69] Conventions, and subsequently adopted UNCITRAL Model Law in 1995.[70] He however laments that arbitration as an ADR mechanism is yet to be fully embraced in the commercial parlance in the country. Gakeri's study appraised the efficacy of arbitral law and ADR in Kenya with more emphasis on arbitration without delving into the other forms of ADR including mediation which the study herein seeks to focus on. Gakeri's study is however

[64] Varda Bondy and Margaret Doyle, *Mediation in Judicial Review: A Practical Handbook for Lawyers* (The Public Law Project 2011).
[65] Niranjan J Bhatt, 'Court Annexed Mediation: Legislative Initiative for Court Annexed Mediation in India' 9.
[66] ibid.
[67] Craig Pollack, 'The Role of the Mediation Advocate: A User's Guide to Mediation' (2007) 73 Arbitration: the Journal of the Chartered Institute of Arbitrators 20; Kariuki Muigua, *Court Sanctioned Mediation in Kenya-An Appraisal* <http://kmco.co.ke/wp-content/uploads/2018/08/Court-Sanctioned-Mediation-in-Kenya-An-Appraisal-By-Kariuki-Muigua.pdf> accessed 17 June 2021.
[68] United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958).
[69] Convention on the Settlement of Investment Disputes between States and Nationals of Other States (International Centre for Settlement of Investment Disputes [ICSID] 1965) 575 UNTS 159.
[70] Jacob K Gakeri, 'Placing Kenya on the Global Platform: An Evaluation of the Legal Framework on Arbitration and ADR' <http://erepository.uonbi.ac.ke/handle/11295/81991> accessed 5 November 2020.

relevant to the study in that it puts into perspective the legal framework in place for ADR in Kenya. Gakeri's study postulates that the existing legal framework in Kenya is oblivious to ADR mechanisms and that the Arbitration Act (1995) is replete with omissions and is not backed by a fathomable policy. The researcher herein shall comprehensively review the legal, policy and institutional framework in place for ADR and specifically court assisted mediation to ascertain its efficacy.

According to Muigua**,** courts and tribunals in Kenya have been empowered to encourage the use of ADR processes in dispute settlement and conflict management, the Constitution's article 159(2) (c) and section 1A of the Civil Procedure Act were amended to encourage the use of ADR and TDR mechanisms in dispute resolution and conflict management..[71]

To fully operationalize ADR and TDR mechanisms, he proposes a review of the Evidence Act (Cap 80) to simplify evidential rules so as to make it easier to focus on substantive justice rather than procedural justice as provided under article 159(2) (d).[72] His conclusion is that whereas the Constitution of Kenya (2010) guarantees the right of Access to legal system and further recognizes the use of ADR and TDR towards this endeavour, he laments the absence of a comprehensive legal and policy framework for their effective application. It is to be appreciated that Muigua's study was conducted prior to the Judiciary piloting Court Annexed Mediation programme. As such it was unable to test the effectiveness of court assisted mediation. This study will therefore go beyond and appraise the legal and institutional framework that has since been put into place to test their efficacy. The researcher shall also confine herself to mediation as an ADR mechanism and will completely leave out TDR mechanisms.

According to Otiso, Despite the fact that Article 159(2) (c) of Kenya's constitution encourages parties to use mechanisms for alternative dispute resolution such as mediation, arbitration, and conciliation, it does not make their use mandatory, and parties are free to use any ADR mechanism they deem appropriate for their situation.[73] He notes that pursuant to the promulgation of the Mediation(Pilot Project) Rules 2015, any suit that were subsequently filed in the Commercial or

[71] Kariuki Muigua, 'Legitimising Alternative Dispute Resolution in Kenya: Towards a Policy and Legal Framework' (2017) 5 Chartered Institute of Arbitrators (Kenya), Alternative Dispute Resolution 74.
[72] ibid.
[73] Justus Otiso, 'The Role of Court-Annexed Mediation in Resolving Succession Disputes in Kenya: An Appraisal' (2017) 1 Journal of Conflict Management and Sustainable Development 99.

Family division of the Milimani High Court would be subjected to screening to determine their suitability for settlement under Court Annexed Mediation scheme.[74]

A review of the literature available reveal that not much has been written specifically on Court Annexed Mediation. Most studies have focussed on mediation as an ADR mechanism generally. The concept of Court Annexed Mediation is being introduced in Kenya for the first time. It is therefore appropriate and opportune that an academic study is conducted to forecast the likely successes and challenges to be encountered in the arena of Court Annexed Mediation.

1.8.3. Literature on application of Court Annexed Mediation

According to D T Eisenberg, the State of Maryland in the United States of America has been heralded as an international model for Court Annexed Mediation programmes, the State having implemented the programme in five court levels i.e.: Small claims courts; general jurisdiction courts; circuit courts; Orphan Courts; intermediate appellate courts; and the Maryland Court of Special Appeals are all examples of limited jurisdiction courts..[75] The judicial system in Maryland avails mediation and settlement conferences for a myriad of suits such as children matters, marital issues and property issues.[76]

J Otiso, states that whereas Article 159(2) (c) of the Kenyan Constitution (2010) directs courts to encourage the use of alternative dispute resolution (ADR) processes such as mediation, arbitration, and conciliation, but it does not coerce parties to employ ADR..[77] He however notes the amendment to section 59 of the Civil Procedure Act to provide for Court Annexed Mediation. He posits that in Court Annexed Mediation unlike litigation, the emphasis is on what works for the parties rather than rights and obligations. Otiso further posits that unlike in mediation, other ADR mechanism imposes solutions on the parties and that these solutions do not last long nor give party involvement and satisfaction the way mediation does. [78] Otiso's study was however focussed on

[74] ibid.
[75] Deborah Thompson Eisenberg, 'What We Know and Need to Know about Court-Annexed Dispute Resolution' (2015) 67 South Carolina Law Review 245.
[76] State Justice Inst, 'State-wide Evaluation of ADR in Md., Executive Summary', <https://sites.google.com/a/marylandadrresearch.org/new/landscape/executive-summary> accessed 5 November 2020.
[77] Otiso (n 73).
[78] ibid.

family disputes and the law of succession generally, this study on its part shall focus on children's' issues and especially Court Annexed Mediation as practiced at Milimani Children' Court.

Ooko using Mavoko Law Courts as a case study, the study intended to determine the consequences of case backlog on the right to access justice in Kenya..[79] One of the findings of the study was that whereas a majority of the respondents interviewed were aware of the existence of ADR mechanisms in place, only a fraction of the respondents had resorted to the ADR mechanisms. The study thus recommended the need to undertake sensitization programmes of the ADR mechanisms. This study is however distinguishable as it shall focus on mediation conducted in the auspices of court as a tool of Access to legal system with a case study of Milimani Children's Court.

1.9. Research Methodology

The researcher conducted qualitative research employing both primary and secondary data collection tools to achieve her endeavour. On the first part, the researcher conducted a comprehensive desktop review of literature written by other scholars as well as legal instruments including the Constitution of Kenya, legislations and other instruments local and international having a bearing on Access to legal system and Mechanism for alternative dispute resolutions. On the second part the researcher conducted a field study at the Milimani children's court.

1.9.1. Data Collection

Research materials shall be sourced primarily from the University of Nairobi libraries and at the Milimani Law Courts Library. Online sources such as eKLR and LexisNexis shall also be utilised. On the second part, the researcher shall conduct a case study of Milimani Children's Court where Court Annexed Mediation has been operationalized. To gather data, the researcher shall employ primary data collection tools specifically interview guides and focus group discussions. The target respondents shall be select Magistrates, Deputy Registrars, Executive Officers, court clerks, advocates and litigants.

[79] Peter O Ooko, 'The Implication of Case Backlog on the Right to Access to Justice in Kenya; A Case Study of Mavoko Law Courts.' (Thesis, University of Nairobi 2018) <http://erepository.uonbi.ac.ke/handle/11295/104552> accessed 5 November 2020.

1.10. Ethical Issues

The researcher in conducting her study especially in collecting data shall took into consideration the following ethical issues:

a) Approvals and licenses. The researcher procured all the necessary approvals from the appropriate regulatory authorities.
b) Accuracy. The researcher accurately presented information obtained from the respondents and strictly utilized the information and data collected for academic purposes.
c) Confidentiality. The researcher maintained confidentiality of her respondents did not identify the respondents using their names in her research report.
d) Incentives. The researcher did not offer cash or benefits in kind to her respondents as an incentive to their participation in collecting data.
e) Informed consent. The researcher informed her respondents of the significance of her study before obtaining information from them.
f) Plagiarism. The researcher adhered to the University regulations on plagiarism and endeavoured to collect new data. Where previous works was cited, the researcher duly acknowledged the source and authors.

1.11. Chapter Breakdown

This section gives an overview of what every subsequent chapter shall entail.

1.11.1. Chapter One: Introduction to the Study

This chapter gives a general background of Access to legal system and of mediation as an ADR mechanism. It gives a sneak preview of how Kenya's Judiciary has embraced Court Annexed Mediation as a tool of enhancing Access to legal system. The topic is then problematized in the form of a statement and how the researcher intends to approach it. The chapter contains the literature review section, theoretical framework, research objectives and questions as well as the methodology to be adopted.

1.11.2. Chapter Two: Conceptual Framework of Mediation and Court Assisted Mediation

The chapter is a conceptual study of Access to legal system, rule of law and human rights and of mediation as an ADR mechanism narrowed down to court assisted mediation. The chapter analysed the nuances of the concept of Access to legal system and ADR mechanisms in promotion of the rule of law and human rights and how Access to legal system is an enabler of other rights and its relationship with the realization of other rights.

1.11.3. Chapter Three: Legal and Institutional Framework

This chapter analysed the legal, institutional and policy framework in place for the implementation of Court Annexed Mediation in Kenya.

1.11.4. Chapter Four: Case study of Milimani Children' Court

This chapter comprises of a case study of Milimani Children's Court, one the courts in which Court Annexed Mediation has been operationalized. The nature of cases being referred to mediation at the children's court were analysed on how their resolution differs from those resolved via the usual litigation. The researcher conducted interviews and focus group discussions with court users who have taken part in mediation processes to get their perceptions and experiences. The researcher sought to establish the successes and challenges that the process has encountered so far.

1.11.5. Chapter Five: Conclusions and Recommendations

This chapter draws the overall conclusions identified from the study and makes recommendations on best practises that can be adopted to enhance the system to become an avenue for expeditious delivery of justice especially in children matters.

CHAPTER TWO: CONCEPTUAL FRAMEWORK OF MEDIATION AS A FACILITATOR OF ACCESS TO LEGAL SYSTEM AND RULE OF LAW.

2.1. Introduction

Chapter one contained a general overview of the adoption of Court Annexed Mediation by Kenya's Judiciary as a means of expediting Access to legal system. It laid down the statement of the problem, the legal theories employed, the justification of the study, literature review and the research methodology to be adopted in the study. This chapter comprises an analysis of the concept of mediation as a facilitator of Access to legal system and rule of law. The chapter demystifies the concepts of Access to legal system, rule of law and mediation. It discusses the approaches to mediation in the legal and political aspects. It appraises the forms, attributes and demerits of mediation as well as the principles of the mediation process. It introduces the concept of Court Annexed Mediation also referred to as mandatory mediation in other jurisdictions. This chapter advance the argument that mediation is a dispute resolution mechanism that albeit structurally different is functionally equivalent and effective as litigation in many respects.

2.2.Concept of Justice and Access to legal system

Galanter reckoned that justice does not exist solely in the arena of formal legal proceedings, nor does it exist solely in the realm of negotiation.[1] It is therefore paramount to appreciate the idea of justice in the formal justice system as well how it can be incorporated into the informal justice system. Justice had been construed in diverse ways with no singular conclusive definition.[2] For some, justice ought to be perceived in terms of retribution and restoration[3], others view it in terms of fairness[4].For others like Boulle, justice ought to be measured in terms of the speed of resolution of a dispute, the responsiveness level of the process, informality of the setting and the accessibility of those processes.[5]

[1] Marc Galanter, 'Worlds of Deals: Using Negotiation to Teach about Legal Process' (1984) 34 Journal of Legal Education 268.
[2] T Sourdin, 'Alternative Dispute Resolution (Pp. 1-490)' [2008] Thomson Lawbook Company.
[3] Allan Edward Barsky, *Conflict Resolution for the Helping Professions* (Thomson Brooks/Cole 2007).
[4] Isabelle R Gunning, 'Know Justice, Know Peace: Further Reflections on Justice, Equality and Impartiality in Settlement Oriented and Transformative Mediations' (2004) 5 No. 2 Cardozo Journal of Conflict Resolution 87.
[5] Laurence Boulle and Allan Rycrof, 'Mediation: Principles, Process, Practice' (1998) 1998 Journal of South African Law 167.

Justice in the formal judicial system has been viewed in two aspects i.e. procedural and substantive justice.[6] Thus justice in formal court systems invoking rights and duties on a dispute and resolving it based on the rule of law. This approach however may not fit in when it comes to informal or Mechanism for alternative dispute resolutions for instance mediation since parties may choose a settlement mechanism based on their own values and needs.[7] As such mediation has been termed as individualised justice due to parties fashioning their own ideas of justice which satisfies their desired outcomes.[8] Thus the notion of justice may vary from individual to individual and may be influenced by factors such as shared and individual values.

2.2.1. Procedural Justice

This has been described as the perception of fairness created when the procedures through which certain outcomes are achieved.[9] It involves the application of fair procedures which culminate in what may be perceived as fair outcomes in dispute management processes.[10] Procedural justice has been said to be composed of both subjective and objective values. Subjective procedural justice is said to be derived from the parties' personal assessment and perceptions.[11] On the other hand objective procedural justice is said to be derive through the application of safeguards in conformity with certain normative standards of justice.[12] This may manifest through acts such as being informed in advance and sufficient detail of the claim made against a litigant and the right to put forward a defence.[13] Other attributes of procedural justice include: the right to have one's case heard by an independent tribunal; right to be given reason for a decision reached and to be availed

[6] JW Twyford, 'Is the Mediation Process Just?' [2005] Construction Information Quarterly.
[7] Jean R Sternlight, 'Dispute Resolution and the Quest for Justice' (2007) 14 Dispute Resolution Magazine 12.
[8] Jacqueline M Nolan-Haley, 'Court Mediation and the Search for Justice through Law' (1996) 74 Washington University Law Quarterly 47.
[9] Tom R Tyler and E Allan Lind, 'Procedural Justice' in Joseph Sanders and V Lee Hamilton (eds), *Handbook of Justice Research in Law* (Springer US 2001) <https://doi.org/10.1007/0-306-47379-8_3> accessed 5 November 2021.
[10] Jill Howieson, 'Procedural Justice in Mediation: An Empirical Study and a Practical Example' (2002) 5 ADR Bulletin 109.
[11] Tom R Tyler, 'Psychological Models of the Justice Motive: Antecedents of Distributive and Procedural Justice' (1994) 67 Journal of Personality and Social Psychology 850.
[12] E Allan Lind and Tom R Tyler, *The Social Psychology of Procedural Justice* (Springer Science & Business Media 1988).
[13] E Patrick McDermott and Arthur Eliot Berkeley, *Alternative Dispute Resolution in the Workplace: Concepts and Techniques for Human Resource Executives and Their Counsel* (Greenwood Publishing Group 1996).

the fright to appeal.[14] Procedural Justice has largely been viewed as being most relevant in formal justice systems since in informal justice mechanisms such as mediation, the parties retain control over the settlement terms, which they can change at any moment if they are unhappy with them.[15]

2.2.2. Distributive Justice

The focus of distributive justice is on perceptions created by outcomes and where there is a feeling of fairness and satisfaction.[16] Distributive justice posits that parties' satisfaction is enhanced when they perceive the outcome of an adjudication process to have been fair.[17] Three key indicators of distributive justice have been identified, these are: equity, equality and need.[18] Equity principle is to the effect that the benefits accruing to a party should be proportionate to their contribution while equality is to the effect that everyone is entitled to the benefits of the outcome. On the other hand the needs principle posits that the needs of individuals depending on their ability to harness basic resources required for their well-being.[19] Distributive justice also focusses on the recipient's perceived fairness of outcome. Thus there exist a feeling of denial or injustice when what is received falls way below what was expected by parties to a dispute.[20] Therefore the manner in which disputants are treated determines their perception of fairness of the entire process.

2.3.Access to legal system in Kenya

Article 2 of Kenya's 2010 Constitution applies the principle of access to the legal system as established by international instruments to the Kenyan environment, stating that every treaty or convention accepted by Kenya becomes part of Kenyan law.[21] Further under article 48, Access to legal system for all persons is guaranteed. Efforts have been placed to enhance capacity of Kenyans

[14] Jessica Katz Jameson, 'Toward a Comprehensive Model for the Assessment and Management of Intraorganizational Conflict: Developing the Framework' (1999) 10 International Journal of Conflict Management 268.
[15] Nancy A Welsh, 'Making Deals in Court-Connected Mediation: What's Justice Got To Do with It' (2001) 79 Washington University Law Quarterly 787.
[16] Morton Deutsch, Peter T Coleman and Eric C Marcus, *The Handbook of Conflict Resolution: Theory and Practice* (John Wiley & Sons 2011).
[17] Tina Nabatchi, Lisa Blomgren Bingham and David H Good, 'Organizational Justice and Workplace Mediation: A Six-factor Model' (2007) 18 International Journal of Conflict Management 148.
[18] Deutsch, Coleman and Marcus (n 16).
[19] Noah Lewin-Epstein, Amit Kaplan and Asaf Levanon, 'Distributive Justice and Attitudes Toward the Welfare State' (2003) 16 Social Justice Research 1.
[20] Deutsch, Coleman and Marcus (n 16).
[21] The Constitution of Kenya, 2010. Art 2 (6).

to claim and access justice through raising awareness on constitutional rights and freedoms. Ignorance and limited understanding has been identified as a major impediment of Access to legal system among the uneducated and vulnerable members of the population.[22] The Kenyan Judiciary is entrusted with judicial functions and is formed under Chapter 10 of the Constitution. The administration of justice without undue concern for procedural technicalities, as well as the protection and promotion of the Constitution's goals and ideals, are among the guiding principles in the exercise of judicial authorities.[23] The Judiciary facilitates access to legal system through providing independent, accessible and responsive solution to disputes.[24]

Access to legal system has been said to be the means with which regular persons can use legal institutions and procedures to settle their problems is exemplified. That human rights would be meaningless in the absence of effective mechanisms of seeking redress. In this regard some of the enablers of Access to legal system include: fair and accessible laws both on form and language; availability of effective, affordable and accessible mechanisms for seeking justice; fairness in the outcomes of dispute resolution processes; knowledge of the existence and use of legal systems and institutions in place.[25]

2.4.1 Enhancing mechanisms for broader Access to legal system

According to a study conducted by Mbote & Migai, [26] while access to the legal system is required for the rule of law ideal to be realized, many Kenyans are uninformed of their basic rights, and courts are not structured in a way that provides for equal access to the legal system. They cite the high fees chargeable to access legal services making legal services unaffordable to the ordinary citizen. They lament the minimum legal aid offered by government which only come in the form of representation for persons charged with capital offences and legal aid for child offenders who do not have any other recourse. The study recommended the institutionalization of Mechanism for

[22] Patricia Kameri-Mbote and JM Migai Akech, *Kenya: Justice Sector and the Rule of Law: A Review by AfriMAP and the Open Society Initiative for Eastern Africa* (Open Society Initiative for Eastern Africa 2011).
[23] The Constitution of Kenya, 2010. Art 159.
[24] The Judiciary of Kenya, 'Judiciary Transformation Framework (JTF) 2012-2016' <https://www.Judiciary.go.ke/Judiciary-transformation-frameworkjtf-2012-2016/> accessed 5 November 2020.
[25] Kenya National Commission on Human Rights (KNHCR), 'The Fourth State of Human Rights Report, Post Promulgation 2010-2014: Human Rights the Elusive Mirage' <http://www.knchr.org/Portals/0/StateOfHumanRightsReports/4th%20SHR%20Report.pdf> accessed 5 November 2020.
[26] Kameri-Mbote and Akech (n 22).

alternative dispute resolutions to ease pressure on courts and reduce backlog of cases and promote expeditious resolution of disputes.

2.5.Concept of Rule of Law

There is no universal definition of the concept of rule of law as various scholars have given the concept a variety of definitions. However, there seems to be a common consensus among the various theorists that at the bare minimum the definition of rule of law should encompass the rule that every person including the government is accountable to the law. The United Nations in 2004, developed a working definition of rule of law as follows:

"All public and private individuals, institutions, and enterprises, including the state, are held accountable to laws that are openly proclaimed, equally enforced, and independently judged, and that are consistent with international human rights norms and standards. It also necessitates measures to ensure adherence to the supremacy of the law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness, and procedural and legal transparency."[27]

The UN definition incorporates both procedural and substantive elements. It expounds on the following broad elements: Accountability, which is to the effect that irrespective of the position held by a person, whoever violates the rights of another, they shall be held to account either through formal justice or informal justice mechanisms; Participation in decision making which involves availing citizens an opportunity of directly taking part in legislative and administrative within the society and in so doing enhance the legitimacy of government actions as well as improving general compliance with the law; Separation of powers among the three arms of government with the roles of each arm being clearly defined; Access to legal system meaning that every citizen should have Access to legal system mechanisms through which to seek redress, and that citizens ought to be aware of their rights and obligations in order to seek redress.[28]

[27] United Nations Security Council, Rule of Law and Transitional Justice,"4.
[28] Vivienne O'Connor, 'Defining the Rule of Law and Related Concepts' (Social Science Research Network 2015) SSRN Scholarly Paper ID 2665650 <https://papers.ssrn.com/abstract=2665650> accessed 5 November 2020.

2.5.1. Rule of law and Human Rights

The rule of law and promotion of human rights have been said to be inextricably woven concepts in the modern society and that the two concepts contemporaneously exist to complement each other and assist societies in balancing between collective and individual interests.[29] As a matter of law, human rights are said to be traceable to treaties and conventions entered into by independent states and the ratification of a convention or treaty by states makes them liable to be bound by its terms.[30] Consequently states have an obligation to align their domestic legislation with international law where applicable.[31] However, where a conflict arises between domestic practice and international obligations, whereas domestic law will take precedence, the state actors should bear in mind serious violation of human rights may make them susceptible to international criminal liability.

Though not a treaty, the UDHR (United Nations Declaration on Human Rights) declared in 1948 provides the foundation for the view that the United Nations founding fathers placed human rights at the pillar of global freedom, justice, and peace.[32] The Universal Declaration of Human Rights (UDHR) gave rise to two key treaties: the International Covenant on Civil and Political Rights (ICCPR) (1976) and the International Covenant on Economic, Social, and Cultural Rights (ICESR) (1976). The two agreements define human rights and lay the groundwork for future international, regional, and national conventions, treaties, norms, and principles.[33]

The Convention on the Rights of the Child (CRC)[34], was the first legally enforceable international treaty to include the whole range of human rights: civil, cultural, economic, political, and social. The Convention's goal is to ensure that all children's rights are recognized and realized around the world. It is an unique pact that has been ratified by almost every member of the international

[29] Leanne McKay and others, 'Toward a Rule of Law Culture: Exploring Effective Responses to Justice and Security Challenges' GSDRC <https://gsdrc.org/document-library/toward-a-rule-of-law-culture-exploring-effective-responses-to-justice-and-security-challenges/> accessed 5 November 2020.

[30] ibid.

[31] ibid.

[32] The United Nations General Assembly (UNGA) adopted the Universal Declaration of Human Rights (UDHR) to further the purposes and principles of the UN. The UDHR document outlines 30 universally guaranteed human rights.

[33] The ICCPR was adopted on December 16th 1966 by UNGA after 15 years of deliberations. It came into force in 1976 with 76 member states.

[34] The United Nations General Assembly (UNGA) adopted the Convention on the Rights of the Child (CRC) in 1989. It entered into force in 1990.

community.[35] Further the international community member states have undertaken to domesticate the provision of the CRC in their respective national, legislative, administrative and judicial measures.

Though Kenya has had a chequered history on human rights violations, it has been steadfast in ratifying international instruments on Human rights. For instance, shortly after Independence it signed ICCPR and later ratified it in 1992 and in the same year it ratified the African Charter on Human and Peoples' Rights; in 2000, it ratified the Children's Charter; and in 2010, it ratified the Maputo Protocol. The international obligations included in these documents were also incorporated into Kenya's 2010 Constitution.[36] and other domestic legislations.

2.6. Children's vulnerability in Kenya's legal system

The Special Task Force on Children Matters, according to a report by the National Council on the Administration of Justice (NCAJ)[37], one of the findings was that there exists a disconnect between the law in theory as against the law in practice. This disconnect has worked to the detriment of children in the justice system. The NCAJ study revealed that majority of the children's cases handled by the Judiciary relate to sexual offences. These cases were established to take a long time to resolve owing to a myriad of issues including insufficient judicial staff and backlog of cases.[38]

The state has main responsibility for the care and protection of children, according to Kenya's 2010 Constitution.[39] Children who are involved with the court system are divided into two groups: those who are victims of crime and those who are perpetrators of crime. Children who have committed crimes or who require care and protection.[40] In place of "children in conflict with the law," as used in international treaties and conventions, the Children's' Act utilizes the phrase "Child Offender"

[35] The Convention has been adopted by the Optional Protocol on the sale of children, child prostitution and child Pornography. In 2011 a third Optional Protocol which allows children whose rights have been violated to Complain directly to the UN Committee on the rights of the child was passed.

[36] Article 2(6) of the Constitution provides that any treaty or convention ratified by Kenya shall, form part of the Law of Kenya.

[37] The National Council on the Administration of Justice (NCAJ) Special Task Force on Children Matters, 'Status Report on Children in the Justice System in Kenya' (2019) <https://ncaj.go.ke/wp-content/uploads/2019/11/NCAJ-Report-Digital-Version.pdf> accessed 5 November 2020.

[38] ibid.

[39] The Constitution of Kenya, 2010. Art 53.

[40] Section 119, The Children's Act (2001) defines a child offender as a person below the age of 18 years who has Been accused or punished for being in contravention of any law in Kenya.

to characterize children offenders. In general, children in need of care and protection are vulnerable to abuse, cruelty, neglect, violence, and human rights violations.[41] The Constitution, the Children's Act, international treaties, conventions, policies and procedure all entrench the principle of best interest as being of paramount importance.[42] These legal instruments contain protections such as the right not to be held, the right to legal representation if the minor is unrepresented, and the right to have their cases resolved quickly. [43]

2.7.The Concept of Mediation

There seems to be no universally accepted definition of the term 'mediation' owing to fact that it can be used in different contexts.[44] Mediation is a process in which a neutral third party, referred to as a mediator, supports a consensual solution among disputants without necessarily rendering a verdict, according to one popular definition.[45] A mediator on its part has been defined as one who intervenes between conflicting parties with the aim of offering a solution or facilitating mutual concessions by the parties.[46] A mediator lacks authoritative decision making authority to compel parties to a specific resolution but simply facilitates them in reaching a decision.[47] According to Ponte, mediation is a private voluntary process in which a third neutral party presides over negotiations of disputing parties to reach a contractually binding settlement.[48] Mediation is thus an ADR mechanism in which an unbiased third party employs their skill and experience to bring warring parties to consensus in a dispute. It is noteworthy that in mediation, it is the parties themselves who determine the agreement rather than the third party.[49] According to Greenhouse, mediation is a laxer mode of dispute resolution mechanism when compared to litigation as it is

[41] Annex C, Children's Act contains a list of children requiring care and protection.
[42] The Constitution of Kenya, 2010. Art 53 (2); Children Act No. 8 of 2001 s 4 (2).
[43] Sec 4(3) of the Children's Act obligates judicial and administrative institutions when exercising their powers Under the Act to treat interests of the child as of paramount consideration.
[44] Michael L Moffitt and Andrea Kupfer Schneider, *Dispute Resolution* (Wolters Kluwer Law and Business 2014).
[45] Carrie Menkel-Meadow, 'Mediation, Arbitration, and Alternative Dispute Resolution (ADR)' (Social Science Research Network 2015) SSRN Scholarly Paper ID 2608140 <https://papers.ssrn.com/abstract=2608140> accessed 4 November 2020.
[46] Marvin C Ott, 'Mediation as a Method of Conflict Resolution: Two Cases' (1972) 26 International Organization 595.
[47] Christopher W Moore, *The Mediation Process: Practical Strategies for Resolving Conflict* (John Wiley & Sons 2014).
[48] Lucille M Ponte and Thomas D Cavenagh, *Alternative Dispute Resolution in Business* (Dame Publications 1999).
[49] Jelis Subhan, 'Arbitration Conciliation and Mediation- Conflict between Formal and Informal Setups' (Social Science Research Network 2010) SSRN Scholarly Paper ID 2145187 <https://papers.ssrn.com/abstract=2145187> accessed 5 November 2020.

conciliatory, therapeutic and more flexible in both substantive and procedural aspects.[50] Mediation is most applied where conflicting parties have tried negotiations but have failed to find a breakthrough, they thus invite a third party to assist with the negotiation with the hope of breaking the gridlock.[51] The underlying principles of mediation is therefore a conflict resolution mechanism which is informal, confidential and consensual whereby a third party divested with decision making authority strives to unite conflicting parties.[52]

2.7.1. Development of Mediation mechanism

Whereas historically, arbitration has been the most common Mechanism for alternative dispute resolution, mediation seem to be gaining momentum. The attraction for the use of mediation seem to have arisen out of the non-adversarial approach adopted in mediation, which ultimately preserves the amicable relationship between parties to a dispute.[53]

The first roots of mediation as an ADR mechanism is traceable to Confucian ethics in China, which advocated for non-disruption of natural harmony and taught that adversarial proceedings were undesirable.[54] The Chinese viewed conflict as a necessary undesirable evil which mediation stepped in to remedy. Chinese folk term for a mediator is *Shuo he ze* which refers to a person who uses harmonious words to seal interpersonal relationships.[55] The Chinese mediator doubled up as a counsellor, educator, pacifier, arbitrator, negotiator, consultant and therapist. The mediator was thus regarded by the Chinese society as an authority in the community.[56]

[50] Carol J Greenhouse, 'Mediation: A Comparative Approach' (1985) 20 Man 90.
[51] D Kariuki Muigua, 'Resolving Environmental Conflicts through Mediation in Kenya' (Thesis, University of Nairobi 2011) <http://erepository.uonbi.ac.ke/handle/11295/16130> accessed 29 November 2019.
[52] Mordehai (Moti) Mironi, 'From Mediation to Settlement and from Settlement to Final Offer Arbitration: An Analysis of Transnational Business Dispute Mediation' (2007) 73 Arbitration: The International Journal of Arbitration, Mediation and Dispute Management <https://kluwerlawonline.com/journalarticle/Arbitration:+The+International+Journal+of+Arbitration,+Mediation+and+Dispute+Management/73.1/AMDM2007006> accessed 5 November 2021.
[53] Ponte and Cavenagh (n 48).
[54] Borut Strazisar, 'Alternative Dispute Resolution' [2018] Law. Journal of the Higher School of Economics 214.
[55] Carrie Menkel-Meadow, 'Ethics Issues in Arbitration and Related Dispute Resolution Processes: What's Happening and What's Not' (2001) 56 University of Miami Law Review 949.
[56] ibid.

The attraction to Mechanism for alternative dispute resolutions in modern international trade is attributable to speed and lack of technicalities in the resolution of disputes.[57] Modern industry and commerce is interested with a fast, non-expensive and efficient dispute resolution system. Judicial systems has been viewed as being overwhelmed by civil procedure rules obsessed with parties rights and that are time and money consuming.[58] The existing legal foundation for alternative dispute resolution may be traced back to the Geneva Protocol of 1923 and the Geneva Convention of 1927, which culminated in the United Nations Convention on the Recognition and Enforcement of Foreign Awards (1958), often known as the New York Convention. Following that, the UNCITRAL Arbitration Rules (1976) and UNCITRAL Model Law were enacted (1985).[59]

Disputes were avoided at all costs in traditional Africa, and if they did arise, institutions and methods were put in place to resolve them. Mediation was once one of the most common methods for resolving disputes.[60] This mediation manifested itself in traditional mechanisms such as the *Ubuntu* system in South Africa.[61]

2.7.2. Mediation distinguished from other forms of ADR

2.7.2.1.Negotiation and Arbitration

The term negotiation is derived from the Latin terms '*neg'* meaning not and '*otium'* meaning leisure or ease. The term negotiation can therefore be interpreted to mean inherent tension within the activity.[62] Negotiation, according to Walton and McKersie, is the intentional interaction of two or more social units aiming to define or renegotiate the parameters of their dependency.[63] The

[57] John Walton and David AR Williams, 'Costs and Access to International Arbitration' (2014) 80 Arbitration: The International Journal of Arbitration, Mediation and Dispute Management <https://kluwerlawonline.com/journalarticle/Arbitration:+The+International+Journal+of+Arbitration, +Mediation+and+Dispute+Management/80.4/AMDM2014065> accessed 5 November 2020.
[58] ibid.
[59] Gary Born and Wendy Miles, 'Global Trends in International Arbitration' <https://biblioteca.cejamericas.org/handle/2015/812?show=full> accessed 26 June 2020.
[60] Kariuki Muigua, 'Reflections on the Use of Mediation for Access to Justice in Kenya: Maximising on the Benefits of Mediation' <http://kmco.co.ke/wp-content/uploads/2018/08/Reflections-on-the-Use-of-Mediation-for-Access-to-Justice-in-Kenya-Maximising-on-the-Benefits-of-Mediation-Kariuki-Muigua-14th-June-2018-1.pdf> accessed 19 July 2020.
[61] Katama Mkangi, 'Indigenous Social Mechanisms of Conflict Resolution in Kenya: A Contextualized Paradigm for Examining Conflict in Africa' [1997] Nairobi: University of Nairobi.
[62] Jonathan R Cohen, 'Adversaries? Partners? How about Counterparts? On Metaphors in the Practice and Teaching of Negotiation and Dispute Resolution' (2003) 20 Conflict Resolution Quarterly 433.
[63] R Walton and R McKersie, *A Behavioural Theory of Labour Negotiations. Beverly Hills* (Sage Publications 1965).

ultimate goal of mediation should not be to defeat one's opponent, but rather to achieve one's goals. Negotiation involves give and take and is therefore not an outright competition, it involves building partnerships instead of adversaries.[64] According to Marc Galantor, negotiation ought not to be viewed as an Mechanism for alternative dispute resolution as this would imply that negotiation is a new phenomenon that is irregular and has not been proven. Galantor points out that negotiation should always be viewed as being part of litigation process.[65] At the core of negotiation process are the parties' interests, expectations and concessions' limits.

Mediation, on the other hand, entails "resolving a dispute or controversy by appointing an independent person between two disputing parties to assist them in resolving their differences.".[66] Mediation is traceable to Mediaeval Latin term *mediationem* which refers to 'a division in the middle'.[67] Mediation has gained traction in International Law as a proper channel of promoting peace among nations. [68] Ideally a mediator lacks social legitimate authority to make a decision but his obligation is to settle a dispute. Further mediation exercise ought to be viewed as an extension of negotiation process that mediation oscillates between bargaining and therapy.[69] Mediators are meant to be independent with the primary objective of assisting disputing parties to: improve communication among them; identify and better understand the nature of dispute between them and propose plausible solutions to the parties.[70] In analyzing the parties involved in a dispute, mediators should be liberal, open-minded, objective, and impartial, rather than having preset or established beliefs on how a dispute should be settled. An impartial mediator should free himself of strong feelings, attitude and biasness in the mediation process.[71] The overall emphasis of mediation is not so much on who is right or wrong but rather establishing some degree of compromise that each party will feel contended.[72] Both Mediation and Negotiation seem to follow the same logic, i.e. the aim of reaching a new agreement acceptable to both parties to a dispute

[64] Cohen (n 62).
[65] Galanter (n 1).
[66] Jeffrey Lehman and Shirelle Phelps, 'West's Encyclopedia of American Law. 2005' Print book: English:
[67] Douglas R Harper, *Online Etymology Dictionary* (D Harper 2001).
[68] Strazisar (n 54).
[69] Susan S Silbey and Sally E Merry, 'Mediator Settlement Strategies' (1986) 8 Law & Policy 7.
[70] Moore (n 47).
[71] Sara Cobb and Janet Rifkin, 'Practice and Paradox: Deconstructing Neutrality in Mediation' (1991) 16 Law & Social Inquiry 35.
[72] Leonard L Riskin, 'Mediation and Lawyers' (1982) 43 Ohio State Law Journal 29.

while pushing the strict legal norms aside. The goal in both mediation and negotiation is finding of ways for resolution of an existing conflict rather than legally protecting interests.[73]

2.7.2.2.Mediation and Arbitration

Arbitration on its part is traceable to the Latin term *Arbitrari* which refers to "decision by one's own discretion or judgment".[74] It is a private adjudication process in which the parties to a dispute choose an arbitrator as a decision maker, and the arbitrator's rules of procedure are defined by the parties.[75] Arbitration is viewed in many ways as an effective version of litigation via private courts. Arbitral courts adopt simplified court procedures which make them more effective, efficient and cheaper than the ordinary courts. Despite the many similarities with court litigation, arbitration has distinctive differences from litigation, for instance in arbitration the parties craft their own rules and control the process as well as choosing their own judges. Further and historically, parties preferred their disputes being resolved by employing customs and norms rather than laws.[76] Opponents of arbitration view it as a means of compelling parties to a contract to use arbitration due to an arbitration clause in a standard contract that a party did not fully comprehend or consent to.[77] As a result, arbitration is a compromise in which disputing parties agree to forego the advantages and hazards of formal litigation in return for the benefits and risks of less formal conflict settlement.[78] Arbitration is distinguishable from mediation in which an independent party oversees the solving of conflicts. Despite the fact that arbitration has remained the most popular ADR process outside of the courtroom due to the growth of arbitration contract clauses, mediation is steadily gaining favour due to its non-adversarial approach to conflict settlement.[79]

[73] Strazisar (n 54).
[74] Mark Godfrey, 'Arbitration in the Us Commune and Scots Law' (2004) 2 Roman Legal Tradition 122.
[75] Strazisar (n 54).
[76] Sarah Rudolph Cole, 'Curbing the Runaway Arbitrator in Commercial Arbitration: Making Exceeding the Powers Count' (2016) 68 Alabama Law Review 179.
[77] Strazisar (n 54).
[78] Richard C Reuben, 'First Options, Consent to Arbitration, and the Demise of Separability: Restoring Access to Justice for Contracts with Arbitration Provisions' (2003) 56 SMU Law Review 819.
[79] Ponte and Cavenagh (n 48).

2.7.3. Approaches to Mediation

There are two theories from which mediation can be approached i.e. mediation in the legal perspective and mediation in political standpoint.

2.7.3.1.Mediation in the political process

Mediation in the political process is characterised by: voluntariness by the parties to engage in mediation exercise; the autonomy of the parties during the whole process until the outcome and willingness to be bound by the outcome of the mediation. According to Bercovitch, the conduct of the parties in committing themselves to the exercise is an indicator that the parties are desirous of amicably resolving the dispute and further that if only one party shows commitment, then the chances of success are minimal.[80]

Mediation in the political perspective is founded on resolution. A resolution in this context is understood to mean the repair of a previously existing relationship to a satisfaction of each party. According to Cloke, conflicts are a result of non-fulfilment of the needs of conflicting parties in the society and that conflicts are overcome through resolution whereby mediation is used to satisfy the mutual needs of the disputing parties and address the main causes of the conflict.[81] According to Muigua, what drives mediation in the political process to lead to a resolution is the party autonomy and voluntariness of the mediation process.[82] That voluntariness exists where both parties have the freedom to make real choices based on their participation in the process. He further avers that true mediation is mediation in the political sense as it leads to resolution of disputes owing to its many attributes of mediation.[83] Galligan asserts that the hallmark of voluntariness lies in the parties' knowledge of the options available to them, their willingness to participate and grace to accept the compromise reached.[84] Thus mediation in the political process does not depend on

[80] Jacob Bercovitch, 'Mediation Success or Failure: A Search for the Elusive Criteria' (2005) 7 Cardozo Journal of Conflict Resolution 289.
[81] Kenneth Cloke, 'The Culture of Mediation: Settlement vs. Resolution' [2005] The Conflict Resolution Information Source.
[82] Muigua, 'Resolving Environmental Conflicts through Mediation in Kenya' (n 51).
[83] ibid.
[84] DJ Galligan, *Due Process and Fair Procedures: A Study of Administrative Procedures* (Oxford University Press UK 1996).

coercion or enforcement but on common consensus to reach a lasting solution and avoid similar conflict in future.[85]

2.7.3.2. Mediation in the legal process

This form of mediation comes about when parties to a dispute are compelled to mediate arrive at a consensus over their dispute without necessarily being given the latitude to choose the mediator nor to dictate the mediation process.[86] Mediation in the legal process is concerned more with the issues in dispute rather than the warring parties to the dispute. As such the voluntariness of the parties as well as their autonomy is omitted .For instance in Court Annexed Mediation, the mediation process is pursuant to a court order with the outcome, commonly known as settlement being returned to court for ratification.[87] Mediation in the legal process unlike the political process lacks the full consent of the parties and the outcome may not be mutually acceptable by the parties and may lead to more controversy.

Mediation in the legal process has often been faulted as not being true mediation owing to its lack of autonomy from the judicial process, which by subjecting mediation results to court processes, there is failure to appreciate the epistemology of mediation.[88] Other salient features often associated with mediation in the legal process are: the lack of autonomy over the forum of conducting mediation; lack of mutual satisfaction and failure to address root causes of the dispute.[89] As such it has been likened to arbitration as it produces a settlement instead of a resolution which is the ideal aim of mediation. This study shall appraise Court Annexed Mediation which falls under the category of mediation in the legal process to establish its strengths and shortcomings.

2.7.4. Attributes and merits of Mediation

From the diverse definitions of mediation, it is apparent that one of critical hallmarks of mediation is the voluntariness of the parties to participate in the process. The parties also control the process

[85] Bercovitch (n 80).
[86] ibid.
[87] Makumi Mwagiru, 'Conflict: Theory, Processes and Institutions of Management' <http://erepository.uonbi.ac.ke/handle/11295/27178> accessed 5 November 2020.
[88] John North, 'Court Annexed Mediation In Australia–An Overview', *Speech given at the Malaysian Law Conference* (2005).
[89] Muigua, 'Resolving Environmental Conflicts through Mediation in Kenya' (n 51).

up to the resolution. Owing to the voluntary nature of mediation process, it follows then that the parties and even the mediator are at liberty to leave the process at any stage. The mediator may halt the process for ethical considerations or other reasons while the parties may opt out for dissatisfaction with the process. Where the process proceeds to the end, the resolution is validated and ratified by the courts.[90]

Unlike arbitration, mediation is not adversarial in nature, the parties are not referred to as plaintiffs or defendants and it not the mediator's obligation to the right and wrong party.[91] It is also possible to maintain parties' relations during and after the mediation exercise since the resolution is by consent and none of the parties feels a loser.[92]

There is flexibility in mediation in that parties are at liberty to determine the processes to be followed by the mediator in accordance with their needs. These preferences include choice of venue to conduct the mediation, the time frame and the desired objectives.[93] As compared to litigation and other ADR mechanisms, mediation is less costly as the parties chose their convenient approach to the exercise. Further unlike other adjudicative processes, mediation does not employ extensive use of expert witness which consequently reduces costs associated with facilitating expert witness.[94]

Mediation offers parties the freedom to present their arguments in an informal manner without stickling to the rules of procedure synonymous with litigation. Further the parties are not restricted to facts and evidence but can also express their emotions and feelings which may be beneficial in reaching amicable resolutions.[95] Mediation offers an array of options in settlement of options only limited to the consent of the parties. As such mediation allows parties to choose from a variety of remedies, which remedies may be non-economic.[96] Further where parties have subjected

[90] Yona Shamir, 'Alternative Dispute Resolution Approaches and Their Application' [2016] Biblioteca <https://biblioteca.cejamericas.org/handle/2015/721> accessed 20 September 2020.
[91] Ivan Bernier and Nathalie Latulippe, *The International Convention on the Protection and Promotion of the Diversity of Cultural Expressions: Conciliation as a Dispute Resolution Method in the Cultural Sector* (2007).
[92] Shamir (n 90).
[93] ibid.
[94] Ponte and Cavenagh (n 48).
[95] Shamir (n 90).
[96] ibid.

themselves to mediation does not preclude them from exploring other dispute resolution mechanisms including litigation.

Parties often prefer mediation due to the confidentiality it offers. This is unlike litigation where proceedings are mostly held with the participation of members of the public. Correspondences in mediation are made in private which may allow parties to be candid hence arrive at a quick resolution.[97]

2.7.5. Demerits of Mediation

Mediation also suffers from its share of disadvantages. Firstly, mediation lacks the evidentiary rules and formalised procedures which are applicable in litigation and even arbitration which are meant to protect parties and ensure fairness.[98] As such mediation has also been criticized for being unpredictable, unreliable and lacking in consistency due to the lack of standardized rules.

Resolutions arrived at out of mediation lack an appeal process. Since mediation exercises are confidential, most of the time there are no records of the proceedings and as such where one party later disown a resolution, it is impossible to appeal to higher body.[99]

2.8. Court Annexed Mediation

The Kenyan Constitution of 2010 incorporated the concept of alternative dispute resolution, such as mediation, reconciliation, and arbitration, as well as acknowledging and fostering the use of traditional dispute resolution processes, into Kenya's legal system.[100] Since then, Kenya's Civil Procedure Act has been updated to include Court Annexed Mediation. Mediation is defined as "an informal and non-adversarial process in which an impartial mediator encourages and facilitates the resolution of a dispute between two or more parties, but does not include attempts by a court to mediate a dispute during legal processes connected thereto." [101]

[97] Mary F Radford, 'Advantages and Disadvantages of Mediation in Probate, Trust, and Guardianship Matters' (2000) 1 Pepperdine Dispute Resolution Law Journal 241.
[98] Ponte and Cavenagh (n 48).
[99] ibid.
[100] The Constitution of Kenya, 2010. Art 59 (2).
[101] Civil Procedure Act 2012 s 2.

As previously described that mediation involves negotiation with the aid of a third, in the context of court assisted mediation, a mediator appointed by the court acts as the third party. The court appointed mediator simply facilitates the parties to negotiate but do not dictate the outcome of the mediation.[102] In Court Annexed Mediation, parties have limited freedom in the choice of the mediator as the court appoints one from its pool of accredited mediators.

2.8.1. Nature of Court Annexed Mediation

Court Assisted Mediation in Kenya is carried out pursuant to Mediation Rules.[103] Under the mediation rules, the resolution reached after the mediation process must be reduced into writing and registered with the court which referred the matter to mediation. Such a resolution is deemed to be enforceable as though it was a judgment of a court and no appeal shall lie from such agreement.[104] Informal mediation, i.e. mediation that is completed orally, is not covered by the Civil Procedure Act amendment. In contrast to traditional informal mediation, the mediation regulations appear to steer Court Annexed Mediation toward a western perspective.[105] The courts play a significant duty in execution of Court Annexed Mediation i.e. if it is of the opinion that a matter ought to be mediated, it shall order matters filed in court to be transferred to mediation platform. This feature in essence negates one of the fundamental elements of mediation which is voluntariness.

2.8.2. Mandatory mediation in foreign jurisdictions

There are several jurisdictions that have made mediation mandatory, for instance in the UK, where a matter has been referred to mediation, party who fails to attend mediation is penalized by being condemned to pay costs for both parties in litigation.[106] Whereas some commentators have hailed mandatory as the much awaited change in civil justice system, it has similarly attracted criticism from those who hold the view that mediation in its very nature ought to be voluntary at all times.[107]

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[102] Muigua, 'Resolving Environmental Conflicts through Mediation in Kenya' (n 51).
[103] Kenya Gazette, Vol CXVII-No 17, Gazette Notice No 1088. 2015 s 348.
[104] Kenya Gazette, Vol CXVII-No 17, Gazette Notice No 1088.
[105] Kariuki Muigua, *Court Sanctioned Mediation in Kenya-An Appraisal* <http://kmco.co.ke/wp-content/uploads/2018/08/Court-Sanctioned-Mediation-in-Kenya-An-Appraisal-By-Kariuki-Muigua.pdf> accessed 17 June 2021.
[106] Jacqueline Nolan-Haley, 'Mediation Exceptionality' (2009) 78 Fordham Law Review 1247.
[107] Dorcas Quek, 'Mandatory Mediation: An Oxymoron - Examining the Feasibility of Implementing a Court-Mandated Mediation Program' (2009) 11 Cardozo Journal of Conflict Resolution 479.

It is argued that mediation in its definition and nature implies the concept of voluntariness which is taken away by the aspect of compulsory mediation which denies disputing parties the freedom to choose their own dispute resolution mechanism.[108] In ***Dunnett vs. Railtrack Plc***[109]**,** whereas the parties were encouraged to mediate, it turned out that the encouragement was more of a compulsion as it was the court reiterated that a successful claimant could be denied costs that would have been awarded otherwise for refusing to mediate. Some scholars have argued that compulsory mediation violates the European Human Rights Convention on the right to access justice. This proposition gained support in the case of **Halsey vs. Milton Keynes Gen. NHS Trust,**[110] where LJ Dyson was of the opinion that ordering mandatory mediation violates the fundamental right to access justice by abrogating one's freedom to seek justice.

Mandatory mediation implementation differs by state in the United States of America. In 1990, Congress passed the Civil Justice Reform Act (CJRA), which required each US District Court to consider principles that promote litigation management, reduce costs and delays, and allow the District Court to refer appropriate cases to alternative dispute resolution programs, such as mediation.[111] The Alternative Conflict Resolution Act of 1998 (ADR Act) was enacted as a result, allowing District Courts to use alternative dispute resolution techniques. [112]

California for instance became the first state to enact legislation calling for mediation in disputes where the issue involves custody of children and access rights.[113] The Statute which became operational in 1981 obligates that disputes relating to custody and visitation rights be referred to mediation before being litigated through County Superior Court. The court assigns a person or agency to conduct the mediation, such as a member of a family conciliation court's professional staff, a mental health care agency, or a probation department.[114]

[108] ibid.
[109] *Dunnett v Railtrack Plc [2001] EWCA Civ 1935*.
[110] *Halsey v Milton Keynes Gen NHS Trust, [2004] EWCA CIV 576*.
[111] Ba Wazir and Maliha Swaleh, 'An Analysis of Mandatory Mediation' <https://su-plus.strathmore.edu/handle/11071/4817> accessed 4 November 2020.
[112] Alternative Dispute Resolution Act No 105-315 of 1998 (Laws of USA).
[113] Michelle Deis, 'California's Answer: Mandatory Mediation of Child Custody and Visitation Disputes' (1985) 1 Ohio State Journal on Dispute Resolution 149.
[114] Trina Grillo, 'The Mediation Alternative: Process Dangers for Women' (1990) 100 Yale Law Journal 1545.

Florida State on its part has a comprehensive court annexed ADR program.[115] Estimates indicate that up to one hundred thousand cases are referred to mediation every year in the State of Florida.[116] In spite the fact that the litigants freedom of preference of dispute solution mechanism is reduced, the same is compensated through considerable flexibility on the formalities of conducting the mediation.[117]

2.9. Conclusion

Mediation has since time immemorial been employed by traditional societies to resolve disputes. Whereas Arbitration has over a long time been a popular ADR for international trade, recent trends indicate that the international corporate community is becoming disenfranchised with arbitration due to its rising costs, many procedural formalities and delays.[118] As such arbitration is finding competition from other forms of ADR especially mediation and conciliation. Whereas these two were favoured due to their informal non adjudicative procedures, the attractiveness of Court Annexed Mediation can only be determined after a reasonable period of time.

[115] Bruce A Blitman, 'Mediation in Florida: The Newly Emerging Case Law' (1996) 70 FLORIDA BAR JOURNAL 44.
[116] Sharon Press, 'Florida's Court-Connected State Mediation Program'in Bergman' [1998] Court-Annexed Mediation: Critical Perspectives on Selected State and Federal Programs.
[117] Quek (n 108).
[118] SI Strong, 'Beyond International Commercial Arbitration - The Promise of International Commercial Mediation' (2014) 45 Washington University Journal of Law & Policy 10.

CHAPTER THREE: THE LEGAL, INSTITUTIONAL AND POLICY FRAMEWORK FOR COURT ANNEXED MEDIATION

3.1.Introduction

Mediation is an ADR method in which parties resolve their disagreements with the help of a neutral third party known as a mediator.[1] Mediation is defined by the Alternative Dispute Resolution Act of 2019 as a facilitative and confidential structured process in which parties attempt on their own, on a voluntary basis, to reach a mutually acceptable settlement agreement to resolve their dispute with the assistance of an independent third party, known as a mediator.[2] Court annexed mediation, therefore is a type of mediation that takes place under the auspices of the court. Court annexed Mediation occurs when a matter is submitted to mediation for resolution after the parties have presented their case before a court.[3]

Mediation, in its most basic form, is a voluntary process in which the parties engaged have complete control over the process and outcome.[4]. Kenya, on the other hand, has made mediation mandatory under the Kenyan Constitution of 2010, effectively eliminating the voluntary nature of mediation. The parties are required to report the results of their negotiations to the court for approval. However, it is critical to guarantee that the procedure is not subjected to the whims of the judicial system, such as delays, bureaucracy, and inefficiency.[5]

The Kenyan constitution of 2010 broadens the options available for dispute resolution by supporting both formal and informal systems of justice, in order to strengthen Kenyans' access to the legal system.[6] Article 159 recognizes the use of Alternative Dispute Resolution (ADR) and Traditional Dispute Resolution (TDR) processes in addition to the court system in this regard. The

[1] Legal Notice no 197 of 2015: Mediation (Pilot Project) Rules 2015.
[2] Alternative Dispute Resolution Act 2019.
[3] Legal Notice no 197 of 2015: Mediation (Pilot Project) Rules 2015.
[4] Makumi Mwagiru, 'Conflict: Theory, Processes and Institutions of Management' <http://erepository.uonbi.ac.ke/handle/11295/27178> accessed 5 November 2020.
[5] Kariuki Muigua, 'Reflections on the Use of Mediation for Access to Justice in Kenya: Maximising on the Benefits of Mediation' <http://kmco.co.ke/wp-content/uploads/2018/08/Reflections-on-the-Use-of-Mediation-for-Access-to-Justice-in-Kenya-Maximising-on-the-Benefits-of-Mediation-Kariuki-Muigua-14th-June-2018-1.pdf> accessed 19 July 2020.
[6] Kariuki Muigua, 'Legitimising Alternative Dispute Resolution in Kenya: Towards a Policy and Legal Framework' (2017) 5 Chartered Institute of Arbitrators (Kenya), Alternative Dispute Resolution 74.

underlying principles for the exercise of judicial authority in Kenya are outlined in Article 159 (2), which include the promotion of ADR and TDR methods.[7]

3.2.Background to the legal framework

Prior to the adoption of the Kenyan Constitution in 2010, there was no clear structure for using the Alternative Dispute Resolution method to resolve conflicts. The pilot process for Court Annexed Mediation was first carried out in the High Courts of Milimani Law Courts' Family and Commercial Divisions before being expanded out across the country. Most communities, however, have long used mediation and other types of Alternative Dispute Resolution to settle disputes. It was thus important that these forms of dispute resolution received formal recognition when they were captured in the constitution of Kenya, 2010. Traditional application of mediation as a way of dispute resolution was carried out mainly through the guide of the existing customary laws and religious beliefs. The processes were mainly conducted by the council of elders.

3.3. Court-annexed-mediation process

Mediation might be voluntary or mandatory, as previously stated. When parties agree to participate in mediation, it is known as voluntary mediation. Mandatory mediation, on the other hand, happens when parties are referred to mediation for the purpose of resolving their conflicts, either through legislative measures or through the courts system. [8] When a case is brought in court, it is first screened to see if it might be resolved through mediation. This is a procedure in which the Mediation Deputy Registrar (MDR) examines cases to determine whether they are suitable for mediation.[9] If a matter is not processed for mediation, it remains in court and follows the standard court procedure.

When a case goes through screening and is referred for mediation, the following then happens: The parties will be notified within seven days if the Mediation Deputy Registrar (MDR) decides to submit a matter to mediation.[10] The MDR will then nominate three (3) mediators from the Register of Judiciary's qualified mediators and notify the parties of their names. The Mediation

[7] The Constitution of Kenya, 2010. Art 59.
[8] Ba Wazir and Maliha Swaleh, 'An Analysis of Mandatory Mediation' <https://su-plus.strathmore.edu/handle/11071/4817> accessed 4 November 2020.
[9] Legal Notice no 197 of 2015: Mediation (Pilot Project) Rules 2015.
[10] ibid.

Accreditation Committee (MAC), an independent body established under the Civil Procedure Act, keeps the Register; [11] parties must state their preferred mediator from the three names in order of priority within seven (7) days of being notified, and inform the MDR of their preference in writing. The MDR will choose a mediator to manage the case once the parties advise the MDR of their preferences; [12] after seven days of receiving the notice from the Mediation Deputy Registrar, one can choose another preferred mediator from the Mediation Accredited Committee's Register. Such a preference can only be made upon agreement with an opponent. The Mediation Deputy Registrar will then proceed to appoint a mediator[13]; the appointed mediator will schedule a date for initial mediation and notify you of the date, time and place.[14]

Furthermore, a mediator who is not on the Mediation Accredited Committee's registration can be chosen. The mediation process, however, is not governed by the Court-annexed Mediation (Pilot) Rules. Nonetheless, the court can record the mediation agreement and have it enforced as a court order.[15] Under the Mediation Rules of 2016, Mediation is classified in two categories; domestic and International mediation.

3.3.1. Domestic Mediation Scope

If the mediation agreement specifies that the mediation will take place in Kenya, it is referred to as domestic mediation.[16] Other instances include where: The mediation is between corporate bodies that are either incorporated in Kenya or have their central administration and control in Kenya.[17] The mediation is between an individual and a body corporate, and the individual is a Kenyan national or has a habitual residence in Kenya; the body corporate is incorporated in Kenya, or its central management and control is exercised in Kenya; and the individual is a Kenyan national or has a habitual residence in Kenya. The location where a significant portion of the

[11] ibid.
[12] ibid.
[13] ibid.
[14] ibid.
[15] ibid.
[16] Nairobi Centre for International Arbitration (mediation) Rules, 2015.
[17] ibid.

commercial relationship's duties are to be fulfilled, or the location where the dispute's subject matter is closely related, or is in Kenya; [18] or is not an international mediation. [19]

This regulation applies to a domestic mediation at the beginning of the mediation or when the mediation agreement is signed. [20]

3.3.2. International Mediation

If the parties to a mediation agreement have their places of business in countries other than Kenya at the time of the mediation agreement's conclusion, it is considered an international mediation. [21] Other instances include where: One of the mediators' parties has a business address in a nation other than Kenya; a country other than Kenya where a considerable part of the economic obligation or other relationship is to be performed; or where the subject matter of the dispute is intimately connected. [22] Also, if the parties have agreed in writing that the mediation's subject matter concerns more than one country. [23]

3.4.Mediation and Access to legal system

As earlier observed, many communities in Kenya and African traditional societies have used mediation and other Mechanism for alternative dispute resolutions and alternative justice systems to resolve disputes for a long time now. It was an everyday affair for conflicting groups to have informal sittings and talk about their issues. Such gatherings were mainly motivated by their love for unity, peace and harmony.[24] Furthermore, as earlier stated, mediation is generally voluntary. Introduction of mandatory mediation in Kenya has taken away this aspect of mediation. As a result, it's critical to ensure that the parties involved engage the mediation process voluntarily, that the process' outcome is recognized, and that the solutions established are acceptable and long-lasting.[25]

[18] ibid.
[19] ibid.
[20] ibid.
[21] ibid.
[22] ibid.
[23] ibid.
[24] Muigua, 'Reflections on the Use of Mediation for Access to Justice in Kenya: Maximising on the Benefits of Mediation' (n 5).
[25] ibid.

Access to the legal system, according to Dr. Kariuki Muigua, is more than just the establishment of official courts in a country. He claims that it also comprises the opening of formal systems and legal structures to disadvantaged groups in society, as well as the removal of legal, financial, and social barriers such as language, lack of legal knowledge, and intimidation by the law and legal institutions.[26] Access to the legal system is a constitutional right, and in order for this important constitutional right to be achieved, several conditions must be met. Expediency, proportionality, equality of opportunity, fairness of process, party autonomy, cost-efficiency, party satisfaction, and remedy effectiveness are some of these factors. [27]

In litigation process, the marginalized, the poor and at times the old are usually disadvantaged because they have little or no influence in decision making process due to the power struggles in the society. The outcome of the litigation process is mostly biased and unfair to the above mentioned groups. The constitutional right of Access to legal system is, therefore, denied. Recognition of mediation as a mechanism for resolving disputes is actually derived on the principle of Access to legal system by everyone and that Conflicts must be settled quickly and without consideration for the procedural barriers that plague the legal system.[28]

It has been observed by many scholars that for the constitutional right of Access to legal system to be realized, it will be important that mediation and other informal forms of dispute resolution are recognized and utilized fully. They have argued that this means that justice is taken closer to the people and that justice is made affordable to the all the people. However, some have argued that mediation has hindered Access to legal system due to its mandatory nature.[29] It has also been argued that mediation hinders Access to legal system in the sense that the parties incur additional litigation costs against their will.[30] Other arguments have also been put forward against mediation aiding Access to legal system that legislating and institutionalizing mediation reduces the alternatives of dispute resolution since it no longer serves as an alternative.[31]

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[26] ibid.
[27] Michelle Maiese, 'Principles of Justice and Fairness' (2003) 20 Consultado el 2010.
[28] Kariuki Muigua, 'Traditional Dispute Resolution Mechanisms under Article 159 of the Constitution of Kenya 2010' [2014] Kmco <http://kmco.co.ke/wp-content/uploads/2018/08/Paper-on-Article-159-Traditional-Dispute-Resolution-Mechanisms-FINAL.pdf> accessed 30 May 2020.
[29] Wazir and Swaleh (n 8).
[30] Holly A Streeter-Schaefer, 'A Look at Court Mandated Civil Mediation' (2000) 49 Drake Law Review 367.
[31] Wazir and Swaleh (n 8).

The denying of parties the chance the chance to have their case heard in a court of law through the normal litigation process and having their case referred for mediation is also a hindrance to justice based on the principle that justice delayed is justice denied. This is also because it may be more expensive, making it appear as a burden to the parties, which is contrary to the goal of mediation, which is to save money, time, and effort.[32] Despite the many factors that appear to vitiate the importance of mediation in aiding Access to legal system, I feel it is still of great importance in the process of accessing justice considering the backlog of cases in the justice system. It therefore, comes in handy to help the courts ease the number of cases that are channeled through the courts for litigation.

3.5.Current legal framework

This section will examine Kenya's mediation framework, including the law controlling mediation and required mediation, as well as the statute requiring it. The ADR and TDR mechanisms are now fully recognized in Kenya's Constitution and are covered by a number of statutes. As a result, courts and tribunals, as well as other informal venues, have begun to use these methods more frequently. Since then, the Judiciary has created and implemented out the Court Annexed Mediation Project, which focuses on commercial and family problems.[33]

As earlier stated in this chapter, mediation previously existed under customary as dispute resolution mechanism in most traditional African societies. Mediation, in its original sense, is a voluntary, non-binding process in which the involved parties get into a discussion with the help of a neutral third party. The resolutions of the discussion become binding once they are put down in writing.[34] Over the recent past, mediation has been advanced globally through the recognition of Court Annexed Mediation.[35] Court-sanctioned mediation can take two forms, according to Dr. Kariuki Muigua: court mandated mediation and court sanctioned mediation. Court mandated mediation, as characterized by the Kenyan legal framework, occurs when parties file a

[32] ibid.
[33] Kariuki Muigua, 'Regulating Alternative Dispute Resolution (ADR) Practice in Kenya: Looking into the Future' <http://kmco.co.ke/wp-content/uploads/2018/08/Regulating-ADR-Practice-in-Kenya-Kariuki-Muigua-June-2018-1.pdf> accessed 19 May 2020.
[34] Peter Fenn, 'Introduction to Civil and Commercial Mediation' [2002] Chartered Institute of Arbitrators, Workbook on Mediation.
[35] Wazir and Swaleh (n 8).

disagreement in court and the court orders that the issue be mediated, with the mediation's outcome being presented to the court for approval.[36]

Court-sanctioned mediation, on the other hand, occurs when parties to a dispute engage in mediation outside of court but then record their decision in court once they have reached an agreement. It has also been defined as the mediation of problems that have been ordered to go to mediation by a judicial officer or that are mediated as a result of a general court order.[37]

Court Annexed Mediation has been recognized by a number of legal authorities. The United Nations Charter 48, Article 33, the Kenyan Constitution 2010 (Articles 159 and 189), the Civil Procedure Act (Section 1 A, 2, 59 A, B and D, 88), the Civil Procedure Rules (Order 46), and the Judiciary Pilot Project Mediation Rules 2015 are among these sources.

3.5.1. The United Nations Charter

The Charter for United Nations takes the lead in the recognition of mediation as a mechanism for dispute resolution especially matters relating to contracts and personal issues. It further recommends the same to be adopted by the member states and individuals too.

Under Article 33(2) it states that the Security Council of the United Nations shall call upon parties to use mediation as a means of solving a dispute when it deems it appropriate. Article 33 of the United Nations Charter states that[38];

"Parties to any dispute whose continuation is likely to jeopardize international peace and security must first seek a resolution through negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement, recourse to regional agencies or arrangements, or other peaceful means of their choosing.".

Article 33 of the United Nations Charter, therefore, forms a basis for the application of mediation and other alternative forms of dispute resolution by the states and individuals. An example of such

[36] Kariuki Muigua, *Court Sanctioned Mediation in Kenya-An Appraisal* <http://kmco.co.ke/wp-content/uploads/2018/08/Court-Sanctioned-Mediation-in-Kenya-An-Appraisal-By-Kariuki-Muigua.pdf> accessed 17 June 2021.
[37] Wazir and Swaleh (n 8).
[38] United Nations Charter, Chapter 6.

use of the provisions of the United Nations Charter is the mediation process that was led by Kofi Annan in Kenya in 2008 regarding the post-election violence.

3.5.2. The Constitution of Kenya, 2010

Article 48 of the Constitution requires the state to ensure that all people have access to the legal system, and if fees are required, they must be reasonable and not obstruct access. The purpose of recognizing mediation and other mechanisms for alternative conflict resolution is to legitimize alternative forums and processes that strive to deliver and promote justice among Kenyans.[39] In relation to the concepts of fostering the use of ADR procedures in conflict management, Article 159 (1) states that judicial authority is drawn from the people and vests in, and is to be exercised by, courts and tribunals constituted by or under the Constitution.[40] The spirit of this article of the constitution, according to Dr. Kariuki Muigua, is to encourage the people's cultural and traditional ways in conflict resolution.[41]

Nonetheless traditional conflict resolution processes, as relating to Article 159 (3), are not to be employed in ways that (a) violate the Bill of Rights; (b) are repugnant to justice and morality or result in outcomes that are abhorrent to justice and morality; or (c) are inconsistent with the Constitution or any written law.[42] The policy of subjecting customary law to the repugnancy test was based on the argument that certain components of customary law do not comport with human rights principles.[43]

Article 189(4) also recognizes mediation as a mechanism for dispute resolution in Kenya. This article provides that;

"National legislation shall provide procedures for settling inter-governmental disputes by Mechanism for alternative dispute resolutions, including mediation and arbitration".

In regards to the above two provisions, the constitution therefore provides for the use of mediation in solving disputes both involving individuals and government institutions.

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[39] Muigua, 'Legitimising Alternative Dispute Resolution in Kenya: Towards a Policy and Legal Framework' (n 6).
[40] The Constitution of Kenya, 2010. Art 159.
[41] Muigua, 'Legitimising Alternative Dispute Resolution in Kenya: Towards a Policy and Legal Framework' (n 6).
[42] The Constitution of Kenya, 2010. Art 159.
[43] Muigua, 'Legitimising Alternative Dispute Resolution in Kenya: Towards a Policy and Legal Framework' (n 6).

3.5.3. Civil Procedure Rules and Civil Procedure Act, Cap 21

The Kenyan Civil Procedure Act describes mediation as an informal, non-adversarial method in which an impartial mediator supports and helps the resolution of a disagreement between two or more parties, but excludes attempts by a judge to settle a dispute during judicial proceedings linked to it.[44]

The Civil Procedure Rules and Act captures the procedural law and practices in the Kenya civil courts; the High Court and the Subordinate Courts. The Civil Procedure Rules and Act carry with it the provisions within which mediation and other Mechanism for alternative dispute resolutions will be supported. Within this framework, the court has inherent authority to consider alternative conflict settlement approaches that advance the overarching goals. Traditional Dispute Resolution procedures could be considered one of these choices.[45] The goals of ensuring a just, expeditious, proportionate, and affordable resolution of civil disputes, according to Section 1B of the Civil Procedure Act, include the just determination of proceedings, efficient disposal of Court business, efficient use of judicial and administrative resources, timely disposition of proceedings, affordable costs, and appropriate technology. [46]

Section 59A establishes the Mediation Accreditation Committee, which is one of the conventional legal system's procedures. The role of the Committee is to determine the criteria for mediator certification and to propose guidelines for mediator certification. [47] In addition to the foregoing, Section 59B of the Civil Procedure Act mandates that courts send cases to mediation and describes the process.

" (I) The Court may order that any dispute before it be submitted to mediation (a) at the request of the parties involved; or (b) where it thinks it suitable; or (c) when the law demands it..... "

Furthermore, under Order 46 rule 20 of the Civil Procedure Rules, the employment of TDR in the resolution of civil disputes might be encouraged.[48] In light of Order 46 Rule 20 and Sections 1A and 1B of the Civil Procedure Act, the court is required to use ADR and TDR, as well as any other

[44] Civil Procedure Act 2012 s 2.
[45] Muigua, 'Legitimising Alternative Dispute Resolution in Kenya: Towards a Policy and Legal Framework' (n 6).
[46] Civil Procedure Act 2012 s 59.
[47] Civil Procedure Act 2012.
[48] Civil Procedure Rules 2010.

relevant methods, to assist the just, speedy, proportionate, and cheap resolution of all civil disputes governed by the Act. It is therefore necessary to establish court-annexed TDR and ADR, since this will help to address the problem of case backlogs, improve access to the legal system, stimulate rapid resolution of disputes, and minimize the cost of accessing justice. [49]

The courts have, therefore, been mandated through the Civil Procedure Rules and Act to refer cases for mediation when they deem them appropriate with the consent of the parties.

Court sanctioned mediation is likewise governed by the Civil Procedure Act. It particularly provides that "all agreements entered into with the assistance of qualified mediators shall be in writing and may be registered and enforced by the Court."[50]

3.5.4. Judiciary Pilot Project Mediation Rules 2015

These provisions allow cases in the High Court to be referred to mediation in civil and family disputes. The Rules shall apply to all civil proceedings filed in the Commercial and Family Divisions of the High Court of Kenya at Milimani Law Courts in Nairobi during the Pilot Project, according to Section 2.

The rules make it mandatory that a case shall be subjected through screening before it is referred for mediation to ascertain whether it meets all the requirements required for a case to be put forward for mediation.

Screening is the procedure through which the Mediation Deputy Registrar or the Court evaluates civil cases to determine whether they are suitable for mediation or not.[51] The Judiciary pilot project standards impose tight mediation guidelines by eliminating patty autonomy, voluntariness, and flexibility, which are typically associated with mediation. [52]

3.5.5. Land Act, 2012

The Land Act is the substantive law of Kenya that governs all land-related issues. It was enacted in order to harmonize land regimes that were dispersed over multiple pieces of law. The Land Act

[49] Muigua, 'Legitimising Alternative Dispute Resolution in Kenya: Towards a Policy and Legal Framework' (n 6).
[50] Civil Procedure Act 2012 s 59.
[51] Legal Notice no 197 of 2015: Mediation (Pilot Project) Rules 2015.
[52] Wazir and Swaleh (n 8).

establishes the guiding values and principles of land management and administration, which include, among other things, the elimination of gender discrimination in land law, customs, and practices; encouragement of communities to resolve land disputes through recognized local community initiatives; participation, accountability, and democratic decision-making within communities, the public, and the government; and participation, accountability, and democratic decision-making within communities, the public, and the government. In the processing and management of land disputes, there is a mechanism for alternative conflict settlement.[53]

The Land Act promotes the use of mediation and other forms of dispute resolution in solving matters pertaining to land. Matters relating to communal land can effectively be solved through mediation and such other Mechanism for alternative dispute resolutions. The use of Alternative Dispute Resolution and Traditional Dispute Resolution mechanisms, according to Dr. Kariuki Muigua, can also help with the implementation of constitutional principles such as public participation, inclusiveness, marginalized protection, non-discrimination, equity, and social justice.[54]

3.5.6. Commission on Administrative Justice Act, 2011

The Commission is required to engage with various public institutions to promote alternative conflict resolution procedures in the resolution of complaints connected to public administration under section 8 (f) of the Act. In this sense, the Commission's use of ADR and TDR methods allows it to investigate the core causes of conflicts and the best choices for resolution.[55]

3.5.7. The National Land Commission Act, 2012

The Commission is required by section 5 (f) of the Act to promote the use of traditional dispute resolution processes in land conflicts. Furthermore, the Commission is required by sub-section 2(f) to create and promote mechanisms for alternative conflict resolution in land dispute handling and management.[56]

[53] Land Act, No 6 of 2012 s 4.
[54] Muigua, 'Legitimising Alternative Dispute Resolution in Kenya: Towards a Policy and Legal Framework' (n 6).
[55] Section 8, Commission on Administrative Justice Act, Laws of Kenya
[56] Section 5, The National Land Commission Act, No 5 of 2012, Laws of Kenya.

3.5.8. Environment and Land Court Act, 2011

The intention of the Act, as per Section 3, is to enable the court to promote the just, quick, proportionate, and accessible resolution of conflicts governed by the Act, and the parties and their representatives are expected to assist the court in achieving these goals.[57] In line with Article 159(2) (c) of the Constitution, Section 20 provides for the application of Alternative Dispute Resolution and empowers the court to adopt and implement any appropriate mechanism such as mediation, conciliation, and Traditional Dispute Resolution mechanisms on its own motion with the agreement of or request of the parties. Furthermore, the Act states that if ADR is a prerequisite to any procedure before the court, the court must halt proceedings until the prerequisite is met. [58]

3.6.Institutional Framework

The judiciary is leading the way in developing the institutional infrastructure for Court Annexed Mediation as a conflict resolution process. Article 159 (2) (c) of the Constitutions requires courts and tribunals to promote the use of Traditional Dispute Resolution and Alternative Dispute Resolution Mechanisms when exercising judicial authority. [59] Section 1A of the Civil Procedure Act states that the Act's overarching goal is to make it easier to resolve civil disputes in a fair, timely, proportionate, and affordable manner.[60] The court has inherent power under this framework to seek dispute settlement solutions that advance the overarching goals.[61]

The Nairobi Centre for International Arbitration (NCIA) is also a statutory body that not only provides arbitration services but also mediation services to the people. The institution has developed tools for the purpose of mediation that include training, rules of practice and accreditation.[62]

The Legal Aid Act of 2016 also establishes The Legal Aid Services that offers mediation services to the people.[63] The Civil Procedure, furthermore, establishes the Rules Committee. The Rules

[57] Commission on Administrative Justice Act No. 3 of 2011 s 8.
[58] Environment and Land Court Act, No 19 of 2011 s 20.
[59] Muigua, 'Legitimising Alternative Dispute Resolution in Kenya: Towards a Policy and Legal Framework' (n 6).
[60] Civil Procedure Act 2012 s 1 (A).
[61] Muigua, 'Legitimising Alternative Dispute Resolution in Kenya: Towards a Policy and Legal Framework' (n 6).
[62] Nairobi Centre for International Arbitration (mediation) Rules, 2015.
[63] The Legal Aid Act, No 6 of 2016 (Laws of Kenya).

Committee is responsible for enactment of rules that will ensure efficient dispensation of justice to the people. This includes selection of mediators that will take charge of mediation processes pursuant to court mandated mediation.[64] Other institutional players in the mediation sector include; the Strathmore University Dispute Resolution Centre, Tatua Centre, Dispute Resolution Centre, and Kituo cha Sheria.[65]

3.7.Policy Framework

It's worth noting that there is now no policy in Kenya governing the use of mediation as a dispute settlement mechanism. In terms of mediation, dispute resolution, and access to the judicial system, there is a significant gap. A mediation policy framework should be established to recognize and affirm the role of mediation and other dispute resolution techniques in the administration of justice, as well as to create a clear interface between mediation and formal processes. According to Dr. Kariuki Muigua, the policy should be aimed at increasing access to the legal system while also safeguarding Kenyan cultures and traditions. Traditional systems should be harmonized with the essential principles of the Constitution and international law in the policy framework.[66]

3.8.Conclusion

Court Annexed Mediation is now part of our law in Kenya as it has received recognition in the constitution of Kenya 2010. That in itself is a great stride forward in our legal system and the quest to see justice served to everyone. A lot still needs to be done to ensure this process achieves its main objective of serving as a vehicle to achievement of justice.

The introduction of court-annexed-mediation in Kenya was meant to promote the constitutional spirit of Access to legal system by bringing justice closer to the people and making it affordable to every citizen. For this to be achieved, there is need for a clear policy framework to be put in place to regulate and guide the use of mediation as a mechanism for dispute resolution.

[64] Nairobi Centre for International Arbitration (mediation) Rules, 2015.
[65] ibid.
[66] Muigua, 'Legitimising Alternative Dispute Resolution in Kenya: Towards a Policy and Legal Framework' (n 6).

CHAPTER FOUR: A CASE STUDY OF THE PRACTICE OF COURT ANNEXED MEDIATION AT MILIMANI CHILDREN'S COURT

4.1.Introduction

This case study was conducted at Milimani Law Courts, specifically the Children's division where the researcher collected primary data through conducting interviews with various respondents ranging from judicial officers, registry staff, advocates, accredited mediators and litigants. The researcher sought to establish the effectiveness of Court Annexed Mediation especially at the Children's court in enhancing Access to legal system. The responses and feedback of the respondents are presented herein below.

The mediation program in Kenya's Judiciary, whose slogan is 'a solution for you by you', came into operation on 4th April 2016 when it was piloted at the Family division and subsequently the Commercial Division of the High Court, at Milimani Law Courts. It was conducted as a pilot project. Upon conclusion of the pilot project, mediation was introduced in the Civil Division of the High Court, the Children's Court and the Chief Magistrate's Commercial Courts. A model has been developed to guide replication of the Court Annexed Mediation process across the country with its implementation currently underway.[1]

One of the divisions in which Court Annexed Mediation has been fully rolled out in Nairobi is the Milimani Children's Court. The roll out was led by the Alternative Dispute Resolution Task Force of the Judiciary and supported by International Development Law Organization (IDLO).

It's worth noting that mediation, both informal and formal, is supported by Article 159 of Kenya's 2010 Constitution, which states that "Mechanisms for alternative dispute resolution must be promoted provided they do not violate the bill of rights".[2] Furthermore, one of the primary goals of the Civil Procedure Act (CPA) is to ensure that civil disputes are resolved fairly and quickly.[3] These provisions thus legitimizes the use of mediation in solving disputes.

[1] Legal Notice no 197 of 2015: Mediation (Pilot Project) Rules 2015.
[2] The Constitution of Kenya, 2010. Art 159.
[3] Civil Procedure Act 2012.

The establishment of Children's Court is to be located at Section 73 of the Children's Act. The purposes of the Court as set out in the Act includes: conducting civil proceedings as set out in the Children's Act: Hearing any case against a kid other than murder or a charge in which a youngster is charged with a person or persons of or over the age of eighteen years; hearing any case brought against a person accused of a crime under the Children's Act; and exercising any other powers granted to it by the Children's Act or any other written legislation..[4]

A Children's Court must meet in a different building or at a different time than other courts, and no one other than members and officers of the court, parties to the case and their advocates and witnesses, parents or guardians, and any other person the court has authorized to be present must be present at any Children's Court sitting.[5] Except if the offense is committed under any other law triable exclusively by the High Court, the children's court has original jurisdiction to try a child for any offence under the Children's Act or any relevant act.[6]

4.2.Court Annexed Mediation at the Milimani Children's Court.

According to the Court Annexed Mediation Deputy Registrar, Court Annexed Mediation was first operationalized at Milimani Children's Court in 2019. It is aimed at enhancing Access to legal system in matters involving children and offer protection for children within the justice System. Between the year 2018 and 2020, the matters that were referred to Mediation by the Milimani Children's court stood at six hundred and nineteen (619), out of which two hundred and thirty seven (237) had been fully settled. Those that remained without a settlement agreement stood at one hundred and fifteen (115) cases. Over the same period of time, the cumulative value of matters that had been referred to mediation by the Milimani children's court stood at Ksh 66,264,697/=, while the cumulative value of the matters that that had been successfully settled as at December 2020 stood at Ksh 8,833,252.[7]

[4] Children Act No. 8 of 2001 s 73.
[5] ibid 74.
[6] Children Rules 2002.
[7] Judiciary Report on CAM Cumulative CMR for the period 2018-2020.

4.2.1. Mediation Accreditation Committee

The Mediation Accreditation Committee is established under Section 59A of the Civil Procedure Act (MAC).[8] The Chief Justice of Kenya appoints the members of the MAC.[9] Under section 59A (2) of the Civil Procedure Act, MAC shall consist of;[10] The head of the Rules Committee; one person nominated by the Advocates' General Meeting; two members nominated by the Kenya Law Society; and eight other members nominated by the following institutions, in that order; The Kenya Private Sector Alliance, the International Commission of Jurists (Kenya Chapter), the Institute of Certified Public Accountants of Kenya, the Institute of Certified Public Secretaries, the Kenya Bankers' Association, the Federation of Kenya Employers, and the Central Organisation of Trade Unions are all members of the Chartered Institute of Arbitrators Kenya Branch. The Chief Justice must also appoint a suitable person to serve as the Mediation Registrar and be responsible for the administration of the Mediation Accreditation Committee's business.

The Mediation Accreditation Committee plays a critical role in Court Annexed Mediation process. The mediation accreditation committee's responsibilities include determining the criteria for mediator certification; proposing rules for mediator certification, maintaining a register of all qualified mediators; enforcing the prescribed code of ethics for mediators; and developing appropriate training programs for mediators.

The Mediation Accreditation Committee is responsible for maintaining, among other things, a register of mediators, according to the Mediation Registrar. The mediators that are nominated and appointed to participate in the current Court Annexed Mediation come from the pool of mediators that they keep. The mediators are chosen from among qualified and interested applicants who meet the committee's accreditation standards. The selection of mediators is usually transparent and merit-based.

[8] Civil Procedure Act 2012.
[9] ibid.
[10] ibid.

4.3.The Mediation Exercise

The Civil Procedure Act,[11] at section 2 stipulates that mediation is an informal, non-adversarial process in which an impartial mediator supports and facilitates the resolution of a dispute between two or more parties, but excludes attempts by a judge to settle a dispute during court proceedings linked thereto. [12]. A mediator is a third party who assists disputing parties in the mediation process outside of the formal litigation process, stated a serving magistrate of the children's court in response to the researcher. Further that the neutral third party assists the parties in reaching a mutually beneficial agreement.

There are two distinct types of mediators depending on the type of approach and role they play in the mediation process. A mediator can either be an evaluative mediator or a facilitative mediator.[13]

In facilitative mediation, the mediator is in charge of the process, while the parties are in charge of the outcome. The mediator establishes a procedure to assist the parties in achieving a mutually beneficial agreement. The mediator asks questions, validates and normalizes the parties' points of view, searches for shared interests behind the parties' differing perspectives, and assists the parties in analysing and deciding resolution options. A facilitative mediator does not offer recommendations to the parties, nor does he give an opinion on the case's outcome, nor does he even try to predict what the court will do. Facilitative mediators are usually concerned with ensuring that the parties reach an agreement based on the information provided and their knowledge of the situation.[14] In this type of mediation, giving options is regarded unsuitable since it may smear the mediator's neutrality and interfere with his or her capacity to operate, and the mediator may not know enough to make these suggestions.

On the other side, evaluative mediation is modelled after judge-led settlement sessions. By emphasizing the errors in the parties' assertions and projecting what a judge or jury might do, an evaluative mediator aids the parties in reaching an agreement. Evaluative mediators focus on the parties' legal rights rather than their needs and interests, and they evaluate using the legal concept

[11] ibid.
[12] ibid 2.
[13] Zena Zumeta, 'Styles of Mediation: Facilitative, Evaluative, and Transformative Mediation' <https://www.mediate.com/articles/zumeta.cfm> accessed 5 November 2020.
[14] ibid.

of fairness. The process of mediation is structured by an evaluating mediator, who has a direct influence on the outcome. In Court Annexed Mediation, evaluative mediation evolved as the primary approach used by the judiciary in the formal mediation system. It's assumed that the parties want the mediator to provide guidance based on experience, technology, and the law. It's also assumed that the mediator is qualified to provide alternatives.[15].

A magistrate of the children's court interviewed by the researcher herein posited that mediation works best in a situation where; you have honest people, parties are co-operative, parties are interested in a continuing relationship, and where the parties feel safe. Furthermore, he avers mediation is not the best dispute resolution mechanism in a situation where the matter is urgent, where the parties feel coerced, in the event of possibility of physical assault, or where there is a vexatious litigant.

4.3.1. The Role of the Mediator in Court Annexed Mediation

A mediator, according to an accredited mediator interviewed, is "an unbiased and neutral third person who supports both parties in reaching a solution." The mediator is selected from the Mediation Accreditation Committee's Register of Accredited Mediators. He added that he calls the meeting to order, then examines the matter at hand and assists the parties in reaching an agreement. Throughout the mediation process, it is critical that the mediator remains objective and neutral. The parties are the ones who make the decisions in this procedure. The role and the general conduct of the mediator are considered very crucial to the whole mediation process.

The researcher recognized the following four primary duties of a mediator in the mediation process based on her interview responses: The mediator enables information to and between the contending parties; the mediator must befriend the disputants in the mediation process to increase trust and confidence in the process; and the mediator is supposed to advocate 'active mediation.' He refers to the ability to build a willingness to engage in constructive negotiation as active mediation. A mediator's further responsibilities may include arranging meetings between the parties after his appointment. It's critical that the mediator schedules a time that is convenient for both parties.

[15] ibid.

At the first meeting, the mediator asks the parties to sign a form describing the proceedings' norms and framework. After that, he goes into detail about how the mediation will be conducted. He also invites the parties to give a brief review of the facts from their points of view. After that, he goes through the facts and tries to come up with a solution that is acceptable to both parties.

Apart from the roles bestowed upon the mediator, there are also some universal duties assigned to him during the mediation process.[16] These responsibilities include: Code of behavior; the mediator must adhere to the established norms and regulations, and he or she must refrain from engaging in any activity that is not related to the issue at hand. Impartiality- it is critical that a mediator maintains his or her impartiality throughout the mediation process. He isn't expected to support any one political party in particular. If a mediator is shown to be biased, he will be replaced by another mediator. A mediator must also disclose to both parties that there is no conflict of interest; confidentiality. All activities and information gathered during the mediation process are to be kept private. The mediator has the authority to give information to the court emerging from the mediation process, but only with the parties' express approval.

4.3.2. [17]Role of Advocates in Mediation vis a vis Role in Litigation

According to an accredited mediator who is also an advocate of the High Court of Kenya, the role of a lawyer in mediation is quite different from the role he plays in litigation. The lawyer should know the process and the concept of mediation and the positive role they are required to play in the process. This is because the lawyer plays a proactive role in mediation. The role of a lawyer starts even before the actual mediation process begins. The role of a lawyer, therefore, can be divided into three stages; pre mediation, during mediation and post mediation.

In pre mediation stage, a party goes to seek the advice from the lawyer once faced with a dispute. The lawyer is required to consider to ensure that there is scope to restoring to any Mechanism for alternative dispute resolution. The lawyer is also charged with the responsibility of about the process, the concept and the advantages of mediation since the parties are always not aware of this. He should also have the skill to convince a party to go to mediation before litigation. The parties

[16] Akshaya K, 'Roles and Duties of a Mediator | VIA Mediation Centre' <https://viamediationcentre.org/readnews/MjM1/Roles-and-Duties-of-a-Mediator> accessed 5 November 2020.
[17]

should also be informed that in a dispute that involves breakdown of relationship, whether contractual or commercial, mediation helps to strengthen and restore relationships. This is a role only a lawyer can play since he understands about mediation. Before commencement of mediation, the lawyer and the party should prepare a mediation brief and figure out the available options.

An advocate plays a critical role during the actual mediation stage. A lawyer's role can either be constructive or destructive depending on his conduct at this stage. Once mediation begins, the advocates' position and obligations change dramatically. Advocates frequently assist their clients in the following ways during mediation: Advocates recognize the importance of the client's position and, in particular, do not speak for the client instead, they provide advice, assistance, and information; Advocates maintain a helpful, cooperative demeanour and exhibit dedication to the mediation process via words and behavior; They do not question or cross-examine the opposite party, spar with the other advocates, or approach mediation like litigation in any other way; They do not view mediation as an adversarial procedure or a way of discovering the truth rather, they value the necessity of finding solutions; They provide normative information regarding the merits and hazards of specific initiatives, usually in private; They serve as a reality check for the client, assisting them in balancing the dangers of accepting or rejecting settlement offers, the potential problems of bringing the case to a third party for determination, and the time, stress, and money of a trial; Advocates assist in the management of the process by requesting breaks, opportunities to speak with the client quietly, or a private meeting with the mediator; They help customers communicate by summarizing discussions or clarifying things that are unclear or when miscommunication is inhibiting productive problem-solving or, worse, increasing conflict; They assist clients in remaining focused on the issues at hand, the facts offered, and settlement choices while dealing with irritation over the pace of development or feeling overwhelmed by direct interaction with the other side. Finally, advocates encourage clients to come up with innovative solutions to their problems and create any documentation that may be required.

Those advocates who perceive mediation legitimately as an opportunity for their clients to participate actively in conversations about, and resolution of, their own issues, according to a litigation advocate who is also an accredited mediator, are valued partners in the process. The Court-Annexed Mediation Pilot Project received numerous comments from parties and mediators expressing this viewpoint. In discussing the role of the advocates', one mediator noted:

"I made extensive use of the advocates' services. I had individual conversations with each of them. I didn't express a viewpoint, but I did talk a lot about risk... Generally, I worked with the advocates and then either left them to sell an idea to their clients or sat in on their meetings"

It is critical that a lawyer have a positive attitude and believes in the process. His role becomes more beneficial in this sense. The lawyer must follow the ground rules of the process as provided by the mediator at this point. He should also advise the client to follow the rules. He must also urge the client to make his argument, and the lawyer must constantly review the mediation case using reality testing, and be ready to advise the party to modify stance, approach, demands, and the level of surrender. When appropriate, the mediator may hold sub-sessions with the lawyers. They must work with the mediator to ensure a smooth and effective mediation process. The lawyer must guarantee that the settlement documented is computed, clear, and executable at the end of the process. He must also provide an explanation.

The role of a lawyer after mediation differs depending on whether or not an agreement has been reached. If a settlement cannot be reached, the lawyer must advise the party on whether to pursue the matter through litigation or through another ADR procedure. If a settlement is made during the mediation process, the lawyer must ensure that the settlement agreement reflects his client's interests. The lawyer must also work with the courts to ensure that the decree issued under the provisions of the settlement agreement is carried out.

4.3.3. Role of Parties in Mediation

In the mediation process, the parties to a disagreement play a crucial role. Despite the fact that they receive advice from both lawyers and mediators, it is usually these parties who make the final choice. Mediation is frequently regarded as a voluntary process. The parties, on the other hand, have the authority to decide whether the disagreement should be settled amicably or not, as well as the conditions of the settlement. Before the mediation, these parties have the right to be heard and speak, but the goal should never be to dispute and defeat the other party. Parties may need to adjust their positions and match their intentions with their best interests. As a result, the parties are bound by the settlement reached throughout the process, and they must cooperate in the execution of the decree reached as part of the settlement

. The role of parties in mediation can be summarized as follows;[18] Under the Practice Direction on Court Annexed Mediation, to file a case summary in prescribed form; to provide the name, physical and postal address, email address, and telephone number in the address of service; Participate in mediation sessions; to take part in the mediation process in a sincere manner; Any information collected orally or in writing during mediation will be treated as confidential; To not utilize any type of electronic gadget to record the mediation sessions; To agree to follow the engagement guidelines and to sign a declaration of understanding; If the parties reach an agreement, they will sign a mediation agreement.

4.3.4. Admission to Mediation Sessions

The Mediation Deputy Registrar (MDR) will issue the parties in the dispute a notification within seven days after the matter has gone through screening and been recommended to mediation. The Mediation Deputy Registrar will then select three mediators from the Judiciary's list of accredited mediators, and notify the parties of their selections. The Mediation Accreditation Committee normally keeps this record, however it can also be found online. After that, the parties have seven days to select their chosen mediator from the three options and notify the Mediation Deputy Registrar.

Parties to a dispute who have been referred to mediation must attend all mediation sessions. An advocate or any other person of the parties' choosing may accompany them to the sessions. Any information obtained orally or in writing in the course of mediation should be treated as confidential, and no electronic device of any kind should be used to record the mediation sessions. An advocate or any other person accompanying the parties to the sessions should commit to following the rules of engagement and statement of understanding, as well as the practice directions.

In an interview with one of the children's court magistrates, he stated that before children matters are referred to mediation, there are a few considerations which are taken into account before those matters are admitted. These considerations include the willingness of parties to go into mediation and complexity of the issues to be handled. Matters involving or affecting children where there

[18] The Judiciary of Kenya, 'The Judiciary Mediation Manual' (2019) <https://www.Judiciary.go.ke/download/the-Judiciary-mediation-manual/> accessed 6 November 2021.

are issues of child abuse, child neglect, defilement, domestic violence or related criminal or illegal purposes are generally precluded from mediation. This is because that are considered unsuitable for mediation.[19]

4.4. Registry Operations

According to a registry staffer, all matters referred to mediation are filed separately during the mediation process. Each court is required to open a register for all matters referred to mediation. These matters are required to be clearly labelled and entered in the Mediation Register and thereafter assigned a reference number. Some of the details that are entered in the register include; serial number, date of issue, value of subject matter, original file number, parties names, advocates/parties address, mediation reference number, date of referral, mediation start and end date and a few remarks on the case.[20]

4.4.1. Registration of Cases for Mediation

A mediation reference file is opened after a matter is registered. The file contains all the documents that are filed in the course of the mediation process. The mediation reference number will then be entered in the main register of cases. It is also a requirement that a file tracking tool shall be put at the back of the cover page indicating all the details including the case summary. The register shall keep samples of forms as set out in the practice Direction Annexure so that it can help the mediators, parties and the advocates involved in the case.

Any new matter that is filed after commencement of the Mediation Rules shall undergo the ordinary registration and filing. This process entails the following activities; presentation of proceedings at the registry, verification of pleadings and documents to ensure completeness, assessment of court fees, verification of court fees deposit slip, assignment of case number, assurance of court fees receipt by the cashier, date stamping of the documents, registration of the case, entry of data in the case register which may be amended as appropriate and entry of the data in the case management system. During the registration process, one is required to take note of

[19] ibid.
[20] ibid.

some important issues. First, court fee is not payable for filing case summaries. Second, court fee is payable for any application filed while the mediation process is ongoing.

4.5. Screening

This is the process by which the deputy registrar or Magistrate or Kadhi assesses whether a case is suitable for mediation. According to the Mediation Registrar, in children's matters, screening shall be done at the close of pleadings. Every civil action including that of children matters instituted in court shall be subjected to mandatory screening by the Mediation Deputy Registrar or magistrate as the case may be and those found suitable may be referred to mediation.

In response to the criteria for screening cases, one Magistrate pointed to a wide range of internationally accepted criteria that has been set for use in mediation screening. They are applied to each case to determine its suitability to be referred to mediation. The magistrate will review the details of each case filed and identify whether or not the case should be sent for mediation. According to the Mediation Registrar, the Judiciary is also in the process of training screening officers who will assist in reviewing the details of each case filed in court with the goal of determining which cases are best suited for mediation and which will proceed through the traditional litigation process.

4.6.Mediation Sessions

Once the magistrate makes a decision for a case to be referred to mediation, he will appoint a mediator and notify the parties of the decision within seven days. In consultation with the appointed mediator, the magistrate will schedule a date for initial mediation and notify you of the set date, time and date. However, one is also allowed to select a mediator of his choice who is not on the Register maintained by Mediation Accreditation Committee. This will not be considered as mediation under Court Annexed Mediation. Nevertheless, the mediation settlement agreement may be registered in court for enforcement as a court order.[21]

During the mediation sessions, a party is expected to file a summarized version of his case in a prescribed form, to attend all the scheduled mediation sessions without fail, to keep all the communication in the mediation confidential, tot to use any electronic device or any other

[21] ibid.

recording device during the mediation sessions, to commit to observe the rules of engagement and to sign a statement of understanding and to sign the mediation settlement agreement if a settlement is reached.

There is a structure guiding formal mediation from the moment the parties agree to subject their matter to mediation and the magistrate refers the same matter to Court Annexed Mediation. The first step is of course setting the table which is aimed at introducing the parties to the problem, putting the parties at ease and also allow the mediator to establish his reputation as a mediator before the conflicting parties.

The opening statement is the second stage. This is done to instill trust in the parties involved in the process and the framework that will guide them through it. The mediator also has the opportunity to clarify the method and terms to the parties at this point. This step also allows the mediator the opportunity to clarify his function to the parties and take control of the process. According to one experienced mediator, the opening statement of mediation should include at the very least the following topics: Initial considerations "My name is...", says the mediator. Introduction of the parties "Are they represented"; What is mediation "Don't make assumptions"; Mediation terminologies; Roles and responsibilities of the mediators Reiterate that the mediator is not a judge and that he or she will not give legal advice. Reiterate that the mediator is a third-party neutral. "Although this may be challenging in an informal mediation if the parties don't know one other,

'A mediation process's deliberations cannot be used in another proceeding." The mediator's ethics (describe what the mediator may and cannot do, as well as what the parties can and cannot do). Rights and responsibilities of the parties; Emphasize that mediation is a voluntary process that can be terminated at any time by the parties; It's a self-determination process, and the mediator should stay out of it. The power to bind the parties; The mechanisms of mediation (such as whether people are allowed to ask questions or how to deal with an inclination or caucusing). What are the caucusing rules? Straight forward procedural rules e.g. ground rules, courtesy, one person speaking at a time, time management, use of phone and electronic device, no use of profanities, are notes to be taken or not and by whom, are parties going to make opening statements or if represented by counsel are the advocates going to speak or not? After the opening statement of mediation comes the story telling phase. This is where both parties get to tell their version of the story before the mediator and even before themselves. It also provides the mediator with the opportunity to get

insight of the issues at hand. The mediator should be able to elicit the interest of the parties and be able to demonstrate that he understands each of the parties' perspective, needs, interest and concerns. The main goal in this stage is to allow the parties to feel heard and paraphrasing brings out the confidence that they have been heard. Through the brainstorming sessions given to the parties at this point, they get the chance to even generate more options. Settlement should be reached to what is durable and realistic option. It is at this stage where the mediator gets to distinguish himself either as a facilitative mediator or an evaluative mediator.

The final stage is the closure stage. This is where the parties are given a chance to strike an agreement that will be registered as the mediation settlement agreement. The mediation proceedings should be concluded within sixty days from the date the mediator is appointed. The period may, however, be extended for a further ten days. If the parties reach an agreement, they will sign the mediation settlement agreement with the magistrate within ten days. If no agreement is reached, the mediator will notify the magistrate after which the case will be processed by the court in the usual manner.

The mediation agreement is usually expected to meet the requirements of a valid contract. According to an advocate mediator, the parties are encouraged to check out for defences to a contract so that they don't arise at a later stage e.g. Fraud, misrepresentation, ambiguity, impossibility, mutual mistake, duress or undue influence. All these can lead to unconsent ability of the contract. The Court was of this opinion in the case of *Kenya Plantation & Agriculture Workers Union v Maji Mazuri Flowers Limited.*[22]

Enforcement is also achieved through the Civil Procedure Act, according to a magistrate of the children's court, and the negotiation is covered by the privilege under section 23 of the Evidence Act. In essence, courts conclude that the parties have agreed that the evidence should not be presented. Despite the fact that the provision does not officially or directly address mediation, it does allow the parties to engage in mediation and settle disputes without prejudice correspondences in principle.[23] Once a mediation settlement agreement has been signed, registered

[22] *Kenya Plantation & Agricultural Workers Union V Maji Mazuri Flowers Ltd [2012] eklr*.
[23] Section 23, Evidence Act

and adopted in court, one cannot appeal against it. This is because a judgment or an order arising from a settlement was generated by the parties to the matter.[24]

4.7. Challenges facing Court Annexed Mediation in the Children's court

The researcher established that public awareness of Court Annexed Mediation remains low and as such parties seeking court assisted mediation on the first instance to solve their disputes remains low. The lack of awareness leaves the court with the burden of screening disputes filed in its registry and refer the appropriate ones to mediation. The lack of an appeal mechanism for the outcomes of Court Annexed Mediation has made the tool unattractive to parties who may wish to appeal decisions of the mediation exercise. This however ought to be remedied by the understanding that the settlement arrived at is consensual by the parties.

According to a Magistrate attached to the Milimani children's court, whereas many children's disputes have been resolved through Court Annexed Mediation, in some instances mediators face difficulties in fashioning appropriate remedies to the parties in complex disputes such as those involving custody arrangement and maintenance. The judicial officer also noted that in children's matters most are unrepresented and that this poses a challenge as those parties do not understand the procedure of seeking referral to mediation forcing the court to explain the procedure to the parties which effectively leads to delay in disposal of other suits.

The Mediation Registrar laments that whereas mediation ought to be voluntary and consensual, the mediation registry contacts parties asking him them to visit the mediation registry to be guided on referring their matters to Court Annexed Mediation. In some cases, the mediation registry screens files on their own motion and refer the disputes to mediation. However, parties sometimes return to the children's court and indicate they are not interested in the mediation process.

According to an accredited mediator, the referral process to mediation in the children's court is not structured. It is random and differs between the sitting magistrates in the different courts. He recommended that the magistrates should have a structured way of referring matters to mediation e.g. maintenance matters be referred to mediation automatically. The mediation practitioner also lamented the lack of timelines for mediation. He decried that some parties after lengthy mediation

[24] The Judiciary of Kenya (n 17).

sessions return to court saying they did not agree during the mediation process and therefore they wish to proceed with the litigation process. That this defeats the essence of Court Annexed Mediation of expeditious disposal of suits as well as parties own solutions.

The interviewed mediators cited the difficulty in enforcement of mediation agreements. For instance, some mediators go beyond the ambit of matters before them therefore making it difficult for the court to enforce some orders. For instance, some parties agree on issues beyond the purview of the Children's court e.g. agreeing on distribution of matrimonial property. The mediation solutions are expected to come from the parties, however not every dispute referred to mediation would yield desired results.

4.8.Conclusion

Since the introduction of Court Annexed Mediation at the Milimani children's courts, the researcher established that it has to a large extent achieved its set goals of enhancing Access to legal system and protecting children within the justice system as demonstrated by the statistics on record. However there remains gaps and challenges which ought to be plugged for the principles and objectives of Court Annexed Mediation as a tool for enhancing Access to legal system in children's matters to be achieved.

CHAPTER FIVE: CONCLUSION AND RECOMMENDATIONS

5.1.Conclusions

The study proceeded on the hypothesis that the novel Court Annexed Mediation has been touted as a useful tool for Access to legal system in Kenya's Judiciary, nonetheless it has not achieved one of its objectives of ensuring expeditious disposal of cases in the Children's Court. On conclusion of the study, it can be said that the hypothesis has been proven as the CAM mechanism is still at its infancy stages.

The objective in chapter two was to analyse the conceptual framework surrounding the concept of mediation. From the analysis of the conceptual framework the study established that mediation has received both locally and internationally recognition. Internationally, mediation has been recognized as an alternative form of dispute resolution under the Charter of the United Nations. In Kenya, it has been recognized under Article 159 of the Constitution as an alternative from of dispute resolution. The courts and tribunals are, therefore, encouraged to embrace the principles of alternative dispute resolution including mediation to enhance Access to legal system. Mediation has been lauded for its advantages that include but not limited to; cost-effectiveness, flexibility, confidentiality, ability to preserve relationships and promoting expeditious resolution of disputes and ultimately a tool for enhancing Access to legal system.

However, there is an opposing school of thought that has been advanced by opponents who feel that mediation and other Mechanism for alternative dispute resolutions have not in any way promoted the set principles and expectations attached to them. According to them, mediation has many shortcomings which include lack of checks and balances through public scrutiny to determine whether justice was done; relinquishment of legal rights due to insistence on fairness over justice; lack of precedents due to the confidential nature of mediation; unequal bargaining power and difficulty enforcing mediation agreements Divergent views on the efficacy of mediation as a dispute resolution technique emerged from the investigation. Overall, there appears to be widespread agreement that mediation is a viable dispute resolution method for resolving social upheavals.

The objective of chapter three was to appraise the sufficiency of the legal, policy and institutional framework in place for Court Annexed Mediation. As discussed in the chapter, Kenya initiated

Court Annexed Mediation in 2015 through which mediation is conducted under the umbrella of the Judiciary. The entrenchment of mediation in the Constitution of Kenya at article 159(3) and 189(4) set the pace for take-off of Court Annexed Mediation in Kenyan Judiciary. The pilot stage was operationalized under a Judiciary mediation manual and upon a successful pilot phase, Practice Directions of Mediation, 2017 were enacted to guide the full roll out Court Annexed Mediation. The Practice Directions set down an elaborate procedure of screening matters referred to mediation. From the review of the legal framework in place, it is to be appreciated that the implementation of Court Annexed Mediation in Kenya is still at an infancy stage and therefore the legal framework has not been fully tested, it is however advisable and desirable that a mediation policy ought to put in place to guide Court Annexed Mediation processes.

The objective of chapter was to conduct a case study in one of the courts that has implemented Court Annexed Mediation to establish its uptake. The Milimani Children's court was chosen in that endeavour. Responses from the actors interviewed revealed the appreciation of the significance of Court Annexed Mediation. First, it is less costly in terms of time and money compared to solving the dispute through litigation. Court Annexed Mediation has enabled this by improving on the timelines of handling civil matters. Under ordinary court litigation, the study established that it takes an average of 673 days (about two years) to settle averagely complex civil matters. With the introduction of CAM, it now takes civil matters processed through mediation an average of 69 days to settle noncomplex disputes. Owing to the speedy settlement of matters, Kenya has witnessed an improvement in ranking in the 2020 World Bank Ease of Doing Business index at 56 out of 190 countries that were ranked. Further to this, in a study conducted by the Law Development Partnership, it is estimated that 100 percent roll-out of Court Annexed Mediation could aid the Judiciary to clear the case backlog many years to the anticipated deadline.

Secondly, it was established that CAM can assist the Judiciary in dealing with backlog of cases that has bedevilled the institution and consequently unlocking monies tied up in litigation. Since the establishment of Court Annexed Mediation in 2016, the Judiciary has witnessed a great reduction in the backlog of cases. The study established that the greatest achievement associated with Court Annexed Mediation is the fact that it has helped in unlocking resources to the economy in terms of billions of shillings. The Judiciary reports that since the interception of CAM, it is

estimated that it has assisted in unlocking more than 10 billion that had been held up in the economy in the adversarial litigation of the past.

Third, parties who choose to resolve their issues through Court Annexed Mediation have the option of choosing their own solution and tailoring it to their specific needs. Fourth, the study found that because mediation is their own solution, litigants are more likely to follow through with it. Fifth, because mediation is peaceful, parties in a dispute who employ it are able to keep their connection after the dispute is resolved.

The study established that litigants become participants therein, hence giving to them the feeling that negotiated settlement has been achieved consensually. The most important person in the mediation system who is the litigant, feels that they are given an opportunity to play their own participatory role in the settlement of the dispute. In the long run, it will give the process large acceptance in the public. It was however established that the uptake of Court Annexed Mediation still remains low due to the lack of public sensitization of its significance in speeding up Access to legal system.

The study also established that Court Annexed Mediation has also come to the rescue of family units. According to the Presiding Judge of the Family Division of the High Court, the Judiciary aims at ensuring that all family courts across the country eventually implement Court Annexed Mediation. CAM has provided the parties with the opportunity to settle their disputes in a reconciliatory manner. Mediation is also less emotionally draining as compared to litigation and has helped in restoring broken relationships. Statistics provided by the Judiciary show that more than 2500 family matters have benefited from the mediation process with about half of those cases being solved in the High Court Family Division and the Children’s Court within Nairobi region.

Finally, the study revealed that Court Annexed Mediation has enhanced Access to legal system. According to the judicial staff interviewed, Court Annexed Mediation has alleviated delayed justice to many aggrieved litigants. Court Annexed Mediation, according to the Deputy Registrar of the Children's Division, "offers rapid and effective settlement for parties to resolve their issues." The parties might ask the court to refer their case to mediation, especially if the case has been pending for years. This scenario is exemplified by a commercial dispute filed on July 1, 2015, before the High Court of Kenya in Nairobi. After significant delays by the parties in providing

their case summaries and selecting their preferred mediator, the matter was referred to mediation on November 3, 2016. After numerous delays by the parties in filing their case summaries and selecting their preferred mediator, a mediator was finally appointed in late February 2017. The parties to the case were able to achieve an agreement in two sessions over three days at the end of March and the beginning of April 2017. On April 10, 2017, a settlement was reached that allowed Ksh. 42.6 million (US$426,000) to be released.

The study established that mediation processes are not always neutral. There are some aspects of mediation that are said to serve the interests of only one party leaving out the other party. This is because of the power imbalance that occurs in the process. For example, in divorce mediation, the abusive party would clearly benefit from a process that assumes that parties have equal bargaining power.

The study also established that Court Annexed Mediation has the potential of being abused by the courts and the Judiciary staff whose aim is to expedite matters for the purpose of promoting efficiency within the legal system. Justice may not really be achieved in the long run. The courts are aiming to use this process to clear up the backlog of cases at the expense of justice. Some cases are, therefore, referred to mediation unnecessarily.

5.2.Recommendations

The implementation of Court Annexed Mediation by Kenya's Judiciary is still at an infancy stage, hence its appraisal is not comprehensive. However, from the study conducted by the researcher herein, some deficiencies are discernible even at these early stages which have been stated hereinabove. To cure the challenges identified, the researcher proposes the recommendations hereunder which are implementable in short term, medium term and long term periods.

- In the short term, it is recommended that there should be a strict timeline of conclusion of matters that are taken to mediation. As much as the Judiciary has developed a timeline of sixty days for conclusion of matters that are referred to mediation, it was observed by some respondents that these guidelines are not strictly adhered to. The Judiciary and the courts should therefore ensure that they develop strict policies and guidelines to govern conclusion and finality of mediation outcomes.

- It is recommended in the short term that matters filed in court should be screened at the earliest opportunity to decide whether they ought to be referred to mediation. The Mediation (Pilot Project) Rules, 2015 establish a framework for screening civil actions and referring those that are judged suitable to mediation. The Judiciary, through the Office of the Mediation Deputy Registrar, should ensure that this process is completed early enough to avoid cases being referred to mediation after substantial steps in the litigation process have already been taken by the parties. This would allow parties to reduce the costs of the procedure while also facilitating the resolution of disputes.
- In the short term, it is also recommended that more public awareness should be conducted so that the public can understand and appreciate the significance of Court Annexed Mediation and how it is conducted. Since the introduction of Court Annexed Mediation in Kenya close to six years ago, at least twelve court registries specifically to handle Court Annexed Mediation issues have been opened up countrywide. This is a clear indication that a large part of the country is yet to be introduced into this project and many people are yet to be made aware of it. The Judiciary should therefore conduct public awareness to educate the masses on this project that is aimed at expediting justice. The Judiciary should also partner more with the Law Society of Kenya to engender Court Annexed Mediation in their service weeks.
- In the medium term it is proposed that a Court Annexed Mediation Policy should be developed. Such a policy will set out a clear structure and procedure of referring matters from the courts to mediation. Apart from the screening guidelines that have been developed to examine matters before they are referred to mediation, there is no other clear structure guiding referral of matters to mediation. There is therefore need to develop the structures to ensure consistency in the manner in which matters are taken into mediation. It is instructive to note that an ADR policy has been forwarded to the Attorney General for consideration and eventual publication into a Bill of Parliament.
- It is suggested that, in the longer term, CAM's capacity be increased by training new mediators and improving the efficiency of those who have already been accredited by the Mediation Accreditation Committee. The Committee's responsibilities under the Civil Procedure Act include developing adequate training programs for mediators. This function must be expanded by the committee in order to improve capacity building and allow Court

Annexed Mediation. In addition to comprehending mediation, non-lawyers must master some basic legal ideas such as commercial law principles of 'responsibility' and 'quantum.' As a result, they will be better able to facilitate the mediation process.

- In the long term it is recommended that there should be proper management of data relating to mediation matters. Data on mediation should always be made available to those who need. This therefore means that a management tool should be developed to manage the data from the time the matter is filed at children's court for screening until the matter is concluded.
- In the long term it is recommended that there should be developed a referral tool from Court Annexed Mediation. The referral process is currently haphazard. The judicial officers cannot clearly tell when files will be returned from mediation. It is, therefore, important that the Judiciary develops a clear tool that regulates the amount of time that a matter takes so that the magistrate or judge handling the matter can be certain of the dates they expect the files back from the mediation process.
- It is recommended in the long term that alongside developing a Court Annexed Mediation Policy, the ideals of the ADR Policy should be complimentary to CAM process. Alternative Dispute Resolution (ADR) is a method of resolving disputes. The goal of the ADR policy is to strengthen, guide, and encourage the expansion of ADR in Kenya so that all Kenyans have access to the legal system. The policy makes a number of recommendations aimed at improving the practice of ADR in Kenya, including the enactment of an Alternative Dispute Resolution Act and the creation of an ADR division of the High Court to serve as a focal point for the ADR sector's connection and coordination. The policy acknowledges the relevance of alternative dispute resolution (ADR) tools and their role in expanding access to the legal system.
- It is suggested that increased assistance for Court Annexed Mediation be provided in the short and long term. While Court Annexed Mediation has shown significant success since its introduction in the country, it has also faced significant problems, including non-compliance by advocates and parties, as well as resistance by legal practitioners. The researcher appreciates the Judiciary's proposals to address these issues, such as simplifying and incorporating Court Annexed Mediation into the legal system. It has also set up mediation rooms in courts that are still under construction. Exercises aimed at the general

public, advocates, and other stakeholders should also be done. Non-compliance with mediators' instructions must be addressed with measures such as summons, citations for contempt, and injunctions, which can only be enforced by courts. The judiciary should also provide long-term funds to facilitate the process. The program must also be flexible.

- It is suggested that increased assistance for Court Annexed Mediation be provided in the short and long term. While Court Annexed Mediation has shown significant success since its introduction in the country, it has also faced significant problems, including non-compliance by advocates and parties, as well as resistance by legal practitioners. The researcher appreciates the Judiciary's proposals to address these issues, such as simplifying and incorporating Court Annexed Mediation into the legal system. It has also set up mediation rooms in courts that are still under construction. Exercises aimed at the general public, advocates, and other stakeholders should also be done. Non-compliance with mediators' instructions must be addressed with measures such as summons, citations for contempt, and injunctions, which can only be enforced by courts. The judiciary should also provide long-term funds to facilitate the process. In order to maximize the program's impact, it must be gradually pushed out across the remainder of the country.
- In the short, medium, and long term, it is advised that the courts, through the Mediation Deputy Registrar, do not push parties into mediation in order to preserve the true features of mediation, which include voluntariness, privacy, confidentiality, and party autonomy. The procedure should be voluntary, and parties should not be forced to participate in Court Annexed Mediation if they intend to pursue their case. Before referring a case to mediation, it is recommended that the parties obtain their consent. Furthermore, in the name of finding a settlement and expediting the parties' disposal, the mediator in charge of the proceedings should not impose his or her judgment on the parties. The mediator's role should be limited to facilitating the process, with the parties making any decisions or reaching agreements on their own. Instead of advocating or pushing solutions on the parties where they fail to agree, the mediator should file a report stating that the parties have failed to reach an agreement. The actual spirit of mediation can be conveyed in Court Annexed Mediation in this way.

5.3.Further Research

The study limited itself to testing the effectiveness of Court Annexed Mediation in the children's court. However, to fully comprehend the effectiveness of Court Annexed Mediation calls for further research in other courts where Court Annexed Mediation has been operationalized. The researcher therefore proposes further research studies to be conducted especially in civil courts to test their effectiveness against adversarial litigation.

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