UNIVERSITY OF NAIROBI

SCHOOL OF LAW- PARKLANDS

"THE ROLE OF ARBITRATION IN PROMOTING ACCESS TO JUSTICE IN NAIROBI COUNTY, KENYA"

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DECLARATION

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

ANNAH NYAERA OMWEGA REG. NO: G62/37645/2020

Signed…… Date…20/09/2023……..

This research project has been submitted for examination with my approval as a University supervisor

Signed: Date: **20/09/2023**

DR. KARIUKI MUIGUA

II

DEDICATION

I dedicate my research project to my parents, John & Josephine Omwega, for teaching me the value of education.

ACKNOWLEDGEMENT

I appreciate the immeasurable support of my supervisor Dr. Kariuki Muigua. I have never met someone as committed as him. If this research project is solid, it is because of his guidance.

TABLE OF CASES

TABLE OF DOMESTIC LEGISLATION

i. The Constitution of Kenya 2010
ii. The Arbitration Act (as amended in 2009) and the Arbitration Rules
iii. The Civil Procedure Act and the Civil Procedure Rules
iv. The Investment Disputes Convention Act
v. The Employment Act,
vi. The Nairobi Centre for International Arbitration Act
vii. The Evidence Act

TABLE OF REGIONAL CONVENTIONS

i. East African Community Treaty,1999

TABLE OF INTERNATIONAL CONVENTIONS

i. New York Convention,

ii. The United Nations Commission on International Trade Law Model law on arbitration

LIST OF ABBREVIATIONS AND ACRONYMS

ADR	Alternative Dispute Resolution
TJS	Traditional Justice System
IJS	Informal Justice Systems
DRC	Kenya Dispute Resolution Centre
ICJ	International Commission of Jurists
UNCITRAL	United Nations Commission on International Trade Law model law on arbitration
NYC	The Convention on the Recognition and Enforcement of Foreign Arbitral Awards OF 1958
ELR	Empirical Legal Research
HCCR	High Court Criminal Case
HCCC	High Court Civil Case
HC ELC	High Court Environment and Land Case
EAC	East African Community

TABLE OF CONTENTS

ABSTRACT

The development of quick and inexpensive dispute resolution solutions should promote it globally. Instead of abandoning the citizen to despair in the pursuit of justice, legal institutions/facilitators should provide a supportive environment that enhances the delivery of justice in any venue. It would also be very great if society's citizens agreed to take responsibility for resolving their own disputes by creating a legislative framework that promotes arbitration. Outside of the established legal framework of the courts, arbitration dispenses justice. It deflects attention from regulations and legal complexities. Contrast this with the official court justice system, which is slow and tiresome for the general public and is replete with business and civil disputes between people of middle and low wealth. The benefits of arbitration are many and well documented. It is safe to claim that the entire world should be going towards arbitration as a way of dispute resolution, and this paper will make a good case for that. Arbitration can save the disputing parties a significant amount of money while also ensuring that they obtain access to justice quickly. The processes of resolving conflict in the county must be analyzed in light of this and the part Nairobi County plays in boosting the country's general economic health and economic simulation. This is due to the fact that disagreements hamper development, thus whatever system is in place must be capable of swiftly resolving them while maintaining existing ties. Arbitration accomplishes this.It is safe to claim that the entire world should be going towards arbitration as a way of dispute resolution, and this paper will make a good case for that. Arbitration can save the disputing parties a significant amount of money while also ensuring that they obtain access to justice quickly. The processes of resolving conflict in the county must be analyzed in light of this and the part Nairobi County plays in boosting the country's general economic health and economic simulation. This is due to the fact that disagreements hamper development, thus whatever system is in place must be capable of swiftly resolving them while maintaining existing ties. Arbitration accomplishes this. It is no secret that most parties in Nairobi County still choose to resolve their disputes in court, as shown by the ongoing backlog. So that methods outside of the courts might be used, it became vital to first comprehend why. Therefore, this will require identifying the issues that prevent society from using arbitration and the reasons why it is ineffective where it is already the dominant way of conflict resolution. Since courts have been the ones to bear the burden of the backlog of cases and are underfunded, which causes judges to become overworked, this paper also raises a significant topic on the role of courts in promoting the use of arbitration. In order to make their jobs easier and free them up to focus on more crucial matters, judges and magistrates must realize that they must be at the forefront of the drive for the use of arbitration. By examining the present legislative framework that controls arbitration and how various stakeholders might better play their roles in ensuring that arbitration is fully utilized, this paper will argue that arbitration plays a role in improving access to justice in Nairobi County. Additionally, it will make suggestions for how to make the problems highlighted better.

CHAPTER ONE

INTRODUCTION

1.0 Background

Arbitration is a private consensual process in which the parties involved agree to present their grievances to a third party for resolution and settlement of the dispute[1]. There is no doubt that dispute resolution through negotiation, mediation, and arbitration is now an appropriate and, indeed, what the world is slowly moving towards[2]. Currently, Alternative Dispute Resolution processes are now being applied globally to a wide range of issues that were initially governed by litigation Instances include world peace and global order, environmental and public policy, science and technology, sports, social development and community issues, crime control and prevention, education, restorative justice, and the family[3]. Conventional areas such as business contracts, employment, labour relations, and insurance as well.

Alternative dispute resolution through means that circumvent the traditional concept of the court justice systems are still touted as being instrumental to the just and expeditious resolution of disputes.[4] This has always been demonstrated by the long and arduous court processes that are made up of procedural and substantive rules that ordinarily are supposed to be applied simultaneously towards the expeditious attainment of justice but sometimes are involved in a rather unnecessary tug of war.[5] This tug of war despite the constitution's best

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1 The Oxford Advanced Learner's Dictionary

2 KariukiMuigua& Francis Kariuki, „ADR Access to justice and Development in Kenya‟.Available at www.kmco.co.ke at Page 1, 2 and Daniel Kaufmann, AartKraay and Massimo Mastruzzi. „Governance Matters III Governance Indicators for 1996-2002‟. (2003) The World Bank

3 .KyaloMbobu, „Efficacy of Court Annexed ADR: Accessing Justice through ADR‟. (2014) ADR Journal ISBN 978-9966-046-02-4 at page 1

4 Kariuki Muigua, 'Access to Justice and Alternative Dispute Resolution Mechanisms in Kenya' 26.

5 Elvis Begi Nyachieo Abenga, 'Civil Practice and Procedure in Kenyan Courts: Does the Overriding Objective Principle Necessarily Improve Access to Justice for Litigants?' (Social Science Research Network 2012) SSRN Scholarly Paper ID 2240955 <https://papers.ssrn.com/abstract=2240955> accessed 16 January 2021.

efforts at resolving this dispute through Article 159(2)(d), the procedural technicalities still persist and as such remain one of the causes for the lengthy duration for justice to be attained through the court systems.[6] Furthermore, the cost of litigation and particularly advocates' fees remain determined by several factors including the complexity of the matter and the duration the matter takes before a solution can be found and this exponentially increases the cost of resolving disputes through the court systems.[7]

Ideally, there exists more than the aforementioned impediments to the realization of the right of every Kenyan to access justice as espoused by the provision of Article 48 at reasonable costs without any undue or unreasonable delays. This is evident from the wisdom of the drafters of the Constitution of Kenya, 2010 to enshrine within the constitution alternative mechanisms for the realization of justice for all in Article 159(2)(c).[8] Furthermore, the drafters also appreciated the significance of traditional justice systems with the only caveat being such mechanisms being that they must be consistent with the Constitution and must be aligned with the Bill of Rights, justice and morality.[9] The goal of the drafters of the constitution in enshrining access to justice as a right was the recognition of these challenges ordinary citizens faced in the court systems and the realization that the imposition of a duty on the State to facilitate access to justice would be a step in the right direction towards the expeditious and affordable access to justice for all.[10] This study therefore recognizes the shortcomings that still persist within the court systems in their best attempts to facilitate access to justice and wishes to propose the scaling up of alternative dispute resolution

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6 Abenga (n 2).

7 Thomas Stipanowich, 'Arbitration and Choice: Taking Charge of the "New Litigation"' (Social Science Research Network 2009) SSRN Scholarly Paper ID 1372291 <https://papers.ssrn.com/abstract=1372291> accessed 16 January 2021.

8 'Constitution of Kenya, 2010'
<http://kenyalaw.org/kl/index.php?id=398> accessed 16 January 2021.

9 Constitution of Kenya, 2010, Article 159(3).

10 Muigua (n 1).

mechanisms over and above their current application to overcome these challenges as originally intended.

However,there still exists a gap between the promises of The Constitution of Kenya 2010 and reality of life under it. Conflict between The Constitution of Kenya 2010 and law in reality is evidenced in cases such as Republic V Mohamed Abdow Mohamed [2013] eklr.[11] In this matter, Mohamed Abdow Mohamed was charged with the murder of Osman Ali on the 19th day of October 2011 at Eastleigh within Nairobi County. The family of the accused and the family of the deceased *met and agreed to resolve the matter out of court. The family of the deceased accepted compensation in the form of camels, goats and other traditional ornaments as provided for under the Islamic Law and customs. The prosecutor agreed with the parties and petitioned the court to discharge the accused. The accused was discharged.* The public and human rights groups were infuriated by this decision as it amounted to downplaying the sanctity of life. The case is a good example of how the constitution is supposed to consider the contexts in which written law is applied. The conflict in this matter is the contestation between African conception of justice for human rights violations and Western perspectives. While the former is restorative, in the case in question, the latter is retributive.

Indeed, there is an increasing recognition that majority of disputes can be resolved through arbitration which is one of the mechanisms of ADR[12]. From business controversies to labour relations disputes, arbitration is quickly becoming the preferred method for resolving conflict and disagreement, and it should be obvious why. The process of litigation is

[11]RepublicVMohamedAbdow Mohamed [2013] eklr http://kenyalaw.org/caselaw/cases/view/88947/

[12] Paul Ngotho, „Challenges Facing Arbitrators in Africa". East Africa International Arbitration Conference Nairobi. Page 8. The writer notes that arbitrators in Europe have 100-500 arbitrations under their belt each while theirAfrican counterparts with 10-20 are considered gurus.

stressful[13]. It is an expensive, lengthy, public demonstration of disagreements that results in a great deal of ill will between litigants. Arbitration, on the other hand, is typically faster, less expensive, less time-consuming, and much more conclusive than litigation[14]. It is a flexible dispute resolving process that allows parties to work through issues with a neutral third party[15]. The process has also over time been credited for giving parties control over their disputes in that the parties get to choose their arbitrators and are therefore more satisfied with the results[16].

Nairobi County hosts Nairobi city which is the capital city of Kenya and is a commercial hub for the East Africa region[17]. It has also rapidly grown as a hub for multinational corporations looking to invest, making it one of the cities that is attracting new global business[18].The rise in economic activity, particularly commercial activity, has eventually resulted in an increase in commercial contracts, the infringement of which creates disputes that need to be resolved[19]. These commercial disputes necessitate prompt resolution, which the Courts' adjudication process does not provide.[20] The faster the disputes are resolved, the more quickly parties can get back to business and continue with the work of growing the economy harmoniously. This

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13 J K Gakeri, „Placing Kenya on the Global Platform: An Evaluation of the Legal Framework on Arbitration and ADR", International Journal of Humanities and Social Sciences. 2011Vol 1 No 6 June page 219

14 Aisha Onsando, Is Arbitration of Disputes Better than Litigation? And Benson Wambugu, Arbitration Cuts on Backlog in Courts. Business journal, 23rd June, 2008 page 2 Nairobi. visited on 9th April, 2015

15 Edward NiiAdjaTorgbor, „A Comparative Study of Law and Practice of Arbitration in Kenya, Nigeria and Zimbabwe, with Particular Reference to Current Problems in Kenya' (2014) Dissertation presented for the degree of Doctor of Law in the Faculty of Law at the University of Stellenbosch University. http://scholar.sun.ac.za

16 A perusal of our reported cases indicated that new foreign companies in Kenya are settling their disputes by filing suits in Kenya. This indicates a level of confidence and increase in investments by foreign companies.

17 The Judiciary Kenya, Report of the Sub-Committee of Ethics and Governance of the Judiciary Kenya. (November, 2005) www.kenyalaw.org (the Justice OnyangoOtieno committee)

18 'What Makes Nairobi the Only African City in Global Investors Top Five Watch list' (The East African, 2022) <https://www.theeastafrican.co.ke/tea/business/what-makes-nairobi-the-only-african-city-in-global-investors-top-five-watchlist-1360140> accessed 15 October 2022.

19 The Kenyan section of the International Commission of Jurists (ICJ) Kenya is a non-governmental. Its membership is drawn from the bar as well as the bench and it"s led by a council of 7 members.

20 Albert Fiadjoe, Alternative Dispute Resolution (1st edn, Cavendish Publishing (Australia) Pty Ltd 2004).

is due to the fact that there is an aspect of finality with arbitration proceedings since there is a limited possibility of vacating an arbitral award.[21]

What all these benefits mean therefore is that at the end of the day there is an increase in access to justice since people will always move to that which is convenient[22]. If more parties move towards arbitration, our courts wascongested and reduced backlog will help ensure that the matters currently in court are resolved faster and courts wasable to give priority to more serious matters[23].

This study therefore recognizes the shortcomings that still persist within the court systems in their best attempts to facilitate access to justice and wishes to propose the scaling up of arbitration over and above its current application to overcome these challenges as originally intended[24].

It was very encouraging and of course the first step towards overcoming the challenges with the court system when Article 159[25] of the Constitution of Kenya came into force which provides:

> *159. (2)(c) In exercising judicial authority, the courts and tribunals shall be guided bythe following principles……*
>
> *(c) Alternative forms of dispute resolution including reconciliation, mediation,* ***arbitration*** *and traditional dispute resolution mechanisms shall be promote.*

This article of the Constitution demonstrates that Kenyans support arbitration as a form of conflict resolution at all levels. The possibility that more conflicts wasresolved by

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[21] Ibid.
[22] Patricia KameriMbote and MigaiAkech, *Kenya Justice Sector and the Rule of Law.A review by AfriMAP and theOpen Society Initiative for Eastern Africa* (March 2011) Page 174 – 176.
[23] See the paper Eric Opiyo, Examining the Viability of a Regional East African Arbitral Institution. 2012.
[24] The Constitution of Kenya,2010
[25] Article 159 of the Kenyan Constitution 2010 emphasizes on the sources of judicial authority in the Kenyan legal system.

arbitration is increased by the Constitution's inclusion of arbitration provisions[26]. The Constitution also requires the government to use alternative dispute resolution, including arbitration, to resolve disagreements with the respective county governments.[27] This will have the result of gaining a swift resolution to devolution-related issues and, consequently, a quicker delivery of services to the populace.

The Bible in Mathew chapter 5 verse 25 also underscores the need for settlement out of court. It provides;[28]

> *"Settle matters quickly with your adversary who is taking you to court. Do itwhile you are still with him on the way or he may hand you over to the judge".*

Similar words are also available in the Koran at 4: 35 where it also emphasizes the need for settlement via arbitration. It provides

> *"And if you fear dissention between the two, send an arbitrator from his people and an arbitrator from her people. If they both require reconciliation, Allah will cause it between them. Indeed, Allah ever knows and acquainted with all things".*

It goes without saying that in this fast paced world that we live in, disputes are ever increasing, perhaps at a rate that is leaving courts in Nairobi a little overwhelmed and now more than ever, there is a growing need to move to systems that will complement our courts[29].

1.1 Statement of the Problem

Despite the numerous disadvantages of litigating disputes through the court system, it is a wonder why parties still flock the court. The Constitution of Kenya 2010 has codified

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[26] The Judiciary, *State of the Judiciary and the Administration of Justice, Annual Report 2012 – 2013*. (2015)www.judiciary.go.ke

[27] Constitution of Kenya,2010,Article 189 (4)

[28] The Holy Bible, the New International Version (NIV) © Bibilica.

29 Note the recent enactment of the Nairobi Centre for International Arbitration Act, No. 23 of 2013

alternative dispute resolution mechanisms but the uptake has remained very low as can be evidenced by the backlog of cases in our courts[30]. The advantages of Alternative Dispute resolution are numerous but there still remains a large percentage of the population that are not aware of the benefits that these mechanisms have to offer let alone having knowledge of their existence[31]. However, courts have been inaccessible to many due to the high court fees, geographical location, complexity of rules of procedures, use of legalese, under staffing, lack of financial independence, lack of effective remedies, a backlog of cases that delays justice, lack of awareness on Alternative Dispute Resolution (ADR) mechanisms[32].

The Judiciary in its transformation framework[33] is anchored on four (4) pillars one of which is people-focused delivery of justice which lays emphasis on access to and expeditious delivery of justice. To realize this, the framework proposes to promote and facilitate ADR and also to promote and enforce dispute resolution systems which are in line with the Constitution. The framework however does not make reference to Arbitration expressly and is more focused on the state of formal access to justice.

It is against this background that this thesis was to amplify the role that arbitration has to play in the grand scheme of promoting access to justice through faster resolution of disputes while ensuring parties incur as little as possible.

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30 KariukiMuigua, „Heralding a New Dawn: Achieving Justice Through Alternative Dispute Resolution Mechanisms in Kenya Journal of Alternative Dispute Resolution" (2013) 1 ISBN 978-9966-046-02-4 by page

31 KariukiMuigua, „Overview of Arbitration and Mediation in Kenya", (A paper submitted at a Stakeholder"s forum on Establishment of Alternative Dispute Resolution (ADR) Mechanism for Labour Relations in Kenya Kenyatta International Conference Center, Nairobi (4th – 6th May, 2011)

32 ICJ Kenya and USAID, 'Strengthening Judicial Reform in Kenya; Public Perceptions and Proposals on the Judiciary in the New Constitution' (2002 vol III < http://pdf.usaid.gov/pdf_docs/pnacw006.pdf> accessed 06 January 2015; Jackton Ojwang, 'The Role of the Judiciary in Promoting Environmental Compliance and Sustainable Development' (2007) 1 Kenya Law Review Journal 19, 29.

33 The Constitution of Kenya 2010

1.2 Justification of the Study

Besides the ratio of judges to an ever-growing population still being too low for the expeditious resolution of disputes with resources that are overstretched and a judiciary that continues to operate while underfunded, it is important to consider alternative ways of facilitating access to justice beyond what can be achieved through the court systems.

1.3 Statement of Objectives

The objectives of this study were:

a) To investigate the legal and policy framework for arbitration in Nairobi County;
b) To investigate the challenges facing the realization of the right to access to justice in Nairobi County;
c) To evaluate the role of arbitration in the facilitation of the right to access to justice in Nairobi County; and
d) To make recommendations for the improvement of the legal and policy framework for the realization of access to justice through arbitration.

1.4 Research Questions

This study answered the following questions:

a) What is the legal and policy framework for arbitration in Nairobi County?
b) What are the challenges in the realization of the right to access to justice in Nairobi County?
c) What is the role of arbitration in the realization of access to justice in Nairobi County?
d) What are the possible recommendations for the improvement of the legal and policy framework for the realization of the right to access to justice through arbitration?

1.5 Theoretical Framework

This study was premised on two theories that provided the theoretical foundation for arbitration as an alternative dispute resolution mechanism that may facilitate the speedy

realization of the right to access to justice. The two theories are the jurisdictional theory and the contractual theory.

1.5.1 The Jurisdictional Theory

This theory has several scholars backing it and none is more recognized than Francis A. Mann for his contributions in the 1983 seminal paper *Lex Facit Arbitrum* where he propounded that the laws of the country where the arbitral proceedings are being held and more so the enforcement of the award from the proceedings should be guiding laws for the resolution of a dispute.[34] This is usually because a country legal systems and rules give life to the operationalization of arbitration as an alternative dispute resolution mechanism and without the express recognition of arbitration or any other dispute resolution mechanism all such proceedings remain illegalities that are unenforceable.[35] Mann further argues that despite ADR being a private matter, the drafting of the arbitration agreement that paves way for arbitration must conform to the laws of both the seat of the arbitrator as well as the place where the parties will seek the enforcement of the award.[36]

This presupposes that arbitration or even any other form of ADR is subject to the laws of the country where the parties wish to adopt the mechanism for the resolution of their disputes and as such the will of private parties must always be bent to conform to the promulgated laws of the State. Furthermore, even where parties wish to adopt ADR matters of the procedure to be followed during such proceedings, the legality of the powers of the arbitrator(s) during the proceedings, the scope of matters to be submitted to the proceedings among other procedural issues cannot be in contravention of the laws of the countries where the proceedings washeld,

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34 Roy Goode, 'The Role of the Lex Loci Arbitri in International Commercial Arbitration' (2001) 17 Arbitration International 19.

35 Goode (n 8).

36 Stipanowich (n 4).

or the arbitral award wasenforced.[37] In the event of any contravention of the procedural aspects of the arbitral proceedings, the enforceability of the award as well as the recognition of the proceedings or even the powers of the arbitrator(s) wascast into serious doubt as a matter of public policy.[38] Based on the foregoing, it is quite evident that recognition of an alternative dispute resolution mechanism is key to the usage of that ADR mechanism for the realization of the right to access to justice using that mechanism. The legal system and its rules therefore remain a pillar upon which the circumvention of court processes in a quest to achieve access to justice for all is predicated.

1.5.2 The Contractual Theory

The proponents of this theory, key among them being Kitagawa, propound that the question of which jurisdiction the arbitration proceedings will take place should play little to no significance in the determination or adjudication of disputes.[39] Kitagawa's contribution is well documented in the chapter on *Contractual Autonomy* as his seminal contribution to the academic discourse on the contractual theory in arbitration as a mechanism for the resolution of disputes.[40] While the proponents do not completely dismiss the role of a country's legal systems in the ADR mechanism, Kitagawa argues that party autonomy should be the predominant factor in the resolution of dispute using these alternative forms of dispute resolution.[41] Contractual theorists therefore express their reservations against the overly intrusive nature of a country's legal systems into the adjudication of disputes through a means

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[37] Hong-lin Yu, 'A Theoretical Overview of the Foundations of International Commercial Arbitration' (2008) 1 Contemporary Asia Arbitration Journal 255.
[38] Yu (n 11).
[39] W Paul Gormley, 'International Arbitration, Liber Amicorum for Martin Domke' (1969) 19 Buffalo Law Review 137.
[40] Gormley (n 13).
41 Philip J McConnaughay, 'Risks and Virtues of Lawlessness: A Second Look at International Commercial Arbitration' (1998) 93 Nw. UL Rev. 453.

that essentially is intended to circumvent the rigorous rules that make the achievement of justice through the court systems long and arduous.[42]

The voluntary nature of contracts implies that parties to a contract are free to privately decide their wishes in the contractual arrangement and to allow the intervention of a State's laws limits the extent of the autonomy.[43] The settlement of the dispute should therefore be aimed at the expeditious resolution of disputes without the exigencies of court processes, rules, or procedures that characteristically slows down the expeditious resolution of disputes and the overall goal of access to justice to everyone in a timely manner.[44]

Based on the foregoing, this study finds the jurisdictional theory with its systems of rules and legal practices to be a stumbling block to the efficient and expeditious resolution of disputes[45]. The autonomous determination of the laws, processes and rules for the resolution of the parties gives the contractual theory the upper hand in eliminating the excesses of the laws, processes, and rules which ultimately slows down the expeditious determination of disputes.[46] The contractual theory is therefore more appropriate in advancing the course of the right to access to justice to all within a shorter period of time. This study will therefore adopt the contractual theory over the jurisdictional theory even as it seeks to reach its findings.

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42 Ilias Bantekas, An Introduction to International Arbitration (Cambridge University Press 2015).

43 Bantekas (n 16).

44 Loukas A Mistelis, Arbitrability: International & Comparative Perspectives (Kluwer Law International BV 2009).

45 Paul Ngotho "Challenges Facing Arbitrators in Africa" East Africa International Arbitration Conference. Nairobi (July, 2014) Available at http://www.ngotho.co.ke

46 See the recommendations and conclusions on the need to train other professions to join the field of arbitration.

1.6 Research Methodology

This study adopted the qualitative methods of research that was evidenced by the doctrinal approach to the analysis of legal concepts, legislative edicts and cases from courts in a bid to expound on the potential for ADR to accelerate the realization of the right to access to justice for all. Particularly, this study adopted secondary methods of data collection and focus on textbooks, peer-reviewed journal, articles, and theses, reports from the internet and other texts by authors on the adoption of Alternative Dispute Resolution as a mechanism for the realization of the right to access to justice for all. Since the researcher would have needed to speak with people who have used arbitration to settle conflicts in Nairobi County despite the fact that litigation is preferred, it was not viable to use primary data in this study.

1.7 Literature Review

Concerns have been raised about the cost of litigation, the never-ending backlog of cases in courts, and even the disappearance of files in court registries. These constantly prove that maybe it is high time that ADR mechanisms were escalated to deal with the challenges that remain unresolved for the court justice systems[47]. To this end, this study reviewed literature on unlocked potential of arbitration in facilitating the expeditious, cost-effective, and fair resolution of disputes through these alternative means[48].

Journals, scholarly papers, and educational books for lawyers and law students that have also been examined have been written about how arbitration works and how it is practiced globally[49]. Since they are based on actual experiences and have an impact on the reader and peers, conference papers on how to improve individual instruments for arbitration have been a great help. However, very little exploratory research and studies have been conducted to uncover and pinpoint what difficulties (likely) parties to arbitration may

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[47] Republic v Mohamed Abdow Mohamed [2013] eKLR.
[48] S. Mishra, "Justice Dispensation through Alternate Dispute Resolution System in India," Op. cit
[49] The Judiciary Kenya, *Report of the Sub-Committee of Ethics and Governance of the Judiciary Kenya*. (November,2005) www.kenyalaw.org (the Justice OnyangoOtieno committee*)*

experience, finally persuading them to pursue litigation[50].

An initial conclusion from the review of the literature in this area that is currently available in Kenya is that the majority of the material is geared toward promoting the different ADR branches, which include mediation, arbitration, negotiation, and conciliation, including med-arb[51]. There haven't been many studies precisely addressing obstacles to arbitration with a focus on the intended parties. The initial literature analysis concludes that Kenya is poised to take off on the international arbitration platform and as a result, an enabling environment must be created to make it easier for the country to take advantage of the available arbitration opportunities.[52] There are also earlier works from Kenya's first years after independence that describe how traditional societies viewed arbitration.[53] It is noteworthy that the first section of the literature assessment includes works by some of the most esteemed figures in Kenyan legal practice and arbitration circles. This will imply that their written contributions are influenced by the experiences they have had while teaching and practicing arbitration in Kenya.

Kariuki Muigua is one of Kenya's more recent and prominent writers in the domain of arbitration.[54] The publications of Muigua are geared toward promoting the use of ADR and have a favorable slant toward arbitration in Kenya.[55] Although he writes with a broader perspective on alternative dispute resolution, he also looks at each of its individual branches, including negotiation, arbitration, mediation, and conciliation. He contends that alternative

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[50] See the recommendations and conclusions on the need to have quality control measures in the practice of arbitration.

[51] A practicing lawyer, arbitrator and a lecture at the Faculty of Law University of Nairobi.

[52] See the paper Eric Opiyo, Examining the Viability of a Regional East African Arbitral Institution. 2012.

[53] A perusal of our reported cases indicated that new foreign companies in Kenya are settling their disputes by filingsuits in Kenya. This indicates a level of confidence and increase in investments by foreign companies.

[54] Note the recent enactment of the Nairobi Centre for International Arbitration Act, No. 23 of 2013

[55] Ojwang J B "Rural Dispute Settlement in Kenya" (1975) Zambia Law Journal. The article evaluates the interactions in rural Kenya processes of law and dispute settlement: Introductory - Conflict settlement in the traditional period - The colonial period: new developments in dispute settlement - Rural dispute settlement in independent Kenya traditional and state institutions.

conflict resolution methods have been in use for some time and have proven to be adaptable, speedy, friendly, and cost-effective, hence facilitating access to justice for a greater segment of the population. It has been suggested that separate forums should be established to handle different types of disputes as courts can only handle a small portion of all issues. He contends that other players in the field of conflict resolution, such as the church and family, have scaled back their efforts to resolve conflicts, leaving it to the courts to resolve all interpersonal conflicts and social tensions.[56]

Muigua has also looked into how the Kenyan Constitution treats alternative dispute resolution.[57] With the express purpose of making sure that the people receives effective and complete justice, this elevation has led to the practice of numerous forms of dispute settlement. The different aspects of justice, including expediency, proportionality, equality of opportunity, fairness of process, party autonomy, cost effectiveness, party satisfaction, and the efficacy of remedies, must exist in order to realize the constitutional right to seek justice[58].

The new Constitution has made provisions for the practice of different cultural beliefs of our communities within a legal framework to the degree that they comply with the Constitution's limitations, even as it works to ensure that everyone has access to justice.[59] Now, our courts can easily adopt a judgment rendered by another forum that did so in accordance with the rules of justice.[60]

According to Kariuki Muigua, the current legal system in Kenya has led to the formation of

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[56] A practicing lawyer, arbitrator and a lecture at the Faculty of Law University of Nairobi.
[57] Chair, Chartered Institute of Arbitrators Kenya and lecturer, Faculty of Law and CASELAP University of Nairobi. See the website of his law firm and articles, *http://www.kmco.co.ke/index.php/publications.*Accessed severallybetween September 2014 and August 2015.
[58] Charles Kajimanga, „Enhancing Access to justice through Alternative Dispute Resolution Mechanisms, The Zambian Experience" A paper presented at the at the Annual Regional Conference held at the Southern Sun, MayfairNairobi, Kenya on (25-26th July, 2013)
[59] KariukiMuigua, „Heralding a New Dawn: Achieving Justice Through Alternative Dispute Resolution Mechanismsin Kenya Journal of Alternative Dispute Resolution" (2013) 1 ISBN 978-9966-046-02-4 by page
[60] A judge, arbitrator and the chairman of the Zambian Chartered Institute of arbitration.

more arbitration forums.[61] He examines how parties to labor disputes might use the alternative forums allowed by the labor statutes, which are supported by the Constitution, in order to speed up the justice process in labor forums. The point of departure from Muigua's writing is he examined the application of ADR as a whole, combining the effectiveness of arbitration with that of mediation, conciliation, and negotiation. In this essay, the difficulties with efficacy in one area of ADR are explored in more detail (arbitration)[62].

The information gathered will show if arbitration has been used to facilitate access to justice in Kenya, particularly in the county of Nairobi. Kariuki Muigua has further concentrated on the theoretical and practical difficulties of arbitration in the absence of empirical data[63]. Another way that this paper differs from Muigua's findings of the benefits of arbitration is that it will highlight certain pre-arbitration stages that need to be revisited in order to encourage parties to employ arbitration and improve justice from the perspective of the end user.[64]

Another writer in the field of arbitration is Paul Ngotho.[65] His lack of being a lawyer in a field dominated by attorneys is where his distinctiveness begins. Furthermore, in contrast to the majority of the authors represented in the literature on arbitration, his works are based on observations and information he has accumulated over the course of his arbitration practice[66].

Paul Ngotho has urged non-lawyers to enter the arbitration industry. As a result, the

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[61] Supra, The Introduction at page 1

[62] Mugenda and Mugenda, *Research Methods – Quantitative & Qualitative Approaches*,(Acts Press Nairobi 2003)

[63] The proceedings shall include pleadings, proceedings notes and the arbitral award

[64]Supra. Note 24 above

[65] KariukiMuigua, „Overview of Arbitration and Mediation in Kenya", (A paper submitted at a Stakeholder's forum on Establishment of Alternative Dispute Resolution (ADR) Mechanism for Labour Relations in Kenya Kenyatta International Conference Center, Nairobi (4th – 6th May, 2011)

[66] UNCITRAL http://www.uncitral.org

arbitrators with subject-matter competence will provide better and improved awards[67] In his article "Challenges Facing Arbitrators in Africa," Paul Ngotho outlined the issues that have rarely been brought up in arbitration practice but are crucial to jurisdiction. One of the issues is that there aren't many non-lawyers working in arbitration[68]. He says that non-lawyers ought to be encouraged to participate in arbitration and trained in doing so.[69] He makes the observation that non-lawyers in the field of arbitration are an endangered species.

Paul Ngotho discusses "corruption," a topic that is very relevant to society and the practice of arbitration but is typically mentioned in hushed tones, in the same article that deals with problems in arbitration. The elephant in the room, as he puts it[70]. Paul Ngotho has described a number of significant arbitration cases that were corrupted[71]. In Kenya and around the world, there is a need to reduce corruption in the arbitration industry. Standards must be upheld, and it must be impossible for arbitrators to engage in corruption, so precautions must be taken. Two of the advocates who were sampled for the interview brought up the subject of corruption as well.[72] These two advocates confirmed the writings of Paul Ngotho by pointing out this cancerous vice that is rocking the boat of arbitration.[73]The writings by Paul Ngotho are geared towards the development of ADR in general but he has apositive bias towards the promotion of arbitration in Kenya and Africa. He has written about what made him want to become an arbitrator. In his short piece on that reason he points out a scenario where he wanted to deliver justice when two people were in a dispute and they

[67] See Chapter 3.3
[68] [47]KyaloMbobu, „Efficacy of Court Annexed ADR: Accessing Justice through ADR" ADR Journal (2013) NairobiISBN 978-9966-046-02-4
[69] Parties may not pull out of instituted Arbitral proceedings once instigated
[70] Chebe, Chinua. *Things Fall Apart* (New York: Anchor Books, 1994) ISBN 0385474547
[71] acob Gakeri, „Placing Kenya on the Global Platform: An Evaluation of the Legal Framework on Arbitration andADR" (June 2011) International Journal of Humanities and Social Science Vol. 1 No.6; page 1 - 2
[72] See page on Research Methodology and chapter 3 that analyses it.
[73] http://www.ngotho.co.ke

appointed him as an arbitrator.[74] He notes that arbitration should be widely practiced to deal with many other sectors example being property disputes, survey and petroleum. This is especially where the subject matter is of public importance and a delay can lead to the complication of the dispute further and further losses.[75] He advises that it would be ideal if parties considered out of court settlement process that are linked to ADR.

Further writings in the field of arbitration in Kenya are by Kyalo Mbobu.[76] He has written several papers in the field of ADR. The main reference paper here is in reference is the Court Annexed ADR.[77]Kyalo Mbobu discusses how efficient justice can be obtained by litigants out of the court justice systems once their cases are referred to any of the available branches of ADR. He notices how other jurisdictions have influenced the pursuit of justice by giving litigants the chance to resolve their differences through ADR[78]. The most popular and established form of alternative dispute resolution (ADR) in Kenya, according to Kyalo Mbobu, has not yet had a significant impact on the nation's case backlog. Thus, he talks about how ADR has been utilized in various nations and how it has affected their societies. He talks about how these nations have passed legislation that enables early ADR exposure to court-filed matters with the assistance of the court's registrar or a judge. [79]

However, Kyalo Mbobu does not demonstrate the extent to which arbitrators have helped litigants obtain justice. He only admits that using court-annexed ADR has improved the administration of justice. He also doesn't address the particular use of arbitration, only ADR in general. This essay explains why, despite arbitration being permitted by Kenyan law and

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[74] Paul Ngotho "Challenges Facing Arbitrators in Africa" East Africa International Arbitration Conference. Nairobi(July, 2014) Available at http://www.ngotho.co.ke

[75] See the recommendations and conclusions on the need to train other professions to join the field of arbitration.

[76] See the recommendations and conclusions on the need to have quality control measures in the practice of arbitration.

[77] ee the questionnaires referenced as Number A17 and A33

[78] http://www.ngotho.co.ke/assets/howibecameanarbitrator.pdfaccessed on 19th August, 2015

[79] KyaloMbobu, „Efficacy of Court Annexed ADR: Accessing Justice through ADR" ADR Journal (2013) NairobiISBN 978-9966-046-02-4

an existing platform being accessible, parties to disputes in Nairobi county have not been using arbitration in a manner that is nearly comparable to court litigation.

The next analysis is short paper by Charles Kajimanga.[80]. He has written about how arbitration can improve access to justice. [81] He provides a case study of the Zambian strategy. As a judge, he begins by pointing out that the case backlog has been a significant barrier to access to justice.[82] This issue occurs all around the world and accelerates the cost of seeking justice. Therefore, it is important to think about whether a barrier to accessing ADR is equally a barrier to accessing justice. The judge notes that compared to litigation, alternative dispute resolution (ADR) channels are more accessible, less expensive, and time-consuming.

The first effect he points out is that arbitration was well regarded by both the bar and the bench after it was established in the legislation[83]. He recognizes that this has reduced the backlog and increased the number of cases being sent to arbitration. He points out that one of the biggest obstacles to accepting arbitration is the sheer number of people whose faith in the legal system is still firmly rooted in the courtroom[84]. He suggests that it's essential for all occupations.

The key difference between this papers with the one by Charles Kajimanga is that this one wasbased on research from Nairobi in Kenya while Kajimanga's paper presents an overview of Zambia (though the comparison is appreciated). While this paper solely discusses arbitration, the paper by Charles Kajimanga discusses the advantages of both arbitration and

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[80] Australia, USA, Lesotho and Rwanda,

[81] A practicing lawyer, arbitrator and a lecture at the Faculty of Law University of Nairobi.

[82] Shttp://www.ngotho.co.ke/assets/article.ngotho.adr.petroleumsector.oct2012.pdf accessed on 19th August, 2015

[83] Leonard OburaAloo, „*Consolidation of Commercial Arbitration: Institutional and Legislative Responses'(*2015) 1 Alternative Dispute Resolution Journal ISBN 978-9966-046-04-8. It discusses the possibilities joining commercial arbitration towards a legal efficacy.

[84] Brenda Brainch, *The Climate of Arbitration and ADR in Kenya* Paper given to the Colloquium on Arbitration and ADR in African States, King's College London, (June 2003) Speaker: the *paper has also been published in the Commonwealth Lawyer 2003, Indian ICFAI Journal of ADR, Corporate Africa, CEDR (Centre for Effective Dispute Resolution) London website*

mediation[85].

The following piece is a dissertation by Edward NiiAdja Torgbor that was submitted for the award of a Doctor of Law at the University of Stellenbosch's Faculty of Law.[86] This essay contrasts arbitration practices in Kenya, Nigeria, and Zimbabwe. These are some of the top nations where arbitration is practiced in Africa. In a similar vein, they are the nations who have domesticated the UNCTRAL model law for arbitration. These jurisdictions' arbitration practices comply with international standards since they domesticated this model statute. The author is also a practicing arbitrator in Kenya.[87]This demonstrates that he is aware of the challenges that an arbitral practitioner or a Kenyan arbitral panel encounter. His writings are centered on what is happening during the arbitration hearings. The work aims to pinpoint and eliminate the barriers and unfair practices in arbitration. As a result, the culture and process of arbitration will become more effective.

Edward NiiAdja Torgbor has restricted his work to the events taking place during the arbitration process. His research questions and the process he used to produce them are evidence of this.[88]This is the point of departure with this work. Our present study focuses on the issues that a party to an arbitration may face while considering seeking arbitration, during arbitration, or when enforcing his judgement. This essay seeks to pinpoint and address any ancillary difficulties with the arbitration procedure.

Additionally, Edward NiiAdja Torgbor has studied the subject of cultural developments in arbitration. He provides proof that the many African societies shared similarities, proving

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[85] Roscoe Pound. „„The Scope and Purpose of Sociological Jurisprudence" (1911) Vol 5, Harvard law review

[86] Charles Kajimanga, „Enhancing Access to justice through Alternative Dispute Resolution Mechanisms, The Zambian Experience" A paper presented at the at the Annual Regional Conference held at the Southern Sun, MayfairNairobi, Kenya on (25-26th July, 2013)

[87] Supra footnote 14 pages 1 and 2.

[88] Edward NiiAdjaTorgbor, „*A Comparative Study of Law and Practice of Arbitration in Kenya, Nigeria and Zimbabwe, with Particular Reference to Current Problems in Kenya'* (2014) Dissertation presented for the degree of Doctor of Law in the Faculty of Law at the University of Stellenbosch University. http://scholar.sun.ac.za

that arbitration was used in previous times[89]. Following the adoption of the common law in the majority of eastern and western African jurisdictions, the similarities became even more pronounced. He points out that arbitration is used both within the legal and cultural frameworks.

He makes the case that there is a wealth of academic research to support the existence of adversarial litigation in African cultural life[90]. The practice, however, was carried out to promote social harmony and coexistence. In addition, the perpetrator needed to compensate the complaint and society for their losses. It is proven by Edward NiiAdjaT's work that he did an excellent job of detecting the advancements in arbitration and the difficulties that practitioners and tribunals must deal with. However, the focus of our current work is on the disputing party.[91]

The promotion of arbitration in our society along the commercial line has also been advocated in the Master in Laws thesis by Eric Opiyo he asks if it is time we established an East African arbitration institution.[92] This is due to the fact that there has been an upsurge in the number of commercial disputes at the many forums available in the region. Once created he envisions that commercial enterprises worldwide will end up preferring the East African region for their business endeavours leading to a direct capital investment and a promotion of our region becauseof the guaranteed access to justice. This hypothesis stresses that the development of arbitration (read dispute settlement) enhances the quality of life the citizens of a country live.[93] The primary difference between our present research and this Master's thesis is that our current research is a field study that focuses on the use of

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[89] Chapter 21, Laws of Kenya
[90] Section 1A Civil Procedure Act Cap 21, Laws of Kenya
[91] The Civil Procedure Rules
[92] Eric Opiyo, „*Examining the Viability of a Regional East African Arbitral Institution'* Master of Laws ThesisUniversity of Nairobi (2012) *http:erepository.uonbi.ac.ke:8080/xmlui/handle/123456789/8391*
[93] Supra note 3.

expanding arbitration to access justice. This Master's thesis was a desk work that focused on corporations settling disputes.

In Kenya, Kariuki Muigua, working with the Commission for the Implementation of the Constitution (CIC) and the International Development Law Organisation (IDLO), recognises that many people, particularly the underprivileged and vulnerable groups, have had difficulty accessing the courts. The report emphasises that courts of law are inaccessible as a barrier to access to justice.[94] The research also emphasises that the main barriers to access to justice for all in Kenya have been a lack of resources, bad views towards the judiciary, a shortage of advocates in rural regions, the marginalisation of particular groups of people, and the legal system..[95] The paper also suggests that a "Alternative Dispute Resolution Act" be passed to include ADR and TDRM in accordance with Article 159 of Kenya's 2010 Constitution. The study makes no mention of what arbitration entails or how much it has improved access to justice or really settled disputes between Kenyan communities and specifically in Nairobi County.

Virtus Chitoo Igbokwe investigates the IJS among Nigeria's Ibo-speaking population to identify how it affects formal legal institutions, social interactions, and social order. He claims that IJS seeks to establish a shared cultural identity, kinship, and collectivism. He discovers that despite modernization, IJS has a long history and significant role in the structure and maintenance of social order in African communities. In this sense, he believes that contemporary society should think about an effective means of integrating IJS with formal justice systems. He contends that doing so will encourage the elevation of shared obligations above individuality and restrain antagonistic impulses. In order to prevent the necessity for court intervention in situations where resolution is possible, he highlights the

[94] Constitution of Kenya 2010, art159 (2) (c).

[95] Centre for Justice & Reconciliation at Prison Fellowship International, 'What is Restorative Justice' (2005) Restorative Justice Briefing Paper,1<http://www.d.umn.edu/~jmaahs/Correctional%20Assessment/rj%20brief.pdf> accessed 01 April 2015.

importance of incorporating IJS within permissible rights limitations. Igbokwe claims that finding an amenable resolution for all parties concerned, rather than establishing who is right or wrong, is the overall goal of IJS.[96] The findings of Igbokwe's study are especially pertinent to this one since they give the researcher a comparative viewpoint as they look into how arbitration promotes access to justice in Nairobi County.

The work of Daisy Owuor Ajima is another master's thesis that aims to encourage the usage of arbitration. The main goal of the thesis is to establish Kenya as a center for international financial services arbitration.[97] The author has concentrated on financial institutions, particularly banks, and the paradigm they have created for resolving disputes. The author points out that the Kenya Bankers Association and Strathmore Law School have developed an ADR center to encourage client involvement in the resolution of specific banking issues although it will first cover mediation.

Daisy Owuor Ajima notes that banks have predominantly used litigation to settle their disputes. She notes that it is time for the consumers of the banking services to use ADR to settle disputes[98]. She notes that for banks to uphold the aspect of confidentiality and avoid the loss of reputation it is necessary for the disputing parties in the financial dispute to result to arbitration.[99]Among the disputes that Daisy Owuor Ajima recommends that can be settled via arbitration include transactional disputes, loans and credit cases and cases in court that involve nominal amountsand so the trial processes is lengthy and costly and of little benefit. She discusses that these cases lead to auctioneers and other third parties when parties use courts leading to endless or lengthy legal process that is unnecessary.

The convergence with this research is that Daisy Owuor Ajima also collected field data

[96] ibid.
[97] Daisy OwuorAjima, „Making Kenya a Hub for Arbitration of International Financial Services Disputes' Master of Laws Thesis University of Nairobi(2014)http://erepository.uonbi.ac.ke/handle/11295/75602?show=full
[98] Chapter 226, Laws of Kenya
[99] Ibid

from some bank staff on their opinion on litigation *vis a vis* arbitration. She found out that the banking staff mostly preferred arbitration since it reduced the reputational risk[100]. Her results show that banks are willing to depart from litigation to arbitration. She notes that only twenty percent of the respondents prefer litigation to arbitration. This leads to the conclusion that ADR needs to be promoted by all arms of government.

The main point of departure with her study is that she only focused only on a segment of the current research site that is financial institutions and not the whole sector of the Kenyan economy and citizens.[101]Further her field sample was very small (few users of banking services) and the geographical site(s) of data collection are not revealed thus raising issues of reliability of the datacollected.[102] She indicated that the banks have also not recommended the use of ADR on matters that relate to crime since there are institutions that are statutory mandated to deal with crime issues.[103] The aspect of using arbitration in criminal realm is developing in our country. The next case illustrates the approach that the Kenyan courts have taken in relation to the use of ADR in criminal procedure.

The case of **Republic Vs Mohamed Abdow Mohamed** is a recent development in Kenya on the use of arbitration.[104] This case confirmed that indeed ADR can be used in the settlement of criminal disputes in the country. This was a case where the accused was charged with murder. Before the hearing of the case started the accused compensated the deceased family and the deceased's family confirmed the compensation before court. The deceased family then indicated that they had nothing more to pursue (within the criminal justice trial) against the accused.

When the matter was coming up for hearing the counsel watching brief for the family of the

[100] *http:erepository.uonbi.ac.ke:8080/xmlui/handle/123456789/8391.*See the literature review.
[101] See page 25 last paragraph
[102] Nairobi HC CR Case No 86 OF 201
[103] See page 11 on her research methodology which is very brief
[104] See page 58 second paragraph which discusses the sample population

deceased in formed court that he had a consent to record. The consent was to the extent that a settlement between the families of the accused and deceased had agreed to withdraw the criminal proceedings after compensation. The office of the Director of Prosecutions did not oppose the application. He convinced the court that the settlement reached was just to the parties. The most notable is the fact that the deceased family was no longer willing to testify against the accused[105]. This led to the Director of Criminal Prosecution withdrawing the case. The following is an extract from the case:

Finally, Counsel submitted that since the time of arrest of the accused, the prosecution had had great difficulty in securing the attendance of witnesses as the said witnesses were not only no longer interested in the prosecution but were actually eager to see the matter marked settled.

JUDGE: I have considered the application. Under ***Article 157*** *of the Constitution the Director of Public Prosecution is mandated to exercise state powers of prosecution and in that exercise may discontinue at any stage criminal proceedings against any person. In the unique circumstances of the present application, I am satisfied that the ends of justice wasmet by allowing rather than disallowing the application. Consequently, I discharge the accused[106].*

It can be noted that other that the settlement which was done between the accused and the aggrieved parties, even if the prosecution and the judge would have wanted to proceed with the case there would have been no witness to testify against the accused since they had settled. The only purpose of proceeding with the case would have been to enhance justice; however justice in this case was done otherwise through settlement. Following queue from the precedent set in this case, it is necessary for magistrates to start using arbitration (more so ADR) in the settlement of misdemeanors against petty offenses. I would foresee a

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[105] The Judiciary Kenya, *Report of the Sub-Committee of Ethics and Governance of the Judiciary Kenya*. (November,2005) *www.kenyalaw.org* (the Justice OnyangoOtieno committee*)*

[106] The constitution of Kenya 2010

scenario where offences of receiving money by false pretenses and petty theft should be arbitrated to ensure the property lostis restituted and the creation of harmony in the society.

1.7.1 Access to Justice

Muigua and Kariuki (2014) argue that the proper management of cases is crucial in the realization of access to justice.[107] The simplicity and flexibility of the processes in addition to the constant goal of producing a win-win for the conflicting parties are viewed to be key towards improving the management of the cases and in turn enhancing access to justice for all[108]. They argue that several challenges such as language barrier, rigid court rules and processes, high court fees, the poor court infrastructure continue to beleaguer court processes, and this makes the realization of justice through the courts quite cumbersome and even frustrating for litigants.

They further argue that justice should not only be affordable but should be expeditiously administered without any discrimination based on financial capability or any other ground and this is therefore the approach and persuasive appeal of alternative dispute resolution mechanisms. As a basic right, access to justice should be achieved through all possible avenues that would enhance its realization at reasonable costs.[109]

However, they also acknowledge that the uptake of ADR is still low in Kenya and as such much remains to be done in order to accelerate the usage of ADR in the resolution of disputes[110].The gap in their research is that their concerns appear limited to the resolution of commercial disputes. Their research does not explore the use of alternative dispute resolution

[107] Kariuki Muigua and Francis Kariuki, 'ADR, Access to Justice and Development in Kenya'.
[108] Article 159(2) (c), Constitution of Kenya, 2010.
[109] Muigua and Kariuki (n 19).
[110] 'Alternative Dispute Resolution: Panacea or Anathema? On JSTOR' <https://www.jstor.org/stable/1341152?seq=1> accessed 31 January 2021

mechanisms beyond resolving disputes between parties who usually do not have a problem paying the high costs of litigation but use ADR for purposes of commercial expediency[111].

This research therefore seeks to address the potential of ADR for the resolution of disputes beyond commercial disputes and seeks make a case for the realization of justice through ADR at costs that are reasonable for both commercial and non-commercial parties.

1.7.2 State of affairs that limit access to justice;

This paper acknowledges that the discourse on access to justice and the opening up of arbitration are related discourses which can be pursued in a manner that complement each other. Howeverin the course of the work efforts wasto stick to the narrow issues in this topic relevant to arbitration and justice since many have written on issues access to justice. The challenges to arbitration may also be termed as what hinders access to justice.[112]

This paper will least be concerned with features and progress towards access to justice and more concerned with the challenges that hinder access to arbitration (however they may be relatedwith the earlier being so broad). The difference is minimal but it is necessary that this paper is confined to the challenges within the sphere of access of arbitration[113]. A few papers have been selected (from the topic of Access to Justice) but which may have almost similar approaches in arbitration.

The Kenya judiciary has conducted studies and formed several working committees to pursues ways that it can enhance access to justice by; faster dispute settlement, making courts accessible to litigants, measures to enhance integrity for effective delivery of justice and (of our concern) incorporating the use alternative dispute resolution mechanisms in the court justice system. The first report being evaluated is the State of the Judiciary and the

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[111] Article 48 of the Constitution of Kenya 2010, guarantees the right of access to justice for all. See also Article 159(2).

[112] The Judiciary Kenya, *Institutionalizing Performance Management and Measurement in the Judiciary. Report bythe Performance management and Measurement Steering Committee*(April 2015) www.judiciary.go.ke

[113] Nairobi HC CR Case No 86 OF 201

Administration of Justice annual report for rear 2012-2013.[114] In this second Annual report State of the Judiciary and Administration of Justice Report it discusses the case load that has been increasing. The State of the Judiciary Report**,** 2012/2013shows that the Kenyan citizens are filing more and more cases.[115] As a result the judiciary is employing more resources to help in the settlement of the cases. The report discusses that the resources being employed wasused to settle the cases. Along these measures being put this report suggests that the resources being employed should be towards the arena of increasing the use of arbitration.

The following is an analysis of the relevant extracts by the report of the Sub-Committee of Ethics and Governance of the Judiciary Kenya made in November, 2005.[116]The committee observed that there is growing congestion in courts. The congestion is partially due to the non-availability of other alternative forms of dispute settlement. The committee in its effort to ensure efficiency and congestion of the court made a recommendation that alternative dispute resolution mechanisms should be incorporated into the court system by appropriate legislation[117].

In the final recommendations of the committee the committee came up with some strategies that should be implemented together with the strategic plan 2005 – 2008.[118] Among these strategies was to introduce ADR into the Kenyan judicial system. However there have not been tangible steps made towards the adoption of ADR in our court justice system.

The decision is still left to the individual magistrate to decide if he will settle the matter via

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[114] The Judiciary, *State of the Judiciary and the Administration of Justice, Annual Report 2012 – 2013.* (2015)www.judiciary.go.ke

[115] See part one of the report

[116] The Judiciary, *State of the Judiciary and the Administration of Justice, Annual Report 2012 – 2013.* (2015)www.judiciary.go.ke

[117] Nairobi HC CR Case No 86 OF 201

[118] Supra note 45 above at page 182.

ADR or proceed to hear the case.[119]

The Kenya judiciary did commission another report that was geared towards increasing performance management in courts in Kenya.[120] The report was prepared for purposes of increasing performance in the judiciary in a way that it can be measured and appreciated by citizens. This was also in queue to the fact that the judiciary has been implementing the work system of performance contracts spearheaded by the executive which helps measure the levels of service delivery to the public. In the report it was noted that; Development and implementation of the Information, Education and Communication (IEC) strategy on use of ADR should be prioritized as enjoined by Article 159 (2) (c) of the constitution which provides that alternative forms of Dispute resolution, including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted.[121]

The report towards the end makes a recommendation on access to justice. It provides that there needs to be developed and ADR policy/strategy for courts to use[122]. The only point of departure with this work is that the judiciary has not substantiated their recommendations and findings based on empirical data. They have simply made the recommendation based on the constitutional dictate of article 159 (2) (c) and for purposes of providing the citizens with another avenue to settle disputes though this finding is not supported with any imperative finding.

The ICJ Kenyan Chapter that has conducted almost a similar research. In a study conducted by the ICJ Kenya Chapter it lays emphasis on the delivery of justice via the informal

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[119] International Commission Of Jurists (ICJ) Kenya, *Report. Interface between Formal and Informal Justice Systemsin Kenya* (June 2011)

[120] The Judiciary Kenya, *Institutionalizing Performance Management and Measurement in the Judiciary. Report bythe Performance management and Measurement Steering Committee*(April 2015) www.judiciary.go.ke

[121] Page 29 and 85 of the report in the above note

[122] The Judiciary Kenya, *Institutionalizing Performance Management and Measurement in the Judiciary. Report bythe Performance management and Measurement Steering Committee*(April 2015) www.judiciary.go.ke

justice sector.[123] These include ADR and the traditional justice systems (TJS). The research notes that ADR and TJS providers have been successful in the delivery of justice as they pursue the use of ADR, however they note that there exists some areas that need to be re-looked at to facilitate access to justice particularly by the under privileged in the society. ICJ recognizes because there exists no one system or set of regulation to the record performance within the various ADR and TJS the gains made in this sector are not noticed. The sector is overlooked in the regulation unless when the various (private) institutions set up their various charters carry out their agendas.

The research by ICJ notices that there is a continued growth of the use of ADR worldwide and this has helped in the clearing of the backlog in many jurisdictions. They notice the fact that parties own the conduct of the ADR system proceedings makes it preferable unlike the court justice system which parties find time consuming and they cannot comprehend the complex procedure. The research notices that the TJS have been in use by communities worldwide but thegains have rarely been documented and thus it is not possible to pinpoint how the TJS has been beneficially effective. The other reason why the benefits cannot be enumerated is because no code or system of regulation exists which keeps records of how societies have been using theTJS systems.

The paper notes that there has been minimal support by government in the promotion of ADRand TJS.[124] Little direct funding and other support are evident. Support in this area in the form of human resource is wanting. The paper notes that this may be a carryover from the colonial era mentality where the social practices of the natives were observed as uncouth and uncivilized. The government should in the realignment of the provincial administration to conform to the new Constitution should look into ways of promoting TJS

[123] www.disputeresolutionkenya.org website visited on 22nd March, 2015 at 1045hrs.
[124] International Commission Of Jurists (ICJ) Kenya, *Report. Interface between Formal and Informal Justice Systemsin Kenya* (June 2011)

by appointing (or having them elected by the public) elders who will dispense with TJS within various localities.[125]

The main congruence of the paper by ICJ and this paper is that it identifies that there is need to promote the various ADR institutions. This is mainly within a statutory framework for the good of the ADR principles. This is unlike the current ways where the promotion of ADR institutions is the norm leading to small disjointed institutional frameworks and weaker outreach to the public on arbitration issues.[126]The major variance with the other discussed papers above is that there is no identification of the arbitration challenges or how arbitration can promoted independently (and not within the ADR framework) and achieve justice. This paper has delved more into how we can promote the TJS.

This paper is faulted by the fact that ICJ admits that it was carried out the research by reviewing the available literature [127]It would have been very ideal if ICJ conducted a small sample survey instead of doing desk research in such a topic. It looks uncorrelated and not extensively analyzed to indicate that TJS are not reported, they are conducted via customs and unwritten laws,informal and indigenous but you conduct a desk study on the same with that hindsight (which little information and record exists). This thus casts doubt to the findings, conclusions and recommendations that have been made in this study.

In Kenya the Kenya Dispute Resolution Centre (DRC) has made tremendous steps in ensuring that disputes are settled via ADR.[128] The organization has tried to identify the needs of dispute settlement via ADR at the various levels in the society.

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[125] This is in accordance with Schedule 6 section 17, we can also align provincial administration to dispense justice vide the principles of Article 159 (2) (c) and 48 of the Constitution.

[126] The Kenyan section of the International Commission of Jurists (ICJ) Kenya is a non-governmental. Its membership is drawn from the bar as well as the bench and it's led by a council of 7 members.

[127] Leonard OburaAloo, „*Consolidation of Commercial Arbitration: Institutional and Legislative Responses'(*2015) 1 Alternative Dispute Resolution Journal ISBN 978-9966-046-04-8. It discusses the possibilities joining commercial arbitration towards a legal efficacy.

[128] Supra note 40 above at page 7.

A paper by its executive director best illustrates what the common citizens want as they access justice. Emphasis mine;

The security offered by ADR to small traders and communities makes a real difference to their livelihoods. Both arbitration and litigation to them are unintelligible, beyond their means and beyond their control. Interestingly, both the 2000 Report on the Reform of Kenya's Commercial Justice Sector and the 2000 Study on Tanzania's Enabling Environment for Business addressed this specific need as critical to alleviating poverty and improving access to justice.''[129]

This extract captures the main focuses and elements of this work but our area of concentration is Kenya counties. However there is need to address the issues with specific reference to arbitration. The DRC main work focuses on mediation with little on arbitration. Their work on arbitration is only via reference from the other organizations that deal with arbitration and more so when cases are referred to them.[130]The point of convergence is the desire to amplify article 159 (2) (c) of our Constitution as it relates to enhancing access to justice[131].

1.7.2 Expeditious Resolution of Disputes

Nguyo (2015) argues that the creation of an enabling environment that is bereft of the frustrations that continually beleaguer disputants as they attempt to prosecute their cases does not aid the cause for the realization of the benefits of right to access to justice.[132] Nguyo further argues that the elimination of procedural technicalities and an unnecessary set of court rules would go a long way in setting aside these frustrations. He also argues that the strain on

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[129] The Judiciary Kenya, *Institutionalizing Performance Management and Measurement in the Judiciary. Report bythe Performance management and Measurement Steering Committee*(April 2015) www.judiciary.go.ke

[130] www.disputeresolutionkenya.org website visited on 22nd March, 2015 at 1045hrs.

[131] article 159 (2) (c) of our Constitution

[132] Wachira P Nguyo, 'Arbitration in Kenya Facilitating Access to Justiceby Identifying and Reducing Challenges Affecting Arbitration' (PhD Thesis, 2015).

the thin judicial resources would be eased by the facilitation of mechanisms such as arbitration to deal with some of the cases that have stuck in court forever.[133]

However, he fails to appreciate that alternative dispute resolution mechanisms are voluntary processes and no one can be compelled to seek ADR in the absence of an agreement to that effect.[134] He also fails to note that a majority of the existing arbitrators are advocates who have been indoctrinated into court rules, systems and processes and to a great extent make the process look and sound like a court process. This research therefore proposes to revolutionize the right to access to justice through arbitration and more so the removal of procedural technicalities by allowing parties to step away from the strict rules that slow down the wheels of justice[135].

1.8 Limitation

This study was limited to arbitration as a form of alternative dispute resolution.

1.9 Hypothesis

There is a limited uptake of arbitration as a mechanism for the resolution of disputes and more should be done as a matter of policy to increase the uptake in both areas with access to courts and with limited access to courts[136]. Furthermore, the low uptake significantly contributes to the non-realization of the right to access to justice in Kenya.

1.10 Chapter Breakdown

This study was divided into the following five (5) chapters:

1.11.1 Chapter One: This was the proposal and it laid the background for the research.

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[133] Nguyo (n 21).

[134] 'Types of ADR - Alternative Dispute Resolution | Miller Law Firm' (*Miller Law*, 17 March 2020) <https://millerlawpc.com/alternative-dispute-resolution/> accessed 31 January 2021

135 F. Kariuki, "Redefining 'Arbitrability:' Assessment of Articles 159 & 189(4) of the Constitution of Kenya," Alternative Dispute Resolution Journal,Vol.1, (CIArb, 2013), pp.175-189. See also, Articles 159 (2), 67 (2) (f) and 189(4), Constitution of Kenya

136 Democracy Promotion and Conflict Resolution: The Role of Access to Justice, Working Paper, Democratic Progress Institute, 2012, available at http://www.democraticprogress.org/wp-content/uploads/2012/12/The-Role-of-Access-to-Justice.pdf, (accessed on 28/2014/2014).

1.11.2 Chapter Two: The Historical background of arbitration in Kenya

1.11.3 Chapter Three: This will delve into the legal framework of Arbitration and discuss the laws governing the same.

1.11.4 Chapter Four: This will delve into a review and analysis of the challenges facing arbitration.

1.11.5 Chapter Five: This Chapter will summarize the research findings, make conclusions on the findings of the study and make appropriate recommendations that will make a case for the adoption of arbitration as a pathway to the realization of the right to access to justice.

CHAPTER TWO

2.0 INTRODUCTION TO ARBITRATION

2.1 THE HISTORICAL BACKGROUND OF ARBITRATION IN KENYA

Arbitration is a process through which a disagreement or dispute between two or more parties regarding their respective legal rights and obligations is sent to a third party, according to Halsbury's laws of England and instead of being decided by a court of law, an arbitration is decided judicially with binding effect by the application of law by one or more people known as arbitrator(s) or an arbitral tribunal. "Judicially determined" denotes that natural justice's tenets be upheld.[137]

Humanity has utilised arbitration since the beginning of time, and King Solomon's wisdom was used to settle the dispute between the two women and the baby.Most African communities used to have councils of elders adjudicate issues by hearing both sides out and coming up with resolutions that were generally accepted to satisfy all parties. A nice illustration can be found in Chinua Achebe's books, where he addresses the Igbo community.[138]

Jacob Gakeri argues that arbitration was used as a conflict resolution method in pre-colonial Africa and Kenya.[139] He mentions a system of dispute resolution where issues are settled by an older council. The concept is based on the fact that the council of elders had the authority to render an irrevocable decision in a disagreement. Before participating in the conflict resolution and settlement forum, the parties typically had to swear an oath of secrecy.

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[137] 1st Kings 3;16-18

[138] Achebe, Chinua. *Things Fall Apart* (New York: Anchor Books, 1994) ISBN 0385474547

[139] Jacob Gakeri, „Placing Kenya on the Global Platform: An Evaluation of the Legal Framework on Arbitration andADR‟ (June 2011) International Journal of Humanities and Social Science Vol. 1 No.6; page 1 - 2

2.2 Administration of disputes and arbitration education.

Since arbitration is a practical method of resolving disputes without taking levels of expertise and control over arbitral processes into account, it cannot be considered an alternative. Arbitration is a process where parties to a dispute agree to present their grievances to a third party for resolution.[140] Institutions are advised to make improvements to their tools for accepting arbitration. The sentiment that market-driven arbitration would be significantly more beneficial for advancing access to justice comes from a communal wealth lawyer.

It is impossible to exaggerate the importance of arbitration in Paul Ngotho's ruling.[141] Additionally, he asserts that litigation further obstructs access to justice through corruption and other issues by failing to fully resolve all newly filed cases in a timely manner. In fact, Dr. Kariuki Muigua claims that arbitration development is one of the more practical solutions to these court system externalities. Brenda Branch, who cites a 10-year average for case disposition in courts, supports this scenario. M. Akech and P.K. Mbote.[142] Further, it is recommended that, in order to satisfy the needs of this enormous population, it is crucial to determine if arbitration is a workable substitute for other forms of conflict resolution given the enormous number of law students graduating.

2.3 The institutionalized approach and justice as equity.

One must better understand the concept of justice itself so that they are able to view Arbitration as a means to improve access to justice in Kenya. John Rawls has questionably written the formative piece on justice from a Western viewpoint. He theorized a vision of the world where all actors having been rendered equal - determine the principles of the institutions governing their social relations. This theoretical stand is derived from an effective standpoint that society should aspire to achieve the best good for the big number of people.

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[140] Brenda Brainch The Climate of Arbitration and ADR in Kenya Paper given to the Colloquium on Arbitration and ADR in African States, King's College London, June 2003

[141] Access to justice through ADR, the bastard provision in Kenya's arbitration Act

[142] Justice Sector and the Rule of Law PK Mbote, M Akech - 2011.

Rawls proposal that justice based on equality is key as, if Arbitration is really to improve access to justice and be a worthwhile alternative to litigation, it must be equally accessible to all.

Each person has the right to the same liberties as those enjoyed by others, according to Rawls' institution-focused theory of justice.[143]. This argument is crucial because it supports the idea that accessibility is essential if Arbitration is to actually function as a viable alternative to litigation. Since the purpose of arbitration in this study is to address issues specific to Kenya and Africa, this theoretical foundation was examined at the regional level rather than on a global scale. According to Rawls, a just financial and legal system would take into account the consent of people who are a part of a society that plans to elect a Leviathan.

n order to address the basic flaws listed as the study objectives and questions in this paper, Rawls places impartiality at the forefront of the determination of a just political system, in this instance an arbitration regime[144]. According to Rawls, the "basic structure of a society" is the key issue relating to justice, and he acknowledges that justice is the primary characteristic of social foundations. He portrays justice as a function of societal organization and internal or tribal differences. When given the freedom to pick the society they live in and the laws they would be subject to, Rawls questions if this will have an impact on the laws they will choose to impose[145].

Rawls beliefs that inequalities should be organized so that they would be to everyone's benefit and arranged so that no one would be prevented from enjoying any rights[146]. These are the two principles that Rawls recognize. First, he believes that everyone should, in an ideal world, have equal rights to the majority of privileges in line with other people capturing

[143] Amartya Sen, The Idea of Justice (Cambridge, Mass.: Belknap Press of Harvard University Press, 2009
[144] John Rawls, A Theory of Justice (Havard university Press 1971).
[145] ibid 2.
[146] ibid 4.

and objectifying the same liberties. From these two concepts, Rawls creates an egalitarian vision of justice that would enable more focus to be placed on people who are born into disadvantaged social or communal situations and with less wealth. To this extent, arbitration should only be regarded as a legal requirement[147]. The notion that a "Just" and fair law that supports these claims made by Rawls can seldom ever have unfavourable consequences. Utilitarian perspective

But there are drawbacks to this method of defining justice. Nozick[148], who wrote Anarchy, State, and Utopia in 1974, is one of the primary opponents who emphasizes that "people produce resources and have rights to the things they produce." Since some people work too hard to be denied of the commodities and chances they have shaped through time and effort, seeking to improve the condition of the impoverished through redistribution and re-imagining of rules is unjust. However, Rawls asserts that legal justice is frequently viewed as "a matter of appropriate responses to actions" in his observation of justice.

2.4 Understanding Justice and Its Nature

The understanding of justice is often related to a just society with universal respect for the human rights of all people including the poor, minorities, indigenous people, and etcetera. In just societies, there is open exchange of knowledge, universal access to important information,education, health care, economic opportunity, judicial process, and etcetera.[149]Justice emerges from the literature as a multidimensional construct, and a number of approaches to its definition have so far been detected.[150] At the most general level, typologies of justice are often discussed, which are largely convergent.[151] These typologies generally seek to define justice in terms of three domains: outcomes, processes, and interactions.[152] At its most general, these three domains of justice are referred to respectively as

[147] Justice Sector and the Rule of Law PK Mbote, M Akech - 2011.
[148] The Costitution of Kenya
[149] The Development of Indicators and Assessment Tools for CSO Projects Promoting Value-Based Education forSustainable
[150] ibid.
[151] ibid.
[152] ibid.

distributive, procedural and interactional justice.[153] Distributive justice pertains to the fairness of the outcomes that one receives; procedural justice involves the perceived fairness of an allocation process; interactional justice concerns the fairness of the interpersonal treatment one receives from others.[154]

In the definitive words of John Paul Lederach- Conflicts are in, in every sense, of the word, 'Cultural' events like all cultural events, they are constituted largely by the taken- for granted, common sense understandings that people have about their worlds, including themselves and the other people who inhabit it. Such commonsense includes knowledge about what is right and wrong, how to proceed, whom to turn to, when, where and with what expectations.[155]

On the other hand, anthropological studies reveal that when disputants are bound together by multi-stranded social relationships, they will seek victory in adversarial contests rather than attempt to reach a compromise.[156]

From the understanding of justice, a number of subdivisions are further identified: distributive justice in relation to resource allocation, restorative justice, corrective justice, retributive justice, transformative justice, informational justice, formal justice and legal-pragmatic justice.[157] Anticipatory justice is also identified in relation to the expectations of future fair treatment.[158]

Without equal access to justice, persons living in poverty are unable to claim their rights, or

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[153] ibid.

[154] Andrew Li and Russel Cropanzano, 'Fairness at the Group Level: Justice Climate and Intraunit Justice Climate' (2009) 35(3) Journal of Management 565, 568.

155 John Paul Lederach, 'Of Nets, Nails and Problems: The Folk Language of Conflict Resolution in a Central American Setting' in Kevin Avruch, Peter Black and Joseph Scimecca (eds), Conflict Resolution: Cross-Cultural Perspectives (Greenwood Press 1991) 166.

156 Merry (n 56) 2061; See also Michael Barkun, Law Without Sanctions: Order in Primitive Societies and the World Community (Yale University Press 1968) 17: 'The way in which a society is organized has a marked effect on the way order is achieved within it.'

157 ibid.

158 ibid

challenge crimes, abuses or violations committed against them, trapping them in a vicious cycle of impunity, deprivation and exclusion.[159] The inability of the poor to pursue justice remedies through existing systems increases their vulnerability to poverty and violations of their rights, while their increased vulnerability and exclusion further hampers their ability to use justice systems. Ultimately, 'poverty will only be defeated when the law works for everyone.'[160] Although discriminatory patterns manifest themselves differently across regions and within countries, in every country in the world the poorest and most marginalized segments of society, commonly women and girls, ethnic minorities, indigenous peoples, undocumented migrants or those living in rural areas continue to be excluded from accessing justice on an equal footing with the most privileged groups in any of the population.[161]Legal enslavement is widespread even in the most industrialized nations, and those who are poor do not have complete de jure or de facto access to justice.[162] This means that globally, persons living in poverty are often prevented from claiming, enforcing and contesting violations of their rights.[163]

Amartya Sen offers a different perspective on what justice is.The Idea of Justice by Amartya Sen was published in 2009 by Belknap Press of Harvard University Press. He does not necessarily provide a precise definition of justice, but rather a framework for thinking about the possibility of an effective pursuit of justice. Sen's emphasis is on social behaviour, not institutional behaviour. He emphasizes the value of taking a "comparative approach" rather than concentrating on an idealized objective, like the establishment of an all-just system. Sen

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159 Magdalene Sepulveda Carmona and Kate Donald, 'Access to Justice for Persons Living in Poverty: A Human Rights Approach' 7 < http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2437808> accessed 01 April 2015.

160 George Soros and Fazle Hasan Abed, 'Rule of Law can Rid the World of Poverty' Financial Times (26 September 2012).

161 The Development of Indicators and Assessment Tools for CSO Projects Promoting Value-Based Education forSustainableDevelopment'<http://about.brighton.ac.uk/sdecu/research/esdinds/resources/Excerpt%20from%20Draft%20Handbook%20on% 20Understanding%20Justice.pdf> accessed 31 March 2015.

162 ibid.

163 ibid.

proposes contrasting other societies that are dealing with comparable issues in order to comprehend the strategies that give them more equitable outcomes.[164] With this approach, an individual or community's "actual realizations and accomplishments" are prioritized over institutions.[ibid] When attempting to comprehend justice as understood by a different culture or group, the comparative method is a more adaptable framework since it acknowledges the existence of "different reasonable principles of justice. [165] Sen places special emphasis on the idea of open impartiality, saying that it encourages us to take advantage of the knowledge that comes from various impartial observers who are in different places and who have diverse viewpoints.[166]He writes, "There may well be some compelling shared understanding that arises in scrutinizing these discoveries together, but there is no need to assume that all the disparities emerging from different views can be resolved similarly.[167] Sen's conception of justice emphasizes the process of deliberation while accepting a variety of viewpoints on what qualifies as more or less just. According to him, the latter may be "concern[ed] with the proper manner of observing and respecting other people, other cultures, other claims, and with [evaluating] alternative foundations for respect and tolerance. We might also reflect on our own errors and work to prevent repeating them.[168] Sen's perspective enables a greater consideration of alternative methods of accessing justice, which grassroots communities actually use, rather than just focusing on the quality of institutions, ensuring that everyone is able to enjoy what brings them joy and is able to settle disagreements/misunderstandings amicably.

Instead of being settled as the disagreements emerge, the question of where disputes are

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[164] ibid
[165] Steven Poole, 'The Idea of Justice by Amartya Sen' The Guardian (London, 7 November 2009) <http://www.theguardian.com/books/2009/nov/07/amartya-sen-justice-book-review> accessed 03 March 2015.
[166] Amartya Sen, The Idea of Justice (Belknap Press of Harvard University Press 2009) 44.
[167] ibid.
[168] ibid

resolved and by whom does not play a significant role.

Given that it is impossible to define, the concept of access to justice comprises social, economic, physical, and, to some extent, spiritual justice. It relates to treating people fairly and the never-ending fight for people from all backgrounds to enjoy equality of opportunity and rights. Based on the difficulties encountered on a daily basis, the concept of access to justice may be as broad as any individual may view it. In order to close the gap between the demand for and supply of high-quality legal help, the notion should therefore be explored in study.

The United Nations Commission on Legal Empowerment of the Poor estimated in 2008 that four billion people were excluded from the rule of law.[169] According to a more recent survey, the majority of people in the world—possibly even as many as two thirds—have difficulty accessing the legal system.[170] Every year, one in every eight people on earth runs into a serious conflict that is hard to avoid: at home, at work, regarding land, about essential assets they bought, or with local authorities.[171]Even though many of these issues could be addressed and resolved with better access to justice, around half of these persons fail to acquire a just, practical solution.[172] Poor people will make up the majority of individuals who are left without recourse or remedy, and the dispute and lack of a settlement usually endanger their way of life. [173] The ideology, design, and operation of the justice system all involve institutional and systemic barriers that harm the underprivileged throughout the whole legal

[169] Report of the Commission on Legal Empowerment of the Poor, 'Making the Law Work for Everyone' vol I (Commission on Legal Empowerment of the Poor and UNDP 2008) 1.

[170] Hague Institute for the Internationalization of Law, 'Towards Basic Justice Care for Everyone: Challenges andPromisingApproaches'(2012)2829http://www.hiil.org/data/sitemanagement/media/TrendReport_BasicJusticeCare_Executive_Summary_030412.p df> accessed 30 March 2015.

[171] ibid.

[172] The Development of Indicators and Assessment Tools for CSO Projects Promoting Value-Based Education forSustainableDevelopment'<http://about.brighton.ac.uk/sdecu/research/esdinds/resources/Excerpt%20from%20Draft%20Handbook%20on% 20Understanding%20Justice.pdf> accessed 31 March 2015.

[173] ibid.

system [174]

2.4 Access to Justice in the Kenyan Context

Since Kenya's formal judicial system has encountered difficulties throughout time, individuals in the country's rural areas have continued to use informal court systems to settle their issues. The problems with Kenya's formal justice system date back to the Moi era, when judicial courts were rife with corruption and impunity. With the adoption of the Kenyan Constitution in 2010, this has led to a cautious but steady reform of the judiciary. The state must guarantee that everyone has access to justice, according to Article 48 of the Kenyan Constitution. Previous legal systems were characterized by an overemphasis on legal procedure.[175] According to the Constitution, content should not be abandoned in favour of formalities; rather, formalities should serve as the actual "handmaiden of the law.'.[176] The employment of alternative dispute resolution procedures, such as traditional dispute resolution mechanisms, is encouraged by Articles 159(2)(c) and (3) of the 2010 Constitution of Kenya. Furthermore, Article 159 (2) (c) of the Constitution mandates that courts and tribunals must apply the principles of ADR, such as reconciliation, mediation, and arbitration, when exercising their judicial authority. However, this provision does not explicitly acknowledge that these ADR mechanisms are more than just principles, despite the fact that they are a component of ADR.

The general parameters for ensuring that everyone in Kenya has access to justice are established by the Kenyan Constitution. Both the formal and informal justice systems are acknowledged. Courts and other tribunals act on behalf of the people to exercise judicial

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[174] ICJ Kenya, Report On The Interface Between Formal and Informal Justice Systems in Kenya' (June 2011) 6 <http://ppi-mande.integrityaction.org/sites/default/files/icj_kenya tiri_-_research_on_alternative_dispute_resolution_in_kenya-628.pdf> accessed 29 March 2015.

[175] ibid.

[176] UN Women,'Progressofthe World'sWomen 201-2012:In Pursuit of Justice' 11-12 <http://progress.unwomen.org/pdfs/EN-Report-Progress.pdf> accessed 30 March 2015.

authority, or the right to resolve legal disputes, on their behalf.[177]

When exercising their power, Courts and tribunals must follow the following guidelines while exercising their authority: [ibid, paragraph 159(2).]

a) Justice must be served to everyone, regardless of status.

b) Justice must be served immediately.

c) Alternative dispute resolution methods, such as reconciliation, mediation, arbitration, and conventional dispute mechanisms, must be encouraged.

d) Justice shall be administered impartially and without undue consideration to formalities.

e) The constitution's objectives and guiding principles must be upheld and promoted.

f) The constitution acknowledges traditional legal systems.[178]They must, however, be applied in a way that does not violate the Bill of Rights, is not inimical to justice and morality, does not produce results that are inimical to justice and morality, and is not at odds with the constitution or any other written law.

g) However their application is guided by the requirement that it doesn't contravene the Bill of Rights; is not repugnant to justice and morality or result in outcomes that are repugnant to justice and morality; and should not be inconsistent with the constitution or any written law.[179]

h) The Bill of Rights is proclaimed to be an essential component of Kenya's democratic state and to serve as the foundation for social, economic, and cultural policies in Chapter 4 of the Constitution, which addresses rights and fundamental freedoms.[180] The dignity of people and communities is upheld and social justice is achieved through the

177 Constitution of Kenya 2010, art 159(1)

178 ibid, art 159(2)(c).

179 ibid, art 159(2)(c).

180 Constitution of Kenya 2010, art 19.

acknowledgment and defence of human rights and fundamental freedoms. The state and its institutions are indeed under a duty to respect, observe, and safeguard

i) , promote and uphold the fundamental freedoms and rights outlined in the Bill of Rights.[181] The government is to put in place legislative, policy and other measures including the setting of standards, to achieve economic and social rights progressively.[182] The needs of vulnerable groups in society, such as women, older people, people with disabilities, children, and youth, as well as members of marginalized or minority groups and specific ethnic, religious, or cultural communities, must also be met by the state and its organs. The state is required by the same clause to pass and enforce laws to uphold its duties under international law with regard to fundamental freedoms and human rights.

Every person has the right to equal protection under the law as well as equal access to its benefits, according to Article 27 of the Constitution. The government should work to make sure that everyone in Kenya has unrestricted access to legal services. According to Article 48, which deals with access to justice, the state must ensure that everyone has access to the legal system. If a price is necessary, it must be reasonable and must not obstruct access to justice. According to this clause, the government must do everything in its power to assist the population in achieving justice in all areas of life.

Numerous issues with Kenya's formal justice system have compelled Kenyans to use informal justice systems as a form of alternative dispute resolution. These difficulties include the fact that the courts are mainly out of reach for the majority of Kenyans due to their distance from one another, that they follow procedures that are unfamiliar to the locals, are arbitrary and unwelcoming, take an excessive amount of time to resolve cases, are vulnerable

[181] Constitution of Kenya 2010, art 21.
[182] Constitution of Kenya 2010, art 21(2).

to corruption, and are ineffective. Kenyans, especially the poor and marginalized, have turned to the informal justice system as a result of the formal court system's credibility issues. This method of dispute resolution varies from community to community.

Though not specifically provided for in Kenyan statutes this dispute resolution method is widely practiced and accepted by Kenyans. Rural folk and those in slums in urban centers rely on IJS because they have no alternatives. The informal judicial system is essentially uncontrolled and uncoordinated, while the official court system has a clear constitutional and legal structure. This study focuses on Nairobi County's traditional justice systems, which are informal judicial systems.

2.5 Accessing Justice through Informal Justice Systems

The term "informal justice system" (IJS) refers to modes of dispute resolution that take place outside of established court systems and have some level of consistency, institutionalization, and legitimacy within a particular constituency.[183] The fact that there is no single definition of IJS—also known as community, traditional, non-formal, informal, customary, indigenous, or non-state judicial systems—is notable.[184] Traditional justice systems are all those locally based, people-centered methods that communities develop and apply to settle localized issues in order to ensure everyone has access to safety and justice..[185] They are local or community-based, non-state justice systems that date back to the precolonial era and were not established by the State.[186] It is a type of judicial system that typically adheres to customary law or an

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[183] DANIDA, 'Informal Justice Systems: How to Note' (2010)<http://um.dk/en/~/media/UM/English-site/Documents/Danida/Activities/Strategic/Human%20rights%20and%20democracy/Human%20rights/Informal%20Justice%20Systems%20final%20print.jpgH> accessed 05 January 2015

[184] For an analysis of the meaning of each of the terms see FIDA-Kenya, 'Traditional Justice Systems in Kenya: A Study of Communities in Coast Province Kenya' <http://fidakenya.org/wp-content/uploads/2013/08/Traditional- Justicefinal.pdf > accessed 8 March 2014.

[185] FIDA-Kenya, 'Traditional Justice Systems in Kenya: A Study of Communities in Coast Province Kenya' <http://fidakenya.org/wp-content/uploads/2013/08/Traditional-Justicefinal.pdf > accessed 8 March 2014.

[186] Penal Reform International, Access to Justice in Sub-Saharan Africa: The Role of Traditional and Informal Justice Systems (Penal Reform International 2001) 11.

unwritten set of moral standards that are upheld by sanctions that change through time.[187] Traditional Shalish (Bangladesh) and officials from Mozambique, for instance, are examples, traditional courts (Zambia, Ghana and Kenya), and traditional dispute resolution (Nepal). Despite the different typologies The definition of IJS includes the following categories of systems[188]

2.5.1 Semi-Formal Courts

While applying customary rules, these state-sponsored or developed systems are frequently incorporated into the formal legal system[ibid.]. Community courts in Mozambique, local council courts in Uganda, informal local courts in Zambia, government-run Shalish in Bangladesh, Juntas Vecinales in Bolivia, and justice of the peace courts in Guatemala are a few examples.[DANIDA, 'Informal Justice Systems[189]. Examples include: Community courts (Mozambique), local council courts (Uganda), local courts using informal procedures (Zambia), government administered Shalish (Bangladesh), Juntas Vecinales (Bolivia), justice of the peace courts (Guatemala).[190]

2.5.2 Alternative Community-Based Systems

The state or non-governmental entities frequently start these (NGOs).[191] Many make use of contemporary alternative dispute resolution techniques (such negotiation and mediation) as well as community standards that have been modified to accommodate human rights.[192] Examples include neighbourhood watch groups, justice committees, community policing councils, paralegals, community mediation centres (Nepal), Ghana, Uganda, and Zambia.[193]

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[187] The Constitution of Kenya 2010

[188] UNDP, 'Informal Justice Systems: Charting a Course for Human Rights Based Engagement' 100 http://www.undp.org/content/dam/undp/library/Democratic%20Governance/Access%20to%20Justice%20and%20Rule%20of%20Law/Informal-Justice-Systems-Charting-a-Course-for-Human-Rights-Based-Engagement.pdf> accessed 8 Mar ch 2014.

[189] ibid.

[190] DANIDA, 'Informal Justice Systems: How to Note' (2010) < http://um.dk/en/~/media/UM/English-site/Documents/Danida/Activities/Strategic/Human%20rights%20and%democracy/Human%20rights/Informal

[191] ibid.

[192] ibid.

[193] ibid.

IJS have a significant role in how communities and individuals perceive justice and the rule of law, with over 80 percent of many conflicts settled through unofficial channels of justice in several nations.[194] However, one of the main topics of discussion in relation to traditional and informal justice systems is whether access to justice can be improved by supporting such systems, adopting or changing some of their procedures, or promoting a closer working relationship between such systems and formal justice systems[195] In fact, there have been efforts to incorporate some aspects of informal justice into official state procedures.[196]

International organizations are beginning to understand the importance of increasing participation in informal judicial systems in order to improve access to justice for underprivileged and poor people. [197] A state's duty under the International Human Rights Standard to provide accessible justice does not mandate that all justice be delivered through formal court systems, as long as the system in place upholds and respects human rights.[198] The prospect of fairness in the three facets of justice—structural, procedural, and normative—is provided by human rights standards.[199] Making sure that real rights are preserved would be the main goal of working with IJS. The paper states that when multiple systems and mechanisms, official and informal, are given the opportunity to (a) interact and learn from one another, (b) collaborate with one another, and provide the best access to justice and protection of human rights, (c) based on user preferences as well as state policy requirements, establish the appropriate division of work and (d) to grow so that you can take on new problems.[200]

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[194] ibid.

[195] UNDP, 'Informal Justice Systems- Charting a Course for Human Rights Based Engagement,'<http://www.undp.org/content/dam/undp/library/Democratic%20Governance/Access%20to%20Justice%20and%2 0Rule%20of%20Law/Informal-Justice-Systems-Charting-a-Course-for-Human-Rights-Based-Engagement.pdf> accessed 8 March 2014.

[196] ibid.

[197] ibid.

[198] Ewa Wojkowska, 'Doing Justice: How Informal Justice Systems Can Contribute' (2006) UNDP <http://siteresources.worldbank.org/INTLAWJUSTINST/Resources/EwaWojkowska.pdf> accessed 05 March 2015.

[199] UNDP, UN-Women and UNICEF, 'Informal Justice Systems: Charting a Course for Human Rights-based engagement'11<http://www.undp.org/content/dam/undp/library/Democratic%20Governance/Access%20to%20Justice%20and%2 0Rule%20of%20Law/Informal-Justice-Systems-Charting-a-Course-for-Human-Rights-Based-Engagement.pdf> accessed 06 March 2015.

[200] See Ewa Wojkowska, 'Doing Justice: How Informal Justice Systems Can Contribute' (2006) UNDP <http://siteresources.worldbank.org/INTLAWJUSTINST/Resources/EwaWojkowska.pdf> accessed 05 March 2015: Structural dimensions consist of participation accountability. Particular attention must be paid to the rights of groups not strongly represented in IJS, which include women, minorities and children, Procedural justice

2.6 Access to justice through arbitration.

A creature that "arises from contracts" between parties is arbitration. Despite this restrictive definition, Carlston (Kenneth S. Carlston, "Law and Contemporary Problems Volume 17 Autumn, 1952 Number 4 theory of the Arbitration Process") goes on to describe arbitration as "a chameleon word, assuming varying significance as the social setting in which it takes place varies" (Law and Contemporary Problems, vol. This implies that arbitration should take into account people's "sentient anatomical structure" and their status as participants to the universal social contract theory as proposed most famously by Thomas Hobbs, John Lock, and Jean-Jacques Rousseau. Arbitration should also not just be considered in the context of written contracts. On the basis of this, it is therefore able to assess its situation generally in Kenya and, subsequently, the capacity of arbitration to reduce the backlog of court cases.

2.6.1 Conformity of the Arbitration process with the Constitution.

All individuals and State organs at all levels of government are bound by the Constitution, which is the Republic's supreme law according to Article 2 of the Constitution. Albert & Others v. A.G. & The Central Bank of Kenya [High Courts of Nairobi, Miscellaneous Civil Application No. 905 of 2001], which ruled that any law contradictory with the Constitution should be deemed unlawful, serves as a compelling example of this. According to Kenneth S. Carlson, arbitration serves to resolve disputes rather than establish rights.

This means that arbitration should be consistent with upholding constitutionally guaranteed rights, such as the right to seek justice.[201] additionally, article 50, which protects the right to a fair trial. The will and consent of the parties provide arbitration, as a method of conflict

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consists of guidance for adjudication process that ensure that the parties to a dispute are treated equally, that their case is decided by a person with no interest in the case, who is obliged to render a decision solely on the basis of facts and objective rules rather than on personal preferences, and that anyone making an assertion or accusation must provide verifiable evidence to support it. Finally, normative justice consists of substantive rules that protect the vulnerable. Examples include prohibition against marrying off children for the economic benefit of parents or guardians or the guarantee of the right of widows to inherit.

[201] Article 48 Constitution of Kenya 2010

resolution, its legal standing.[202]. This is in accordance with the model law of the UNCITRAL that has been adopted into the Act. These are provisions for pre-dispute arbitration. Article 159(2) of the constitution, which is responsible for governing the process, permits arbitration clauses in contracts of an international commercial character, and other kinds of ADR, such as mediation, are typically included as well.

2.6.2 Access to justice through arbitration in Nairobi County Nairobi

Nairobi County lies in the centre of Kenya's south. 140 kilometres (87 miles) south of the equator are said to be covered by it. Nairobi National Park, which encompasses 113 km2 (70 mi2) of plains, rocks, and woodland, surrounds the city. The Ngong Hills are to the west of the city, and it is close to the eastern edge of the Rift Valley. Kenya's capital city is Nairobi.[203.] Consists of 85 electoral wards and eleven gazetted sub-counties. Additionally, Nairobi sends one senator to the Senate, seventeen Members of Parliament from different constituencies, and one County Woman Representative to the National Assembly.[204] The Kikuyu, Luhya, Luo, Kalenjin, Kamba, Kisii, and Meru peoples make up Nairobi's main ethnic groups. Each tribe is further subdivided into clans or sub-tribes, which are sometimes thought of as a family and still adhere to their old ways. Most of the places lack regular courts, and citizens would have to travel great distances to access the formal justice systems, making access to formal courts expensive. This chapter will explore arbitration and access to justice, describing the reporting process, the concerns covered, and the decisions that have been reached.

Arbitration is a relatively new field of social research in Nairobi.[205] Prior research tended to concentrate more on the presence, structure, and operation of arbitration rather than how it

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[202] Reily v. Russell, 34 Mo. 524, 528 (1864).
[203] Independent Electoral and Boundaries Commission
[204] Independent Electoral and Boundaries Commission.
[205] FIDA-Kenya, 'Traditional Justice Systems in Kenya: A Study of Communities in Coast Province Kenya' 3 <http://fidakenya.org/wp-content/uploads/2013/08/Traditional-Justicefinal.pdf > accessed 8 March 2014.

relates to justice.[206] But over the past few years, this has changed, and arbitration is now getting a lot of attention. These procedures have recently been acknowledged by the law, subject to specific restrictions..[207] Due to their enormous potential to improve access to justice, promote the rule of law, and foster community development, these mechanisms have gained prominence..[208] Additionally, ADR works to advance social justice and inclusion, especially for those groups that have been marginalized by the formal system.[209] Their recognition is partly a result of the growing legitimacy and legality of the judicial authority of non-state justice systems,[210] which are easily accepted by the communities they serve because they are locally produced, culturally suitable, use little resources, and run efficiently.[211]

The Kenyan Constitution declares ADR to be the basis of the country and the collective civilization of the Kenyan people.[212] The research revealed that the Nairobi rely on litigation that has been passed down through centuries to settle disagreements among themselves; a practise that informs dispute resolution among the Nairobi that they are proud to uphold and have learned to live with. The constitution also states that people have the freedom to engage in any cultural activity of their choosing and cannot be forced to follow any cultural customs or obligations.[213] Affirmative action plans created to ensure that minorities and marginalized groups develop their cultural values, languages, and practices are likewise guaranteed under the Constitution.[214] As long as they do not violate the principles of justice and morality, the Constitution or any written law, the Constitution mandates that courts and tribunals deliver

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[206] ibid.

[207]Francis Kariuki, 'Community, Customary and Traditional Justice Stems in Kenya: Reflecting on and Exploring the Appropriate Terminology' 1 <http://www.strathmore.edu/sdrc/uploads/documents/books-and-articles/Paper%20on%20Traditional%20justice%20terminology.pdf> accessed 17 November 2015.

[208] ibid.

[209] Kariuki (n197) 1 quoting Estelle Hurter, 'Access to Justice: To Dream the Impossible Dream?' (2011) 44(3) The Comparative and International Law Journal of Southern Africa 408.

[210] Kariuki (n 197) 2 quoting Miranda Forsyth, 'A Typology of Relationships between State and Non-State Justice Systems,' (2007) 56 Journal of Legal Pluralism 67, 69.

[211] Kariuki (n 197) 2 quoting David Pimentel, 'Can Indigenous Justice Survive? Legal Pluralism and the Rule of Law' (2010) 32(2) Harvard International Review 32.

[212] Constitution of Kenya, 2010, art 11(1).

[213] UNICEF, 'Informal Justice Systems: Charting a Course for Human Rights-Based Engagement 90<http://www.unicef.org/protection/files/INFORMAL_JUSTICE_SYSTEMS.pdf> accessed 03 April 2015.

[214] Constitution of Kenya, 2010, art 11(1).

justice in accordance with the principles of traditional dispute resolution mechanisms.[215]

2.6.3 Access to Justice as per Article 48 of the Constitution.

One of the most important factors that must be evaluated in light of the factors that would make arbitration a workable substitute for litigation is the money component. The ability of the parties to pay is a significant barrier to accessing justice. This holds true not just for the different types of ADR but also for the legal system. This demonstrates why it was vital to add Article 48, which declares that it is the obligation of the declares to ensure that the citizens have access to justice, while considering the Constitution and the necessity for effective access to justice. Further, it states that any costs should be "reasonable and fair" if they are in doubt.This claim is not entirely true because the costs of litigation do sometimes exceed those of lengthy proceedings.[216].

The fees could soar even higher if section 32b of the act, which places the burden of determining the arbitrator's time, the arbitration forum fee, and all other standard litigation fees like legal fees and related costs solely on the chosen Arbitrators, is taken into account. Like many vaguely defined legal provisions, Article 48 of the Constitution does not specify what constitutes "reasonable" fees, leaving this decision entirely up to the court.

The establishment of Arbitration must take into account a number of the previously mentioned considerations. The arbitration act does not specify the fees involved in litigation, in contrast to the court process. The majority of the time, parties to arbitration proceedings have different financial negotiating power. This implies that a party with more money may choose to hire an arbitrator whose fees are too expensive for the opposing party. This is the Party's legal right, but if the other parties are unable to cover these costs, it will negatively

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[215] Kariuki (n 197) 2 *quoting* Miranda Forsyth, 'A Typology of Relationships between State and Non-State JusticeSystems,' (2007) 56 Journal of Legal Pluralism 67, 69.

[216] Arbitration is generally less expensive than litigation, it can still become too expensive in the long run in case of any dragging" Kariuki Muigua

impact their ability to access the court system. In rare circumstances, if the fees are not paid, the arbitrators may refuse to award the parties a judgement.

Modern arbitration may also be institutional or result in higher expenses than Court, among other differences. However, it is crucial to remember that, in contrast to the judicial system, which is rife with corruption at all levels, constitutional and statutory provisions guard against the abuse of the system. For example, under Section 35 (2) (v) of the Act, a court may set aside a decision if it was influenced by some sort of fraud. The growth of arbitration and, to some extent, access to justice have both been significantly hampered by court action. However, it is unclear how a court might enforce under the circumstances set forth by The Act[See Chapter 3.3] because such situations are not anticipated.

Article 48 may be invoked to protect the last component of the right as envisioned. However, there are a number of claims that arbitration does not advance the essential ideas of Natural Justice. The discussion in this chapter should continue in this direction.

2.7 Principles of Natural Justice

The viability of arbitration must be evaluated in light of Natural Justice. This is so because arbitration comes with benefits like having a lot of influence over the proceedings. Unless the parties determine otherwise later or in an arbitration agreement',[217] The parties are aware of every detail of the case before filing a court complaint. Second, arbitration is a confidential and voluntary process that enables parties whose privacy is merely violated to settle issues without being made public. Parties have further power over the arbitration process in addition to selecting the arbitrators.

In the Ridge v. Baldwin case from England.[218] After Ridge was exonerated of allegations related to corruption, the watch committee fired him as Brighton's chief constable. He

[217] Parties may not pull out of instituted Arbitral proceedings once instigated

prevailed on appeal because the Police Regulations laid out a process that ought to have been followed and because there was a deficiency in natural justice because he was neither informed of the reasons for his dismissal nor given the chance to present his case to the committee on watch. The House of Lords ruled that the watch committee had violated the natural justice criteria, rendering the decision to fire Ridge invalid. The House of Lords disagreed with the court of appeal's conclusion that the committee was only operating in an administrative role and ruled that the committee's decision was invalid because it had not been made in a manner consistent with natural justice. It is also crucial to remember that, with the exception of a few statutory limitations, primarily those imposed by Section 10 of the Act, arbitration rulings should be final and binding. In accordance with Articles 47, this read.[219] and 48.[220] The necessity of natural justice's guiding principles is further emphasized by the constitution.

2.7 .1. Fairness in Administrative Processes

The Constitution's Article 50 guarantees everyone the right to a fair trial. Every individual has the right, according to clause (1), to have any legal dispute adjudicated in a fair and public proceeding before a court or, as necessary, another independent and impartial tribunal or organization. Such individuals or parties to a dispute also have the right to, among other things, appropriate time and resources to put together a defence and to present and refute evidence.

To enable the person to effectively convey their argument, the information provided to them must be adequately accurate.

According to Section 19 of the Arbitration Act, which deals with treating parties equally,

[219]. Article 47 deals with fair administrative action. Clause (1) thereof provides that every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair(Kariuki Muigua)

[220] Article 48 provides that the State shall ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice. This provision is not biased towards people dealing with public law only but also protects those dealing with private law(Kariuki Muigua)

each party must be given a fair and reasonable opportunity to submit their case, subject to Section 20. The Constitution's Articles 27 and 50, which address equality and fair hearing, respectively, would apply to this provision. According to Justice Deverrel's argument in the Epco case, applications to uphold constitutionally guaranteed rights should not be "easily" permitted because the Arbitration Act clearly states that "parties shall be treated with equality and each party shall be given full opportunity of presenting his case." challenged.

It is important to emphasize that the fair trial provision of the Arbitration Act does not, by itself, ensure this right. Any fair and/or equal treatment clause that appears to conflict with other clauses therein is useless for achieving justice. According to the Constitution, such a hearing must be guided by principles like openness, the rule of law, diversity, respect for human rights, and nondiscrimination.[221] Any departure from this could be contested as being unconstitutional.

The principles of natural justice include the right to an impartial administrative procedure and the opportunity to be heard.[222] For a long time, arbitration has been viewed as a process where the influence of the courts has been minimized to the point where the fundamental rights of the parties may be subordinated in order to get a decision. According to Kariuki Muigua, "Parties are sometimes not permitted to be represented by lawyers; rights of appeal are sometimes limited; there is a wide discretion of a tribunal at times, which may lead to inconsistent and illogical decisions" as a result of the fact that most arbitration proceedings take place in private. [223].

Kenyan legislation have advanced significantly to address this flaw. According to Section 13 of the Arbitration Act (Cap 4 of 1995), anyone being considered for appointment as an arbitrator is required to report any circumstances that might give rise to legitimate concerns about his independence or impartiality. This is essentially the first occasion in which the Act

[221] Article 10, Constitution of Kenya 2010
[222] The Constitution of Kenya,2010
[223] Constitutional Supremacy over Arbitration in Kenya Kariuki Muigua

strives to uphold the principles of Natural Justice.[224]. The autonomy of arbitration is based on the agreement of the contracting parties. Since the decisions of the chosen Arbitrators are final and binding, this provision mandates that any bias or conflicts of interest be disclosed. Essentially, it is the Arbitrators' responsibility to reveal any personal information that might have an impact on the contracting party. The parties to the conflict, the nature of the issue, and finally the topic at hand should all be taken into account by the arbitrator.In the **Marbury v. Madison** case,[225] It was decided that the Judicial Department had the responsibility of defining the law. According to the Court, individuals who apply the rule to specific instances must inevitably explain and interpret it. When two laws contradict, the Court must decide which one was applied. However, the Constitution has taken steps to address and ensure this Natural right through the aforementioned Articles 47 and 48. These protect the parties' right to justice. Fairness encompasses both procedural and administrative elements.

Due to the cutting-edge nature of arbitration, it is necessary to use already existing legislation to simplify this procedure and adapt it to the Kenyan setting. The Constitution's Article 50 guarantees everyone the right to a fair trial. In addition, it states in clause I that everyone has the right to a fair and public hearing before a court or, as necessary, another independent and impartial tribunal or organization for the resolution of any issue that can be settled through the application of law.

Thus, the supreme law mandates that in order to provide a fair hearing, there must be openness, the rule of law, diversity, respect for human rights, and nondiscrimination.[226] Any departure from that would make it in violation of the constitution.

224http://www.kenyalawresourcecenter.org/2011/07/principles-of-natural-justice-in.html#sthash .IxqNbON8.dpuf

[225] 5 U.S. 137, 1 Cranch 137, 2 L. Ed. 60 (1803).

[226] Article 10, Constitution of Kenya 2010

2.7.2. Equity.

This right is not guaranteed notwithstanding these provisions in the operational Act because the Act must be interpreted in accordance with the constitutional principles. A key component of arbitration is privacy. The Constitution's Article 50 requires that the proceedings be open to the public. The Miller Vs. Miller [1988] KLR 555 case provides an exemption, stating that the public aspect of a trial may be renounced with the permission of both parties and that it may also be held in private if doing so would obstruct access to justice. In his decision dated March 3, 2010, Judge JV Ogunda stated that arbitrations should be held in public, subject to clause 50(8). This was thought A private arbitral decision may be made in conformity with the constitution's provisions of supremacy proceeding invalid. A party to a dispute must have the ability to hire legal counsel, according to Article 50 I (g) of the same document. Some arbitration agreements disallow this right and waive it. Further, Article 25 of the Constitution declares that the right to a fair trial and everything it involves are unrestricted under subsection 25(b). Despite being permitted under the UNCITRAL model legislation, which are in accordance with the Act, these deviations do not make the proceedings any more constitutional. This implies that the constitution and arbitration principles in Kenya are at odds.

The UNCITRAL model law and rules, along with the agreed-upon national laws of the parties, serve as the lex loci arbitri within the international context, which may allow the choice of law clause to get beyond these obstacles.

Limitations apply to this as well under Article 1(2) in the form of an offensive conflict of laws.[227] According to Edward Nii Adja Torgbor's interpretation of this article, UNCITRAL rules "may be subordinate to the mandatory provisions of the applicable state arbitration laws." Thus, one considers the venue and arbitrability of conflicts between parties subject to

[227] These Rules shall govern the arbitration except that where any of these Rules is in conflict with a provision of the law applicable to the arbitration from which the parties cannot derogate, that provision shall prevail."

Kenyan law, whether they are corporations or private citizens. The New York Convention, which Kenya is a signatory to and which took effect there on May 11, 1989. This practically means that, assuming the other nations are participants to this convention, arbitration conducted outside the jurisdiction of Kenya but having relevance or if one of the parties is closely tied to Kenya are enforceable in Kenyan courts.

2.8 Concluding Remarks

The general concept of arbitration and ADR methods was introduced in this chapter. It has discussed the key characteristics of arbitration that make it a useful tool for settling conflicts. One of the alternative conflict resolution methods that is frequently used in the current world is arbitration. Since ancient times, it has played a significant role in many international and domestic issues. For instance, it has been utilize in family disputes, environmental problems, business or commercial disputes, and other minor disagreements.Since arbitration is now a recognized right under Kenya's 2010 Constitution, its advantages could be leveraged to make it a useful tool for settling disputes in Kenya.

This Chapter has outlined how the concept of arbitration in promoting access to justice is evaluated on a scale of justice. Justice would then entail that, in accordance with their human rights, every individual within a specific community, area, or nation must have access to conflict resolution procedures of any kind. These procedures must maintain the rule of law, be impartial, and advance general equity and equality. Additionally, the chapter has illustrated the difficulties that access to justice faces at various societal levels. These difficulties was discussed and maybe remedied in the chapters that follow. The chapter has also covered the nature of ADR, their impact on society, and the reasons why people use them. It has also shown how much the Kenyan Constitution values culture and conventional conflict resolution methods.

CHAPTER THREE

THE LEGAL FRAMEWORK OF ARBITRATION IN KENYA

3.0 Introduction

The Kenyan justice system, like those in most other countries, consists of three parts: the police, who are in charge of keeping an eye on criminal activity and bringing cases against those who break the law, and the bar, which is made up of attorneys who are licensed to practise law in Kenya. Due to the high expenses of admission and time commitment, which discourage qualified solicitors and force them towards the private sectors of employment, this appears to be a contributing element in the obstruction of access to justice. A lawyer without a postgraduate degree may actively participate in arbitration practise, but they are not permitted to represent clients in court. This is the connection to arbitration.] which is essentially a lawyer or legal practitioner. Kenya's legal system has experienced numerous stages of progress from the precolonial era to the current post-2010 constitution era. The yearly judicial reports published after 2010 provide enough evidence of the numerous and varied developments, as well as the ongoing evolution of the fundamental concepts underpinning the judiciary's mandate.

Up until recently, the Judiciary appeared to have sound principles for the administration of justice, but the reality was very different. Before we delve into the inner workings of the judiciary and its role in promoting citizens' access to courts of law in Kenya and Africa as stated by the International Court of Justice (ICJ), it is important to note that this paper goes beyond the confines of the court system and dispels the myth that justice can only be sought in a court of law.[228]

[228] This premises is based on the fact that Africa both historically and practically has several alternatives from the traditional mechanisms to the more formal.

3.1 Law and Regulation of Arbitration in Kenya.

This chapter will evaluate the merits of arbitration based on cost, case outcome, and the legal and regulatory frameworks in existence in order to decide whether it is a viable option as a substitute for the court system for accessing justice. Before this analysis of the advantages and demerits of the arbitration procedure, there was a history of the arbitration laws in Kenya up to that point. Like most African countries, Kenya has had a law governing arbitration and alternative dispute resolution.[229] i.e. Justice Charles Kajimanga of Zimbabwe[230] acknowledges that one of the important methods to improve access to justice is through the use of ADR. He continues by saying that this is possible because most ADR processes, like mediation and arbitration, involve the parties actively participating in the settlement of their problems. Although this viewpoint can seem definitive, it is far from being absolute because it gives Elders the power to resolve disputes when resources are transferred as payment, despite the widespread usage of ADR processes in informal contexts like traditional settings.[231] (quite similar in practice and execution to arbitration)[232], has taken several years to be included in statute and the entire legal system. Arbitration has a long history, dating back to the time of the Holy Books.[233]

The Arbitration Act (1995), Act No. 4 of 1995, Cap. 49 Laws of Kenya, is in fact Kenya's first real statute to declare the status of this ADR mechanism. Since then, the Arbitration Amendment Act of 2009 (hereafter referred to as the Act) has repealed it. Due to Legal Notice No. 394 of 1995, this act became effective on January 2, 1996.[234]. This was primarily caused by the fact that courts had complete discretion to intervene at any time and invalidate

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[229] ADR dates back to 1189, being the first year of the reign of Richard I and the start of the Plea Rolls. See Redgment J Introduction to the Legal System of Zimbabwe (1981) 20. Stellenbosch

[230] enhancing access to justice through alternative dispute resolution mechanisms - the zambia n experience presented at the annua l regional conference held at southern sun, Mayfair Nairobi, Kenya on 25 - 26 July, 2013

[231] African customary arbitration". UNCITRAL Working Group, 39th session 19 June -7 July 2006 (UN doc A/61/17).

[232] I. W. Zartman Ed., (2000} Traditional Cures for Modern African Conflicts;

[233] The Holy Biblell1; Isaiah ch 2:4; the Quranic basis of arbitration is found in 4:35 and 49: 9-10

[234] See more at: http://www.kenyalawresourcecenter.org/2011/07/arbitrationagreement.htmI#sthash .hIL6uRSV.dpuf

any judgments they found to be unjust. However, it is tragic for the growth of African culture, ideas, and experience that their practices and procedures are either criticized or disregarded until they are "acknowledged by colonialist language or nomenclature. The growth and advancement of such practices are, at best, stifled or, tragically, even ignored by some Africans themselves.". Consequently, the African contribution to human knowledge, according to Edward Nii Adja Torgbor, advancement and experience are either ignored, undervalued, marginalized, or ignored in the global environment.[235].

The 2010 Constitution acknowledges the necessity of arbitration and other ADR procedures in addition to the Act. According to Article 159(2)(c) of the Constitution, when exercising their judicial authority, courts and tribunals must be guided by the principle of promoting alternative dispute resolution (ADR), which includes negotiation, arbitration, mediation, and other traditional dispute resolution methods. As the supreme law of the nation, this article may indicate a desire or, more likely, a need for a litigation-free alternative, which was demonstrated in the next chapters.

This is important because if the courts are the only ones responsible for justice distribution and the system is backed up, the backlog clearing initiative was necessary because of the massive backlog.[236] from the judiciary's perspective, Given the current situation, most people find it challenging to access justice sought through the court, but it is very attainable with the correct management and guidance.In accordance with the Act and the Constitution, Order 46 of the Civil Procedure Rules provides, among other things, that at any time before judgement is rendered, interested parties in a suit who are not under any disability may apply to the Court for an order of reference to arbitration. Section 59 of the Civil Procedure Act 34 provides that all references to arbitration by an order in a suit, and all proceedings thereunder,

[235] Edward Nii Adja Torgbor A Comparative Study of Law and Practice of Arbitration in Kenya, Nigeria and Zimbabwe, with Particular Reference to Current Problems in Kenya.
[236] Available at http://www.judiciary.go .ke/porta I/blog/post/high-court-case-backlog-clearance-initiative accessed on 12/12/2015

shall be governed in such a manner as may be provided for by rules. This has encouraged parties to include arbitration clauses in their contracts and allowed courts to lessen their workload by enabling such matters to be expedited through arbitration.[237] .

International Arbitration has gained much more traction in Kenya. The current arbitration Act is based on a Model of the United Nations Commission on International Trade Law (UNCITRAL) which was adopted in 1985 with a view to encouraging an arbitration processes that would have global recognition. The goal is to assess if arbitration can improve "Access to Justice" for everyone. According to Article 48 of The Constitution of Kenya 2010, any fees associated with accessing justice must be reasonable and not prevent it. These International Arbitration participants typically have the financial resources necessary to see an arbitration through. In conjunction with article 35(5), which permits tribunals to determine their own fees[238] It allows tribunals to postpone rulings in exchange for money raises questions about their ability to improve access to justice, which brings us full circle to one of the primary problems with the legal system: the cost of pursuing a case all the way to trial.

The East African Court of Justice, a body of the East African Community (EAC), exists at the level of East Africa. The Democratic Republic of the Congo, South Sudan, Tanzania, Burundi, Rwanda, and Kenya make up the EAC. In addition to its authority over the interpretation and application of the EAC Treaty, the Court also possesses arbitration-related jurisdiction. [239]The EAC has jurisdiction over disputes arising from arbitration clauses in agreements or contracts concluded by the Community or any of its institutions as well as

[237] Section 6 of the Act

[238]http://www.kenyalawresourcecenter.org/2011/07/arbitration-agreement.html#sthash.hl L6uR5V.dpuf

[239] Emilia Onyema, *The Transformation of Arbitration in Africa the Role of Arbitral Institutions* (2022) <https://profiles.uonbi.ac.ke/kariuki_muigua/files/05_onyema_ttaa_ch.4_kariuki_muigua.pdf> accessed 17 October 2022.

clauses in commercial agreements or contracts where the parties have delegated the Court's jurisdiction to handle arising disputes.[240].

The court adopted the 2012 East African Court of Justice Arbitration Rules, which are applicable in arbitration of cases before the court, subject to Article 32 of the treaty.Especially when the parties are from different East African Community states, the East African Court of Justice acts as an efficient arbitrator of international economic disputes. The East Africa Court of Justice arbitrates conflicts, however few members of the East Africa Community are aware of this fact, which presents a problem because it restricts the number of problems that can be brought before the court for arbitration.[241].

In light of the foregoing, the following is a discussion of the national legislation governing arbitration:

3.1.1 The Constitution

The Kenyan Constitution of 2010's Articles 60, 159, and 189 provide the fundamental foundation for arbitration. According to Article 159 of the Kenyan Constitution, alternative dispute resolution procedures like negotiation, mediation, arbitration, and traditional dispute resolution procedures should be encouraged as long as they do not violate the bill of rights, are not inimical to justice and morality, or are in conflict with the constitution or any other written law..[242] According to Article 159, the courts and tribunal must follow guidelines that support traditional dispute resolution processes as well as alternative dispute resolution methods like reconciliation, mediation, and arbitration when exercising their judicial authority.

The constitution stipulates that national legislation must include procedures for resolving intergovernmental disputes through alternative dispute resolution mechanisms, such as

[240] Article 32 of the Treaty for the establishment of the East African Community of 1999
[241] Peter Muriithi, *Effectiveness of the East African Court Of Justice As An International Arbitral Tribunal* <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3828796> accessed 17 October 2022.
[242] www.disputeresolutionkenya.org website visited on 22nd March, 2015 at 1045hrs.

negotiation, mediation, and [UNCITRAL http://www.uncitral.org] arbitration. This is done to improve relations between the national and county governments. The Constitution's Article 60 encourages the use of recognized traditional dispute resolution processes to resolve conflicts involving land problems. Article 60(g) states that encouraging communities to resolve land disputes through legitimate local community initiatives in accordance with the Constitution is one of the concepts in land administration. This was envisioned after it was realized that other avenues for settlement should be used because it takes a long time for land disputes to be resolved through our judicial system of justice.

3.1.2 The Arbitration Act of Kenya

The Arbitration Act, Chapter 49 Laws of Kenya, which had governed arbitration in Kenya since 1968, was replaced by the current Act in 1995. The United Nations Commission on Trade Law's Model provides the foundation for the existing Arbitration Act.[243] Subsequently, the 1995 Act was amended vide the Arbitration (Amendment) Act 2009.[244]

The Arbitration Act specifies the scope of the functioning of arbitration tribunals in Kenya as well as the threshold at which courts may get involved in arbitration.[245] A written contract is what initiates arbitration between the parties.[246] The dispute was heard by one or more impartial, experienced arbitrators, and the parties agree to be bound by the arbitrator's judgement. The arbitrators examine the available testimony and evidence before reaching a decision based on the legal standards outlined in the arbitration agreement.[247]

Article 165 of the Constitution of Kenya 2010

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[243] Article 165 of the Constitution of Kenya 2010

[244] Article 165 (6) of the Constitution gives the High Court the power to supervise tribunals and all bodies thatexercise quasi-judicial functions

[245] S. 10, No. 4 of 1995

[246] S. 4, No. 4 of 1995, Arbitration Agreement

[247] S. 32, No. 4 of 1995

Article 165 (6) of the Constitution gives the High Court the power to supervise tribunals and all bodies thatexercise quasi-judicial functions.Section 10 of the Arbitration Act provides that except as provided in this Act, no court shall intervene in matters governed by this Act. This provision may be rendered unconstitutional because as per the Constitution, the High Court has unlimited jurisdiction.[248] Further the Constitution provides that the High Court has the supervisory jurisdiction.[116]This supervisory jurisdiction runs over any independent tribunal.[249]

The Act's Section 12 outlines the various methods for choosing an arbitrator (or arbitrators) and grants the parties liberty in this regard. The arbitral tribunal may make a determination about its own jurisdiction, according to Section 17. The arbitral tribunal's authority to decide on challenges to its own jurisdiction is referred to as kompetenzkompetenz. This clause calls into doubt the arbitral tribunal's impartiality in certain circumstances.

The arbitral tribunal has the authority to assess the admissibility, relevance, substance, and weight of any evidence presented to it under Section 20 of the Act. According to Section 28, the High Court may be asked for help in gathering evidence by the arbitral tribunal or a party who has obtained the tribunal's consent. The High Court can appeal an arbitral award made by the arbitral tribunal, and the reasons for doing so are outlined in Section 35. The Act's arbitration provisions, to a considerable part, rely heavily on the legal system.

3.1.3 The Civil Procedure Act and the Civil Procedure Rules

Sections 1A and 1B of the Civil Procedure Act state that the primary goal of the law is to make it easier to settle civil disputes in a fair, timely, reasonable, and cheap manner.[250] This can be taken to mean that the courts are free to use alternative conflict resolution procedures

[248] Section 12 of the Act

[249] Article 165 (3) :The High Court has jurisdiction to hear an appeal from a decision of a tribunal appointed underthis Constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144

[250] Chapter 21, Laws of Kenya

to accomplish the paramount interest in civil issues.[251] Section 59 allows for the referral of disputes to arbitration, which shall be subject to Order 46's stipulated rules..[252]When parties are involved, Order 46 Rule 1 allows for the referral of a matter to arbitration before a court order is issued.

3.1.4 Labour Laws

Employer and employee labour issues can be resolved under the Employment Act.[253] The statute allows for the resolution of complaints involving unfair or summary termination;[254]

A labour officer who receives a claim under this section must give both the employee and the employer every opportunity to present their case before recommending to the parties what, in his opinion, would be the best way to resolve the disputes in accordance with section 49's provisions.

The Industrial Court Act[255] stipulates that if the Industrial Court is not convinced that an effort has been made to resolve the disagreement through reconciliation, it may refuse to rule on any matter that is brought before it, aside from an appeal or review..[256]

Section 58 of the Labor Relations Act[257] provides that;

i.A collective bargaining agreement between an employer, a group of employers, or an employer' organization and a trade union may provide for: a)The conciliation of any category of trade disputes listed on the collective bargaining agreement by an independent and impartial conciliator chosen by agreement and the parties

ii.An award in an arbitration under a collective bargaining agreement as described in subsection (1) is final and enforceable and- iii.Is appealable to any court on legal issues

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[251] Section 1A Civil Procedure Act Cap 21, Laws of Kenya
[252] The Civil Procedure Rules
[253] The Constitution of kenya,2010
[254] Section 47(2)
[255] Chapter 226, Laws of Kenya
[256] Section 15
[257] Act No. 14 of 2007

iii.Can be overturned by the industrial court on any legal basis v.enforceable through the Industrial Court

The majority of labour disputes are arbitrated in front of the county's labour officials. The Employment and Labour Relations Court in Kenya frequently gives the labour officer's conclusions, who may have arbitrated the dispute before it was brought to court, more weight as evidence.

3.1.5 The Evidence Act

The Evidence Act, Section 2, states that evidence rules shall not apply to proceedings before an arbitrator in order to prevent legal nuances in the arbitration process.[258]In order for the parties to the arbitration tribunal to proceed according to their own rules and in the way they see fit to resolve the dispute, this is necessary.

Paul Ngotho's piece, which describes how anyone can present a party before an arbitration panel, emphasizes this..[259] This section is meant to emphasize the importance of having a quick trial with few legal obstacles during the arbitration process.

3.1.6 The Nairobi Centre for International Arbitration Act

This law attempts to make it easier to promote and establish Nairobi as a centre for arbitration.[Nairobi as an arbitration centre] It aims to raise awareness of arbitration hearings in Nairobi within the global business and commercial community. According to Section 5 of the Act, the center's duties include, among others, promoting, facilitating, and encouraging the performance of international commercial arbitration and making sure that arbitration is reserved as the preferred method of resolving disputes.[260] This is a brand-new Act, and the centre is in the process of establishing an office of the registrar before choosing

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[258] Cap 80 of the Laws of Kenya

[259] Arbitration Act

[260] The Arbitration Act of UK Act no 6 of 1996

a panel of arbitrators to oversee the arbitration processes.[261]

3.2·Role of the Court in Arbitration Process.

Another important factor in establishing the independence and viability of arbitration as an independent method of dispute settlement is the degree to which the court can interfere with the arbitral process. This is predicated on the idea that arbitration must be a voluntary process in order to present a dispute to a tribunal that has been freely chosen for a decision.[262] and binding decision (Kenneth S. Carlton, 1952)[263]. This is due to Section 10 of the Act, which specifies how much the court may intervene in arbitration procedures. No court shall intervene in situations covered by this Act, with the exception of those set forth in this Act. At first glance, the Act appears to continue reducing the occasions in which the national court should get involved in arbitral proceedings.

The limitations stipulated by the Act apply when courts may intervene to decide disputes over which the parties cannot agree or to support the arbitral tribunal in some other way. When there is an existing agreement to submit the dispute to arbitration, the High court is given the authority under Section 6 of the Act to halt judicial proceedings and refer the dispute to arbitration. This prevents cases from withdrawing their consent to arbitrate in the event that the scales do not tip in their favour.

This stance is supported by Kenyan case law, such as in Nancy Nyamira & Others v. Archer Dramond Morgan Ltd.[264] ,As it was said that it is crucial that courts uphold the deadlines set forth in that Act because "otherwise courts would be used by parties to underwrite the undermining of the objectives of the Act."

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[261] The Arbitration Act of Zimbabwe

[262] UnCitral Arbitration Rule (As Revised In 2010) United Nations Uncitral United Nations Commission On International Trade Law Art 34(2)

[263] law and contemporary problems volume 17 autumn, 1952 number 4 theory of the Arbitration process

[264] Civil Suit 110 of 2009, [2012]eKLR

3.2.1. Statutory power of Court to intervene in the arbitration process

If the parties are unable to agree on the number of arbitrators, the High court may do so under Section 11(1) of the Act. In addition, Section 12 of the Act allows the Court the authority to name the arbitrator(s) in cases when the parties are unable to agree on the selection process. When a party asks it, the High Court may issue temporary protective orders under Section 7 of the Act. But according to the clause, if the arbitral tribunal has already made a decision regarding such an application, the High court must take that decision as the final resolution of that case.

However, this does not take into account the harm incurred or the interest of the party the judgement was made against. Despite this, Section 14(1) of the Act gives the High Court the authority to determine on an application by a party in arbitration proceedings against an arbitrator. Additionally, Section 15(2) empowers the High Court to decide whether to revoke the appointment of an arbitrator in cases where the parties are unable to do so themselves. The High court has the authority to decide definitively on the issue of the arbitral tribunal's jurisdiction under Section 17 of that law.Section 28 provides that the arbitral tribunal, or a party with the approval of the arbitral tribunal, may request from the High Court assistance in taking evidence, and the High Court may execute the request within its competence and according to its rules on taking evidence. Section 35 confers the High court powers to annul an arbitral award within the conditions outlined in such clause.

According to Section 35(1), the sole way to appeal an arbitral award to the High Court is to file an application to set it aside under Subsections (2) and (3).

This suggests that the Court won't take action in these situations until a displeased party requests it. The grounds for setting aside an arbitral award by the High Court are outlined in subsection (2). One of the parties' incapacity, an invalid arbitration agreement, a lack of proper notice regarding the appointment of the arbitrator or of the arbitral proceedings, or a

situation in which the applicant was unable to present its case are grounds for the arbitral award to be set aside for which the applicant must provide proof. Where the arbitral tribunal's composition or the arbitral procedure was against the parties' agreement, with the exception of situations where the agreement conflicts with provisions of the Act and the parties cannot deviate from those provisions, or when fraud, undue influence, or corruption affected the decision-making process that led to the award. In addition to the aforementioned, the High Court may also nullify arbitral awards if it determines that the dispute's subject matter cannot be resolved by arbitration under Kenyan law or that the award is against Kenya's national policy.

However, the Act specifies deadlines on when a dissatisfied party must file applications with the High Court to have arbitral verdicts set aside. According to Section 35(3) of the Act, the court will not consider any requests to set aside an award if three months have passed after it was entered. This restriction aims to both guarantee that such decided matters are put to rest and to stop such applications from being made in bad faith.

3.2.2 Jurisprudence on non-arbitrarily of certain disputes

It is common knowledge that not all issues may be settled amicably through ADR. These include judicial review of administrative decisions, consumer disputes, certain intellectual property issues, insolvency, patent validity, and criminal responsibility.[265]Additionally, for a very long time, family disputes were not subject to arbitration unless they concerned the division of property.[266].

However, the 2019 court of appeals judgement in TSJ v. SHSR caused that position to shift..[267] In a nutshell, the facts were that an Ismaili husband requested the dissolution of his marriage with his Ismaili wife through the Shia Imami Ismailia National Conciliation and

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[265] Vianney Sebayiga, *The Arbitrability of Family Disputes in Kenya* (2022) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4136412> accessed 16 October 2022.
[266] Ibid.
[267] [2019]eKLR

Arbitration Board in Nairobi due to irreconcilable differences. After hearing from the parties, the Arbitration Board issued a decision that dissolved the marriage, granted the wife joint custody of the children with the husband still having access and visitation rights, and mandated that the husband pay monthly spousal and child support. But because the husband disobeyed the ruling, the wife applied to the High Court for recognition and enforcement of the Arbitration Board's arbitral judgement under Section 36 of the Arbitration Act. The major question before the High Court was whether the Arbitration Board had the authority to decide on child custody and support issues as well as give a divorce decree.

According to the High Court, only regular courts or Khadi's Courts have the authority to hear and resolve marriage issues. Additionally, it was clearly established that only business conflicts could be resolved through arbitration. As a result, the Arbitration Board lacked the power to handle divorce-related issues. Additionally, the High Court declared that all child custody and child support cases must be decided by the Children's Court, and that the Arbitration Board lacks the authority to do so. The arbitral award of the Arbitration Board was thus overturned.At the court of appeal, a question that had to be answered was whether the board had exceeded its mandate in issuing the orders it did. The court stated in very emphatic terms that the Arbitration Act does not limit the application of arbitration to only commercial disputes.

When exercising their judicial jurisdiction, courts are required by the Constitution to improve arbitration and other dispute settlement procedures, which expanded the use of arbitration beyond commercial disputes. The Court also declared that a Muslim couple may choose to end their marriage outside of the legal system. As a result, under the Shia Imami Muslim Constitution, the Arbitration Board had the power to make decisions regarding marriage and matrimonial property. Additionally, the Court of Appeal concluded that because the

Arbitration Board had been freely appointed by the parties. As a result, the Arbitration Board had the authority to make such orders regarding child-related issues.

The verdict has emerged as a prime illustration of how our courts are increasingly realizing the value of arbitration as a means of providing access to justice.[268] Family conflicts frequently elicit strong emotions and, as a result, leave members of the same family with "bad blood.[269] Arbitrating such issues will have benefits such as ensuring that such private concerns are not made public and that conflicts are resolved quickly so that families do not have to live in anxiety because courts take so long to reach their rulings.

The use of arbitration should be expanded to cover family problems because there are many cases in the children's courts that need to be settled. In order to accomplish this, one method is to alter the Arbitration Act so that it is clear what is arbitrable and what is not.

3.3 Conclusion Remarks

In this chapter, the legal framework for arbitration practise is covered. In Kenya, arbitration is recognized and governed under the Civil Procedure Act (Cap. 21) and its provisions, as well as the 1995 Arbitration Act. The Arbitration Act, 1995 was signed into law on August 10, 1995, and it became effective on January 2, 1996. It did away with Chapter 49 of the Kenyan laws, which had governed arbitration cases since 1968, and replaced them. The Model Arbitration Act of the United Nations Commission on Trade Law served as the model for the Act. The Arbitration (Amendment) Act 2009, which was approved on January 1st, 2010, has since revised the 1995 Act.

The Arbitration Act of 1969 was abolished on 2 January 1996 by the Arbitration Act of Kenya 1995 ("the Act"), which is based on the UNCITRAL Model Arbitration Law of 1985

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[268] Sebayiga (n 182)

[269] 'Family arbitration – Resolving family disputes in uncertain times - BDB Pitmans' (*BDB Pitmans*) <www.bdbpitmans.com/insights/family-arbitration-resolving-family-disputes-in-uncertain-times/#:~:text=What%20is%20family%20arbitration?,property,%20and%20arrangements%20for%20children.> accessed 8 November 2022.

("MAL"). It was changed in 2010 to include, among other things, the arbitrator's immunity. Notably, the MAL modifications from 2006 were not included in the change. The Act does not yet include the most recent MAL provisions on temporary measures as of the time this article was published. The Act adopts the international best practise, as codified in MAL, including express distinction between domestic and international arbitration; a liberal definition of what an agreement "in writing" is; party autonomy on choice of arbitration, tribunal composition, and procedure; the doctrine of kompetenz la kompetenz; immunity of arbitrators; independence and impartiality of arbitrators throughout the arbitral proceedings; non-interference by courts; and financial penalties for noncompliance.

CHAPTER FOUR

REVIEW AND ANALYSIS OF THE CHALLENGES FACING ARBITRATION

4.0 Challenges

There are numerous instances in the children's courts that need to be resolved, so arbitration should be used more often for family disputes. One way to do this is to change the Arbitration Act to make it clear what may and cannot be arbitrated.[270]when the Appellant had made an application for a constitutional amendment in accordance with sections 70 and 77 of the Kenyan Constitution[271], the Civil Procedure Act's section 3A and section 3 of the Judicature Act. The applicant claimed that an arbitrator's preliminary finding had breached their constitutional right to a fair arbitration.

Despite the establishment of arbitration in Kenya, there are still several difficulties that limit the progress made in developing a strong legal framework as a substitute for litigation. Conflict management is encouraged by promoting access to justice, hence it is effectively used to improve the reduction of court backlogs.

4.1 Arbitrator training

These issues stem from a lack of individuals with the necessary skills to resolve conflicts through arbitration procedures as well as a lack of understanding of how these procedures operate. Professional alternative dispute arbitrators are unable to handle all the cases that are recommended by the many laws to be handled via arbitration execution and supported by the Kenyan constitution because they are overwhelmed by the volume of disagreements caused by the large number of people.[272]

In the entire nation, just a few organizations train arbiters. "The Chartered Institute of Arbitrators (Kenya Chapter)" is the most fundamental one; it provides members with training.

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[270] Civil appeal No. 248 of 2005 (unreported).
[271] Repealed by the Constitution of Kenya
[272] Paul Wambua, 'The Challenges of Implementing ADR as an Alternative Mode of Access to Justice in Kenya' (2013) 1(1) Alterative Dispute Resolution <https://doi.org/chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://ciarbkenya.org/wp-content/uploads/2021/02/final-vol-1-issue-1.pdf> accessed 8 November 2022.

Additionally, "The Dispute Resolution Centre" exclusively works with its members, not necessarily educating and enlightening the entire public. More organizations should start the training of arbitration specialists, especially in the numerous middle-level universities or colleges dispersed across the nation because these organizations may not be able to meet the demands of everyone.This suggests that creating a dispute resolution centre at the Law Society of Kenya may be a smart move in the right direction.

4.2 Code of Ethics

If training efforts are expanded, there is a low probability that there was enough arbitrators. This goes against the fact that the existing code of conduct is specific to arbitrators and that only arbitrators are subject to removal or barring under "the Arbitration Act" provisions.[273].[Kariuki Muigua, "Overview of Arbitration and Mediation in Kenya"; “"A Paper Presented at a Stakeholder's Forum on the Establishment of Alternative Dispute Resolution (ADR) Mechanisms for Labour Relations in Kenya, held at the Kenyatta International Conference Centre, Nairobi, on the 4th - 6th May 2011." Unless it becomes mandatory for all practitioners to register as members of a professional body, which will allow one to develop "an effective code of ethics" and improve the execution of enforcement for their regulation, the main battle was managing independent practitioners.

4.3 Acceptance by the society

Arbitration wants to benefit society as a whole. However, the community is still one that is focused on the courts. Most people prefer a court order or an administrative tribunal ruling over a negotiated agreement that is only reliant on goodwill when it comes to enforcement. Surprisingly, despite the Constitution's promotion of the use of institutions for mediated dispute resolution, individuals continue to rush to the courts rather than other alternatives to Litigation. Convincing people to choose arbitration is difficult since the social group has

[273] Kariuki Muigua, "Overview of Arbitration and Mediation in Kenya"; A Paper Presented at a Stakeholder's Forum on Establishment of Alternative Dispute Resolution (ADR) Mechanisms for Labour Relations In Kenya, held at the Kenyatta International Conference Centre, Nairobi, on 4th - 6th May, 2011. Page 11, Available at http://www.chuitech.com/kmcolatta chments/article/83/0verview%20of%20Mediati 0 n Kenya.pdf

grown so enamoured with legal proceedings (given the overflowing risk nature of courts and vice versa).

4.4 Institutional capacity

The capacity of diverse organization must be strengthened in order to fulfil the requirements for arbitration processes set forth by the Kenyan constitution.[274] These organizations include the Dispute Resolution Centre and the Chartered Institute of Arbitrators (Kenya Chapter), both of which were founded in 1984. a 1997-founded nonprofit organization. It is necessary to increase current institutions' capability and set up systems for creating new institutions. This will make it much easier to provide arbitration services to more people.

4.5 The arbitration Practice

Due to lawyers' participation into the practise of arbitration, it has grown more formal and time-consuming in Kenya.[275] Due to the disputants' discontent, this has led to more cases being referred to the national Courts. The referrals have been based on issues that relate to both procedural and substantive components of the arbitration. Due to some distinctive features of arbitration, which, while advantageous, may also have a negative impact on one party's ability to access justice, recourse to the courts may be essential.

The absence of a uniform framework for the oversight or accountability of arbitrators is one of these.[276] a loosening of the norms of evidence and less opportunity for rigorous discovery,[277] inadequate or nonexistent justifications for arbitrators' judgments,[278] and minimal safeguards for weaker parties.

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[274] Justus Munyithya, 'ADR As A Promising Method of Accessing Justice for the Wider Kenyan Communities - ' (2013) 1(1) Alterative Dispute Resolution <https://doi.org/chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://ciarbkenya.org/wp-content/uploads/2021/02/final-vol-1-issue-1.pdf>.

[275] Muigua K., *Settling Disputes through Arbitration in Kenya*, op. cit. p. 10.

[276] Supervision is mostly Institution-based.

[277] Limited timeframes are usually allocated for this.

[278] Parties may agree on whether they will expect an award with reasons thereof or otherwise.

The flexibility, affordability, and simplicity of the Alternative Dispute settlement techniques to dispute settlement are their key selling points. Since arbitration is gradually becoming more expensive than litigation, especially when the arbitration process is contested in court following an award, these features are no longer fair.[279]. When the parties to an award disagree, they file a lawsuit, which means they are back to the same legal jargon used in civil processes. This circumstance also highlights the other element that is transforming arbitration: judicial intervention. Even when the aforementioned are court-mandated arbitration processes, courts typically are not required to look into the subject matter of those proceedings.

Courts are granting all applications made by parties with the potential goal of impeding the arbitral process and, as a result, postponing the parties' access to justice. This indicates that parties are rapidly losing faith in the arbitration process since it is absurd to employ arbitration, which takes many years, only to have the case resolved by the courts. At a time when the constitution is attempting to encourage the use of arbitration and other alternative methods, this has happened. Despite that, this is not a conclusive point.[280].

4.6 Gap between Traditional Laws and Human Rights Standards

Most informal judicial systems violate established human rights principles, particularly those pertaining to equality and non-discrimination.[281] Another issue is when local customs and beliefs directly conflict with human rights principles. For instance, it can be acceptable to punish someone who has broken the law in the community with physical violence and public humiliation. The researcher learned through the interviews at Kamukuru that a persistent repeat offender who has disobeyed the baraza's rulings is publicly humiliated by being

[279] Kariuki Muigua, Avoiding Litigation through the Employment of Alternative Dispute Resolution, page 8, Available at http://www.chuitech.com/kmco/attachments/a rticle/l0l/pdf
[280] See Chapter 3.3.1
[281] Kariuki (n 197) 2 *quoting* David Pimentel, 'Can Indigenous Justice Survive? Legal Pluralism and the Rule ofLaw' (2010) 32(2) Harvard International Review 32.

stripped of clothing and caned as they are led to governmental authorities (police)..188 But doing so would be in flagrant violation of human rights laws that forbid torture and other cruel penalties. A community must be given the authority to take action in order to bring its customs into compliance with constitutional norms and values in order to achieve human rights values, as has been noted in jurisdictions with fairly advanced human rights jurisprudence, particularly by the South African Constitutional Court in the case of Shilubana & others v Nwamitwa CCT 3/07.

4.7 Inappropriate Use of Traditional and Indigenous Justice Systems

These systems are unsuited for circumstances where formality is required to preserve the rights of both the victim and the offender, such as in rape and murder cases, because to the informality of procedure, which may be a strength in dealing with small-scale civil and criminal cases. This includes the assumption of innocence, the right to a fair trial, the right to legal representation, and the rules of evidence.

4.8 Exclusion of Disadvantaged Groups

IJS are typically dominated by high status men over the world, and they frequently exclude women, minorities, young people, and the most vulnerable populations.[282] As a result, social hierarchies and prejudices are perpetuated throughout the dispute resolution process, and individuals from disadvantaged groups have few options for challenging the judgments of those in positions of authority. Traditional laws may also be biased and discriminate against women and other marginalized groups; for instance, they may only penalize women who commit adultery.

4.9 Forum Shopping

An efficient legal system is hampered by unclear or overlapping jurisdictions. One party in a disagreement, for instance, may choose to appeal against the ruling in other forums if they are

[282] Kariuki (n 197) 2 quoting David Pimentel, 'Can Indigenous Justice Survive? Legal Pluralism and the Rule of Law' (2010) 32(2) Harvard International Review 32.

dissatisfied with the outcome of the decision. This compromises the effectiveness of the IJS's rule and its valuable contribution to clearing the backlog in formal systems.

4.10 Lack of Enforcement Mechanisms

IJS are frequently based on the idea of restorative justice, which emphasizes mending relationships between the victim and the offender and coming to an agreement on a resolution[283]. Traditional systems, on the other hand, frequently lack legal force and rely heavily on social pressure since they lack precise enforcement tools to support their judgments.[284] Although this might be adequate in small-scale occurrences, serious offenses require accountable enforcement procedures.need to be in place that are both humane (that is, avoid cruel and degrading treatment) and effective.

4.11 Enforcement Mechanisms That Violate Human Rights

Sometimes, corporal, cruel and inhuman punishment for committing even minor crimes is used in IJS.[285] These rights violations need to be addressed when developing strategies to improve IJS.

4.12 Corruption

IJS is susceptible to corruption due to some structural flaws. Traditional leaders who have the power to arbitrate disputes may abuse their position to the advantage of people they know or who can afford to bribe them.[286] Because traditional judges are frequently underpaid or unpaid at all, they may rely on gifts and bribes to support themselves, which can affect the outcome of the hearing. In conventional systems, nepotism is a problem as well.[287] The selection of traditional judges may be based more on who they know or are linked to than on

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[283] Kariuki (n 197) 2 quoting David Pimentel, 'Can Indigenous Justice Survive? Legal Pluralism and the Rule of Law' (2010) 32(2) Harvard International Review 32.

[284] Constitution of Kenya, 2010, art 11(1).

[285] .KyaloMbobu, „Efficacy of Court Annexed ADR: Accessing Justice through ADR". (2014) ADR Journal ISBN 978-9966-046-02-4 at page 1

285 Kariuki Muigua, 'Access to Justice and Alternative Dispute Resolution Mechanisms in Kenya' 26.

[286] Constitution of Kenya, 2010, art 11(1).

[287] Maud Piers and Christian Aschauer, Arbitration in the Digital Age (1st edn, Cambridge University press).

their competence in rendering just and acceptable judgments. Additionally, traditional legal systems may lack impartiality and be subject to influences and concerns from the outside world (political).

4.13 Future of arbitration

When utilized in the administration of justice, arbitration has demonstrated excellent results. The inclusion of arbitration in the constitution mandates that its use will have an impact on the strategy for resolving disputes, encouraging its use to improve access to justice through the swift resolution of disputes without unfair consideration of matters of substance. There is a comprehensive policy and legal framework in place to establish the use of arbitration to resolve disputes. It should be underlined that if arbitration were to be used and recognized as an alternative to litigation but as an equally suitable means of realizing justice, the majority of disputes that end up in court may never have reached such levels in the first place. When arbitration has been utilized to resolve disputes and advance justice, it has been successful because it is more affordable, speedy, creates relationships, and is closer to the people.

The promotion of justice and the parties both gain indirect advantages through arbitration. It can improve the performance of courts by lowering the accumulation of cases, as was already noted in various sections of this work. This may gradually erode public confidence in the legal system, which discourages foreign investment.[288].

4.14 Arbitration in the digital age

It is time to consider and reconsider how the arbitration process, from the appointment of the arbitrator to the final decision, might be made more efficient through the interplay of technology. Justice and technology have now come together; they have begun to interact, and they will interact more and more; faster than we can all believe or even conceive, according

[288] Inessa Love, Settling Out of Court: How Effective Is Alternative Dispute Resolution? , page 1, The W 0 rid Bank Group Financial and Private Sector Development vice presidency, 0 c t 0 b er 2011. Available at http://siteresources.worldba nk.org/FI NANCIALSECTOR/Resources/282044-1307652042357/VP3 29-Sector Accessed on 22/11/2015

to Dirk De Meulemeester, who was the chairman of the Belgian Centre for Mediation and Arbitration.. [289]

Technology has being used more and more in commercial transactions around the world and in Nairobi as well. This can be partly due to COVID-19, which recognized the necessity to restrict human contacts. As a result, most people have shifted to concluding business transactions and resolving conflicts online.

The necessity for arbitration and other dispute resolution procedures is anticipated to rise as a result of the expansion of this new disputing environment. Additionally, as the internet environment develops, it will undoubtedly affect what occurs offline..[290] Nowadays, a lot of what was formerly physical wasfound online.

The issue then arises: Has arbitration followed suit, given how frequently court cases are handled online, particularly in Nairobi? Moving arbitration online will speed up the resolution of disputes because one of the key features of arbitration is that it does not adhere to a predetermined set of rules, which removes pointless formalities and saves time and money.

The time has come for arbitration hearings to be held online, allowing parties to conduct the proceedings in the convenience of their own workplaces rather than having to go to other towns or cities. [291] Both time and money wassaved by doing this. However, this will need to be done in a way that doesn't jeopardize the fairness and due process concepts covered in chapter two above.

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289 Maud Piers and Christian Aschauer, Arbitration in the Digital Age (1st edn, Cambridge University press).
290 Ibid.
291 'The Legal 500' (The Legal 500 – The Clients Guide to the best Law firms, top Lawyers, Attorneys, Advocates, Solicitors and Barristers.) <www.legal500.com/developments/thought-leadership/dispute-resolution-in-the-digital-age/> accessed 8 November 2022.

4.2 Concluding Remarks

This Chapter has described how a scale of justice is used to assess the idea of access to justice. Then, justice would require that every person living in a certain neighbourhood, region, or country must have access to any type of conflict resolution mechanism in accordance with their human rights. These processes must uphold the rule of law, be fair, and promote equality and general equity. The chapter has also demonstrated the challenges that access to justice faces at many socioeconomic levels. In the chapters that follow, these issues was examined and perhaps resolved. This chapter also discusses the nature of ADR, their effects on society, and the motivations behind their use. It has also demonstrated how much Kenya's Constitution respects culture and established methods of resolving disputes.

CHAPTER FIVE

SUMMARY OF FINDINGS, CONCLUSION AND RECOMMENDATIONS

5.0 Summary of findings.

The goal of the study was to investigate how arbitration has improved access to justice in Nairobi. The study specifically aimed to look at the framework for arbitration in law and policy and to analyse the difficulties in realizing the right to access justice in Nairobi. Additionally, it aimed to offer suggestions for enhancing the legal and political framework necessary to make arbitration accessible to justice. According to the study, there are numerous issues with our judicial system that call for a swift switch to arbitration in order to guarantee access to justice. The process is still extremely formal in our courts because of the numerous procedural and technical regulations that are in place. [292].

There is a backlog of cases, which makes it take too long for cases to be decided. When they are, parties may elect to appeal, which would result in the lawsuit continuing indefinitely.[293].This issue can be resolved on one's own by regularly training magistrates, solicitors, judges, and the general public in alternative dispute resolution.[294]. Furthermore, by making sure that there is ongoing communication and regular training, some biases and anxieties regarding arbitration could be reduced. It is noteworthy to note that one of the lawyers questioned expressed dismay that "injunctive orders" could only be partially handled by an arbitration forum.[295] However, the immediate problem was the lawyer's refusal to acknowledge that a party might go to court to get an injunction while arbitral procedures

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[292] Paul Ngotho "Challenges Facing Arbitrators in Africa" East Africa International Arbitration Conference (Nairobi - July, 2014) Available at http://www.ngotho.co.ke At page 9 and 10

[293] MusiliWambua „Broadening Access to Justice in Kenya through ADR; 30 years on" Kenya Journal of Alternative Dispute Resolution" (Vol 3 No1 2015)

[294] There was a consistent display of lack of knowledge in the field of arbitration and the procedure of getting parties to solve a dispute via arbitration. Advocates also made comments like need to be trained in arbitration procedures. Few advocates showed a well-grounded understanding of arbitration.

[295] KariukiMuigua, Settling Disputes Through Arbitration in Kenya (2nd Edition Glenwood Publishers Ltd. 2012 Nairobi) 134 - 138

were continuing. Additionally, the author acknowledges that the formulation of arbitration may not have been in boundaries and leaps like litigation to facilitate the issuance of orders like to Anton Piller orders and Mareva injunctions. [296]

Second, the study discovered that arbitration did, in fact, contribute to improved access to justice. This is as a result of the many benefits it offers over legal action taken in a courtroom. Arbitration ensures that conflicts be handled more quickly, which saves both time and money. The courts will have more important cases to decide if more disagreements are settled through arbitration.

Third, the study discovered that there are numerous laws and rules that govern the arbitration industry in our nation. They include "the Nairobi Centre for International Arbitration Act, the Civil Procedure Act, the Evidence Act, and the Arbitration Act of 1995".

Finally, the study's introduction included two hypotheses. The initial assumption was that arbitration as a dispute resolution method is not widely used. The theory was validated. This is because it became clear throughout the investigation that, despite arbitration's availability as an alternative conflict resolution method, our courts remain overburdened, which can only indicate that people aren't using it. This, together with the difficulties arbitration faces, including the general lack of understanding of the procedure, have all contributed to its slow uptake.

Since rigid court rules and procedures, high court costs, and poor court infrastructure continue to plague court processes, the second hypothesis—that the low uptake of arbitration significantly contributes to the non-realization of the right to access justice in Nairobi—was

296 MarevaCompaniaNaviera SA v International Bulk carriers SA, [1975] 2 Lloyd's Rep 509 (C.A. 23 June 1975). , [1980] 1 All ER 213 and Anton Pillar KG v Manufacturing Processes Ltd & Others [1975] EWCA Civ 12, [1976] 1 All ER 779 (8 December 1975)

also proven. This makes the realization of justice through the courts quite difficult and even frustrating for litigants, who either choose to give up or have to wait too long for justice.

5.1 Conclusion

It is a groundbreaking decision to adopt the current reality as opposed to the logical reasoning of arbitration as part of out-of-court settlements as specified in the Constitution and Acts of Parliament.. Alternative dispute resolution must be viewed as an integral part of any modern civil justice system, as observed by The Law Commission in Dublin. However, some of the challenges have been discussed above, and there is a need for caution to prevent this effort from being defeated by capacity issues.

In order for proper litigation management to be taken into account while weighing the alternatives, it must become ingrained in our legal system and mental framework as a normative factor. The majority of clients continue to favour litigation, and it is noted that in arbitration, protocol must be followed or deviated from. Despite the fact that clients must always have access to litigation, it should only be used as a last choice because it may be an extremely stressful process.

It is crucial to remember that the constitution's Bill of Rights must always be upheld and carried out. There is a need to educate the public about the use of arbitration in order to achieve a just and quick resolution of conflicts. Alternatives to litigation and arbitration in Kenya have a promising future in advancing a developed society where problems can be resolved more quickly and affordably without resorting to litigation. Eventually, a party who seeks to avoid the difficulties of litigation may properly retain the assistance of ADR implementation specialists. In our rapidly expanding Nairobi County, which embraces globalization, there may come a time when ADR becomes the standard rather than an alternative to litigation, where litigation differs significantly.

The term "arbitration" can legitimately refer to an appropriate dispute resolution process rather than an alternative because the word "alternative" implies that arbitration is less effective than litigation, which is untrue. The truth is that these procedures should be regarded as being on par with, if not superior to, formal proceedings. Every citizen has the potential to use arbitration whenever there is a chance of a conflict, and this potentiality is only waiting to be realized. Now is the time to understand that arbitration and other alternative conflict resolution processes normally operate independently and without regard to any adjudicative process.

5.2 Recommendations

In light of the findings, this study makes the following recommendations:

5.2.1 Short-term goals

The organizations tasked with improving arbitration must focus on marketing to increase awareness of arbitration. This may be accomplished through road shows, neighbourhood outreach programmes, local media advertising, and civic education campaigns. This will increase arbitration's acceptance and visibility in Nairobi.

The judicial system should encourage parties to try arbitration through judges and magistrates. The possibility that the parties and their counsel will choose for arbitration is very high.

5.2.2 Medium term goals

The expenses related to arbitration need to be decreased. Parties may still find it prohibitively expensive to use arbitration as a dispute settlement method, which deters them from adopting it.

Second, given how quickly the world is advancing in terms of technology, there needs to be sufficient ICT support to encourage online conflict resolution. Arbitrators need to have proper training on how to use technology to conduct hearings, share documents, etcetera. This will cause disputes to be settled even more quickly.

Last but not least, further research must be done, especially in Nairobi County, on the use of arbitration. To determine the success rate of arbitration as an alternative dispute resolution method, data must be collected on cases that courts have referred to arbitration and those that have been successfully resolved through arbitration.

5.2.3 Long term goals

To increase the number of issues that can be settled by arbitration, the scope of arbitration under the arbitration statute needs to be increased. In TSJ v. SHSR, the Court of Appeal's reasoning[297] establishes that family disputes are arbitrable despite the Act's lack of specific mention and sufficient evidence to support this.

A change needs to be made to "Part VI of the Civil Procedure Act" on Special Proceedings or legislation of specific rules, as the three judge bench of the court of appeals recommended at the conclusion of their ruling, to explicitly render the acknowledgement and implementation of decisions which emanate from various bodies as the Arbitration Board, in the same way that settlements arising from other mechanisms resolution are recognized, registered, and enforced by.

5.3 Linking Formal and Informal Justice

A policy reform that will help connect the official and informal justice systems must be put in place. There needs to be legal empowerment at the local level, involving the traditional leaders and the locals, given that the traditional justice system is legitimated and accepted by rural people as an efficient conflict resolution mechanism that incorporates the victim and the offender.

To improve access to justice, a legal framework that is accepted and used by the local community is required, one that links the formal court procedure with the informal justice

[297] [2019] eKLR

system. Application of the R v. Mohamed Abdow Mohammed[298]

In order to solve a murder case, traditional conflict resolution methods are used. Abdow Mohamed was accused of killing Osman Ali Abdi on October 19, 2011, in Eastleigh, Nairobi's Starehe District, along with other others who were not in court.[299] The prosecution asked the court to label the case as resolved in accordance with Islamic law and customs on the day of the trial.[300] The prosecution claimed that the accused's relatives had performed rituals and given camels and goats as payment to the deceased family.[301] The ceremonies served as blood money for the departed person's relatives.[302] Additionally, the prosecution said that because no witnesses to the murder were willing to testify, they were unable to continue with the case.[303] The Director of Public Prosecution was permitted to withdraw cases with the permission of the court under Articles 159 and 157, and the court upheld the application of this conventional conflict settlement mechanism.[304] In contrast to pre-2010 doctrine on customary law, this decision illustrates the expansion of ADR into the field of criminal law.[305]

Establishing a law or policy that explicitly offers and recognizes conventional conflict settlement processes would be part of a workable legal framework. Giving the village elders express recognition and jurisdiction over certain things is one way to achieve this. The Kenya Law Reform Commission needs to investigate the viability of the legal system. In the end, this would institutionalize the existing traditional justice systems, reinforce them, and establish a link between them and the formal court system.

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[298] [2013] eKLR; See also Francis Kariuki, 'Community, Customary and Traditional Justice Stems in Kenya: Reflecting on and Exploring the Appropriate Terminology' 1<http://www.strathmore.edu/sdrc/uploads/documents/books-and-articles/Paper%20on%20Traditional%20justice%20terminology.pdf> accessed 17 November 2015.

[299] R v Mohamed Abdow Mohammed [2013] eKLR.

[300] ibid.

[301] ibid.

[302] ibid.

[303] ibid.

[304] ibid.

[305] ibid.

In order to establish the nexus, it is also necessary to make sure that the procedures for resolving conflicts are documented for ease of reference, uniformity, and preservation for future generations.

Recognizing the ADR in the Constitution with restrictions is insufficient. On the one hand, as was previously shown, the Constitution both ensures that every person has the right to decide whether or not to abide by a particular cultural practise and acknowledges culture and the usage of ADR. This presents a problem because it became clear during the interviews250 that the fines imposed by the Maasai cultural practise would still need to be paid by the perpetrator or their families/clans, even if they had been charged with an infraction and completed their formal sentence. Therefore, a connection between the two systems is required to promote harmony and reduce the possibility of double hazard.

5.4 Conducting Survey on Existing ADR in Kenya

To locate and catalogue all ADR in Kenya, a thorough survey must be carried out. This would go a long way towards identifying the various organizational structures and styles of operation that would aid in determining the advantages and disadvantages of the ADR. The study wascrucial in creating a connection between the official and informal judicial systems in the nation in the long run. Priority should be given to encouraging the conventional systems to document their procedures in order to aid in reforming them if necessary before the creation of the legal framework uniting the two systems.

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