

UNIVERSITY OF NAIROBI
COLLEGE OF HUMANITIES AND SOCIAL SCIENCES
SCHOOL OF LAW

**THE IMPLICATION OF CASE BACKLOG ON THE RIGHT TO ACCESS TO
JUSTICE IN KENYA; A CASE STUDY OF MAVOKO LAW COURTS.**

BY:
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**A RESEARCH PROJECT SUBMITTED IN PARTIAL FULFILMENT OF THE
REQUIREMENT FOR THE AWARD OF THE DEGREE OF MASTERS (LL.M) IN
LAW DEMOCRACY AND GOVERNANCE**

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DECLARATION.

I **Peter Oduor Ooko** the undersigned hereby declare that this is my own original work and to the best of my knowledge has not been previously presented for the award of a degree in this and/ or any other university. Where other works have been used, reference have been provided. In this regard, it is hereby presented in partial fulfillment of the requirements for the award of the LLM Degree in Law, Democracy and Governance.

Signed.....

Date.....

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SUPERVISOR

This project has been presented for examination with my approval as the supervisor duly appointed by the university.

Signed.....

Date.....

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DEDICATION.

I would like to dedicate this work to my family, from whom I wouldn't have done much without their love, encouragement and understanding as I sat long hours studying and writing.

I would also like to dedicate the work to my father, the late Joseph Ooko Olar, for his ethos on education, leadership and hard work.

Lastly, I also dedicate this work to my mum, Rose Anyango Ooko for always believing in me and encouragement throughout my school life.

ACKNOWLEDGEMENT.

I would like to pass my cordial gratitude to all those who have made this academic journey possible through their support and advice. First and foremost, I am deeply grateful to my Supervisor, Dr. Nancy Baraza for her scholarly support, patience, guidance and encouragement in the planning, development and completion of this project report. She was always there for me whenever I needed guidance. It is without doubt that his perpetual sacrifice all along that has helped me manage to complete my report. I also thank the Executive Officer Mavoko Law Courts Mr. John Andabwa for opening up the doors of his office to me and providing me with all the necessary information that enabled me carry out my fieldwork swiftly. Finally, I convey my gratitude to my loving wife Mercy Cherotich and daughters, Denine and Paula, for all the support. I thank God for them. Despite the contributions and support of the above named persons, any error(s) of commission and/ or omission remain solely my responsibility.

LIST OF STATUTES.

Appellate Jurisdiction Act, cap 9 of the Laws of Kenya.

Civil Procedure Act, cap 21 of the Laws of Kenya.

Judicature Act, cap 8 Laws of Kenya.

Judicial Service Act, Act No.1 of 2011 Laws of Kenya.

Jurisdiction of Regional Courts Amendment Act, 2008 (South Africa).

Promotion and Prevention of Unfair Discrimination Act, 2000 (South Africa).

LIST OF CASES.

Jasbir Singh Rai & 3 Others versus Tarlochan Singh Rai & 4 Others.

S versus Zuma.

Kigula and Others versus. Attorney-General.

Republic versus. The Honourable the Chief Justice of Kenya & Others Ex Parte Moijo

Mataiya Ole Keiwa.

Richard Nduati Kariuki versus Honourable Leonard Nduati Kariuki & Another.

Iron and Steel Wares Ltd versus C. Martyr and C.

Chelashaw versus Attorney General & Another.

Ratman versus Cumarasamy.

Cropper versus Smith.

James Kanyiita Nderitu versus Attorney General and Another NRB Petition No. 180 of 2011
(UR),

Benning versus Union Government (Minister of Finance) 1914 AD 180 185.

Gibbons versus Cape Divisional Council 1928 CPD 198 200.

LIST OF ABBREVIATIONS.

ADR- Alternative Dispute Resolution.

CJEU- Court of Justice of the European Union.

CM- Chief Magistrate.

CUCs- Court Users Committees.

ECHR- European Convention on Human Rights.

ECtHR- European Court of Human Rights.

EU- European Union.

ICCPR-International Covenant on Civil and Political Rights.

NCAJ- National Council on Administration of Justice.

NGO- Non Governmental Organization.

SPM- Senior Principal Magistrate.

SRM- Senior Resident Magistrate.

TDRM- Traditional Dispute Resolution Mechanisms.

UDHR- Universal Declaration of Human Rights.

UN –United Nations.

ABSTRACT.

The Constitution at Article 48 thereof guarantees the right of access to justice through which the administration of justice in Kenya is premised. By dint of Article 159 and 232 of the Constitution, the fundamental pillars of the right of access to justice which are premised on the equality before the law and to equal protection and equal benefit of the law forms the foundation for the extent policy, legal and organizational framework for administration of justice in Kenya. The concept and normative content of the right to access to justice is recognized under the various international and regional legal instruments which Kenya has specifically ratified and forms part of the Laws of Kenya by dint of Article 2(5) and (6) of the Constitution, 2010.

The four fold objectives of this study is: (a) to appraise the current status of case backlog in Mavoko Law Courts; (b) to evaluate the legal implication of backlog of cases on the right to access to justice in within Mavoko Law Court; (c) to evaluate the appropriateness of the current intervening measures to address the problem of case backlog in Kenya based on a case study of Mavoko Law Court; and (d) to consider appropriate legislative, policy and administrative measures to address the problem of case backlog in Kenya.

The study establishes that that the judicial system for administration of justice and guaranteeing the right to access to justice in Kenya falls short of the legitimate expectations of Kenyans. In particular, the study established that: (a) Mavoko Law Court is currently served by three Magistrates against the optimum number of six Magistrates; (b) there are no guidelines on file allocation. The allocation is unique to each Court station and is based on whims and dictates of

the head of station; (c) more traffic cases are filed compared to civil and criminal cases partly because the Court serves a major transport corridor comprising of the Nairobi-Mombasa Highway and the several feeder roads linking several estates in the area; (d) most traffic cases were finalized at 96.8% of the base of cases filed, followed by Criminal cases at 81.1% of the bases of the number of criminal cases finalized. Most civil cases remain pending with the number finalized being at 35.4%. When this data was presented to the judicial officers and the litigants, the running justification for such a trend was that civil cases are subject to many interlocutory applications with strict procedural requirements compared to Traffic cases. Further, both civil and criminal cases are prone to many adjournments as delay tactics to avoid the finalization of the matters. For traffic cases, it was explained that in most cases, the accused persons normally enter a plea of guilt which then closes the case upon sentencing; (e) Court and advocates fees account for 40% of the factors that impede access to justice. Though case backlog as a factor was at a paltry 11%, the study found out that this is a compounding factor since it leads to jostling over justice dispensation which ultimately breeds corruption that favours the rich at the expense of the poor; (f) 90% of the respondents were of the opinion that the current rules of procedure and the evidence rules were too complex to facilitate access to justice by those not learned in law hence the justification to resort to lawyers to represent them in most of the cases; (g) Only 46% of the respondents were aware of the Judiciary Transformation Plan hence urgent need to undertake sensitization programme; (h) while most respondents at 59% were aware of Arbitration, Mediation, Adjudication, expert Determination and Negotiations as mechanism of alternative dispute resolution, only 18% had used resorted to the mechanisms as opposed to litigation. Of the 18% of the respondents who have resorted to the alternative

mechanism, 80% of the cases were for settling non-capital offences out of court with the assistance of the clan elders, family members and the prosecutor.

In response to these gaps, the study addresses pertinent conceptual issues and recommends various imperative reform measures for the efficient delivery of justice. The proposed reforms draw from the conceptual, theoretical, desktop reviews and statistical data in chapters one, two and three respectively of this study. The study presents a compelling case for reform and strengthening, as the case may be of the policy, legal and administrative framework within which judicial authority is exercised in order to safeguard and guarantee the right of access to justice.

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CHAPTER ONE.

1.0 INTRODUCTION.

1.1 Introduction.

This chapter details the framework under which the research is undertaken. It provides the background that led to the identification and formulation of the research topic. The scope of the research in terms of the research objectives, research questions and the research hypothesis are captured. A number of theories and literature materials that were reviewed informed the other chapters and the findings and recommendations made at chapter five of this research project.

1.1.1 Background.

Access to justice as a fundamental human right is recognized under the international, regional and national legal instruments. At the international level, access to justice is safeguarded in several United Nations instruments, such as the 1998 Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters and the 2006 Convention on the Rights of Persons with Disabilities. Core elements of these rights include effective access to a dispute resolution body, the right to fair proceedings and the timely resolution of disputes, the right to adequate redress, as well as the general application of the principles of efficiency and effectiveness to the delivery of justice.¹

¹ Articles 2 (3) and 14 of the United Nations International Covenant on Civil and Political Rights (ICCPR) and Articles 8 and 10 of the UN Universal Declaration of Human Rights (UDHR).

In Europe, the efficiency and quality of justice systems and the independence of the judiciary as fundamental elements of access to justice is regularly assessed through the EU Justice system.²

In European human rights law, the notion of access to justice is enshrined in Articles 6 and 13 of the European Convention on Human Rights (ECHR) and Article 47 of the EU Charter of Fundamental Rights, which guarantee the right to a fair trial and to an effective remedy, as interpreted by the European Court of Human Rights (ECtHR) and the Court of Justice of the European Union (CJEU), respectively.

Article 47 of the EU Charter of Fundamental Rights states: “Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented”. Article 47 applies to all rights and freedoms arising from EU law; the Explanations to the Charter confirm that it corresponds to the rights in Article 6 (1) of the ECHR, without Article 6’s limitation on civil rights and obligations. Article 47 therefore secures, as a minimum, the protection offered by Article 6 of the ECHR, in respect to all rights and freedoms arising from EU law.

The right to access to justice is a fundamental driver to ensure the achievement of the Sustainable Development Goals since, by guaranteeing access to justice for all, governments ensure democratic participation and mechanisms of accountability. Hence, policy makers should pay

² The 2018 EU Justice Scoreboard. Communication from the Commission to the European Parliament, the Council, the European Central Bank, the European Economic and Social Committee and the Committee of the Regions COM(2018) 364 final. Accessed from https://ec.europa.eu/info/sites/info/files/justice_scoreboard_2018_en.pdf on 2nd December, 2018.

attention to access to justice.³ Under Sustainable Development Goal Number 16, it was agreed to;

“promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels.”

In Kenya access to justice has transformed progressively from a purely customary system administered by the chiefs and clan elders through the British leaning system to a more robust right based system incorporated in the Constitution.⁴ By 1920 when Kenya was a British colony, the governance sphere, laws and orders were modeled along the British governance framework.⁵ The governance model was designed to advance its imperial policy and meet the needs of the settler communities in Kenya.⁶ The system as of itself greatly eroded the traditional dispute resolution mechanisms and in effect brought about a more formalized court led system. In fact, the system was biased against Africans, characterized by structural injustices and social inequalities since the colonial governance of Africans was based on orders and strict obedience. This ultimately led to civil disobedience in pursuit for basic rights and freedoms.⁷ However, in 1963 when Kenya gained independence, there was no adjustment in the governance system introduced by the British.⁸

³ Dr. Julieta Marotta (2018), “Access to Justice: A Driver for the Sustainable Development Goals.” Accessed from <http://www.mepli.eu/2018/04/access-to-justice-a-driver-for-the-sustainable-development-goals/> on 4th December, 2018.

⁴ Chapter Four of the Constitution of Kenya, 2010.

⁵ YP Ghai and JPWB McAuslan, “Public Law and Political Change in Kenya: A study of the Legal Framework of Government from Colonial Times to the Present (Oxford University Press Nairobi Kenya 1970).

⁶ Government of the Republic of Kenya, Report of the Committee on the Administration of Justice (Kwach Report) (Government Printers Nairobi 1998). p.6

⁷ S Ouma and J Ambani “Taking These Rights Seriously” Civil Society Organisations’ in Eastern Africa Coalition on Economic, Social and Cultural Rights (EACOR) (Report) (October, 2008).

⁸ Ibid.

While the demand for justice has increased over the years since independence, access to justice had been compounded by a number of challenges, among them, high costs in accessing justice, protracted legal procedure leading to inordinate delays in administration of justice and ignorance of the law.⁹

As at 30th June 2013, the number of pending cases in all courts stood at 426,508, out of which 332,430 were civil and 94,078 were criminal. Magistrates Courts had the largest number of pending cases at 276,577, followed by the High Court (145,596), the Court of Appeal (4,329), and Supreme Court (6).¹⁰ This implies that, on average, and without admitting new cases, the Judiciary required three years to clear all the case in the courts. In this regard, the High Court required 13 years, Magistrates Courts required two and a half years and Kadhis' Courts required two years to clear the pending cases.¹¹ This implies a need for innovative measures for expediting disposition of cases. The situation was not different as at 2015 where Kenya's courts had enormous backlogs, estimated as high as 1 million cases.¹² This situation was compounded by lack of sufficient resources. As at 2011, Kenya had only 53 judges and 330 magistrates for a population of 41.4 million.¹³ Corruption also influenced the outcomes of cases. According to

⁹ K.I. Laibuta (2010), "Access to justice in Kenya: An Appraisal of the Policy and Legal Frameworks." Accessed from http://erepository.uonbi.ac.ke/bitstream/handle/11295/15704/Laibuta_Access%20to%20civil%20justice%20in%20Kenya%20an%20appraisal%20of%20the%20policy%20and%20legal%20frameworks.pdf?sequence=4&isAllowed=y on 22nd October, 2018.

¹⁰ The Judiciary Blue Print (2017), "Sustaining Judiciary Transformation (SJT). A Service Delivery Agenda 2017-2021." Accessed from http://kenyalaw.org/kl/fileadmin/pdfdownloads/Strategic_BluePrint.pdf on 2nd December, 2018.

¹¹ Judiciary Strategic Plan 2012 to 2018. Accessed from <https://www.judiciary.go.ke/download/strategic-plan-2014-2018/> on 6th December, 2018.

¹² Final Report of the Task Force on Judicial Reforms," 33, July 2010; accessed September 24, 2017, <http://www.kenyalaw.org/Downloads/Final%20Report%20of%20the%20Task%20Force%20on%20Judicial%20Reforms.pdf>.

¹³ "State of the Judiciary and the Administration of Justice Annual Report 2011–2012," Judiciary of Kenya, 14–15,

Transparency International's 2010 Global Corruption Barometer, 43% of Kenyans who sought services from the judiciary reported paying bribes.¹⁴

To overcome these challenges, the government, through the Judiciary, has undertaken progressive organizational, administrative, legislative and constitutional reforms to revitalize the exercise of judicial authority and give premium to the right to access to justice. The legislative steps taken to revitalize the right to access to justice include: Amendment to the Civil Procedure Act, cap 21 of the Laws of Kenya; Amendment to the Appellate Jurisdiction Act, cap 9 of the Laws of Kenya; and the promulgation of the Constitution of Kenya, 2010. The introduction of section 1A and 1B of the Civil Procedure Act and sections 3A and 3B of the Appellate Jurisdiction Act were meant to set out the overriding objective of facilitating a just, expeditious, proportionate and affordable resolution of disputes.

The Constitution, of Kenya, 2010 is categorized as one of the transformative texts to governance particularly because of its value based and human rights based approach to governance.¹⁵ The human rights based approach to governance is strengthened by the elaborate and progressive Bill of Rights. It contains all categories of human rights that are ordinarily included in international human rights instruments. The recognition, protection and promotion of human rights and fundamental freedoms have been given major emphasis under the Constitution. The Constitution expresses the Bill of Rights as an integral part of Kenya's democratic state and the framework

October 19, 2012. accessed July 16, 2018, http://www.judiciary.go.ke/portal/assets/files/Reports/STATE%20OF%20THE%20JUDICIARY%20ADDRESS%202011_2012%20.pdf.

¹⁴ World Bank, World Development Indicators; Accessed July 16, 2018, [http://databank.worldbank.org views/reports/tableview /data/.aspx](http://databank.worldbank.org/views/reports/tableview /data/.aspx).

¹⁵ Orago NW "The 2010 Kenyan Constitution and the hierarchical place of international law in the Kenyan domestic legal system: A comparative perspective" 2013 AHRLJ.

for social, economic and cultural policies.¹⁶ The Bill of Rights provides for both the civil and political rights as well as the economic, social and cultural rights, reflecting the crucial interdependence of these rights. Implementation of the Bill of Rights requires the adoption of strategic policy action plans and the mainstreaming of Human Rights Based Approach (HRBA).¹⁷

The Constitution of Kenya, 2010 as opposed to the repealed Constitution has provided for a specific right to access to justice¹⁸, which is the subject of this research. As a national value and principle of governance, it binds every state and public entity in the exercise of their functions whether constitutional or statutory.¹⁹

As a fundamental right issue the State has an obligation to observe, respect, protect, promote and fulfill it.²⁰ These obligations are not defined in the Constitutional text. However, from the literature reviewed the obligations have been defined. The obligation to observe means to monitor the implementation of the right; ‘respect’ means that the State must refrain from interfering with their enjoyment; protect means the state must prevent violations by third parties; and promote means that the State must encourage and advance the realization of these rights,

¹⁶ Article 19(1) of the Constitution of Kenya, 2010.

¹⁷ Uchenna Emelonye (2018), “Adopting a Human Rights Based Approach to Kenya Development Plan” Accessed from <http://erepository.uonbi.ac.ke/bitstream/handle/11295/84674/Adopting%20A%20Human%20Rights%20Based%20Approach%20to%20Kenya%20Development%20Plan.pdf?sequence=1&isAllowed=y> on 4th December, 2018.

¹⁸ Article 48 of the Constitution, 2010.

¹⁹ Article 10(1) of the Constitution, 2010.

²⁰ Article 21(1) of the Constitution, 2010.

which includes ensuring public awareness. To fulfill means the State must take appropriate legislative, administrative, budgetary, judicial and other measures towards their realization.²¹

In terms of administrative transformative measures undertaken by the Government, the Vision 2030²² spells out key strategic interventions to be undertaken in transforming the Judiciary including: Aligning the national policy and legal framework with the needs of a market-driven economy, human rights and gender equality commitments; Increasing access and quality of services available to the public and reducing barriers to service availability and access to justice; Streamlining functional capability (including professionalization) of legal and judicial institutions to enhance inter-agency cooperation; Inculcating a culture of compliance with laws, cultivating civility and decent human behavior between Kenyans and outsiders.

Further, the judiciary has taken a deliberate measure to revitalize the judicial authority and right to access to justice as envisaged under the Constitution through the Judiciary Transformation Framework.²³ It sets out the overall blueprint for reclaiming, reforming and repositioning the Judiciary as an effective and independent arm of government. A clear transformation has been laid out for “equitable access to, and expeditious delivery of, justice.”²⁴ It is anchored on four pillars: focusing on people outside the institution; focusing on people within the institution, providing the resources and infrastructure required, and employing information communication

²¹ Van Boven TC, Flinter C. & Westendorp, “The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights Utrecht: Netherlands Institute of Human Rights, 1998.

²² Vision 2030 is Kenya’s development blueprint which aims to transform Kenya into a newly industrializing, middle-income country providing a high quality of life to all its citizens by 2030 in a clean and secure environment. Available at <https://vision2030.go.ke/>. Accessed on 6th December, 2018.

²³ Available at <http://kenyalaw.org/kl/fileadmin/pdfdownloads/JudiciaryTransformationFramework.pdf>.

²⁴ Foreword by Dr. Willy Mutunga, the then Chief Justice of Kenya to the Judiciary Strategic Plan 2012-2018.

technology across the board. These four pillars are instrumental in the fair dispensation of justice.

1.1.2 Situational Analysis of Mavoko Law Courts.

Mavoko Law Courts is a Magistrates Court handling both criminal and Civil cases. It is situated in Machakos County next to Athi River Health Centre, off Athi River Road, Athi River Town. The Court was established on 12th June, 2012 by the Honourable Chief Justice as a pilot Court to test the working practicability of the Judiciary Transformation Framework 2012 – 2016. This Court was initially started as a Municipal Court with the sole mandate of dealing with Mavoko Municipal Council matters only. However, with the lapse of time the jurisdiction of the Court enhanced to mandate it hear and determine other penal cases including criminal, traffic, children, succession and civil cases.

In addition to the working practicability of the Judiciary Transformation Framework 2012 – 2016, the Court was also picked as a case study because of its case backlog that stood at an estimated 30 and 50 per cent as at the year 2012 and 2013 respectively. Put into perspective, by the end of 2012, Mavoko law Court established on 12th June, 2012 had registered a total of 2,572 cases with only 1,813 being fully determined thus leaving the remaining balance as back log. This situation replicated itself in the subsequent years. In 2013 a total of 4,567 cases were registered but only a paltry 2,584 were resolved and hence leaving a back log of 2,983²⁵. In 2014 as at 30th October, 2014, the Court had registered 5,310 cases but only 3,603 had been resolved. In the sum total, this court has so far registered 12,449 cases since its establishment but only

²⁵ Mavoko Law Court Criminal and Civil Register of 2012 and 2013.

8,000 have been determined to a logical conclusion thus leaving a balance of 4,449²⁶ as case back log, a worrying trend that need to be addressed as a matter of urgency if an access to justice as enshrined in the Constitution is to be realized.

1.2 The Statement of the Problem.

To date the implementation of required legal frameworks has been progressing slowly. The realization of the constitutional guarantees under Article 48 of the Constitution of Kenya, 2010 of the right to access to justice; and the progressive principles of judicial authority under Article 159(2) of the Constitution are yet to be achieved through practical policy, legislative and administrative reforms. It is one thing to have the rights protected constitutionally, but yet another to ensure they are realized and are enforceable in the courts. In addition to the law, the State must put in place policies and programmes that enable the Constitution to be actualized. The limitation of the right to access to justice is inexcusable without any reasonable explanation.²⁷ The Constitution provides that the Bill of Rights is an integral part of Kenya's democratic state and is the framework for social, economic and cultural rights.²⁸ Further to this, the Constitution defines the purpose of such recognition and the protection of the rights as being fundamental to preserve the dignity of individuals and communities and to promote social justice and the realization of the potential of all human beings.²⁹

²⁶ Mavoko Law Court Criminal and Civil Register of 2014.

²⁷ Article 24 of the Constitution, 2010.

²⁸ Article 19(1) of the Constitution, 2010.

²⁹ Article 19(2) of the Constitution, 2010.

Accordingly, the Constitution obligates the State to realize the implementation of the rights by providing for three pronged clear roadmap plan. The first mandate is through the formulation and enactment of clear legislative, policy and other measures including the setting of standards to achieve them.³⁰ The second mandate is to place the burden on all State organs and all public officers.³¹ While the third mandate is for the State to enact and implement legislation to fulfill its international obligations in respect of human rights and fundamental freedoms.³²

Flowing therefore from the above, is to interrogate the appropriateness and reasonableness of the Judiciary's current measures in discharging its burden of enhancing access to justice in the wake of the current backlog of cases in our judiciary. Is it a case of being an accessory to the breach of the right? Who is to be held culpable, if any? And what is the appropriate way forward? The ultimate effect of the breach of the right through poor management of backlog of cases is to lead to a breakdown of the rule of law due to lack of confidence in the Judiciary. It is argued that for the rule of law to be realized, there must be suitable application mechanisms' including an independent and professional judiciary, easy access to litigation and reliable enforcement agencies.³³ The problem is further grounded on the fact that while the judiciary laid bare the road map to its own transformation, other stake holders in the justice system i.e., the police; the office of the Director of Public Prosecution; the Prison Department, the Children's Department; the Probation Department; the Law Society of Kenya etc. never took such a similar and important

³⁰ Article 21(2) of the Constitution, 2010.

³¹ Article 21(3) of the Constitution, 2010.

³² Article 21(4) of the Constitution, 2010.

³³ Kameri, M (2011). "Kenya Justice sector and the rule of Law", open Society Initiative for Eastern African Johannesburg, South Africa.

initiative.³⁴ The resultant is that despite the aforesaid judicial framework being in place, very little progress has been achieved towards eradication and /or reduction of case back log in Kenya.³⁵

1.3 Theoretical Framework.

The research is premised on the interplay of the interest theory and the theory of justice. The Interest theory as espoused by John Finnis³⁶ provides that rights exist to serve relevant interests of the right-holder. It perpetuates the idea that rights are an instrumental approach to the justification of rights, in that rights are instrumental in securing human well-being. Coupled to this is the theory of justice where John Rawls in his book, *A Theory of Justice*³⁷ writes that theories of justice are about the appropriate way to structure government and society that is political theory, writ large. In his view, a theory of justice is needed because publicly agreed terms of social cooperation are both necessary and possible.

Rawls put into context his theory of justice by advocating for three principles: equal liberty; equal opportunity and difference principle. Under the principle of equal liberty, Rawls proffers that persons are at liberty to do something when they are free from certain conditions either to do or not to do it and when their doing it or not doing it is protected from interference by other persons. He provides the rationale of this theory to be that it is necessary in a society based upon the principles of justice in that it assures that all citizens will have and acknowledge a personal

³⁴ Report of the Taskforce on the Review of the Legal, Policy and Institutional Framework for Fighting Corruption in Kenya (2015). Accessed from <http://www.statelaw.go.ke/wp-content/uploads/2016/08/Republic-of-Kenya-Report-of-the-Task-Force-on-the-Review-of-the-Legal-Policy-and-Institutional-Framework-for-Fighting-Corruption-in-Kenya-2015.pdf> on 22nd October 2018.

³⁵ Ibid.

³⁶ Finnis, John. *Natural Law and Natural Rights*, (Oxford; Clarendon Press, 1980).

³⁷ John Rawls, *A Theory of Justice* (Harvard University Press, Cambridge, Mass, 1971)

state in the maintenance of the just order. Liberty also assures that each member of the community will have the opportunity to pursue his personal place of life without undue interference.

On the principle of equal opportunity, Rawls states that social and economic inequalities are to be arranged so that they are attached to offices and must be open to all under conditions of fair equality of opportunity.

On the third principle of deference, Rawls advocates for this principle on the basis that differential treatment of additional benefits and opportunities in a community might actually be to the benefits of the citizenry at large. However, Rawls attaches a condition to the difference principle in that economic inequalities are to be arranged so that they are to the greatest benefit of the least advantaged consistent with the just savings principle.

The two theories are relevant to the current study to the extent that access to justice is not only a fundamental right captured under Article 48 of the Constitution of Kenya, 2010 but also a principle of exercising judicial authority in the dispensation of justice.³⁸ Tied to it are the principles of equal liberty and opportunity. The Constitution of Kenya, 2010 at Article 27 extensively provides for the right of equality and freedom from discrimination. It states explicitly that every person is equal before the law and has the right to equal protection and equal benefits of the law. It defines equality to include the full and equal enjoyment of all rights and

³⁸ Article 159 of the Constitution of Kenya, 2010.

fundamental freedoms.³⁹ Indeed the Constitution affirms this concept of equality by providing that every person shall enjoy the rights and fundamental freedoms in the Bill of Rights to the greatest extent consistent with the nature of the right or fundamental freedom.⁴⁰

On the principle of difference theory, our constitution recognizes the limitations of fundamental freedoms only to the extent that they are reasonable and justifiable in an open and democratic society. Unlike the former Constitution under which every right had exceptions, limitations and proviso's, the approach under the Constitution is to adopt a general limitation clause apart from internal limitation contained under specific rights.⁴¹

1.4 Literature Review.

The review of literature was to establish the extent (if any) to which any of the objectives of this study had been undertaken established a scantiness of research. While there were some literature that had the potential to inform the study with respect to the objective, research questions, conceptual, legal and theoretical frameworks on which this study is premised, little had been accomplished in the scope of this study. Accordingly, this study constitutes a valuable contribution to research in the field of access to justice and a much needed building block in the key theme of this study.

The review of literature was undertaken in key themes of access to justice and the constitution; Access to Justice as a fundamental Human Right concept; The Theories underpinning the

³⁹ Article 27(2) of the Constitution of Kenya, 2010.

⁴⁰ Article 20(2) of the Constitution of Kenya, 2010.

⁴¹ Article 24 of the Constitution of Kenya, 2010.

concept of Access to Justice; The phenomenon of case backlog and its effects; and the revolutionization of the right to access to justice in Kenya.

1.4.1 Access to Justice and the Constitution.

Walter F. Murphy⁴² in his study on constitutional democracy tries to untangle the three interrelated concepts of constitutions, constitutionalism and democracy. He conceptualizes that democratic theory is based on a notion of human dignity: as beings worthy of respect because of their very nature, adults must enjoy a large degree of autonomy, a status principally attainable in the modern world being able to share in the governance of their community. Constitutionalism on the other hand enshrines respect for human worth and dignity as its central principle. To protect that value, citizens must have a right to political participation, and their government must be hedged in by substantive limits on what it can do, even when perfectly mirroring the popular will. Walter proceeds by stating that constitutionalism and democratic theory raise questions about the concept of a constitution and the relationship of any particular constitution to those theories as well as to constitutional democracy. One has to ask what the constitution is; what is its authority; its functions; what does it include; how does it validly change over time?

This study is relevant as a background text to this topic of study because it explains the exercise of public authority according to the principles of constitutionalism and democratic will of the people and the limits to such exercise. Therefore any measures adopted to address the case backlog should conform to the Constitution as the *grundnorm* hence its relevance. The material though is deficient for it doesn't provide an analytical framework on access to justice as a

⁴² Walter F. Murphy, "Constitutions, Constitutionalism, and Democracy." Obtained from Prof. Ben Sihanya, JSD, University of Nairobi Law School.

fundamental human right and how its realization is hindered by the case backlog within our judicial system, hence the essence of this study.

1.4.2 Access to Justice as a fundamental Human Right concept.

J.B Ojwang and J.A. Otieno Odek⁴³ in their article underscore the importance of human rights, as a subject of international law; and it seeks to sketch the emergent scheme for the enforcement of the principle, if only with regard to the limited area of the judicial approach to the relevant laws, in the Kenyan context. The article provides that the sole purpose of the human rights guarantees is to elevate the individual as against the broader community, the private interest as against the general interest; it represents a restraint to the free course of utilitarianism.

The article is relevant to this study to the extent of its grounding on the significance of human rights to persons and the place of international law in its enforcement mechanisms. In fact, the Constitution at article 19(2) underscores the purpose of recognizing and protecting human rights and fundamental freedoms is to preserve the dignity of individuals and communities and to promote social justice and the realization of the potential of all human beings. However, the article fall short of contextualizing their discourse to the implication of case backlog to the right to access to justice hence the rationale for this study.

As part of the realization of the potential of every human being as an overriding purpose of human rights, **Kariuki Muigua and Kariuki Francis in their article on ADR, Access to**

⁴³ J.B Ojwang and J.A. Otieno Odek, “the judiciary in sensitive areas of public law; emerging approaches to human rights litigation in Kenya.” Netherlands International Law Review (the Hague) Vol.5

Justice and Development in Kenya⁴⁴, conceptualize the correlation between access to justice, dispute resolution and development.

In this article, authors argue that development is not practical in a situation where there is conflict. Disputes should be resolved effectively and expeditiously for development to take place. Formal mechanisms for dispute resolution have not always been effective in managing conflicts. Courts have been inaccessible by the poor owing to technicalities, complex procedures, high costs and delays.

They argue that ADR and TDRM mechanisms contribute to enhanced access to justice by all, and in particular among the poor people hence strengthens the Rule of Law and enhance development.

Jennifer William & Hoodah Abrahams Fayker in their Article Women, Custom and Access to Justice⁴⁵ posit that African legislatures are contend with the challenge of of reconciling customary law and modern law of dispute resolution. A particular challenge is in interpreting and implementing customary law which are patriarchal in practice. Primary trepidations in this context relate to the promotion of gender justice and women's rights within the parameters of the law as well as questions linked to women's fair and equal access to justice.

⁴⁴ Available at <http://www.strathmore.edu/sdrc/uploads/documents/books-and-articles/ADR%20access%20to%20justice%20and%20development%20in%20Kenya.pdf>. accessed on 27th February, 2018.

⁴⁵ Heinrich Boll Stiftung Publication-Perspectives Africa-Issue 3, December, 2013. Accessed from https://www.boell.de/sites/default/files/perspectives_dec_2013_web.pdf on 27th February, 2018.

The authors argue that Custom and tradition are at the core of common understanding and the dispensation of justice in great parts of African societies. The right to customary practices is enshrined in a number of constitutions in sub-Saharan Africa. As a matter of fact, traditional court systems remain an important, if not crucial, vehicle for dispute resolution in most African settings where the state law and legal practice institutions are socially, economically and geographically inaccessible for the great majority of citizens, and women in particular.

A Handbook on European Law relating to Access to Justice (January, 2016) jointly done by European Union Agency for Fundamental Rights and Council of Europe⁴⁶ provides an synopsis of fundamental facets of access to justice in Europe, with specific reference to relevant rights provided in the Council of Europe's European Convention on Human Rights (ECHR), as interpreted by the European Court of Human Rights (ECtHR), and the Charter of Fundamental Rights of the European Union, as interpreted by the Court of Justice of the European Union (CJEU).

Access to justice is not just a right in itself but also empowers individuals to enforce other rights. This handbook is broad in scope, covering criminal and civil law. Existing FRA-ECtHR handbooks on European law relating to asylum, borders and immigration and to the rights of the child contain analyses on access to justice by asylum-seekers and children; therefore, these areas are not covered in this handbook.

Access to justice enables individuals to protect themselves against infringements of their rights, to remedy civil wrongs, to hold executive power accountable and to defend themselves in

⁴⁶ Accessed from http://www.echr.coe.int/Documents/Handbook_access_justice_ENG.pdf on 27th February, 2018.

criminal proceedings. It is an important element of the rule of law and cuts across civil, criminal and administrative law. Access to justice is both a process and a goal, and is crucial for individuals seeking to benefit from other procedural and substantive rights.

1.4.3 The Theories underpinning the concept of Access to Justice.

Bix (2009)⁴⁷ reviews the several legal theories as espoused by various philosophers and points out the extent to which apparently contradictory legal theories can be shown to be compatible. With this background information, he tries to relate the theories to their practicality in today's world's situation or happenings.

The book shall be a useful reference material in appreciating the theories anchoring the instant study. However, to the extent that the book does not contextualize the various theories with the concept of access to justice and the case backlogs then this study shall seek to fill the gap.

1.4.4 The phenomenon of case backlog and its effects.

Several publications have been done before on case backlog reduction starting with the Kwach Committee Report of 1999; a Report of the Advisory Panel Of Eminent Commonwealth Judicial Experts of 17.5.2002; an analysis of case back log in Kenya by Justice Onyango Otieno Committee of 19.10.2012; state of the Judiciary Report, 2012; amongst other publications which by and large made myriad important recommendations towards the eradication of case backlog in Kenyan Courts.

⁴⁷ Brain Bix, "Jurisprudence: Theory and Context," 5th Edition, Sweet and Maxwell.

However, these publications just made holistic recommendations without taking into account the peculiar nature of each courts needs with regard to eradication and/or reduction of case backlog. These publications did not also put in place the necessary and mandatory implementation mechanisms to ensure fulfillment of their recommendations and/or strategies with respect to peculiar needs of each court nor did they propose any time lines within which various cases ought to be heard and concluded. These are some of the missing gaps that this research seeks to redress with an emphasis being laid to the peculiar nature and needs of Mavoko Law Court.

Leonard Kurgat and Kepha Ombui in their study⁴⁸ did a survey of factors that affect service delivery in the Kenyan judicial system with a case study of Makadara Law Courts. The key findings of the study revealed that lack of adequate sufficiently trained staff, insufficient IT system and poor relationship among the key stakeholders as the main factors ailing service delivery at the MLC. The study recommended that there should be full IT integration, reconciliation unit strengthened; collaborative meetings amongst the key players of judicial service delivery and in addition developing tool for measuring judicial performance. In conclusion reconciliation and other alternative dispute resolution methods have been encouraged and so desired results have been achieved including withdrawal of many cases from court as well as durable but private resolution to conflicts being found. Integration of IT infrastructure in the court system is also taking root. The personnel to facilitate proper integration and use of IT in court system remain an area of great concern. In terms of working relations, it can be deduced

⁴⁸ Leonard Kurgat and Kepha Ombui, “Factors Affecting Service Delivery in the Judicial System in Kenya: A case of Makadara Law Courts.” International Journal of Science and Research (IJSR) ISSN (Online): 2319-7064.

that there is seemingly good working relationship between the three key agencies, the judiciary, police and prison.

To the extent that the survey was on general terms affecting service delivery in the judiciary in terms of the causes, the instant study shall complement the survey by identifying exactly the causes of case backlog and proceed to proffer appropriate mitigating measures.

David Wangutusi in his paper, Case Flow Management and Scheduling Judiciary Work⁴⁹ found that those who come to court come for a purpose, redress of which must come as fast as possible. He also notes that case flow management is not only a Ugandan issue but of international concern.

The researcher concludes that quick justice has been evasive in practice to a greater number of litigants in Uganda. The study is relevant to this study in terms of the comparative analysis of the Kenyan situation to Ugandan situation.

Godfrey Kaweesa in his study⁵⁰ investigates the concept of case backlog and its impact on the right to due process in Uganda. He advances different strategies in mitigation. The study primarily employs a qualitative methodology, covering the period 2004 to 2011. The study is

⁴⁹ Wangutusi, D. (2003, July). Case Flow Management and Scheduling Judiciary Work. Paper Presented during an induction course for Magistrates Grade one at the Uganda Management Institute Kampala.

⁵⁰ Godfrey Kaweesa, "Case Management and the Right to due process; the Uganda Judiciary." Accessed from http://www.parliament.go.ug/new/images/stories/jud_backlog.pdf on 18th November, 2014.

also relevant to this study in terms of comparative analysis of the situation of case backlog in Uganda vis-à-vis the Kenyan situation.

1.4.5 The revolutionalization of the right to access to justice in Kenya.

Through the principles contained in Article 159, judicial officers are required to do whatever they can to reduce the levels of anxiety of those who come before them, especially the unrepresented persons.

The Kenyan judiciary has been working hard to ensure that courts are, and feel friendly enough. Through small but significant gestures, judges and magistrates are finding ways to make courts friendlier. Many magistrates and judges now start their sessions by extending greetings to those in the courts, an act that humanizes the judges and makes it easy for those attending court to present their concerns. Perhaps most commendable has been how most judicial officers now deal with unrepresented persons in court, mostly taking time to explain the proceedings to them and trying to find creative ways to ensure that the overbearing court environment does not inhibit their ability to articulate their case and to receive substantive justice.⁵¹

Additionally, access to justice has been enhanced by the introduction of the National Council on Administration of Justice (NCAJ) and Court Users Committees (CUCs) (including police and prison services, children's departments, civil society organizations, the LSK, and paralegals). However, the author is critical that while the achievements of the NCAJ, a seemingly elitist and Nairobi based organ, are hard to publicly quantify, CUCs on the other hand are having a lasting

⁵¹ Mayer Gainer (2015), "Transforming the Courts: Judicial Sector Reforms in Kenya, 2011–2015." Accessed from https://successfulsocieties.princeton.edu/sites/successfulsocieties/files/MG_OGP_Kenya.pdf on 2nd December, 2018.

impact on how justice is administered and delivered in Kenya. CUCs are local accountability forums introduced by the judiciary to ensure that consumers of justice are able to provide feedback on how the judiciary works, and to propose ways that delivery and access to justice can be enhanced. They have become the vehicles that make local communities feel connected with the justice system.

Further, the author states that before the 2010 constitution came into force, it was very common for courts to insist that anyone who brought a suit had to show that he or she was personally, directly and substantially affected by what they intended to challenge in court. Courts also insisted that no one could maintain a suit on behalf of another. This meant that those who faced constant abuse, such as evictions or labour malpractices, but who did not have means to sue could never access justice.

Moreover, Courts constantly engaged in hair splitting on technicalities to essentially defeat justice. In fact, this was the story with Kenneth Matiba following 1992 general elections. When, after the elections, Matiba sought to contest the outcome that saw former President Daniel Moi declared the winner, the courts threw out his case on the basis that his wife, and not him, had signed the supporting court documents.⁵² The court did not care that his detention had left him disabled, unable to sign on papers and hence the reason his wife did so on his behalf. Thus, while it is true that the former constitution had little to facilitate access to justice, many judicial officers were also too eager to frustrate whatever opportunity there was for the poor, human rights advocates, or those in opposition to the government to try and access justice.

⁵² Kenneth Stanley Njindo Matiba versus Daniel Toroitich arap Moi [1994] eKLR

Fortunately, Article 22 (and its corresponding provision outside the Bill of Rights Article 258) allows everyone to go to court whenever their rights are infringed. But there is more. Article 22 also allows anyone to go to court on behalf of another person whose rights are infringed especially where there are good reasons why the affected person is unable to go to court. Additionally, the Article provides that a person can go to court in the public interest. Basically, the cumulative effect of Article 22 is to make it impossible for the courts or anyone else to shut the door on anyone seeking to access justice.

Commendably courts have been very keen to give full effect to Articles 22 and 258, including finding creative and just ways to sustain cases that do not conform to the traditional format of proceedings. There have been efforts by a number of judges and magistrates to work with, or facilitate litigants to ensure their disputes are heard by the courts, including in some instances waiving fees that need to be paid to court to bring litigation.⁵³

But at a substantive level, Article 22 has had significant impact in regard to access to justice. Of note are the many cases where courts have protected persons living in informal settlement from facing arbitrary evictions. Through Article 22, people requiring retroviral drugs have received reprieve by being allowed to access cheaper generic medicines, even where pharmaceuticals had managed to lobby Parliamentarians to pass a law that made access to cheaper generic drugs an offence. The positive stories of Article 22 are endless.

⁵³ Mayer Gainer (2015), “Transforming the Courts: Judicial Sector Reforms in Kenya, 2011–2015.” Accessed from https://successfulsocieties.princeton.edu/sites/successfulsocieties/files/MG_OGP_Kenya.pdf on 22nd October, 2018.

This Article has painted a rosy picture, and deservedly so, on what the courts and communities are doing to facilitate access to justice. However, many challenges abound, which will form the bedrock of this study.

The Vision 2030⁵⁴ overall goal is to transform Kenya into a middle-income country providing a high quality of life to all its citizens by the year 2030. The Vision is anchored on three pillars, namely: the Economic Pillar which targets sustained economic growth of 10% per annum; the Social Pillar which seeks to create a just and cohesive society enjoying equitable social development in a clean and secure environment; and the Political Pillar whose aspiration is for Kenya to enjoy issue-based, people centred, results oriented and accountable democratic political system. The three pillars are underpinned by the Foundations for Socio-economic Transformation, which seek to provide the necessary support for Kenya's social, economic and political development.

The Vision spells out the following strategies which are associated with the role of the Judiciary: Aligning the national policy and legal framework with the needs of a market-driven economy, human rights and gender equality commitments; Increasing access and quality of services available to the public and reducing barriers to service availability and access to justice; Streamlining functional capability (including professionalization) of legal and judicial institutions to enhance inter-agency cooperation; Inculcating a culture of compliance with laws, cultivating civility and decent human behavior between Kenyans and outsiders.

⁵⁴ Accessed from <https://vision2030.go.ke/> on 6th December, 2018.

The Vision outlines judicial and legal reforms as a flagship project that relates to reforms in the rule of law and enhancement of the Bill of Rights. The Vision further outlines reforms in Government institutions, especially those involving public participation in governance, and those connected to transparency and accountability within the public sector.

The Second Medium Term Plan, 2013-2017 of the Kenya Vision 2030 was themed on “Transforming Kenya: Pathway to Devolution, Socio-Economic Development, Equity and National Unity.” The Plan placed the Judiciary under the Governance, Justice, Law and Order Sector (GJLOS). Legal Reforms in this sector are presented in three components namely: development of laws to implement the Constitution; civic education on the Constitution; and inculcating a culture of constitutionalism. Judicial Transformation was placed as a flagship project in the MTP 2013-2017. The key goals within this project were: the transformation of the Judiciary into an independent but complementary partner with other organs of government, institutions of justice chain and stakeholders involved in justice sector; transformation of court procedures, processes, organizational culture and management to re-orientate them towards a culture of responsive, proactive, friendly, effective and accessible service delivery; redesigning institutional and administrative arrangements of the Judiciary to create a unified national institution with appropriate levels of devolution; and equipping the Judiciary to develop a robust, indigenous, patriotic and progressive jurisprudence.

The 2014-2018 Strategic Plan for the Judiciary⁵⁵ is themed on the building on the early successes and lessons of Judiciary transformation Plan. It provides fresh impetus and guidance on how the judiciary can broaden, deepen and sustain transformation for the long-term. At the

⁵⁵ Accessed from <https://www.judiciary.go.ke/download/strategic-plan-2014-2018/> on 6th December, 2018.

same time, it retains a clear and present focus on the directive mandate that the Constitution provides on dispensation of justice.

The strategic objectives in the Plan is derived from the situation analysis of the weaknesses and strengths of the Judiciary under the Strategic Plan 2008 to 2012. The Strategic Plan 2008-2012 ushered in reform initiatives aimed at enhancing access to and expeditious delivery of justice. During the 2008-2012 Strategic Plan period, the Judiciary initiated a number of key flagship projects and other high priority programmes aimed at achieving judicial excellence. The Plan sought to enhance judicial independence, improve the Judiciary's image and restore public confidence, build capacity in human resources management and development, improve access to justice and institutional structures, leverage on ICT, and streamline financial management and procurement.

In terms of improving access to justice, the key achievements included the establishment of additional High Courts and Magistrate Courts, decentralization of the Court of Appeal to Malindi, Nyeri, and Kisumu with sub registries in Nakuru and Eldoret. The Judiciary also managed to fast track determination of cases of public interest such as election disputes within the stipulated Constitutional or statutory timelines. The Plan, however, cites high number of pending cases and backlog, slow and lengthy court procedures and inadequate Courts as some of the challenges experienced between the years 2008 to 2012 Plan.⁵⁶

The Plan states that as at 30th June 2013, the number of pending cases in all courts stood at 426,508, out of which 332,430 were civil and 94,078 were criminal. Magistrates Courts had the

⁵⁶ Paragraph 2.2.1(4) of the Judiciary of Kenya Strategic Plan 2012 to 2018.

largest number of pending cases at 276,577, followed by the High Court (145,596), the Court of Appeal (4,329), and Supreme Court (6). This implies that, on average, and without admitting new cases, the Judiciary required three years to clear all the case in the courts. In this regard, the High Court required 13 years, Magistrates Courts required two and a half years and Kadhis' Courts required two years to clear the pending cases. This implies a need for innovative measures for expediting disposition of cases.⁵⁷

The Strategic Plan sought to address obstacles that impede public access to courts. The plan proposed measures to enhance access to both substantive and procedural justice through construction of new courts while existing courts were to be renovated. In line with the constitutional requirement of establishing a high court in every County, 25 High Courts were to be constructed in the plan period. Further, three Courts of Appeal were to be constructed in select towns while 30 Magistrates' Courts will be constructed across the country. To improve the courts, 100 courts were to be refurbished and renovated to include ramps, restrooms, waiting areas, customer care centres, gate houses, robbing rooms, lifts, signage, cells, and mediation rooms. Additional sub-registries and mobile courts were to be established in far-flung regions. Specialized courts such as Small Claims Courts and the International Organized Crimes Division of the High Court were also to be established. Court procedures will be reviewed to identify bottlenecks to accessibility as well as to review court fees.⁵⁸

⁵⁷ Paragraph 2.3 of the Judiciary of Kenya Strategic Plan 2012 to 2018.

⁵⁸ Paragraph 3.2.1 of the Judiciary of Kenya Strategic Plan 2012 to 2018.

A report by the Danish Institute for Human Rights based on a comparison with the East African Law Society on Access to justice and Legal Aid in East Africa, December, 2011⁵⁹ presents a comparative analysis of access to justice and legal aid in Kenya, Uganda and Tanzania. The study is part of the follow-up process to the December 2008 Kigali Conference on Access, to Justice and Legal Aid in Africa, organized by the Danish Institute for Human Rights, the Rwandan Legal Aid Forum and the East Africa Law Society, which sought to address the challenges within the African context of achieving the goals of the Kyiv Declaration on the Right to Legal Aid. The main purpose of the study was to identify trends in the provision of legal aid in Kenya, Uganda and Tanzania, including a description of the main legal aid practices used in the region, and identification and description of linkages between the various legal aid providers.

The report finds that the state, the legal profession, NGOs and paralegals are all active in the field of legal aid in all of the countries covered. Despite some general trends, the roles played by these actors and the interplay between them, however, vary significantly across the region. Whereas the report identifies a number of modes of cooperation between the various legal aid providers in the region, the level of regulation and coordination of legal aid services generally remains low. The low level of regulation and coordination is most notably evident from the fact that none of the countries have yet adopted and implemented a national legal aid policy and/or bill. However, such policies are currently being drafted in Kenya and Uganda under the auspices of state bodies, but in Tanzania no efforts have yet been made to establish a general policy framework for the provision of legal aid.

⁵⁹ Accessed from https://www.humanrights.dk/files/media/billeder/udgivelser/legal_aid_east_africa_dec_2011_dihhr_study_final.pdf on 27th February, 2018.

NGOs and paralegals play important roles for access to justice across the region. As opposed to the legal aid initiatives managed by state bodies and the legal profession, the legal aid services offered by NGOs and paralegals are usually much more accessible for the poor and vulnerable in rural areas. The types of legal aid offered by these actors, however, tend to vary considerably from the services offered by other legal aid providers. For example, due to the fact that they are mostly prohibited from offering this form of legal aid, paralegals are only rarely involved in legal representation. On the other hand, the report finds that NGOs and paralegals are active in providing other forms of legal aid, including for example legal assistance, legal awareness raising, legal training and advocacy work.

The report concludes that there are some major challenges for access to justice in the region, many of which have to do with the limited involvement of state bodies in legal aid across the region. Analyzing international standards relevant for the provision of legal aid, the report concludes that the governments in the region do not fully fulfill their responsibility to ensure that the poor and vulnerable are provided with accessible and quality legal aid. Based on these findings the study offers a series of recommendations for the various stakeholders in legal aid.

1.5 Objectives of the Research.

The broad objective of the research is to find out the negative effects of the current status of backlog of cases in Kenya's judiciary on the full enjoyment of the right to access to justice.

The specific objectives include;

- a. To appraise the current status of case backlog in Mavoko Law Courts;
- b. To evaluate the legal implication of backlog of cases on the right to access to justice in within Mavoko Law Court;

- c. To evaluate the appropriateness of the current intervening measures to address the problem of case backlog in Kenya based on a case study of Mavoko Law Court; and
- d. To consider appropriate legislative, policy and administrative measures to address the problem of case backlog in Kenya.

1.6 The Research Questions.

The study seeks to answer the following research questions;

- a. What is the current status of case backlog in Mavoko Law Court?
- b. What is the implication of the case backlog on the right to access to justice in Kenya based on a case study of Mavoko Law Court?
- c. What is the adequacy of the current measures employed by the Judiciary to address the problem of case backlog in Kenya based on a case study of Mavoko Law Court?
- d. What are the appropriate legislative, policy and administrative measures to be employed by the Judiciary to alleviate the problem of case backlog in Kenya?

1.7 Broad Argument.

This research proceeds on a broad argument that Access to Justice being a fundamental right, the judiciary and every person is bound to promote, protect and enforce it. Article 21(1) of the Constitution of Kenya, 2010 provides as follows;

“It is a fundamental duty of the State and every State organ to observe, respect, protect, promote and fulfill the rights and fundamental freedoms in the Bill of Rights.”

One of the ways of doing this is through the reduction of the case backlog. Accordingly, the research proceeds, while taking into account a case study of Mavoko Law Courts, to interrogate the efficacy of the Judiciary Transformation Plan.

1.8 Hypothesis of the Research.

The study is based on the following hypothesis;

- a. The current status of case backlog in Kenya is huge, a fact contributed to by various legal, institutional and administrative challenges.
- b. Case backlog in court is a fundamental hindrance to the realization and protection of the right of access to justice.
- c. The current intervening measures to address the problem of case backlog in Kenya and Mavoko Law Court in particular, is still inadequate.
- d. The legislative, policy and administrative measures to address the problem of case backlog in Kenya should be premised on a system of equality, economy, proportionality, expedition and stakeholders' inclusivity which are fundamental to the realization of the right of access to justice.

1.9 The Conceptual Framework.

This section explains the meaning and essence of key concepts as generally used in the context of this study. The key concepts explained include justice, substantive justice, procedural justice, Access to justice and fair trial amongst others.

Justice as used in this study refers to the right to seek protection and vindication of certain rights by full and equal access to the law. Substantive justice as a component of justice refers to entitlement under the law while procedural justice denotes fairness in the process of dispute resolution.⁶⁰

⁶⁰R. Reiner "Justice" in Barron and Others op. cit. note 3, p.754.

Access to Justice as used in this study denotes the situation of equality before the law and a just, fair and expeditious determination of disputes.

Case backlog as used in the study refers cases that remains undetermined for a period of three (3) years.

Case Management refers to a system in which a court assumes closer administrative control over the litigation process and ensures speedy delivery of justice.

Court is an independent judicial organ responsible for determination of disputes. It carries out its mandate as per the Constitution.

Delay refers to task being late or deferred beyond reasonable time.

Judge means the Presiding Officer of a court sitting at the level of High court, or Environment and land court or Industrial Court, Court of Appeal or Supreme Court.

The term Fair “Trial” in the context of this study implies, *inter alia*: (a) the availability of affordable competent representation; (b) reasons for any legal process against a person; (c) expedition in dispute resolution; (d) cost-effectiveness in the process of dispute resolution; and (e) availability of appellate processes.

1.10 The Research Methodology.

The study was based on a desktop review of various legal instruments and literature materials on one hand and qualitative data collection methods on the other hand. The various legal instruments reviewed included the Constitution as the Supreme Law of the Land, the relevant legal instruments touching on the right to access to justice and the regional and international legal instruments having a bearing on the rights of access to justice. The legal instruments and literature materials shall be sourced from the Kenya law reports and at the Libraries in Parklands and Jomo Kenyatta Memorial Library. Qualitative methods were used in order to study perception as well as understanding of respondents of the issues under discussion.

1.10.1 Sampling Design.

The target groups of this study were the court users, judicial staff, and legal sector stakeholders drawn from Mavoko Law Courts. A multi-stage sampling procedure was employed for the study in as far as respondents at the court stations are concerned. The respondents interviewed included: (a) three magistrates based at the Court Station; (b) The Executive Officer of the Court; (c) five clerks serving the Station; (d) seven advocates that practice law before the Court; (e) Seventy One (71) litigants who were randomly sampled. The seventy one litigants were identified based on the number of cases filed per day which stood at between fifty to one hundred per day.

1.10.2 Data collection.

The Primary data was collected between the month of January and February, 2014 through various techniques. In collecting primary data the research instruments used included questionnaires, interview guide and observation guide. The questionnaires used consisted of both

open ended and closed ended questions. Discussions were held with the Magistrates and registry staff.

1.10.3 Data Analysis.

Data was analyzed using the SPSS analysis. The analysis mainly focused on descriptive statistics. SPSS and Microsoft office excel were used in the data analysis and study findings represented in tables and charts for clear visualization. The findings were then captured in form of a research report arranged in themes in accordance to the study objectives.

1.10.4 Limitations of the Study.

It is anticipated that certain limitations will be encountered during the research period including;

- a. Because the registry at Mavoko Law Court is not automated, it was difficult to quickly get data on the number of cases filed.
- b. Lack of co-operation and/or hostile reception from the interviewees posed another challenge as well as receipt of abstract answers.

1.10.5 Mitigating the Limitations.

I intended to employ a number of measures to mitigate the foreseeable limitations including;

- a. Request for an official letter from the University authorizing the research. This enabled me get an official appointment with the intended respondents.
- b. Working as per the scheduled time-table to avoid delays.

1.11 Chapter Breakdown.

The study is structured into five chapters.

Chapter One captures the framework of the study in terms of the objectives of the study, the research questions and the Statement of the Problem. Before setting out these parameters a background of the study is provided which shall help distill the main issues for consideration in the research.

Chapter Two deals with the analysis of the legal and institutional framework governing the right of access to justice and its implementation mechanisms in Kenya.

Chapter three covers an illustrative study from other jurisdictions on how they have dealt with the issue of case backlog. The choice of the countries shall be based on the similarity of their judicial working conditions to Kenya and the magnitude of success or failures witnessed.

Chapter four covers the research findings and analysis with the main goal of finding out the current status of case backlog in Kenya and the measures put in place to address them based on their adequacy.

Finally, Chapter Five draws conclusions for the study and recommends strategic policy, legal and administrative interventions in order to guarantee the right of access to justice.

CHAPTER TWO.

THE JURIDICAL ANALYSIS OF ACCESS TO JUSTICE AND ITS INTERFACE WITH THE CASE BACKLOG IN KENYA.

2.0 Introduction.

This chapter reviews the scope, extent and normative content of the right to access to justice, the understanding of which shall be useful in evaluating its interface with the backlog of cases and how the problem can be addressed holistically. The appraisal in the chapter of the current legal framework for the administration of procedural and substantive justice helps to gauge the extent to which they accord to the conceptual framework of access to justice.

2.1 The Normative content of the right to access to justice.

Based on literature, four different kinds of typologies on the normative content of the right to access to justice can be discerned. The first typology is exemplified by Cappelletti and Garth movement⁶¹ in which they describe the evolution of access to justice in terms of three “waves” of change. These included the emergence of legal aid; emphasis on group and collective rights in regard to a test case and public interest litigation in order to address systemic problems of inequality; and development of alternatives to litigation in court to resolve disputes and justice problems.⁶²

⁶¹ M. Cappelletti and B. Garth (eds.), *Access to Justice: A World Survey*, Vol. I, Sitjoff and Noordhoff – Alpehena andenrijn, Milan, 1978.

⁶² *Ibid.*

The second typology is based on the description of access to justice in a broader sense including social justice, economic justice and environmental justice apart from court based litigation.⁶³

Kollapen⁶⁴ captures this broader concept in the following terms;

*“Justice is not the exclusive preserve of the courts. The Constitution is designed to achieve justice in the broader sense including social justice and various functionaries including government, independent institutions, the private sector and indeed civil societies take on a special responsibility for the achievement of justice and thus access to justice is more, much more than simply access to courts.”*⁶⁵

Under the third typology, the concept of access to justice denotes the situation where state legal systems are organized to ensure that every person is able to invoke the legal processes for legal redress irrespective of social or economic capacity and that every person should receive a just and fair treatment within the legal system.⁶⁶ Bowd captures this typology in terms of equity with which those from differing backgrounds are able to gain from the justice delivery system.⁶⁷

⁶³ Open Society Foundation for South Africa *Access to Justice Round-Table Discussion* (Parktonian Hotel, Johannesburg 2003-07-22) 5.

⁶⁴ Kollapen “Access to Justice within the South African context” Keynote Address to *Access to Justice Round-Table Discussion 5*.

⁶⁵ Ibid.

⁶⁶ Murlidhar Law, Poverty and Legal Aid: Access to Criminal Justice (2004) 1.

⁶⁷ Bowd Access to justice in Africa: Comparisons between Sierra Leone, Tanzania and Zambia Institute of Security Studies Policy Brief Nr 13 (Oct 2009) 1.

The fourth typology captures the right of access to justice to consist of three key elements: equality of access to legal services; national equity; and equality before the law.⁶⁸

Regardless of the typologies discussed above, the normative content of the right to access to justice connotes a strategic and deliberate affirmative steps being taken to empowering the users of a dispute resolution system, by breaking down the barriers that prevent access to the poor and indigent.⁶⁹

2.2 The Constitutional Underpinning of the Right to Access to Justice in Kenya.

The right to access to justice is underpinned under Article 48 of the Constitution of Kenya, 2010 in the following manner;

“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.”⁷⁰

The above quotation does not define the normative content of the right but places an obligation on the State to take certain measures to ensure access to justice. This therefore calls for interpretation of the concept.

⁶⁸ Access to Justice Advisory Committee (Australia) Access to Justice: An Action Plan (1994) 7-9.

⁶⁹ Mathias Nyenti, “Access to justice in the South African social security system: Towards a conceptual approach.” Centre for International and Comparative Labour and Social Security Law, Faculty of Law, University of Johannesburg.

⁷⁰ Ibid.

2.2.1 The Interpretation tools.

The right of access to justice must be interpreted in accordance with approach for the interpretation of the rights in the Bill of Rights. In interpretation of the right, it should be underscored that the Constitution is a radical document and the Bill of Rights, which is the centerpiece of the Constitution, underpins its transformative nature. This essence was captured by the then Chief Justice Mutunga in *Jasbir Singh Rai & 3 Others versus Tarlochan Singh Rai & 4 Others*⁷¹ where he observed as follows;

“There is no doubt that the Constitution is a radical document that looks to a future that is very different from our past, in its values and practices. It seeks to make a fundamental change from the 68 years of colonialism, and 50 years of independence. In their wisdom, the Kenyan people decreed that past to reflect a status quo that was unacceptable and unsustainable, through: provisions on the democratization and decentralization of the Executive; devolution; the strengthening of institutions; the creation of institutions that provide democratic checks and balances; decreeing values in the public service; giving ultimate authority to the people of Kenya which they delegate to institutions that must serve them, and not enslave them; prioritizing integrity in public leadership; a modern Bill of Rights that provides for economic, social and cultural rights to reinforce the political and civil rights, giving the whole gamut of human rights the power to radically mitigate the status quo and signal the creation of a human-rights State in Kenya; mitigating the status quo in land that has been the country’s Achilles heel in its economic and democratic development. These instances, among others, reflect the will and deep

⁷¹ [2013]eKLR at para. 89.

commitment of Kenyans, reflected in fundamental and radical changes, through the implementation of the Constitution.”⁷²

Writing on constitutional interpretation, Professor Githu Muigai, in a seminal paper on constitutional interpretation in Kenya,⁷³ captured the key issues in judicial interpretation. He stated;

*“First, the fact that the Constitution is both a political charter and a legal document makes its interpretation a matter of great political significance, and sometimes controversy. Second, the court’s interpretation of the Constitution by way of judicial review is equally controversial as it is essentially counter-majoritarian. A non-elected body reviewing and possibly overruling the express enactments and actions of the elected representatives of the people would raise the issue of legitimacy. Thirdly, however defined, the Constitution is an intricate web of text, values, doctrine, and institutional practice. It lends itself to different interpretations by different, equally well-meaning people. Fourthly, the Constitution contains conflicting or inconsistent provisions that the courts are called upon to reconcile, and at other times the Constitution implicitly creates a hierarchy of institutions or values and the courts are called upon to establish the order of importance. Fifthly, at times, the Constitution is vague or imprecise or has glaring lacunae and the courts are called upon to provide the unwritten part.”*⁷⁴

⁷² Ibid.

⁷³ Professor Githu Muigai, “*The Judiciary in Kenya and the Search for a Philosophy of Law: The Case of Constitutional Adjudication*” in International Commission of Jurists, *Constitutional Law Case Digest Vol II*, Nairobi, 2005, p 159.

⁷⁴ Ibid.

Contrary to the current Constitution, the former Constitution did not provide for the manner in which the Constitution was to be interpreted. This was largely left to the judge to discern its meaning primarily from the words and thereafter adopt a philosophy which he considered suitable to give the words content. In deed the judges expressed a basic conservative position that in constitutional adjudication and interpretation the Constitution was to be construed in the same way as any other legislative enactment.⁷⁵

In terms of the Constitution of Kenya, 2010, apart from looking and considering the plain meaning of the words of the Constitution, the Constitution now provides tools for interpretation and application which must all be taken into account when construing it. These provisions include the following: the preamble provides the foundational basis of the Constitution; the Constitution must be interpreted in a manner that promotes its purposes, values and principles;⁷⁶ in a manner that advances the Rule of Law and the human rights and fundamental freedoms in the Bill of Rights;⁷⁷ permits the development of the law⁷⁸; contributes to good governance⁷⁹; according to a set of comprehensive national values and principles of governance which bind all state organs, state officers, public officers and all persons in making or implementing public policy decisions;⁸⁰ Article 232 provides that values and principles of public service include the

⁷⁵ Muthomi Thiankolu, “Landmarks for El Mann to the Saitoti Ruling; Searching a Philosophy of Constitutional Interpretation,” [2007] Vol. 1 KLR 188.

⁷⁶ Article 259(1) (a) of the Constitution of Kenya, 2010.

⁷⁷ Article 259(1)(b) of the Constitution of Kenya, 2010.

⁷⁸ Article 259(1) © of the Constitution of Kenya, 2010.

⁷⁹ Article 259(1) (d) of the Constitution of Kenya, 2010.

⁸⁰ Article 10 of the Constitution of Kenya, 2010.

involvement of people in the policy making process; and the application of treaties which Kenya has ratified and general principles of international law.⁸¹

All these provisions taken together provide a foundation for the development of constitutionalism. The above methodologies have been affirmed by the courts. In the case of *S versus Zuma*,⁸² the Constitutional Court of South Africa laid down the approach to be adopted in the interpretation of a fundamental right in the Constitution. The Court proposed that a right must be interpreted in a manner that seeks to realize the objectives of the right. It held that:

*“The meaning of a right or freedom guaranteed by the Charter was to be ascertained by an analysis of the purpose of such guarantee; it was to be understood, in other words, in the light of the interests it was meant to protect. In my view, this analysis is to be undertaken, and the purpose of the right or freedom in question is to be sought by reference to the character and the larger objects of the Charter itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concept enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the Charter. The interpretation should be ... a generous rather than a legalistic one, aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the Charter’s protection.”*⁸³

⁸¹ Article 2(5) and (6) of the Constitution of Kenya, 2010.

⁸² *S v Zuma* 1995 2 SA 642 (CC).

⁸³ *Ibid.*

It is now trite law that the Bill of Rights must further be interpreted according to its textual, social and historical context within which the right is underpinned.⁸⁴ The textual context of the right of access to justice will indicate the nature and scope of the concept envisaged by the Constitution. To really appreciate the textual context, the harmonized, liberal and purposive interpretation of the relevant provisions of the constitution of the right in issue must further be employed. In deed in *Kigula and Others versus Attorney-General*⁸⁵ the Uganda Court of Appeal sitting as a Constitutional Court held that the principles of constitutional interpretation are as follows;

*“ (1) that it is now widely accepted that the principles which govern the construction of statutes also apply to the interpretation of constitutional provisions and that the widest construction possible, in its context, should be given according to the ordinary meaning of the words used; (2) that the entire Constitution has to be read as an integrated whole and no one particular provision destroying the other but each sustaining the other; (3) that all provisions bearing on a particular issue should be considered together to give effect to the purpose of the instrument; (3) that a Constitution and in particular that part of it which protects and entrenches fundamental rights and freedoms are to be given a generous and purposive interpretation to realize the full benefit of the rights guaranteed. ”*⁸⁶

⁸⁴ *Government of the Republic of South Africa v Grootboom* (2000) 11 BCLR 1169 (CC) par. 21-22.

⁸⁵ [2005] 1 EA 132.

⁸⁶ *Ibid.*

This was affirmed in *Republic versus The Honourable the Chief Justice of Kenya & Others Ex Parte Moiwo Mataiya Ole Keiwa*⁸⁷ where the court held that the Constitution must not be construed in a narrow or pedantic manner and that construction which must be beneficial to the widest possible amplitude of its powers must be adopted, or that a broad and liberal spirit should inspire those, whose duty is to interpret the Constitution. The social and historical context implies the societal structural inequalities and the history and background to the adoption of the right of access to justice was one where significant obstacles were placed in the way of an unqualified access to courts in the past.

In *Richard Nduati Kariuki versus Honourable Leonard Nduati Kariuki & Another*⁸⁸, the High Court held that the Constitution is a living document. It is a house with many rooms, windows and doors. It is conservative enough to protect the past but flexible enough to advocate new issues and the future. Constitutional Theory, the Court has set various models of interpreting constitutional tests i.e. Historical, textual, structural, doctrinal, ethical and prudential. The Constitution formalizes the historical consensus of values and aspirations evolved incrementally from a stable and unbroken past to accommodate the needs of the future. Ordinarily the value content of law relates to the purpose or underlying basis of that law. Such judgment is based on the views and values of the people that make the law and those who the law regulates.⁸⁹

⁸⁷ Nairobi HCMCA NO. 1298 of 2004.

⁸⁸ HCMA No. 7 of 2006 (HCK) [2006] 2 KLR 356.

⁸⁹ Ibid.

2.2.2 The nature and scope of the Right to access to justice; its application and enforcement.

Guided by the above highlighted tools for the interpretation of the Bill of Rights, the following are discernible as the nature and scope of the understanding and application of the right to access to justice as envisaged by the Constitution.

2.2.2.1 The context of equality.

The broad conceptualization of access to justice accords with the constitutional concept of equality. The Constitution provides that every person is equal before the law and have the right to equal protection and equal benefit of the law.⁹⁰ The Constitution defines equality to include the full and equal enjoyment of all rights and fundamental freedoms.⁹¹ Therefore, the right of access to justice cannot be seen in isolation. There is a close relationship between it and the other rights. These rights must all be read together in the setting of the Constitution as a whole. The concept of access to justice must be interpreted as including elements of other rights necessary for its attainment. Put into perspective, socio-economic rights are necessary facilitators to the attainment of the right to access to justice and therefore should be read as integrated whole.

Equality involves both formal and substantive dimensions. Formal equality requires that the adjudication system should be open to everybody in the same manner, irrespective of their circumstance. The insufficiency of the formal equality to address the structural social and economic differences of persons in society has led to the adoption of the concept of substantive equality focusing on outcomes. It requires the law to ensure equality of outcome and is prepared

⁹⁰ Article 27(1) of the Constitution of Kenya, 2010.

⁹¹ Article 27(2) of the Constitution of Kenya, 2010.

to tolerate disparity of treatment to achieve this goal through adoption measures in favour of the weak and exposed, and providing them with financial and other support.⁹²

The Constitution has adopted the substantive equality in different ways including;

- a. The State is obliged to take legislative and other measures, including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination.⁹³
- b. Arrested persons have been accorded rights to include being given reasons for his arrest; the right to remain silent; information of the consequences of remaining silent; legal representation; to be brought to court within specified timeframe; to be released on bond, et cetera⁹⁴;
- c. Article 50 guarantees the right to fair hearing;
- d. The constitution obliges the State to take special measures in the best interest of special categories of persons comprising children⁹⁵, persons with disabilities⁹⁶, youth⁹⁷, minorities⁹⁸ and older members of society⁹⁹ to access opportunities in life.

⁹² Scarman English Law - The New Dimensions (1974) 28-29; as quoted in Law and Justice Foundation of New South Wales (Australia) Access to Justice Roundtable Proceedings of a Workshop July 2002 (April 2003) 20.

⁹³ Article 27(6) of the Constitution of Kenya, 2010.

⁹⁴ Article 49 of the Constitution of Kenya, 2010.

⁹⁵ Article 53 of the Constitution of Kenya, 2010.

⁹⁶ Article 54 of the Constitution of Kenya, 2010.

⁹⁷ Article 55 of the Constitution of Kenya, 2010.

⁹⁸ Article 56 of the Constitution of Kenya, 2010.

⁹⁹ Article 57 of the Constitution of Kenya, 2010.

2.2.2.2 The Creation of specialized courts within the context of access to justice.

The reasons for the creation of the constitutional specialized courts with the same status as High Court are two: the need for specialization hence reducing backlog; and the complexity of the matters dealt with.

Article 162 of the Constitution of Kenya provides;

“162. (1) The superior courts are the Supreme Court, the Court of Appeal, the High Court and the courts mentioned in clause (2).

(2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to—

(a) employment and labour relations; and

(b) the environment and the use and occupation of, and title to, land.

(3) Parliament shall determine the jurisdiction and functions of the courts contemplated in clause (2).

(4) The subordinate courts are the courts established under Article 169, or by Parliament in accordance with that Article.”

Article 165 provides-

“165. (1)

(a); and

(b).....

(2)

(3) Subject to clause (5), the High Court shall have—

(a)

(b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;

(4).....”

(5) The High Court shall not have jurisdiction in respect of matters—

(a) reserved for the exclusive jurisdiction of the Supreme Court under this Constitution; or

(b) falling within the jurisdiction of the courts contemplated in Article 162 (2).”¹⁰⁰

2.2.2.3 The Principles of exercise of judicial authority.

The Constitution enjoins courts to exercise their judicial authority in line with certain set principles.¹⁰¹ The principles are captured to be derived from the people.¹⁰² I shall discuss these principles as hereunder capturing their relevance to justice dispensation.

a. The principle of administration of justice to all irrespective of status.¹⁰³

This embodies the principle of equality and non-discrimination discussed in the earlier part of this chapter.

b. Justice shall not be delayed.¹⁰⁴

This embodies faster dispensation of justice without sacrificing on quality. Several measures have been taken by the judiciary to ensure faster dispensation of justice including employment of

¹⁰⁰ Ibid.

¹⁰¹ Article 159(2) of the Constitution of Kenya, 2010.

¹⁰² Article 159(1) of the Constitution of Kenya, 2010.

¹⁰³ Article 159(2)(a) of the Constitution of Kenya, 2010.

¹⁰⁴ Article 159(2)(b) of the Constitution of Kenya, 2010.

more judges and magistrates; establishment of more physical courts; and establishing of judicial weeks where pending cases are fast-tracked.

Further, the Civil Procedure Act¹⁰⁵ has introduced the Overriding Objective principle to ensure that justice is dispensed without delay. Section 1A of the Act provides that;

“1A. Objective of the Act

- (1) The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.*
- (2) The Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).*
- (3) A party to civil proceedings or an advocate for such a party is under a duty to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the Court.”¹⁰⁶*

c. Employment of ADR mechanisms.¹⁰⁷

The Constitution enjoins the courts to adopt and promote alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms because of the flexibility and speed in justice dispensation. However, the use of these alternative means should not contravene the Bill of Rights; should not be repugnant to justice and morality and should not be inconsistent with the Constitution or other written law.

¹⁰⁵ Cap 21 of the Laws of Kenya.

¹⁰⁶ Section 1A of the Civil Procedure Act, cap 21 Laws of Kenya.

¹⁰⁷ Article 159(2) (c) of the Constitution of Kenya, 2010.

d. Administration of Justice without undue regard to procedural technicalities.¹⁰⁸

One of the critical and transformative provisions in the dispensation of justice is the inclusion of a constitutional provision which provides that justice shall be administered without undue regard to procedural technicalities.¹⁰⁹ It is the law that prescribes the procedures to be taken in enforcing rights and duties of parties to a suit and the manner in which redress may be obtained.¹¹⁰ Procedural laws have for a long time taken centre stage in the adversarial system of litigation.

The practice of procedural laws takes different forms depending on the nature and the complexity of a given case. It accordingly varies in terms of the amount of time between filing and trial, a judge's authority to enforce court orders (through contempt or otherwise), and the availability of appeals. Scholars have discussed and emphasized on the importance of procedural laws. They provide that no procedural decision can be completely neutral in the sense that it does not affect substance.¹¹¹ If procedures are to serve any purpose at all, they will affect litigation behaviour and create new winners and new losers.

The principal objective of procedural law is to enhance justice, certainty and consistency in determination of cases. Rule of Procedure ensure that courts proceeds with determination of cases in accordance with the due process of Law. For instance, procedural law helps ensure that a

¹⁰⁸ Article 159(2) (d) of the Constitution of Kenya, 2010.

¹⁰⁹ Article 159(2) (d) of the Constitution, 2010.

¹¹⁰Walston Dunham, 'Substantive and Procedural Issues' in *Introduction to Law*, <www.delmarlearning.com/.../dl_display_sampchap.aspx?isbn...cid=7> accessed on 8th April, 2015.

¹¹¹Donald Elliott, 'Managerial Judging and the Evolution of Procedure', (U. CHI. L) 53.

defendant in a civil lawsuit or an accused person in a criminal case has received notice of the suit or case and has been given an opportunity to defend himself and present evidence in court.¹¹²

Further, procedural laws have played a key role in mitigating excessive costs and undue delays in litigation. This has been done through various methods including: giving the judge a more active role; tailoring the procedure to the complexity of the case including introduction of summary procedure for small claims; setting time limits for filing suits; and the introduction of Alternative Dispute Settlement procedures before invoking court litigation.¹¹³ This proposition was emphasized and the principle first applied in East Africa in the case of *Iron and Steel Wares Ltd versus C. Martyr and C*¹¹⁴, where it was held that the function of the rules is to facilitate the administration of justice and not otherwise.

Courts have summed up the importance of procedural law in the following cases. In the case of *Chelashaw versus Attorney General & Another*¹¹⁵, the court observed that without rules of practice and procedure the application and enforcement of the law and the administration of justice would be chaotic and impossible and their absence or non-adherence would lead to uncertainty of the law and total confusion since laws serve a purpose and they enhance the rule of law.

¹¹² *ibid.*

¹¹³ C.H. Van Rhe (2004), 'The Law's Delay: Essays on undue delay in Civil Litigation', (Antwerp/Oxford/New York; Intersentia).

¹¹⁴(1956) 23 EACA.

¹¹⁵ [2005] 1 EA 33

In the case of *Ratman versus Cumarasamy*¹¹⁶ Lord Guest delivering the opinion of the *Privy Council* at p. 935 said:-

*“The rules of the Court must, prima facie, be obeyed and in order to justify a court in extending the time during which some step in procedure requires to be taken there must be material on which the Court can exercise its discretion. If the law were otherwise, a party in breach would have unqualified right to an extension of time which would defeat the purpose of the rules which is to provide a time table for the conduct of litigation.”*¹¹⁷

Despite the above cited advantages of procedural laws, it has been argued that they have many times been abused at the expense of substantive dispensation of justice hence the constitutional provision on not giving undue regard to procedural technicalities in the dispensation of justice. This objective is not to be compromised by undue rigidity in the application of procedural requirements, which are ancillary to it.¹¹⁸ Lord Justice Bowen in the case of *Cropper versus Smith*¹¹⁹ where the principle of substantive justice was reaffirmed held that;

*“It is a well-established principle that the object of courts is to decide the rights of the parties, and not to punish them for mistakes they make in the conduct of their cases by deciding otherwise than in accordance with their rights.”*¹²⁰

¹¹⁶[1964] 3 ALL E.R. 933.

¹¹⁷ Ibid.

¹¹⁸DBM Mosotah (2011), “Article 159 and Oxygen Principle not Magic Wands.” Nairobi Law Monthly, April, 2011.

¹¹⁹(1884) 26 Ch D 700 at 710.

¹²⁰ Ibid.

2.2.2.4 Historical Context to Administration of justice.

These concerns the barriers that hindered the access to justice. They include;

a. Locus standi.

Under the former Constitution, the enforcement of fundamental rights and freedoms and even the access to justice in general was a legal minefield. Our law reports are replete with cases where obviously meritorious claims were dismissed on account of procedural deficiencies. The first hurdle a litigant had to surmount was that of *locus standi* derived from the common law which required that a party demonstrate a special interest in the matter.¹²¹

Article 22(1) and (2) of the Constitution has now settled the issue of *locus standi* as follows;

“22. (1) Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.

(2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by—

(a) a person acting on behalf of another person who cannot act in their own name;

(b) a person acting as a member of, or in the interest of, a group or class of persons;

(c) a person acting in the public interest; or

(d) an association acting in the interest of one or more of its members.”¹²²

¹²¹ see *Maathai versus Kenya Times Media Trust* [1989]eKLR.

¹²² Article 22(1) and (2) of the Constitution of Kenya, 2010.

b. Prohibitory fees.

Filing fees plus disbursements have been a major hindrance to access to justice. Under Article 22(3) of the Constitution of Kenya, 2010, the Chief Justice is empowered to make rules under for enforcement of fundamental rights and freedoms. The rules must satisfy the following criteria;

- (a) the rights of standing provided for in **Article 22(2)** are fully facilitated;
- (b) formalities relating to the proceedings, including commencement of the proceedings, are kept to the minimum, and in particular that the court shall, if necessary, entertain proceedings on the basis of informal documentation;
- (c) no fee may be charged for commencing the proceedings;
- (d) the court, while observing the rules of natural justice, shall not be unreasonably restricted by procedural technicalities; and
- (e) an organization or individual with particular expertise may, with the leave of the court, appear as a friend of the court.

These rules have now been promulgated as the **Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013**.¹²³

b. Time Limits.

Ordinary civil suits have time limits within which to lodge a claim.¹²⁴ However, unlike the former Constitution which provided that the Chief Justice could prescribe a time limit under which claims under **section 84** of the former Constitution may be brought, the Constitution has

¹²³ Legal Notice No. 117 of 2013.

¹²⁴ Limitation of Actions Act.

no such limitation. The Courts held the provisions of the *Public Authorities Limitation Act* cannot defeat the right to seek relief for constitutional violations. However, the grant of relief would be defeated by inordinate delay and laches particularly where the rights of the respondent are prejudiced.

In *James Kanyiita Nderitu versus Attorney General and Another NRB Petition No. 180 of 2011 (UR)*, the court stated as follows;

*“[45] I must state that it is well established the law concerning limitation of actions cannot be used to shield the State or any person from claims of enforcement of fundamental rights and freedoms protected under the Bill of Rights Although there is no limitation period for filing proceedings to enforce fundamental rights and freedoms, the court in considering whether or not to grant relief under **section 84** of the Constitution, is entitled to consider whether there has been inordinate delay in lodging the claim. The Court is obliged to consider whether justice will be served by permitting a respondent, whether an individual or the State in any of its manifestations, should be vexed by an otherwise stale claim. Just as a petitioner is entitled to enforce its fundamental rights and freedoms, a respondent must have a reasonable expectation that such claims are prosecuted within a reasonable time.”¹²⁵*

2.3 International Standards of Access to Justice.

The global recognition of certain minimum standards of access to justice including equality before the law, expeditious disposal of claims, proportionality and fairness in dispute resolution are captured in various international and regional instruments to which Kenya has specifically

¹²⁵ James Kanyiita Nderitu versus Attorney General and Another NRB Petition No. 180 of 2011 (UR).

ratified and forms part of the Laws of Kenya by dint of Article 2(5) and (6) of the Constitution, 2010.

Article 8 of Universal Declaration of Human Rights (UDHR)¹²⁶ underscores the principle of equality before the law and proclaims that everyone has the right to an effective remedy by a competent national tribunal for acts violating the fundamental human rights granted to him or her under the Constitution or relevant laws of a country. This is reaffirmed under Article 10 which states that everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal in the determination of rights and obligations and of any criminal charge against him or her.

Article 2(2) of the 1966 International Covenant on Civil and Political Rights (ICCPR)¹²⁷ to which Kenya acceded to on 1st May, 1972 requires each State Party to take the necessary steps in accordance with its constitutional process and with the provisions of the ICCPR, to adopt such laws or other measures as may be necessary to give effect to the Covenant. These rights include, inter alia: (a) the right to effective remedies as guaranteed by Article 2(3); (b) the right to fair trial guaranteed by article 14; (c) the right to equal treatment before the law as provided for in article 16; and (d) the right to freedom from discrimination guaranteed by articles 2(1) and 26 of the Covenant.

The directive principle of access to justice expressed in the various international human rights instruments are also echoed in a range of African Union Protocols, which Kenya subscribes to.

¹²⁶ The 1948 Universal Declaration of Human Rights (UDHR), UN.Doc.A811, December 10th, 1948.

¹²⁷ The 1966 International Covenant on Civil and Political Rights (ICCPR), UN. Doc. A/6316 (1966).

Article 3(1) and (2) of the 1981 African Charter on Human and Peoples' Rights (ACHPR) guarantees equality of all persons before the law and the right to equal protection of the law. Article 7(1) safeguards the right to a fair hearing including the right to defence and the right to be defended by Counsel of one's choice, and the right to an appeal to competent national judicial organs.

The 1990 African Charter on the Rights and Welfare of the Child¹²⁸ under Article 4 incorporates an element of participatory justice as a fundamental component of access to justice in cases involving the children. It provides that in all judicial or administrative proceedings affecting a child who is capable of communicating his/her own views, should be given an opportunity to be heard either directly or through impartial representative and his or her views should be taken into account in accordance with the relevant laws.

Article 8 of the 2000 Protocol to the African Charter on Human and Peoples' Rights on the Right of Women in Africa¹²⁹ guarantees access to justice and equal protection before the law of men and women.

2.4 Conclusion.

The discussion in this chapter has shown that access to justice is a broad concept beyond the mere establishment of the courts system and its functioning. The chapter has revealed that despite the lofty aspirations on administration of justice and the right to access to justice under

¹²⁸ The 1990 African Charter on the Rights and Welfare of the Child, OAU. Doc. CAB/LEG/24.9/49.

¹²⁹ The 2000 Protocol to the African Charter on Human and Peoples' Rights on the Right of Women in Africa, OAU. Doc. CAB/LEG/66.6.

the Constitution, Kenya is still grappling with problems on equal and full access to justice which has been compounded by the Country's poor economic status.

CHAPTER THREE.

THE JURIDICAL ANALYSIS OF ACCESS TO JUSTICE AND ITS INTERFACE WITH THE CASE BACKLOG IN THE REPUBLIC OF SOUTH AFRICA.

3.0 Introduction.

This chapter is geared towards providing an analytical comparative insight into the working systems of the South African justice framework towards the facilitation of the right to access to justice in an efficient, effective and timely manner. Accordingly, the chapter shall analyze the court systems in South Africa, the normative content of the right to access to justice and the statutory, policy and administrative framework put in place to facilitate the smooth operations of the court systems and the right to access to justice with a view to finding out its interface with the case backlog strategies and the output, if any.

The choice of South Africa is particularly based on its liberal and transformative nature of its constitutional framework which anchors the court system and the right to access to justice. South Africa's constitutional framework is based on shared values as captured in our constitution, 2010 in terms of the entrenchment of Constitutionalism, the Rule of Law and fundamental rights and freedoms of all human beings. The Constitution of the Republic of South Africa was promulgated on 18th December, 1996 and came into effect on 4th February, 1997.

3.1 The Justice System in South Africa.

The justice system in South Africa consists of the Courts system, the National Prosecuting Authority and the Department of Justice and Constitutional Development.

3.1.1 The Courts system of the Republic of South Africa.

The Constitution of the Republic of South Africa establishes a unified judicial system for South Africa.¹³⁰ This consists of the Constitutional Court¹³¹, the Supreme Court of Appeal¹³², the High Courts (including any high court of appeal established by Act of Parliament)¹³³, the Magistrates' Courts¹³⁴ and any other court established in terms of an Act of Parliament.¹³⁵ In terms of the organizational and legal structures of courts, the courts systems can also be categorized into Superior Courts, the Regional and District Courts, Chiefs Courts, and Family Court Centers. The superior courts are the Constitutional Court, the Supreme Court of Appeal and the High Courts.¹³⁶

The exercise of judicial authority is pegged on the principles of independence, impartiality, effectiveness, efficiency and legislative or policy formulation to regulate performance. In particular, the Constitution provides that no person or organ of state may interfere with the functioning of the courts.¹³⁷

All courts function in terms of national legislation, and their rules and procedures must be provided for by national legislation. South Africa follows a Romano-Dutch system of law.

¹³⁰ Chapter 8 of the Constitution of South Africa.

¹³¹ Article 167 of the Constitution of South Africa.

¹³² Article 168 of the Constitution of South Africa.

¹³³ Article 169 of the Constitution of South Africa.

¹³⁴ s. 6 of the Constitution Seventeenth Amendment Act of 2012.

¹³⁵ Ibid.

¹³⁶ Article 166 of the Constitution of South Africa.

¹³⁷ Article 165 of the Constitution of South Africa.

The Constitutional Court deals exclusively with matters relating to the Constitution and its interpretation, protection and enforcement.¹³⁸ It is composed of a President, Deputy President and nine other judges appointed by the President of the country on the advice of the Judicial Service Commission.¹³⁹

The Supreme Court of Appeal, situated in Bloemfontein, is the highest Court in respect of all other matters except constitutional matters.¹⁴⁰ It is composed of the Chief Justice, Deputy Chief Justice and a number of judges of appeal determined by Act of Parliament.¹⁴¹ The Court has jurisdiction to hear and determine an appeal against any decision of a High Court.

The High Court is designated to decide on any constitutional matter except a matter that only the Constitutional Court may decide; or is assigned by an Act of Parliament to another court of a status similar to a High Court; and any other matter not assigned to another court by an Act of Parliament.

In addition to the mainstream High Courts, the following specialist high courts exercising national jurisdiction have been established;

- a. The Labour Court and Labour Appeal Court which adjudicate over labour disputes and hear labour appeals, respectively.

¹³⁸ Article 167(3) (b) of the Constitution of South Africa.

¹³⁹ Article 167(1) of the Constitution of South Africa.

¹⁴⁰ Article 168(3) of the Constitution of South Africa.

¹⁴¹ Article 168(1) of the Constitution of South Africa.

- b. The Land Claims Court in Randburg, Gauteng, which hears matters on the restitution of land rights that people lost after 1913 as a result of racially discriminatory land laws.
- c. The Competition Appeal Court, situated in Cape Town, which deals with appeals from the Competition Tribunal.
- d. The Electoral Court, situated in Bloemfontein, which sits mainly during elections to deal with associated disputes.
- e. The Tax Court, situated in Pretoria, which deals with tax-related matters, including non-compliance with tax obligations.

In order to reduce the workload in the High Courts, regional courts have been established to hear matters within their jurisdiction. In a report contained in the official government website, the Regional courts have dealt with 82 271 cases since their inception in 1996. Of these, 57 668 cases have been finalized, 21 932 withdrawn and 2 671 transferred to the High courts.¹⁴²

Unlike the High Court, the penal jurisdiction of the Regional Courts is limited by legislation. The regional courts by virtue of the Jurisdiction of Regional Courts Amendment Act, 2008, adjudicate civil disputes. Although the regional courts have a higher penal jurisdiction than magistrates' courts, an appeal cannot be made to the regional court against the decision of a magistrate's court. The appeal must be made to the High Court.

¹⁴² South African Government Information. (2013). "Case-Reduction Backlog Project". Available: www.info.gov.za/aboutgovt/justice/system.htm#eft (accessed November 2018).

The Magistrates' Courts and all other courts may decide any matter determined by an Act of Parliament. However, it may not enquire into or rule on the constitutionality of any legislation or any conduct of the President. Magisterial districts are grouped into 13 clusters headed by chief magistrates or senior magistrates. This has provided uniform court management systems throughout the country and addressed the imbalances in the former homelands. There are 432 magistrate's courts in the country. A magistrate's court has jurisdiction over all offences except treason, murder, rape and certain other cases, such as serious armed robbery.

There are other sector or subject specific courts established to deal with the given relevant dispute. An example is the equality court established pursuant to the Promotion and Prevention of Unfair Discrimination Act, 2000. The Act defines equality court as every magistrate's court and every High Court specifically conferred with the additional jurisdiction. The right to equality is protected under the as read with the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000. The twin Acts aim to prevent and prohibit unfair discrimination and harassment; promote equality; eliminate unfair discrimination; and prevent and prohibit hate speech.

3.1.2 The National Prosecuting Authority.¹⁴³

The authority is established with the power to institute criminal proceedings on behalf of the state, and to carry out any necessary functions incidental to instituting criminal proceedings.

¹⁴³ Article 179 of the Constitution of South Africa.

3.1.3 The Department of Justice and Constitutional Development.

The Department of Justice and Constitutional Development is responsible for administering the courts and for constitutional development. It performs these functions in conjunction with judges, magistrates, the National Director of Public Prosecutions and Directors of Public Prosecutions.¹⁴⁴

3.2 The Normative Content of the Right to Access to Justice.

The right to access to justice is embodied in the South African Constitution as a Right to Access to Court in the following manner;

“Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.”¹⁴⁵

This right can be dissected into three components: the guarantee of everyone with a dispute to be able to bring the dispute to a court or tribunal to seek redress; courts, tribunals or forums that resolve disputes to be independent and impartial in the execution of their duties; and for disputes to be resolved in a fair and public hearing.

3.2.1 The guarantee of everyone with a dispute to be able to bring the dispute to a court or tribunal to seek redress.

The rationale behind the guarantee is to ensure protection against actions by the state and other persons which deny access to courts or other fora.

¹⁴⁴ Executive Order on formation of government issued from time to time.

¹⁴⁵ Article 34 of the Constitution of South Africa.

The state is obligated to respect, protect, promote and fulfil the rights in the Bill of Rights. These obligations are not defined. However, from the various literature reviews the obligations have the following meanings. The obligation to observe means to monitor the implementation of the right; ‘respect’ means that the State must refrain from interfering with their enjoyment; protect means the state must prevent violations by third parties; and promote means that the State must encourage and advance the realization of these rights, which includes ensuring public awareness. To fulfil means the State must take appropriate legislative, administrative, budgetary, judicial and other measures towards their realization.¹⁴⁶

The Constitution enshrines the rights of all people in South Africa and affirms the democratic values of human dignity, equality and freedom. In recognizing that the rights are derogable in some circumstances, the Constitution provides for parameters of such derogation.

The Constitution provides that the rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into accounts all relevant factors, including: the nature of the right; the importance of the purpose of the limitation; the nature and extent of the limitation; the relation between the limitation and its purpose; and less restrictive means to achieve the purpose.¹⁴⁷

¹⁴⁶ Ibid.

¹⁴⁷ Article 24 of the Constitution of Kenya. See also the observation in *Attorney General v Kituo cha Sheria & 7 others* [2017] eKLR

Put into perspective in terms of the right to access to court, the relevance of *locus standi* in court proceedings, ouster clauses, time limits, notices, procedural hurdles, delay in dispute resolution and exorbitant court fees have been described as conditions which clog the ordinary right of an aggrieved person to seek the assistance of a court of law as a very drastic provision and a very serious infringement of the rights of individuals. Accordingly any condition to dispute resolution must be proportionate the fair and adequate vindication of the rights of the litigants while taking into consideration the quality of the output in terms of resolution.

3.2.2 Courts, tribunals or forums that resolve disputes to be independent and impartial in the execution of their duties.

This limb is concerned with the multiplicity of dispute resolution fora and the independence of the same. The anchoring of the right to access to justice on the multiplicity of dispute resolution fora is based on the fact that there are several institutions whether judicial, quasi-judicial, administrative that are engaged in dispute resolution of whatever kind. Kollapen states that;

“Justice is not the exclusive preserve of the courts. The Constitution is designed to achieve justice in the broader sense including social justice and various functionaries including government, independent institutions, the private sector and indeed civil society take on a special responsibility for the achievement of justice and thus access to justice is more, much more than simply access to courts.”¹⁴⁸

On the independence, the Constitution guarantees the independence of the judiciary by providing the following:

- a. Non-interference or control from other organs of government.

¹⁴⁸Kollapen J. Access to Justice within the South African context. Keynote Address to Open Society Foundation for South Africa Access to Justice Round-Table Discussion (Parktonian Hotel, Johannesburg, 22 July 2003).

- b. The binding nature of its decisions, judgments, and rulings.
- c. Defined security of tenure.¹⁴⁹

3.2.3 Fair and public hearing.

The right to fair hearing is anchored on the right to equality under the South African Constitution. Equality forms part of the cornerstone of South Africa as a constitutional democracy. It is listed in the Constitution of the Republic of South Africa as part of the non-derogable rights.

The Constitution of South Africa provides that,

“9. (1). Everyone is equal before the law and has the right to equal protection and benefit of the law.

(2) Equality includes the full and equal enjoyment of all rights and freedoms. The State in order to promote the achievement of equality, legislative and other measures designed to protect or advance persons or categories of persons, disadvantaged by unfair discrimination may be taken.

(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.

(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.”¹⁵⁰

¹⁴⁹ Article 165(2) of the Constitution of South Africa.

There are several conceptions of equality, the most important of which are broadly covered in the concepts of formal equality and substantive equality. Formal equality holds that the state must be act neutrally to all human beings. It assumes that all people are equal and that inequality can be eradicated simply by treating all people in the same way. Formal equality is therefore blind to structural inequality.

Substantive equality in contrast to formal equality holds the value that equality is not simply a matter of likeness, that those who are different should be treated differently. The very essence of equality is to make distinction between groups and individual in order to accommodate their different needs and interests. It considers discrimination against groups which have been historically advantaged to be qualitatively aimed at remedying that disadvantage.

Public hearing is based on the principle of accountability and transparency in justice delivery so that justice must not only be done but must be seen to be done.

3.3 Conclusion.

The discussion on the totality of the justice system in South Africa is based on the fact that in order to appreciate the reduction strategies of the case backlogs in the courts, then there is need to evaluate the efficiency and effectiveness of the justice sector systems and its linkages. Therefore access to justice should be understood from the concept of equity with which those from differing backgrounds are able to gain from the justice delivery system. That is, whether the legal system is structured and administered in such a manner that it provides everyone with

¹⁵⁰ Article 9 of the Constitution of South Africa.

affordable and timeous access to appropriate institutions and procedures through which to claim and protect their rights. Accordingly, it is has emerged that South Africa has invested in several devolved court system from the constitutional court, to Supreme Court of Appeal, to High court, specialized courts with the status of High Court, Magistrates courts, regional courts to other community and statutory courts. This has the potential of enhancing the capacity of the courts to handle large volume of cases. Further, the South African constitution has anchored a broad based right to access to justice with clear supporting provisions for its implementation.

CHAPTER FOUR.

DATA COLLECTION, COLLATION AND ANALYSIS.

4.0 Introduction.

This chapter presents findings of research carried out among the judicial officers, litigants and advocates at Mavoko Law Courts. The objective of the study was to determine the causes of case backlog at Mavoko Law Court as a case study and interrogate the relationship between the case backlogs and its effect on the right to access to justice.

Judiciary through its, Judicial Transformation Plan (2012-2016) anchored on four pillars: People-focused delivery of justice; Transformative leadership, organizational culture and professional staff; Adequate financial resources and physical infrastructure; and Harnessing Technology as an enabler for justice.¹⁵¹ The ultimate aim of the plan was to transform court procedures, processes, organizational culture, and management to re-orientate them towards a culture of responsive, friendly, and effective service delivery pegged on performance management.

The research sought to use Mavoko Law Court as a case study based on its strategic position of having been identified as one of the flagship projects under the transformation plan.

4.1 Research Methodology.

The study was carried out among the judicial officers, litigants and advocates at Mavoko Law Courts. The study adopted both a descriptive and correlational design methodologies. This research design was adopted to accurately and systematically describe the causes of case backlog at Mavoko Law Court as a case study and interrogate the relationship between the case backlogs

¹⁵¹ Ibid.

and its effect on the right to access to justice. Descriptive research design involves querying the selected population about a certain issue and allows the researcher to collect information on the actual state of the phenomenon at the time of the study. Descriptive research design was adopted because of its utility in showing and documenting the state of affairs as it's exists at present.

Abel Gitau Mugenda, 2008 states that descriptive studies are quite important in providing the foundation upon which correlational studies emerge.¹⁵² He states that the typical statistics that are used in descriptive studies are measures of dispersion and central tendency. The variance and standard deviation are the most common measures of dispersion while the mean, median and mode are the most common measures of central tendency.

The correlational design on the other hand was adopted because it is mainly concerned with assessing relationships among variables. The design is based on the premise that if a statistically significant relationship exists between two variables, then it is possible to predict one variable using the information on the other variable. In terms of this research, the utility of this design was to predict the relationship between case backlog and access to justice.

The study embraced both quantitative and qualitative methods of data collection and analysis. Quantitative were concerned with aggregates, general trends, averages and proportions while qualitative were concerned with general statements on how themes or categories of data collected were related.

¹⁵² Abel Gitau Mugenda (2008), "Social Science Research-Theory and Principles. "Applied Research & Training Services (Press).

The research used the questionnaires, interviews and content analysis of the human resource staff establishment and the data on the staff employed as obtained from the Executive Officer. Three sets of questionnaires were developed and administered, one set to the registry staff, the second set to the magistrates and the last set to the litigants/advocates. The questionnaires were divided into two (2) parts. The first part was mainly a brief on the nature of the inquiry and then permission to collect data from the respondents. The rationales of the first part were: to get permission to proceed; and to assure on the confidentiality of the information so as to encourage the respondents to freely provide the required information without fear of victimisation. This was done by keeping the instruments anonymous. The second part mainly dealt with open ended questions concerning the status of cases filed in Court, the analysis for the status of the case and the reasons for delay in finalising the case, if any.

To enhance the accuracy and validity of data collected, one research assistant was identified, trained and employed to collect data from among the sampled respondents. The training focused on the scope of their duties, the methodology of administering the questionnaires, the collation of data collected and finally on ethical conduct of the researchers in administering the questionnaires and use of information obtained from the respondents.

An interview schedule was also used to provide information on the practice of aspects of human resource management and administration in an organisation. The main of the interview schedule was to triangulate the data collected so as to enhance the validity, reliability and accuracy of the information.

Prior to embarking on this research, the proposal was presented to the supervisor for academic approval. Permission to do research was sought from department of Academic Affairs, Campus Law School, University of Nairobi and National Commission for Science, Technology and Innovation (NICOSTI). I also debriefed the research assistants to ensure they are aware of the ethical guidelines. Further, I prepared an introduction letter that was presented to the respondents during the data collection process to ensure they are aware of their rights to confidentiality and willingness to participate in the research.

4.2 Research Findings and Data Analysis.

Having collected the necessary data and collated the results, the study established the following:-

4.2.1 The Human Resource at Mavoko Law Courts.

Having examined the human resource manual of Mavoko Law Courts I noted that at its inception, the Court was served by one magistrate. However, due to workload, a second magistrate was posted barely after a month in July, 2012. Further pressure of work led to the postage of a third magistrate in March, 2013 and subsequently a fourth one in February, 2014.

The Court was served by the four magistrates until August, 2015 when the head of the station was transferred to Mumias Law courts without any replacement thus leaving only three magistrates. In March, 2016, a second magistrate was transferred to Moyale without an immediate replacement till May, 2016 when a Senior Resident Magistrate was posted, having just been freshly recruited. In the month of June, 2016, Hon. Linus P. Kassan- Senior Principal Magistrate was posted therein as the in charge of the station thus bringing the total number of magistrates back to four. However, this only lasted for two months when the Resident Magistrate

was transferred to Chuka law courts without any replacement. In May, 2017 another Principal Magistrate was transferred to Milimani Law Courts though with an immediate replacement.

It is therefore clear that based on an average of 4,000 cases filed each year, two or three magistrates are not enough to handle the cases within the timelines required. Currently, the Court is served by three magistrates against the optimum number of six magistrates. I found in a human resource file, several letters requesting for additional magistrates without favourable response. When the non-response was probed further through an interview, I gathered that the main reason cited has been the acute shortage of magistrates within the Judiciary. The staff and the litigants, however, remain optimistic that a new judicial officer in the rank of a resident magistrate will soon be posted therein.

4.2.2 Files Allocation.

The study found out that the Judiciary does not have in place any policy guideline and framework with regard to the allocation of files amongst its judicial officers. Accordingly, the manner of allocation of files is unique to each Court station based on the whims and dictates of the head of station.

The study, however, noted that there was an attempt in the year 2012 by the Registrar of Magistrates Court to regulate this anomaly by giving a directive to the head of stations with regard to a rotational plea taking amongst magistrates in any particular station.¹⁵³ However, the directive has largely not been implemented and has sometimes proved inadequate since the

¹⁵³ Circular Ref. RMC No. 15, dated 20.5.2012.

directive was only to regulate the allocation of criminal and traffic matters without addressing the issue of civil matters.

A further directive was again issued by the Registrar Magistrates Court in 2014 requiring that all the pleas and other new matters ought to be handled by the in-charge of the station thus contradicting the earlier one given in the year 2012.¹⁵⁴ In fact, in some stations like the Chief Magistrate Court, Milimani the Registrar has given a stern direction that all pleas can only be taken by the in-charge unless he/she is not sitting, which in that case the pleas are supposed to be handled by the second in command.¹⁵⁵

In view of the foregoing, generally, file allocations are being left at the dictates of the in-charge of the station. So, in case of a lazy in charge, he/she will always allocate himself/herself very few matters while pushing the bulk of other matters to his junior colleagues who in most cases cannot refuse to handle the same for fear of retribution. On the same breadth, if you have a hardworking in-charge which in most cases are very rare, he or she will take the bulk of the work at the expense of his other colleagues.

Another challenge with this kind of file allocation does arise when you have an in charge who decides on which type of cases he/she wants to be seized off. In this case, you find some in-charges who allocate only simple matters to themselves and/or only confine themselves with the plea taking while burdening their junior colleagues with very complex which in effect goes a long way to negatively impact on their returns. Cases in point are so many where an in-charge

¹⁵⁴ Circular Ref. RMC No. 4, dated 3.6.2014.

¹⁵⁵ Memo Ref. No. 8 dated 20.1.2015.

who is mostly in the rank of a Chief Magistrate or Senior Principal Magistrates arrogates himself/herself the role of plea taking only and at worst, hearing of misdemeanour offences while allocating all the felonies to their junior colleagues. They do in the disguise of being bogged down by other administrative duties.

Between the years 2012 and 2015 the then Magistrate in-charge, Honourble Madam Teresa Odera - Principal Magistrate, put in place some internal mechanisms with regard to plea taking and files allocation. To this end she devised a system whereby all the magistrates would be allocated a duty on a weekly basis. While on such duty, all the fresh civil matters and applications would be forwarded to the duty court to do the allocations to other courts. However, there was no register maintained to confirm how many of such new civil matters had been allocated equally to the other courts either on a daily, weekly, monthly and/or yearly basis. This anomaly culminated to other courts being allocated more matters than the others depending on who is on duty. The system likewise encouraged forum shopping not only by litigants and but also by their counsels who would only file their matters when a particular magistrate was on duty. And more so, when some interim orders are being sought independently and/or together in the substantive suit filed.

However, in terms of criminal matters, such pleas would only be taken by the Magistrate in-charge who in turn would allocate the same to the other courts unless she is not sitting and/or assigns another court to take such pleas and do the allocation. In that case, the second in command and/or the assigned court would take such pleas and allocate the files to the other courts. But even if another court takes such pleas and allocate the matter to the in-charge, she

would still re-allocate the same back to any other court including the court which did such allocation if she deems fit not to handle such a matter.

In terms of the traffic pleas, the same used to be handled by the second in command i.e., Court No. 2 while the children matters used to be handled by the third in command i.e., Court No. 3. The said two courts would then allocate the same to other courts using the same procedure as adopted in the allocation of civil matters. However, the same challenges experienced with the allocation of the civil matters likewise persisted in the allocation of traffic and children matters as well.

When Honourable Linus P. Kassan – Senior Principal Magistrate took over as the in-charge i.e., sometimes in May, 2016, he changed that system which had been put in place by Honourable Odera PM. To this end he took over the entire role of plea taking of both criminal and traffic matters and even allocation of the same to other courts. And whenever he is not sitting, then the second in command would assume the role of plea and files allocation. In terms of fresh civil matters, the duty courts would still do the allocation of the same.

4.2.3 Statistics on the number of cases filed between 2014 and 2016.

The study revealed that Mavoko Law Courts receives a higher percentage of traffic cases compared to civil and criminal cases.

When this data was subjected to further probe, it was demonstrated that Mavoko Law Courts administers an area which is a major transport corridor with a complete weighbridge. The area is served by Mombasa Road, Namanga Road and the various interconnecting feeder roads serving

major towns such as Mlolongo, Kitengela, Athi- River and the emergent towns such as Syokimau, Katani and Machakos junction areas. It is therefore inevitable that there may occur many cases of traffic accidents and breach of traffic laws.

4.2.4 The percentage number of cases finalized between 2014 and 2016.

The study revealed that most traffic cases were finalized at 96.8% of the base of cases filed, followed by Criminal cases at 81.1% of the bases of the number of criminal cases finalized. The study revealed that most civil cases remain pending with the number finalized being at 35.4%. When this data was presented to the judicial officers and the litigants, the running justification for such a trend was that civil cases are subject to many interlocutory applications with strict procedural requirements compared to Traffic cases. Further, both civil and criminal cases are prone to many adjournments as delay tactics to avoid the finalization of the matters. For traffic cases, it was explained that in most cases, the accused persons normally enter a plea of guilty which then closes the case upon sentencing.

4.2.5 The main factors that impede access to justice in Mavoko Law Courts.

The study revealed that 40% of the respondent expressed a firm opinion that court and advocates fees pose the greatest challenge to access to justice, followed by delay in determination of cases at 20%, backlog of cases at 19%, corruption at 11% and others at 10%.

This study argues that the backlog of cases though is rated at only 19% of the main impediments to access to justice have a multiplier effect on the attempt to eliminate barriers to the effective administration of justice since it gives room for litigants to jostle for judicial services leading to corruption and differential treatment of parties on the basis of socio-economic status.

4.2.6 Complexity of Rules of Court.

90% of the litigants and accused persons interviewed stated that both rules of procedure and evidence are complex. They explained that the complexity justified their turning to lawyers to

represent them. Accordingly, there is need to simplify the rules of procedure in order to afford the litigants who cannot otherwise engage advocates to act in person.

4.2.7 Awareness on Judiciary Transformation Plan.

The Study found out that only 46 % of the respondents were aware of the Judiciary Transformation Plan. This they attributed to lack of sufficient publicity undertaken by the Judiciary. Out of the 46 % only 30 % were knowledgeable on the pillars and key thematic activities under the Judiciary Transformation Plan.

4.2.8 Familiarity with Alternative Dispute Resolution Mechanism.

While most respondents at 59% were aware of Arbitration, Mediation, Adjudication, expert Determination and Negotiations as mechanism of alternative dispute resolution, only 18 % had used resorted to the mechanisms as opposed to litigation. Of the 18% of the respondents who have resorted to the alternative mechanism, 80% of the cases were for settling non-capital offences out of court with the assistance of the clan elders, family members and the prosecutor.

4.3 Conclusion.

The statistical data presented in this chapter corroborates the desk research in chapter one and two in which it is aptly demonstrated that the judicial system for administration of justice and guaranteeing the right to access to justice in Kenya falls short of the legitimate expectations of Kenyans. The Chapter has highlighted on the factors that impede access to justice and how they were rated by the respondents hence forms a basis for a prioritised implementation of the justice reform matrix.

CHAPTER FIVE.

5.0 FINDINGS, CONCLUSION AND RECOMMENDATIONS.

5.1 Conclusions.

This study sought to find out the implication of case backlog on the right to access to justice in Kenya, taking Mavoko Law Court as a case study. The study was premised on the right to access to justice which is one of the paradigm shifts in the new Constitutional dispensation, and the Judicial Transformation Plan which identified case backlogs as one of the obstacles to the fundamental right to access to justice. The study was justified in proposing appropriate ways of addressing the causes and effect of case backlog in Kenya.

The study proceeded on the fact that despite the Judicial Transformation Plan, backlog of cases in Kenya has been a major hindrance to the administration of justice thereby negating on the litigants' Constitutional right to access to justice. By the end of 2012, Mavoko law Court established on 12th June, 2012 had registered a total of 2,572 cases with only 1,813 being fully determined thus leaving the remaining balance as back log. This situation replicated itself in the subsequent years. In 2013 a total of 4,567 cases were registered but only a paltry 2,584 were resolved and hence leaving a back log of 1,984. In 2014 as at 30th October, 2014, the court had registered 5,310 cases but only 3,603 had been resolved. In the sum total, this court has so far registered 12,449 cases since its establishment but only 8,000 have been determined to a logical conclusion thus leaving a balance of 4,449 as case back log, a worrying trend that need to be addressed as a matter of urgency if an access to justice as enshrined in the Constitution is to be realized.

For logical flow of the study, the research was designed into five chapters. Chapter One dealt with the framework of the study in terms of the objectives of the study, the research questions and the Statement of the Problem. Before setting out these parameters a background of the study was provided this helped in distilling the main issues for consideration in the research. Chapter Two dealt with the analysis of the legal and institutional framework governing the right of access to justice and its implementation mechanisms in Kenya. Chapter Three captured the juridical analysis of access to justice and its interface with the case backlog in the Republic of South Africa. Chapter Four covered the research findings and analysis with the main goal of finding out the current status of case backlog in Kenya and the measures put in place to address them based on their adequacy. Chapter Five was meant to capture the conclusions and recommendation of the study.

The normative content of the right to access to Justice as exemplified by our Courts and its implementation mechanisms through the statutory enactments and administrative orders were discussed in Chapter Two of the study. The study while considering the various typologies of the right to access to justice concluded that the normative content of the right encapsulates a more strategic and deliberate affirmative steps being taken to empowering the users of a dispute resolution system, by breaking down the barriers that prevent access to the poor and indigent. It is thus a broad concept encapsulating the establishment of the courts system, its functioning, efficiency and alternatives to its use for the better protection of the rights of everyone. Accordingly, access to Justice is not the exclusive preserve of the courts. The Constitution is designed to achieve justice in the broader sense including social justice and various functionaries including government, independent institutions, the private sector and indeed civil society take

on a special responsibility for the achievement of justice and thus access to justice is more, much more than simply access to courts.

It is submitted in the study that the right of access to justice though specifically provided under article 48 of the Constitution, its interpretation and application must be based on a harmonized reading and purposive application of all the relevant provisions of the Constitution under the context of equality, the establishment of specialized courts, the principles on exercise of judicial authority and the historical context of the exercise of the right to access to justice.

Equality involves both formal and substantive dimensions. Formal equality requires that the adjudication system should be open to everybody in the same manner, irrespective of their circumstance. The insufficiency of the formal equality to address the structural social and economic differences of persons in society has led to the adoption of the concept of substantive equality focusing on outcomes. It requires the law to ensure equality of outcome and is prepared to tolerate disparity of treatment to achieve this goal through adoption measures in favour of the weak and exposed, and providing them with financial and other support.

The study submitted that by dint of Article 162 of the Constitution, the reasons for the creation of the constitutional specialized courts with the same status as High Court are two: the need for specialization hence reducing backlog; and the complexity of the matters dealt with.

The third context within which the right to access to justice should be applied is with regard to the principles of exercise of judicial authority under Article 159 of the Constitution including the

administration of justice irrespective of status; administration of justice without delay; employment of alternative means of administration of justice, without however, must not be compromising on the Bill of Rights, justice and morality and should not be inconsistent with the Constitution or other written law; and undue regard to procedural technicalities.

The study underscored that the primary purpose behind procedural law is to make certain that every case brought to court is justly and consistently treated. Uniform legal procedural rules help ensure that courts do not impose criminal or civil penalties against a person without due process or fundamental justice. For instance, procedural law helps ensure that a defendant in a civil lawsuit or an accused person in a criminal case has received notice of the suit or case and has been given an opportunity to defend himself and present evidence in court. However, the study cautions that the objective of procedural law is not to be compromised by undue rigidity in its application since the object of Courts is to decide the rights of the parties, and not to punish them for mistakes they make in the conduct of their cases by deciding otherwise than in accordance with their rights.

The study concludes that despite the transformative nature of the Constitution with regard to access to justice, there are still some legislative and administrative obstacles to the enjoyment of the right such as the *locus standi*, the prohibitive fees and time-limits that need to be addressed as a matter of urgency.

The consideration of the right to access to justice in the context of South Africa was done in Chapter Three in which South Africa was selected based on its liberal and transformative nature

of its constitutional framework which anchors the Court system and the right to access to justice. South Africa's constitutional framework is based on shared values as captured in our constitution, 2010 in terms of the entrenchment of Constitutionalism, the Rule of Law and fundamental rights and freedoms of all human beings.

The study established that the Constitution of the Republic of South Africa establishes a unified judicial system for South Africa which consists of the Constitutional Court, the Supreme Court of Appeal, the High Courts (including any High Court of Appeal established by Act of Parliament), the Magistrates' Courts and any other court established in terms of an Act of Parliament. In terms of the organizational and legal structures of courts, the courts systems can also be categorized into Superior Courts, the Regional and District Courts, Chiefs Courts, and Family Court Centers. The superior courts are the Constitutional Court, the Supreme Court of Appeal and the High Courts.

The independence and workings of the Court system of South Africa is ring fenced in the Constitution through the enactment of specific principles independence, impartiality, effectiveness, efficiency and legislative or policy formulation to regulate performance.

The study established that in order to reduce the workload in the courts system South Africa has invested in several devolved Court system from the constitutional court, to Supreme Court of Appeal, to High court, specialized courts with the status of High Court, Magistrates courts, regional courts to other community and statutory courts. This has the potential of enhancing the capacity of the courts to handle large volume of cases. Further, the South African constitution

has anchored a broad based right to access to justice with clear supporting provisions for its implementation.

In a report contained in the official government website, as at 2016, the Regional Courts have dealt with 82 271 cases since their inception in 1996. Of these, 57 668 cases have been finalized, 21 932 withdrawn and 2 671 transferred to the High courts. Unlike the High Court, the penal jurisdiction of the regional courts is limited by legislation. The regional courts by virtue of the Jurisdiction of Regional Courts Amendment Act, 2008, adjudicate civil disputes. Although the regional courts have a higher penal jurisdiction than magistrates' Courts, an appeal cannot be made to the regional court against the decision of a magistrate's court. The appeal must be made to the High Court. The Magistrates' Courts and all other courts may decide any matter determined by an Act of Parliament. However, it may not enquire into or rule on the constitutionality of any legislation or any conduct of the President.

The Constitution of the Republic of South Africa has a specific provision on the right to access to justice which provides for the guarantee of everyone with a dispute to be able to bring the dispute to a Court or tribunal to seek redress; courts, tribunals or forums that resolve disputes to be independent and impartial in the execution of their duties; and for disputes to be resolved in a fair and public hearing.

Chapter Four of the study addresses the findings of research data collected among the judicial officers, litigants and advocates at Mavoko Law Courts. The study found out that:-

- i. Mavoko Law Court is currently served by three Magistrates against the optimum number of six Magistrates.
- ii. There are no guidelines on file allocation. The allocation is unique to each Court station and is based on whims and dictates of the head of station.
- iii. More traffic cases are filed compared to civil and criminal cases partly because the Court serves a major transport corridor comprising of the Nairobi-Mombasa Highway and the several feeder roads linking several estates in the area.
- iv. The study revealed that most traffic cases were finalized at 96. 8% of the base of cases filed, followed by Criminal cases at 81.1 % of the bases of the number of criminal cases finalized. The study revealed that most civil cases remain pending with the number finalized being at 35. 4 %. When this data was presented to the judicial officers and the litigants, the running justification for such a trend was that civil cases are subject to many interlocutory applications with strict procedural requirements compared to Traffic cases. Further, both civil and criminal cases are prone to many adjournments as delay tactics to avoid the finalization of the matters. For traffic cases, it was explained that in most cases, the accused persons normally enter a plea of guilt which then closes the case upon sentencing.
- v. Court and advocates fees account for 40 % of the factors that impede access to justice. Though case backlog as a factor was at a paltry 11%, the study found out that this is a compounding factor since it leads to jostling over justice dispensation which ultimately breeds corruption that favours the rich at the expense of the poor.
- vi. The study further revealed that 90% of the respondents were of the opinion that the current rules of procedure and the evidence rules were too complex to facilitate

- access to justice by those not learned in law hence the justification to resort to lawyers to represent them in most of the cases.
- vii. Only 46% of the respondents were aware of the Judiciary Transformation Plan hence urgent need to undertake sensitization programme.
 - viii. While most respondents at 59% were aware of Arbitration, Mediation, Adjudication, expert Determination and Negotiations as mechanism of alternative dispute resolution, only 18 % had used resorted to the mechanisms as opposed to litigation. Of the 18% of the respondents who have resorted to the alternative mechanism, 80% of the cases were for settling non-capital offences out of court with the assistance of the clan elders, family members and the prosecutor.

5.2 Recommendations.

Drawing from the conceptual, theoretical, desktop reviews and statistical data in chapters one, two and three respectively of this study, this chapter presents a compelling case for reform and strengthening, as the case may be of the policy, legal and administrative framework within which judicial authority is exercised in order to safeguard and guarantee the right of access to justice.

In response to the specific findings in chapter four of this study, the study makes the following recommendations:-

5.2.1 Employment of more magistrates.

There is an urgent need for the Judicial Service Commission to consider employing more magistrates. Consequently, the Chief Justice and the Chief Registrar of the Judiciary should consider posting three additional magistrates to serve Mavoko Law Court considering the finding that the Court is currently served by three Magistrates against the optimum number of six Magistrates.

In order not to prejudice any court within the Republic, the Judiciary through the Judicial Service Commission should consider recruiting additional magistrates in order to ensure efficient and effective delivery of justice in a proportionate and expeditious manner.

5.2.2 Establishment of Guidelines on Allocation of cases.

In order to eliminate potential cases of favouritism and corruption in allocation of cases, the Judicial Service Commission in consultation with the judicial officers should come up with electronic system of case allocation. This is in view of the research finding that there are no guidelines on file allocation. The allocation is unique to each Court station and is based on whims and dictates of the head of station. The system should consider factors such as the case load of a particular magistrate in allocating cases.

5.2.3 Establishment of Civil, Traffic and Criminal Divisions within the Magistrate Courts.

In order to enhance specialisation and promote efficiency in dispute resolution, the Judicial Service Commission should consider establishing civil, traffic and criminal section within the busy magistrates' court. This should however, be on a rotational basis where a magistrate sits in a particular section for a given period of time (say three months) to complete all the cases assigned to him or her) then moves to another section. The current system where particular days are assigned for either criminal, civil or traffic hearing is not sufficient to mount an expeditious hearing and determination of disputes.

The necessity of establishing specialised section within Mavoko Law Courts is more compelling considering the research findings that more traffic cases are filed compared to civil and criminal

cases partly because the Court serves a major transport corridor comprising of the Nairobi-Mombasa Highway and the several feeder roads linking several estates in the area.

5.2.4 Reshaping Rules of Procedure.

This study revealed in chapter four that complex rules of procedure limit the application of the overriding principles of justice dispensation such as proportionality, expedition and fairness of process. For example, the study revealed that most civil cases remain pending with the number finalized being at 35.4%. When this data was presented to the judicial officers and the litigants, the running justification for such a trend was that civil cases are subject to many interlocutory applications with strict procedural requirements compared to Traffic cases. Further, both civil and criminal cases are prone to many adjournments as delay tactics to avoid the finalization of the matters. The study further revealed that 90% of the respondents were of the opinion that the current rules of procedure and the evidence rules were too complex to facilitate access to justice by those not learned in law hence the justification to resort to lawyers to represent them in most of the cases.

Accordingly, there is need for the Rules Committee of the Judiciary to reform the rules of procedure to make provision for multi-tracking of cases, which involve diverse mechanisms of differential case management by fast tracking or expedited proceedings through simplified procedure.

5.2.5 Reforming Legal Aid Mechanism.

The study established that high cost of litigation compounds access to justice. Court and advocates fees account for 40% of the factors that impede access to justice. Though case

backlog as a factor was at a paltry 11%, the study found out that this is a compounding factor since it leads to jostling over justice dispensation which ultimately breeds corruption that favours the rich at the expense of the poor.

The study therefore, proposes a legal framework for the provision of judicial services at an affordable cost which is founded on the provision of Article 48 of the Constitution which enjoins the State to ensure access to justice for all and if any fees are required, it shall be reasonable and shall not impede access to justice.

Accordingly, there is need for the Attorney-General to ensure a reformed legal aid scheme anchored in law to guide the operationalization of article 48 of the Constitution. The current system of pauper brief determined by courts is inadequate since it takes away the valuable time of a magistrate in deciding on an application instead of concentrating on core judicial function of dispute resolution. Further, the application itself is made at a fee and allotted time for hearing which is of itself time consuming and expensive.

5.2.6 Establishment and decentralisation of ADR mechanisms.

While most respondents at 59% were aware of Arbitration, Mediation, Adjudication, expert Determination and Negotiations as mechanism of alternative dispute resolution, only 18 % had used resorted to the mechanisms as opposed to litigation. Of the 18% of the respondents who have resorted to the alternative mechanism, 80% of the cases were for settling non-capital offences. In fact, only 46% of the respondents were aware of the Judiciary Transformation Plan hence urgent need to undertake sensitization programme.

Therefore there is an urgent need to decentralise the existing court annexed mediation, Nairobi Centre for International Arbitration, Professionals led ADR and community based ADR to smaller cities, towns and villages in order to aid in dispute resolution. The enabling legislation should and rules of procedure in ADR should on the other hand be suitably designed to accommodate and set out limited circumstances in which it would be appropriate for a party to refuse an offer to alternative dispute resolution.

Further, there should be sustained awareness through legal and civic education targeting legal practitioners, judicial officers, para-legal staff and the public at large in order to motivate change towards ADR as the mechanism of choice in dispute resolution.

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