UNIVERSITY OF NAIROBI

Faculty of law

The Judiciary's Quest for Case Backlog Reduction: A Reflection into the Court Users Committees

A Research Project Submitted in Partial Fulfilment of the Requirements for the Award of the Masters of Laws Degree of the University of Nairobi

Sophie Amekwi Kathure Kaibiria

Reg No: G62/12118/2018

Supervisor: Hon. Dr. Nancy Baraza

DEDICATION

This study is a dedication to my husband Steve and my children Zawadi and Mark, to my parents, and all the access to justice champions.

ACKNOWLEDGMENT

I praise God for enabling me to complete this thesis.

I acknowledge with gratitude the guidance and support from my supervisor Dr. Nancy Baraza. I appreciate the scholarly insight and advice extended towards the completion of this work.

My deep appreciation to my husband Steve for the support and encouragement when I had to undertake these studies late in the evenings and to my children Zawadi and Mark who encourage me to excel. I also appreciate my Mum and Papa for their constant encouragement to strive for the best.

To my close friends who have supported and prayed for me as I undertook these studies, I am forever grateful.

TABLE OF CONTENTS

LIST OF INTERNATIONAL INSTRUMENTS

African Charter on Human and People's Rights Charter of Fundamental Rights of the

European Union

European Convention of Human Rights

International Covenant on Civil and Political Rights

The 1990 African Charter on the Rights and Welfare of the Child 2000

The Protocol to the *African Charter on Human* and. *People's Rights on the Rights of Women in Africa*

Universal Declaration of Human Rights

LIST OF ABBREVIATIONS

ACHPR	African Charter on Human and People's Rights
ADR	Alternative Dispute Resolution
CEPEJ	Commission for the Efficiency of Justice
CUCs	Court Users Committees
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EU	European Union
FY	Financial Year
GJLOS	Governance Justice Law and Order
ICCPR	International Covenant on Civil and Political Rights
JLOS	Justice Law and Order
JTF	Judiciary Transformation Framework
LSK	Law Society of Kenya
NCAJ	National Council on the Administration of Justice
ODPP	Office of the Director of Public Prosecutions
SJT	Sustaining Judiciary Transformation Framework
UDHR	Universal Declaration of Human Rights

CHAPTER ONE

INTRODUCTION

1.0 Background to the study

Access to Justice has been stated to be a basic principle of the rule of law in a country. Access to justice permeates all aspects of the justice chain from the more direct meaning of actual physical access to facilities; to the right of appearance in court; to advocacy for the poor; to reforms in the justice sector; to ultimately measuring the quality of outcomes by managing the obstacles faced by those trying to access the judicial system[1]. In the absence of access to justice, people are unable to have their voices heard, exercise their rights, challenge discrimination, or hold decision-makers accountable[2]. The Constitution of Kenya at Article 48 requires that the State ensure that there is access to justice at a reasonable cost. Apart from this Kenya subscribes to international law instruments, covenants, and treaties that advance reasonable access to justice. This, therefore, goes to establish that access to justice is both national and international imperative for the State.

The Judiciary is the State's primary symbol of justice. Justice through the Judiciary must be perceived to advocate the laid principles of access to justice. The Judiciary of Kenya plays an important role in the justice sector being a critical arm of government. The elements of access to justice through the Judiciary are recognised in several provisions of the Constitution of Kenya 2010. Firstly, Constitution propagates decentralisation of the structures which included the establishment of the Supreme Court of Kenya and inculcation of administrative leadership

[1] Alberta Civil Liberties Research Centres(ACLRC), "*What is access to justice?"* http://www.aclrc.com/what-is-access-to-justice accessed on 8 March 2019

[2]United National organisation, Access to justice,www.un.org/ruleoflaw/thematic-areas/access-to-justice-and-rule-of-law-institutions/access-to-justice/ accessed on 8 March 2019

positions in the Court of Appeal and the High Courts[3]. The Constitution also propagated for access to all parts of the country through devolved service[4]. This being a way to ensure there are reduced delays in services and more so in the dispensation of justice through the court. Thirdly, it was a recognition of the aspirations of Kenyans as stipulated in the preamble to the Constitution for a good governance system that upholds the essential values of human rights, equality, democracy, social justice, and the rule of law.

Good governance pre-2010 was a mirage for the Judiciary. Before the onset of judicial reforms in Kenya, the Judiciary was seen to be an amorphous institution that did not serve justice as is mandated. Dr. Willy Mutunga(Kenya's First Chief Justice post-2010) in giving the progress report on judicial transformation noted that the Judiciary before 2010 was designed to fail as it was low on resources, structures, integrity, and public confidence[5]. It was in this vein judicial transformation initiatives started. Under Mutunga's administration, the Judiciary developed a Judiciary Transformation Framework (JTF)[6]. The framework was largely an institutional plan for better service delivery. Notably, one of the key challenges the framework was embarking on tackling was case delay, commonly referred to as 'case backlog".

Case backlog in the Judiciary was one of the tasks that Mutunga and now Chief Justice David Maraga have sworn to resolve. Mutunga saw a case backlog as an impediment to justice[7]. In his view cases that had stayed in the system for more than three years were a backlog. He went on to establish mechanisms through JTF to reduce the backlog menace. Some of the measures

[3] Articles 159-164
[4] Article 6(3)
[5]Dr. Willy Mutunga, "*The progress report on the transformation of the judiciary the first one hundred and twenty days"(*Kenya Law Reports blog, 19th October 2011)< http://kenyalaw.org/kenyalawblog/progress-report-on-the-transformation-of-the-judiciary/> accessed on 9 January 2019.
[6] Judiciary of Kenya, JTF Blueprint, < https://www.judiciary.go.ke/about-us/our-blueprints/> accessed on 9 January 2019
[7] Ibid n5

included improved services to the people through incorporating stakeholder engagement; internal improvement of the capacity of officers; improvement of infrastructure; and the incorporation of ICT in *modus operadi*.[8]

On his part Chief Justice Maraga in launching his blueprint emphasised his commitment to reducing the case backlog in the Judiciary during his tenure[9]. This blueprint sought to sustain what the JTF had been undertaking since 2012 especially in the reduction of case backlog. Measures such as judicial service weeks and court-annexed mediation processes have been increasingly utilised in the recent past in reducing the case backlog. In fact, in 2018 the Judiciary went on a countrywide initiative of clearing backlog of cases that are older than five years[10]. This drive was borne out of the status report that showed statistics that 27% of cases in the Judiciary that were regarded as backlog were older than 5 years[11]. The impetus to resolve case backlog is further emphasised in the periodic report of the State of the Judiciary Annual Report(SOJAR) (2017/2018). In the report, the total case backlog stood at 384,147 cases. Out of these, 202,611 cases were aged 1-3 years; 76,675 cases were aged 3 - 5 years and 104,861 cases were over 5 years old. This data shows there is indeed a challenge that the Judiciary needs to address to improve access to justice through a reduction in the turnaround time taken to conclude a court case[12].

Consequently, one of the ways the Judiciary has employed to address case backlog has been stakeholder engagement. This has been mainly through a multi-sectorial approach

[8] Ibid
[9] Judiciary, Sustaining Judiciary Transformation(SJT): A service Delivery Agenda 2017-2021, (Jomo Kenyatta foundation 2017)
[10] Brian Otieno, "Case backlog to be cleared, says CJ", (*The Star* 21 August 2018) https://www.the-star.co.ke/news/2018/08/21/cases-backlog-to-be-cleared-says-cj_c1805859 accessed on 9 January 2019.
[11] Judiciary, State of the Judiciary annual Report 2017/2018 p 22
[12] Ibid

characterised by a chain interlinking various justice sector players who interrelate and co-relate at different levels. These players who are the Judiciary, the ODPP, the Probation Department and aftercare service, the Prisons Service, the Department of Children services, the LSK, and other interested non-governmental agencies, all work around each other and continuously interact at various levels in the justice chain. They interact in semi-formal groups known as Court Users Committees (CUCs) that are present in each court station. This coordinated approach has been seen as *sine quo non* in ensuring a unified journey towards facilitation and administering access to justice. This synchrony has however not been coordinated enough to reduce the phenomenon of case backlog to manageable levels. Each of the agencies seems to be to work for their own singular goal which is not in congruence to the spirit of interlining espoused in the Constitution thus undermining the overall goal of ensuring access to justice for all. The JTF recommended that one of the ways to deal with the issue of the backlog was to coordinate with other government agencies and to disseminate information on court processes to the public through stakeholders such as CUCs. This recommendation has thus far not been fully realised the target of reduction of case backlog which the Judiciary still grapples with.

1.1 Problem Statement

The Constitution gives principles of access to justice that the state through its agencies should advance. Equally the international instruments that Kenya subscribes to, such as the Universal Declaration of Human Rights (UDHR)[13] also sets out principles of human rights that also govern access to justice. It is on this background that the Judiciary has had enhanced institutional regulation to enable it to function as the country's conveyor of justice. However, for the last 10 years since the promulgation of the Constitution, the Judiciary has been grappling

[13] The United Nations, 1948, UNGA res. 217 A(III)UDHR art 5

with the issue of case backlog which seems to be on the increase every year. This has led to the continued lack of confidence in the justice system and in particular the judiciary.

Problems such as lack of adequate officers, lost court files, infrastructural inadequacies, non-appearance of key witnesses for court proceedings, lack of facilities for vulnerable witnesses, and inaccessible courts still follow the justice system. It is therefore imperative to reflect on the challenges that lead to persistent case backlog as well as establish recommendations to improve the effectiveness of CUCs.

1.2 Justification of the study

This study aims to interrogate the elements of interagency partnerships that were intended to enhance better administration of justice and the reduction of case backlog. This is particularly important because in the past it was unfathomable for the three arms of government to work together for a just society. The reason being that the key ingredients of coordination and inter-relations were not advocated by the justice sector agencies then. It was, therefore, a system whereby each worked to fulfil their own 'singular' mandate or goal without appreciating the effect certain actions and orders will affect the chain of justice. This led to an increased backlog in the court, the unjustified high number of inmates in prison and remand, weak institutional capacity for the police, and the prosecution, and a disgruntled *mwananchi.*

It is important to interrogate the status of this interagency collaboration through the CUCs and how it affects delays in the Judiciary. This study will find out whether this mechanism employed by the justice sector is indeed working well to enhance access to justice. The study will be a point of reference for practitioners on how collaboration through CUCs has a future in the reduction of case backlog in the judiciary.

1.3 Statement of the objective

1.3.1 Main Objective

The main objective of this study is to research the role CUCs play in case backlog reduction in the Judiciary.

1.3.2 Specific objectives

1. To examine the effect of the dispensation of justice in court after incorporating inter-agency partnerships
2. To analyse inter-agency partnerships in the justice sector
3. To analyse the effectiveness of inter-agency partnerships in case backlog reduction

1.4 Research Questions

1. What measures have been put in place by the Judiciary to deal with the case backlog?
2. What are the policies and regulations available for justice sector agencies to ensure the expeditious determination of cases in court?
3. Can the trend in case backlog reduction be attributed to interagency coordination in the justice sector?

1.5 Conceptual Framework

The study is premised on the understanding of good governance, deliberative democracy, and public participation in the judicial system as a measure to enhance access to justice. The conceptual flow of these concepts will be analysed to answer the research question.

This section explains various terms used in the study. The key concepts that have expounded include access to justice, case backlog, case management delay among others.

Justice has on many occasions been likened to the element of equality provided for in the Constitution. Hence justice is traditionally thought of as maintaining or restoring a balance or proportion.

Access to Justice the notion of Access to Justice has been broadly interpreted to be a basic principle of the rule of law that incorporates physical access to justice as well as social barriers to access the court system.

Case Backlog as used in this study refers to cases that remain undetermined for three (3) years.

Case Management in this study refers to the managing of the life cycle of a case or trial more effectively and refers to the systems by which courts assume closer administrative control over the case processes than is traditionally associated with litigation.

The court is an organ of the Judiciary presided over by a judge, judges, or a magistrate where criminal or civil cases are adjudicated.

Court Users Committees (CUCs) are platforms that bring together actors and users in the justice system to enhance the multi-sectoral approach to access to justice.

Delay inordinate time is taken by the court to determine a case.

1.6 Theoretical Framework

The concept of access to justice through the formal processes of the law is a theory practised by most modern judicial systems. The concept is drawn from the ancient philosophies of Socrates and Plato and was developed by both the natural school sociological school of law theorists that included Thomas Hobbes, John Locke, John Rawls, and Jean Jacques Rousseau. The theory of justice encompasses the concept of a social contract as its main principle in fairness. In a just society principles of justice, equality, fairness, and freedom are secured and

are not influenced by policies and social interest. John Rawls talks of the main structures of society as being in the way in which the main institutions (political and social) of society fit together. He propagates the idea of an independent Judiciary which will result in fairness and equality of opportunity[14]

Rawls is primarily known for his theory of justice as fairness conceptualized justice from the perspective that persons are free and equal[15]. He further asserted that justice is the first virtue of social institutions as truth is of the system of thought. As for Rawls, the rule of law is based on adherence to a system of procedural rules. He calls for equality in the application of the law in society within the systems governing society[16]. The governing society was conceptualised in the theory of governance as a social contract.

The social contract is a theory propagated by the natural law philosophers most notably John Locke, who saw the system of governance as an agreement between the sovereign and the society. This is where the society submitted to the sovereign as its ruler, it is a theory generally based on consent[17]. According to Locke, the majority creates a government that is supposed to act in the protection of the natural rights of individuals in society. To Locke, all men were free and equal and they lived in a state of nature where they pursued their interests. In this state, Locke stated that there was a need to secure an individual property from the state of nature[18]. Herein then falls in the social contract where man surrenders his authority to the government and the law[19]. The government enacts the laws which are adjudicated by judges and enforced by the executive. On his part Jean- Jacques Rousseau opined that the reason society was

[14] John Rawls, *Justice as Fairness: A Restatement* (2001) Harvard University Press <https://books.google.co.ke/books accessed on 9 January 2019
[15] *Ibid*, pg 3
[16] Brian Bix, Jurisprudence: Theory and Context, (7th edn, Sweet and Maxwell 2009) 113
[17] Ibid
[18] Adrienne E Van Blerk, Jurisprudence: An introduction, (1st edn 2002)19
[19] Bix n15, 109-110

afflicted by greed, competition, and inequalities was because of civilization and population increase hence competing interests heightened between the social classes[20]. He advocated for reciprocated duties where the sovereign is committed to the good of the people and each individual is committed to the good of all. It is on these principles that John Rawls propagates justice as fairness in attempting to answer the question of a 'socially just' as a means of distributing public goods. Through his difference principle, he brought into the social contract debate where social inequalities need to be addressed thus birthing the concept of social justice where social and economic inequalities are to be viewed in a manner that gives benefit to the most disadvantaged members of the society.

The Constitution of Kenya at Article 10 (2) encapsulates the principles of good governance to include the rule of law, participation of the people, equity, social justice, inclusiveness, equality, human rights, non-discrimination, protection of the marginalised, good governance, and sustainable development. All these principles have been identified in the works of Locke, Hobbes, and Rousseau who recognize rules as necessary for people to cooperate to create social and individual good within society. These rules are governed by institutions that exist in sovereign nations. These institutions include the Judiciary as the organ principally mandated to interpret the law and adjudicate disputes. The Judiciary exists in society and it is a tool of access to justice. It is for this reason that the study relies on the social contract theory as postulated by John Locke and the theories of justice by John Rawls, with necessary modifications to fit modern-day Kenya.

[20] Benjamin Nwabueze, Constitutionalism in the Emerging States (C Hurst & Company 1973)

1.7 Research Methodology

This study will be carried out using a qualitative method where secondary data will be used to analyse the status of interagency collaboration in the justice sector as well as the caseload trends. This information will also answer the research question, fulfil the project writing obligations, and ultimately test the research hypothesis.

The research will use sources such as library materials in form of statutes, treaties, and conventions; books by key authors; Journal articles, sessional papers, and policy documents. Research materials and data were accessed from constitutional bodies, statutory government agencies, and international organisations publications such as the UN and EU, and specialised agencies in the governance sector. The NCAJ secretariat where the researcher was a consultant was a useful source of materials used in this study. The department of performance and planning of the Judiciary was utilised for the data collection and analysis as regards access to justice in Kenya. The study also quotes works from scholarly writers on access to justice through public participation for sustainable development. Finally, the African, European, and Asian contextual experience of Court Users Committees will be reviewed comparatively.

1.8 Literature Review

The saying that Justice delayed is justice denied had been a reality in the Judiciary of Kenya before 2010. The literature review on case backlog has not been extensive on what has been done by the judiciary together with its partners. There have however been many reports of initiatives by stakeholders in the justice sector towards reducing the time taken in the conclusion of cases in courts. The study will hence conduct a literature review that will seek to answer the research question by dividing the literature review into four sub-themes. That is, Access to justice as a good governance concept; the theories underpinning the concept of access

to justice; the phenomenon of case backlog and its effects; and Interagency cooperation in enhancing access to justice.

1.8.1 Access to justice as a good governance concept for modern democracy

According to Cheema and Maguire[21], governance is a neutral concept that is constituted of intricate mechanisms, practices, dealings, and bodies that exist as a channel for citizens and other interests to express their interests, exercise their rights and obligations and arbitrate their disagreements. In their publication they note that good governance relates to the distribution and control of resources as a response to common problems; it is featured in the ideologies such as participation, transparency, accountability, rule of law, effectiveness, equity, and strategic vision. Practically they translate these principles into certain tangible things—such as free, fair, and regular elections; a legislature that is fairly represented and that carries out its role of making laws and providing checks and balances; and the sovereignty of the judiciary. They also translate into the promise of human rights and the rule of law, and the integrity of these institutions. According to the duo, good governance also devolves power and resources to local governments to encourage and strengthen public participation. It is in this analysis that the jurisprudence of participatory democracy that was imbued in our constitution shall be discussed. Participation which is also coined as a good governance principle is ever-present in the legal system. The road that the Kenya Constitutional reform campaigners made towards judicial reform was a strategy to enhance judicial credibility and accountability by advancing its democratisation and decentralisation.

Yash Ghai[22] in looking into the objectives of the 2010 Constitution observes that the Constitution propagates for the rule of law and democracy, human rights, and fundamental

[21] Cheema, S.G. and Maguire, L. (2004) *"Democracy, Governance and Development: A Conceptual Framework"*, New York. United Nations Development Programme

[22] Yash P.Ghai (2014), "*Constitution and Constitutionalism: the Fate of the 2010 Constitution"*,(Kenya: The Struggle for a new Constitutional order) Zed books, P118-127

freedoms to regulate coercive power of the State and protect the people. He goes on to define democracy for Kenya as a balance of different interests of communities and the preservation and promotion of the Constitutional principles. He highlights that the Constitution creates participatory democracy which is observed continuously. This people power is reflected in Articles 10(2) (a), 118 and 196(a) where there is the stipulation of access to court and other institutions that receive and deal with complaints; and most important he notes it keeps reminding the people that sovereignty lies with them.

John Rawls[23] relates the rule of law to 'liberty'. Rawls encourages the systemic and fair administration of public rules which is the epitome of a just legal system symbolised by the legitimate expectations of the people. According to Rawls several measures have to be put in place for the rule of law to take effect. These are: the element of the possibility of legal requirement; utmost good faith on the part of the legislature; fairness and equality in the application of the law; laws must be publicly promulgated; rule against retrospective application of the law; lastly the systems must respect the dictates of natural justice. The rules of natural justice are common law rules applicable in Kenya. Justice needs to prevail so that those affected by it are dealt with justly.

According to Hilaire Barnett[24], for the rule of law to be respected and applied, the legal process-civil and criminal-must exhibit certain features. These are accessibility, the law must be accessible to all if rights are to be enforced. Accordingly, there must exist a system of the court that is both available locally and the cost of having recourse to courts must be such that it is real-rather than symbolic-access to the courts. Secondly, there must be procedural fairness.

[23] John Rawls, extracts of 'Theories of Justice' in Michael Freeman FBA, Lloyd's Introduction to Jurisprudence (9th edition) Sweet and Maxwell 2014 p481-492
[24] Hilaire Barnett, Constitutional & Administrative Law(5th ed),Cavendish Publishing 2004

Justice and the rule of law demand that, in the conduct of legal proceedings procedural fairness must be observed. Others include the credibility of evidence and impartial judicial officers.

The Handbook on European Law Relating to Access to Justice[25] lays out the legal principles of access to justice by focusing on the European Union. The handbook references the rights as enshrined in the European Convention on Human Rights (ECHR) as adjudicated by the European Court of Human Rights (ECtHR) and the Charter of Fundamental Rights of the European Union, as adjudicated by the Court of Justice of the European Union. In both the Council of Europe and EU law, the right of access to a court is taken connote that courts ought to be accessible. The concept of accessibility here includes the existence and convenience of the court within the relevant jurisdiction, the available legal analysis, access to information, and the accessibility of the court's outcomes. In certain circumstances, it will also give regard to the physical accessibility of the court if it is situated in areas where the applicants may have a challenge in fully participating in its proceedings.

The right of access has the condition that seeks to limit it. For instance, putting measures in place to ensure their cases in court are handled judiciously can advance the proper administration of justice. Moreover, the condition to pay court fees are aimed at discouraging frivolous claims or are pegged on ensuring the proper running of the court. However, these conditions must not prejudice, "the very essence of the right". The EU law talks of reasonable time spent by litigants in accessing the independent bodies and tribunals as a measure of access to justice. This is an important rule that cuts across civil, criminal, and administrative law. This is a crucial facet of good governance for the Judiciary.

[25] European Union Agency for Fundamental Rights and the Council of Europe publication (2016)https://fra.europa.eu/en/publication/2016/handbook-european-law-relating-access-justice accessed 10 August 2019

Dr. Laibuta I Kibaaya[26], in his doctoral thesis views justice as a continuum of principles and values rather than an end in itself. These principles include the ability to realize the right to full and equal access to the protection of one's entitlement by the law enforcement agencies without undue delay and expense of technicalities; ease of entry into the Judicial system and the availability of physical judicial institutions with an appropriate alternative to conventional dispute resolution mechanism; less resource-intensive pre-trial protocol and civil process of claim adjudication. Affordability of competent legal representative in the adjudication process; the principle of equity and efficiency; cultural appropriateness and conducive environment within the judicial system; and expeditious processing of claims and timely enforcement of judicial decisions.

1.8.2 Theorizing the concept of access to justice

In theorizing access to justice the study will analyse Faisal Bhabha's[27] publication in referring to the contextualisation of the five waves in the evolution of 'access to justice'. He notes it began in 1960 with the focus on access to lawyers and the courts through legal aid. This led to institutional redesign through the 1970s focusing on the judicial system and the criminal justice process. The third wave was in the 1980s that saw the 'demystification of the law' which was inspired by the equality imperative. It included some measure of substantive access to justice. Especially in property, family, and criminal law reforms and the emergence of Alternative Dispute resolution (ADR). The 1990s brought about the fourth wave of 'preventive law' which saw fresh approaches to ADR and the expansion of access to justice to justice beyond the judicial system. Finally, the fifth wave began in the year 2000 focusing on the comprehensive, equally oriented approach that seeks to empower citizens through the law.

[26]Kibaara I Laibuta, "*Access to Civil Justice in Kenya an Appraisal of the Policy and Legal Frameworks"* (2012)(Doctoral Dissertation, University of Nairobi)
[27] Faisal Bhabha," *Institutionalizing access to justice' judicial legislative and grassroots dimensions"* (2001) 33QLJ 139

Secondly, the study shall rely on Brian H. Bix[28] and MDA Freeman[29] in encapsulating the theories of justice and democracy as enunciated by the renowned ancient philosophers.

1.8.3 Phenomenon of case backlog and its effects

The study will look at the Report of the Taskforce on Judicial Reform (Ouko report), the various Annual State of the Judiciary Report from 2015 to 2018, and the Governance Justice Law and Order (GJLOS) report where there are discussions on interagency coordination in the reform of the justice sector. The said reports provide a wealth of recommendations on the establishment of court users committees but they do not have key recommendations on how to measure the effectiveness of these committees. From these reports, the study shall put a case of CUC utilisation and effectiveness in case of backlog reduction through various interventions such as mediation, alternative dispute resolution, case management measures, and accountability checks which lack in the publications.

The effects of case backlog are usually felt by the users of the court. To highlight the effects, the research looked at the report by the Report by the European Union on backlog reduction programmes and weighted caseloads for southeast Europe[30]. The report notes that in backlog reduction programs, court efficiency and effectiveness are sometimes considered as competing with the quality of justice, but this is a misrepresentation of the facts since they are factors that constitute the overall concept of justice. Truly the most tangible outcome of justice indeed comes from a fair decision in due time since "the exercise of legal rights is always devalued if delayed". The excessive length of judicial proceedings is both "a disease that requires specific treatment and a symptom of unhealthy conditions" of the judicial process. It further gives an empirical analysis of various jurisdictions as regards backlogs and measures put in place. One

[28] Brian H. Bix, "*Jurisprudence: Theory and Context*,"(7th ed) sweet and Maxwell 2015
[29] Michael Freeman FDA, Lloyd's Introduction to Jurisprudence, (9th ed, Sweet & Maxwell 2014) p482
[30]Philip Langbroek, Matthew Kleinman," *Backlog Reduction Programmes and weighted caseload methods for South East Europe, two comparative inquiries"*,(2016) Regional Cooperation Council (RCC) www.rcc.int accessed on 10 January 2019

of the considerations being the formation of accountability checks through the court users themselves.

The report on the case backlog reduction Committee of Uganda[31]gives an analysis of case backlog reduction measures among some commonwealth countries including Kenya. This report shall be used by the study for comparative analysis as it touches on the periods that the Judiciary of Kenya also gives a weighted analysis of case backlog in the judicial system.

1.8.4 Inter-agency cooperation in enhancing access to justice

The elements of interagency coordination can be found in the Constitution of Kenya. The Constitution implores the governance structures to coordinate and create inter-agency relations for efficiency and accountability. This was one of the issues that were given credence during the judicial reform process from 2010 that lead to the enactment of the Judicial Service Act.[32]The Act has various provisions to enhance the proper administration of justice as one of the recommendations from the Ouko report of 2010. It speaks of Inter-agency coordination through the National Council on the Administration of Justice (NCAJ) which manages the CUCs. This agency shall be explored in this study. Further to this, the Judiciary published strategic plans that incorporated elements of interagency coordination. These strategic plans the Judicial Transformation Framework (JTF)[33] and the Sustaining Judiciary Transformation Framework (SJT)[34].In having these strategies the Judiciary was seen to be implementing some of the recommendations from various pre-2010 reports on the Judiciary. Most of these recommendations touched on the incessant delays in court. The reality is that each day new cases are filed as others are finalized however, the reforms were supposed to reduce the

[31] Judiciary of Uganda Report, 2017
[32] Cap 185B of the laws of Kenya
[33] Judiciary of Kenya accessed from www.judiciary.go.ke
[34] Ibid

instances of delays. The study will explore the framework and strategies of this inter-agency coordination and its effectiveness in case backlog reduction.

The Vision 2030[35] political pillar envisages "a democratic political system that is issue-based, people-centered, result-oriented and accountable to the public". Vision 2030 envisages a nation with a democratic system that mirrors the hopes and desires of its citizenry. It visualizes Kenya to be a country where equality is prevailing without discriminating against anyone on account of race, ethnicity, religion, gender, or socioeconomic status; a country that values and seeks to develop the cultural values, traditions, and aspirations of its people for the benefit of all. The vision's Second Medium Term Plan 2013-2017 themed 'Transforming Kenya: a pathway to development, socio-economic development, equity, and National Unity' places the Judiciary under the governance, GJLOS. In this thematic area, the Judiciary's transformation was placed as one of the flagship projects. The main goal is to transform the Judiciary into an independent but complementary partner with other areas of government, institutions of justice as well as the relevant stakeholders. Part of the transformation that was envisaged was to deal with the problem of case backlog as a way to stir socio-economic development. This has been ongoing with heightened incidences of multi-sectoral approaches to deal with court delays. The study shall seek to highlight the progress of this intervention.

Lastly, Marilene Lorizio[36] has related economic growth with efficiency in the justice sector. She notes that economic growth depends on commercial variables, institutions, and the amount of public trust meted in the institutional powers. Notably, countries with above per institutional stability measurements and per capita income, grow faster than those with a low level of institutions. The focus shall be on the conclusion that economic performances are influenced

[35] Kenya Vision 2010 accessed from https://vision2030.go.ke/ 20 August 2019
[36] Marilene Lorizo, *"Efficiency of the Justice and economic Systems"*(2013) Procedia Economics and Finance 17(2014) 104-112 www.elsevier.com/locate/procedia accessed 10 august 2019,

by the legal and judicial system, capable of forming the rules of the game. Today societies are run by the rules and regulations that are operational within their formal legal structures, that include institutions that recognize and apply both codified norms and informal ones, such as customs, habits, informal rules, moral codes, routine, and so on. Giving due regard to the effect these rules and regulations have on the commercial enterprise is critical in current economic realities. Additionally, an economy facilitates the recognition of those variables that are, in each country's structure, the reasons for a formal trial process, the process of litigation itself and the costs, to give assurance on the impact of the various legal and judicial systems and which principles they should adopt to spur economic growth. It has been accepted that the rules are significant and have a big impact on economic growth. Therefore the Judiciary's continuous problem of the case backlog will be studied in vis a vis its impact on the economy.

These materials shall form the basis of this study and shall further be used to answer the research questions and form relevant recommendations.

1.9 Limitations

The study will be conducted through a desk review and interviewing the NCAJ secretariat instead of issuing questionnaires and having focused group discussions with all the stakeholders in Milimani Law courts.

The survey would have also employed two research assistants to assist in issuing questionnaires.

1.10 Hypothesis

1. Dispensation of justice in Kenya's first and second instance court does not rely on interagency partnerships

2. Interagency partnership is necessary for the quick dispensation of justice in Kenya's first and second instance court
3. There is a relationship between interagency partnership and the dispensation of justice in Kenya's first and second instance court

1.11 Chapter Breakdown

The study is spread out in five chapters namely:

Chapter One introduces the study by stating the basis. It further comprises the background, the statement of the problem, justification of the study, research objective, and limitation of the study, literature review, theoretical framework, study hypothesis, and research methodology.

Chapter two is on the conceptual framework/theoretical framework of access to justice. The chapter will look at the philosophises of democratisation and decentralisation of governance structure. A historical look at judicial reforms will be highlighted to cast light on the democratisation of the Judiciary to advance access to justice. It is in this chapter where the judicial structure and the role of the CUC will be explored as a product of democracy.

Chapter three is focused on a case study of Milimani/Machakos CUCs. In the chapter, there shall view of the structure, operations, and effectiveness of CUCs as regard case backlog reduction. Data Tabulation will also be presented for the CUC in the study.

Chapter four will entail a comparative analysis of interagency coordination presently in other jurisdictions. A look at the approach by Uganda and the European Union countries shall be a build-up to the recommendation.

Chapter five will discuss the findings of the research and analysis and the recommendations

CHAPTER TWO

THEORETICAL FRAMEWORK IN ACCESS TO JUSTICE THROUGH THE JUDICIAL SYSTEM

2.0 Introduction.

To contextualise the role of the Judiciary in a democratic society this chapter shall explore the theories of democracy and decentralisation of governance structures. This shall lead to a discussion on judicial reforms that culminated in the 2010 Constitution and the enactment of the Judicial Service Act. The role of the judiciary in enhancing the Constitutional principles of governance vis a vis the CUCs will be discussed.

2.1 The Principles Underlying Access to Justice

As concluded earlier access to justice presented itself through waves. In this analysis, one can denote that those typologies reflect how access to justice cannot be contained in one static definition. This is because the law as is applied in society keeps changing and so is the normative framework that access to justice flows in. Therefore, the study will focus on access to justice as it is laid in the principles as prescribed by Laibuta as encompassing the following:

1. The states laid out a mechanism to ensure that to the right to full and equal access to the protection of individual rights through the law enforcement agencies without undue delay, expense, or technicalities. This being on the basis that the state will capacitate and institutionalise a legal aid scheme to guarantee access to the law and its institutions by the poor;
2. An easily assessable justice system and the availability of judicial infrastructure and resources with applicable alternatives to our common law dispute resolution mechanisms;

3. Inexpensive and equally accessible pre-trial practices and civil process of claim n adjudication;
4. The presence of skilled legal representation during adjudication proceedings;
5. Systems that are culturally sensitive and favourable environment within the judiciary's structures; and
6. Expeditious processing of orders of the court, executions, and timely enforcement of judicial decisions[37]

As Prof. Gahi put, it the Constitution is loaded with the sovereignty principle starting with Article 1 where all sovereign power in all the people of Kenya. This sovereign power is further delegated to state organs which are Parliament, the Executive, and the Judiciary[38]. This advances Hobbesian theory where he recommends the delegation of power of the people to the state through its organs. These are institutions that govern the various aspects of government in Kenya with the Judiciary being considered an avenue for adjudication of disputes.

2.2 A Case for Collaboration in Governance Management

At the onset of the final third of the twentieth century, there was a shift in the trending governance topics away from conflict. The so-called 'wicked problems' began holding central governments accountable. These problems that included environmental degradation, urban economic development, and public health became the next challenge for central governments that were operating in single units. The philosophy of hierarchy that imbues top-down leadership strategies failed when presented with such problems that could not be resolved through a unilateral application of the rules.[39] The failure of this style of leadership leads to the concept of governance, as an alternative to government[40].

[37] Ibid n4 quoting Connie Ngondi- Houghton, "*Access to Justice and the Rule of Law in Kenya"*
[38] Article 1(3) of the Constitution of Kenya 2010
[39] 6 Robert Agranoff and Michael McGuire, "*Collaborative Public Management: New Strategies for Local Governments"* (2003).
[40] Bingham, B. Lisa, (2008),"*Collaborative governance: Emerging Practices and incomplete Legal Framework for Citizen and Stakeholder Voice"*, UC Beckeley,< https://escholarship.org/uc/item/8r99f510> assessed on 24 November 2020

Governance advocates for navigating rather than top-down directing, and it presently means a practice that links resources and strategy being utilised in collaborative relationships while involving various entities to achieve a public policy. It may encompass multiple organisations and participants from public, private, and non-profit sectors in a coalition geared towards solving mutual problems. Certain indicators of this phenomenon have come to be termed collaborative public management[41]. Governance is also in certain instances depicted as the inclusion of citizens or those governed in participatory through institutions by incorporating civic engagement; this is participatory governance, characterised by the contribution by the public to the policymaking and administrative functions of the government through deliberation. The norm in collective or public, governance is that the skilled technocrats' do not have conclusive and crucial knowledge on public norms and knowledge[42]. Participation in governance incorporates engagement in any stage of the policy process, including documentation of issues, selection of choices, the ranking of these choices, coming up with policy approach, sanctioning, actualising, and executing the strategic objective[43]. Scholarly works in public administration literature have gone into distinguishing between collaborative public management and collaborative governance[44]. The literature surrounding collaborative governance falls into two categories: one that is primarily on collaboration among organizations, and a second that structure through the known or traditional concept of civic engagement and ways for citizens to participate in governance. The tragedy is that neither of these literature interrogates the processes for collaboration[45]. They largely avoid interrogating the evolution of dispute resolution and deliberative democracy as key undertones that contributed to the evolution of governance[46]. As noted by Joanne more recently scholars narrowed on the terms "the new governance" in recognition of the evolution away from command-and-control hierarchy to "a new model of collaborative, multi-party, multi-level, adaptive, problem-solving New Governance[47]."

[41] Ibid
[42] Ibid
[43] Ibid
[44] Ibid
[45] Ibid
[46] Ibid
[47] Jody Freeman, The Private Role in Public Governance, 75 N.Y.U.L. REV. 543 (2000).

Professor Jody Freeman on examining the scale of the private actors' role in public governance across the policy field, observes that non-governmental actors engage in both legislative and adjudicative roles[48]. She propagates that public/private collaboration is a movement best unpacked as a set of negotiated relationships in which "public and private actors negotiate over policymaking, implementation, and enforcement." She notes that relevant statutes mostly focus only on the largely address demands incorporated development from the unitary agency perspective. They do not interrogate the fundamental work of agencies except concerning judicial review for ultra vires agency action. They do not dissect the build-up of collaborative networks or other existing channels of concerted public management. They sometimes opt to utilise public participation, for example, issuing notices and inviting comments in rulemaking or public hearings.[49]This then leads to the exploration of public participation as a democratic principle.

2.3 Debunking the Phenomenon of Deliberative and Participatory Democracy

Deliberative democracy is a concept that evolved during, is conclusively too new agreement on an exclusive term. During the discussion of this concept, one will mention terms such as participatory democracy, deliberation and dialogue, deliberative democracy, and to a large extent, collaborative governance. This movement was invoked as a reaction to apparent failures in the representative democracy vis-a-vis conflict over public policy. Several indications by civil society have argued for increased public participation in the policy process[50]. This wave of democracy seeks more citizen deliberation, dialogue, and shared decision-making in governance. Key to the evolution of the many forms of participatory governance are notions of dialogue and deliberation[51]. The discourse on this concept is contrasted with the common law processes of governance present in Kenya, which are debate

[48] Ibid . The author includes among these corporations, public interest organizations, private standard setting bodies, professional associations, and non-profit groups. She however excludes citizens in their individual capacity
[49] Ibid
[50] John Gastil and Peter Levine, the Deliberative Democracy Handbook: "*Strategies for Effective Civic Engagement In The 21st Century* "(2005); Nancy Roberts," *Public Deliberation in an Age of Direct Citizen Participation"*, 33 Arn rev. of pub. admin. 1 (2003).
[51] Ibid

centric. Dialogue requires participants to engage in rational diverse opinions, in an environment of mutual respect and civility, all placed in a perceived middle ground, intending to invoke a common ground or even a unanimous outcome. In a debate, opponents are keen to find the faults in the dispute to have an advantage in an effective rejoinder; in deliberation and dialogue, participants are keen to know the other's perspective and formulate follow-up questions for a deeper understanding. Deliberation is the thoughtful consideration of information, views, and ideas[52].

From this movement, they note that there has been multiplication and experimentation with several of organs and practices which include these movements into the 21st century;

> "*The 21st Century Town Meeting, Appreciative Inquiry, Bohmian Dialogue, Citizen Choice Work Dialogues, Citizens Juries, Compassionate Listening, Consensus Conferences, Conversation Café, Deliberative Polling, Dynamic Facilitation, and the Wisdom Council, Future Search, Intergroup Dialogue, National Issues Forums, Nonviolent Communication, Online D&D, Open Space Technology, Public Conversations Project, Study Circles, Sustained Dialogue, Wisdom Circles, and World Café[53]. And now for the Kenya Judiciary is the Court Users Committees."*

In a deliberative democracy such as ours, there are explicit terms of public participation and inclusion spelt out in the Constitution. Citizens can now as of a right participate in decision-making regarding the protection of their civil liberties. This includes but is not limited to, input on government decisions about rights. To ensure human rights, governments are tasked with engaging and supporting the participation of society on these issues. For our jurisdiction, public participation is a principle that has been given prominence in the Constitution of Kenya 2010[54].

[52] Ibid

[53] Comprehensive definitions for dialogue and deliberation that include a primer of models and techniques on the website of the National Coalition for Dialogue and Deliberation, www.thataway.org. Further mapping the growing field and more description, see also Abigail Williamson, "*Mapping Public Deliberation"*, Cambridge, MA: John F. Kennedy School of Government (2004). It also lists mediation and dispute resolution, processes that can be utilised in large scale participation.

[54] Article 10

It is stipulated in Article 10(2) of the Constitution where national values and principles of governance find a home. This also includes in part principles patriotism, national unity, sharing and devolution of power, the rule of law, and democracy. Public participation as a democratic principle is echoed across the Constitution including Article 69(d), which makes it a requirement for the state to ensure there is public participation. Public participation is equally embraced as one of the principles applied in the devolved functions and the two arms of national and county governments are supposed to involve the public in their key decision-making process.

2.4 Evaluating Judicial Democracy

The adjudication of disputes in the legal system requires that there are efficiency and equality. These elements being akin to promoting the ideals of a just society. This is deduced from Hart's principles of Justice where he notes that justice involves a multiplicity of claims between many people thus this requires legal efficiency or legal functioning[55]. This has however been argued by scholars to be a traditional way of looking at the Judiciary in a modernised society where elements such as globalisation, decentralisation, and participatory democracy reign supreme. Joanne and Susan[56] argued for the shift in solely categorising the judicial role in its traditional role as the interpreter and enforcer of laws. They note that judicial pronouncements resulting from the formal adversarial process such as ours, are the symbol of legitimate and effective judicial intervention. Judges and magistrates rely on evidence, legal arguments, and submissions presented formally in court. This is then deliberated upon in chambers after the conclusion of the hearing after which an impartial ruling or judgment is read out in court. This

[55] Gardner, John, Hart on Legality, Justice, and Morality (May 13, 2010). Oxford Legal Studies Research Paper No. 44/2010. Available at SSRN: https://ssrn.com/abstract=1606463 or http://dx.doi.org/10.2139/ssrn.1606463 accessed on 16th November 2018

[56] Joanne Scott & Susan Sturm, "*Courts as Catalyst: Rethinking Judicial Role in new governance"*, (2006) 13 Colum.J. Eur. L, 567.

process depicts the centrality of the judicial function[57]. This is to a certain extent the status of law and the legal system, complex, poorly understood, and packaged mostly because most court users and consumers do not participate in the normative process. Their role is left to supplying the facts, interpretations from precedents legal texts, and legal arguments. Similarly, for public bodies focus is usually on the evaluation of whether the agency got it right or whether they acted within their authority in interpreting and applying its administrative functions[58]. This according to the due make the law static. Static in a world that is swiftly changing and bringing forth emerging legal issues that require a dynamic and multi-faceted democratic society. A society which according to Roscoe Pound has to respond to the society. It is in their submission that they note that most of the public ills result from social practices and the dynamic interaction between culture, cognition, and context. Therefore the remedial measures cannot be reduced to a single explanatory theory and the rule of law[59]. It is, for this reason, they agree that there is indeed a need for the elements of reflection, participation, adequacy, transparency, impartiality, and principle decision that will need to be considered when needed to determine complex or novel problems of the twenty-first century. They call for judicial involvement as a problem-solving mechanism. Through this mechanism, courts can prompt and create occasions where inquiry and remedial action with relevant non-judicial actors in response to problems on conditions and practices[60]. This will become a way for the court to publicise and gain visibility on the diversity of the forms of governance that are present in the justice system. New governance models invite cross-fertilization from the bench and beyond the bench both of which the courts can bring to the table. Resultantly, the dynamic interaction that is envisaged

[57] Ibid
[58] Ibid
[59] Ibid
[60] Ibid

then introduces democratic governance values of the rule of law, participation, transparency, and reasoned decision making[61].

In continuum, Joanne concludes that full and fair participation is a convergence of principles that are attempt enjoin new governance in its enumerable versions under a single rubric being the participation of all actors. As parliamentary symbolism and mandate of representation weaken in governance, more direct forms of public participation are seen to be key in the development of new governance and enhancing citizen participation. As part of the sociological development, new governance theorists are searching for ways to arrive at a better understanding of how to identify participants and to categorise their participation in a way that reflects these underlying values.

2.5 Decentralisation of the Judiciary

The term decentralisation and devolution has been used interchangeably in Kenya over the past twenty years. For this study, the term decentralisation will be used to reflect the move by the Judiciary to devolve or reach all parts of the country for better administration of justice.

The UNDP notes that decentralisation or decentralising governance should not be the magic bullet in governance challenges, but a means of facilitating a much open, responsive, and highly effective local government that are geared towards improving the existing representative systems of community-level decision making. This is done through mechanisms that encourage local communities and regional entities to manage their affairs, and ensuring that there is are less bureaucratic gaps between central and devolved units, effective systems of decentralised governance enable responses to people's hopes and aspirations are presented, and in the long run, they ensure that government response meets most of the people's social needs[62]. It is also noted that decentralisation encourages governments to look for

[61] Ibid n 40

[62] UNDP, Decentralized Governance Programme: Strengthening Capacity for People -Centered Development, Management Development and Governance Division, Bureau for Development Policy, September 1997, p. 4

programs and innovative policies for two reasons. First, because governance is an innovative practice and second is that through its actualisations, in the decentralisation process the devolved units are supposed to acquire novel and broader responsibilities to provide public services for all[63].

It also views decentralisation as a form of Participatory Mechanisms and Citizen Feed-Back Systems

> ". . . *This approach builds upon the growing trend towards quality control of public service production through citizen and customer participation. Above all, it includes systematic and decentralized citizen quality feedback systems, and in some cases, explicit service obligations by the administration towards citizens within the framework of a citizens' charter, focused upon issues such as timeliness, accessibility, and continuity of services. Moreover, by abandoning administration by rule in favor of results-oriented steering one will create organizational space will be created for autonomous action by units at the local level. Such an approach can, however, lead to the centrifugal segmentation of the administrative system unless monitoring is developed as a medium for collective observation, learning, and self-steering.*[64]"

The report also concedes that decentralisation is a process where there is the redefinition of how an organisation's processes, systems, and dealings fit in the structures of the ordinary citizenry, the emphasis a general sensitization of the public and an increased awareness of costs and benefits, that affect the direct stakeholders, both at the central and local levels, has to be emphasized. Similarly, they opine that the process of decentralization is analysed from this point of view, as an alternative to it being regarded in simple and misinterpreted terms of it being a shift of power from the central to the local government[65]. This definition angles the

[63] Ibid
[64] Ibid
[65] Ibid

setting for the incorporation of CUCs devolved structures of the judiciary which began by judicial reform post-2010.

2.6 History of the establishment of CUCs

The voting in of the NARC government in 2003 saw revived interest in the push for judicial reform as the said coalition had sought election on a reform agenda. External push for such reform was equaled by internal endeavors within the judiciary to reform, albeit, under difficult circumstances. It is in line with these internal initiatives that the Kenya Magistrates and Judges Association (KMJA) in partnership with GTZ (now GIZ) conducted a study which revealed that integrity concerns amounted to less than 10 percent of the concerns of the citizenry on the delivery of justice[66]. The most common concern was with backlogs and the inability of the courts to administer justice without undue delay. The study also revealed that the delays were caused not only by the judiciary but also by other actors in the court system. Following wide consultations, KMJA and GTZ developed three transparent and accountability mechanisms (TAM): Court Users Committees, Citizens Dialogue Cards, and Peer Review Mechanism[67].

The idea of structuring CUCs in the justice system was the brainchild of the KMJA who in 2006 felt this would be the best way to resolve the frustration within and without the Judiciary. In that same year, GJLOS releases a Household Baseline Survey that showed that only 4 percent of the population pursues their legal disputes in court while 96 percent prefer extrajudicial means of settling disputes; This was mostly due to mistrust of the Judiciary coupled with the lengthy and complicated judicial processes, there was also the perception of corruption among the judicial officers and generally the mystic nature of administration of justice[68].

[66] ICJ Kenya, Baseline Survey of the State of CUCs, 2013 p8-9
[67] Ibid
[68] J. Lenaola, "*Public Participation in Judicial Process"*, Kenya Law Reports (2011).

Fast forward to 2008 when the In the year 2008, infamous Post Election Violence occurred and precipitated the leadership of the Orange Democratic Movement (ODM) to question the credibility of the Judiciary by proclaiming their lack of trust in the Judicial process especially concerning election petitions. This resulted in an ensuing political struggle characterised by bloodshed, loss of lives, unemployment, homelessness, and internal displacement by Kenyans mostly because the judiciary it was argued, had clothed itself mystery and limited public participation in its processes.

Accordingly, KMJA was convinced that involving the public in the judicial processes through consultative engagements such as meetings with the various stakeholders would foster mutual understanding, open up the judiciary to public scrutiny and participation in decision making. This would then result in an improved positive public opinion of the Judiciary, as well as reduce the incidences where judicial officers are perceived as perennially corrupt and unfit to serve, to a capable, effective and responsive institution of justice[69].

The drive-by KMJA to get its members to initiate and work with CUCs, together with the enthusiasm and support with which the initiative was met by partners, saw the increased engagement of the judiciary in promoting the workings of the committees. The need to strengthen and establish CUCs is set out in the Judiciary Transformation Framework Programme that was initiated under the first Chief Justice Hon. Willy Mutunga under the current judiciary as established under the 2010 Constitution. The program saw the judiciary undertake a review of the status of the CUCs in all the court stations in the country. Out of the expected returns from 112 court stations, the Office of the Deputy Chief Justice received 86 CUCs status reports by December 2011. The reports indicated that more than 86% of court stations have established CUCs of which 75% were active[70]. For most of the court stations

[69] Ibid
[70] Ibid

without an existing or active CUC, the major impediments to the formation and sustenance of the committees were financial constraints and lack of commitment from other justice sector stakeholders.

Other court stations cited different reasons for inactive CUCs such as newly formed stations and/or districts (e.g. Mukurweini Law Court). In Kiambu, an early decision to form a single Committee for all stations precluded the formation of station level CUCs. However, most stations were in the process of forming CUCs in line with the transformation process[71].

Conversely, Kenyan sovereign initiated access to justice concepts during the judicial reform process. The ripple effect from the Post-Election violence of 2007/2008 meant that there was a gap within the institutions that limited its ability to address the injustices that came about from the aftermath of the bungled elections. This lead to the judicial reform wave in the post-2007/08 and pre 2010 Constitution. The agitation for judicial reform also recommended in the Kriegler report, led to the formation of the Taskforce on Judicial Reforms whose mandate included *inter alia* making proposals for any measures that would address the issue of backlog of cases in the judicial system. The team was also to consider any measures or proposals necessary to strengthen and enhance the performance of the Judiciary[72]. In considering the assignment the team came up with recommendations related to access to Justice that included:

i. The restructuring of courts physical infrastructure to advance the principle of non-discrimination especially for persons living with physical disabilities among other vulnerable persons;
ii. Justice through the court is adjudicated without giving regard to any technicalities;

[71] Ibid
[72] Republic of Kenya, Final Report Taskforce on Judicial Reforms, (5th version), Government Press Nairobi, 2010

iii. The Kadhi's court is regularised by developing formal rules and procedures that will be applicable in court.; and

iv. The practice rules and procedures are subjected to periodic review to ensure their simplicity and efficiency.[73]

Additionally, the Taskforce considered some challenges being faced by the justice sector as a whole. It was reported that, through public views, issues of integrity were the most common drawbacks for *wanjiku's* quest for justice through the formal system. It was surmised that the integrity of the justice system was pegged on the effectiveness, fairness, and efficiency in the functioning of all actors and stakeholders within the sector. Procedural ineffectiveness negates the principles laid out by Bennet on the legal process having the basic two principles of the rule of law. That is accessibility and procedural fairness. These principles were enunciated by J.Mativo *in Li Wen Jie & 2 others v Cabinet Secretary, Interior, and Coordination of the National Government & 3 others* where he noted[74]:

> **"***In the modern state, the decisions of statutory or administrative bodies can have a more immediate and profound impact on people's lives than the decisions of courts, and public law has since Ridge vs. Baldwin been alive to that fact. Procedural fairness has embedded in it the age-old natural justice requirements that no man is to be a judge in his cause, no man should be condemned unheard and that justice should not only be done but seen as done.*"

[73] Patricia Kameri Mbote and Migai Akech, "*Kenya: Justice Sector and the Rule of Law"*, Open Society Initiative for Eastern Africa(2011)
[74] 2017 eKLR

This lacked to a great extent before 2010. The Constitution sought to cure these through the creating of specialised courts starting with the creation of a Supreme Court that would have their stipulated jurisdiction. This is through Article 162 which provides:

"*…The superior courts are the Supreme Court, the Court of Appeal, the High Court, and the courts referred to 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 under that Article."

The ineffectiveness of the justice system was also seen as been caused occasioned by a lack of coordination between the Judiciary and other agencies. It was viewed as a chain-linked problem by other agencies in the sector, such as the Police, Prisons Department, the Probation Department, the State Law Office, and the Bar. In that regards the Task Force heard that in most cases the court delays were was contributed by other agencies other than the judiciary. For instance, there was a presentation on systemic failure existing in various organs such as instances when prisoners and suspects failed to have their day in court due to lack of transportation, failures by officers of the court to make an appearance in ongoing matters, or incessant adjournment of cases due to failure by investigative organs to provide medical or expert reports, bond witnesses, or execute warrants in time. The Task Force was also briefed that unreasonable delay in sentencing was sometimes caused by the failure of police and

probation officers to duly furnish the courts with previous records of convictions and pre-sentencing reports for the accused persons. Finally, as regards the Bar, the Task Force heard that the decline in the efficiency and effectiveness of the justice system was attributable in part to the inability of advocates to play their roles effectively as officers of the court[75].

2.7 Decentralisation of Judicial Reforms

Upon the promulgation of the Constitution the Judiciary sort to reform and enhance access to justice which is its primary. This is also one of the constitutional guarantees in Article 48[76] of the Bill of Rights. A right that was confirmed as a civil right by the Supreme Court in *Hermanus Phillipus Steyn v Giovanni Gnecchi-Ruscone*[77] and further article 159 of the same Constitution in defining principles that courts and tribunals must adhere to in the exercise of their judicial authority provides that "justice shall not be delayed"[78].Dealing with delays was one of the recommendations of the Ouko report. One of the recommendations the Taskforce noted the need for interagency coordination in the justice sector and pushed for the establishment of Court Users Committees (CUCs). It was a strategic plan by the It is this organ that this study reflects on and seeks to establish how the issue of case backlog has improved since the enactment of the Judicial Service Act Cap 185 B. Legislation that is ripe with the advancement of access to justice through various instructional reforms. The Act gives impetus to the spirit of cooperation in government as per Article 6(2) and (3) of the Constitution that states:

> *"(2) The governments at the national and county levels are distinct and inter-dependent and shall conduct their mutual relations based on consultation and cooperation.*

[75] Ibid 43 p109
[76] Constitution of Kenya 2010
[77] 2013 eKLR the Court emphasised that access to justice is one of the fundamental rights in the Constitution of Kenya
[78] Article 159(2)b

(3) A national State organ shall ensure reasonable access to its services in all parts of the Republic, so far as it is appropriate to do so having regard to the nature of the service."

2.7 The law on the formation of CUCs

CUCs are managed under the National Council on the Administration of Justice (NCAJ) which is established under section 34 of the Judicial Service Act. Its overall mandate encapsulated under Section 35 of the Act is to encourage coordination, efficiency, effectiveness, and consultation as mechanisms in the administration of justice and reform of the justice system. Being a statutory organ it has a further mandate of "overseeing and promoting sector-wide partnership through regular Council meetings; issue-based special working committees and the implementation of the recommendations of CUCs. This organ operates by making policies that are geared towards the improvement of access to justice. Its constitutive mechanisms are anchored in the Constitution in Article 159 (2). The article states:"…*In exercising judicial authority, the courts and tribunals shall be guided by the following principles—*

(a) justice shall be done to all, irrespective of status;

(b) justice shall not be delayed;

(c) alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3);

(d) justice shall be administered without undue regard to procedural technicalities; and

(e) the purpose and principles of this Constitution shall be protected and promoted."

To do this the NCAJ developed the Strategic Plan (2012-2016), one of the key Strategic Objectives was to Operationalize Court User Committees (CUCs). To fulfill this mandate, the

NCAJ facilitated the establishment of (CUCs) and further ensured that the CUCs were empowered in their operations.

After the successful establishment of CUCs, the NCAJ saw the number of these committees grow to 128 as of 2018. This number grew out of mainly the success rate publicised among CUCs over the years and the need to establish them not only as a Judicial Performance indicator but as a primary avenue to ensure the judiciary fulfills its Constitutional mandate.

CUCs provide a platform for the Judiciary and other justice sector players to interact with the devolved structures of governance at the National, County, and the Station level. They are formal collaborations between the various justice sector actors who include government agencies and non-state actors. Their specific functions are stipulated in part 6 of the CUC guidelines as follows:

"i. *Propose policy and legislative interventions to the NCAJ Council for the effective and expeditious delivery of justice;*

ii. Implement policies and strategies of the NCAJ Council

iii. Identify needs and challenges from various agencies, that hinder the expeditious delivery of justice and propose effective solutions;

iv. Serve as a platform for promoting and establishing peer review mechanisms among participating agencies;

v. Enhance information sharing and learning among stakeholders;

vi. Propose capacity building for stakeholders on relevant fields of concern to the NCAJ;

vii. Organize and hold annual open days, sensitization events and execute outreach programmes;

viii. Hold fact-finding missions to penal facilities and places of custody including prisons, remand homes, police stations, borstal institutions,

rehabilitation schools, psychiatric hospitals, probation hostels and any other place of detention;

ix. *Prepare and share reports on all CUC activities with the NCAJ secretariat and its stakeholders;*

x. *Promote Alternative Dispute Resolution in accordance with the provisions of Article 159 of the Constitution;*

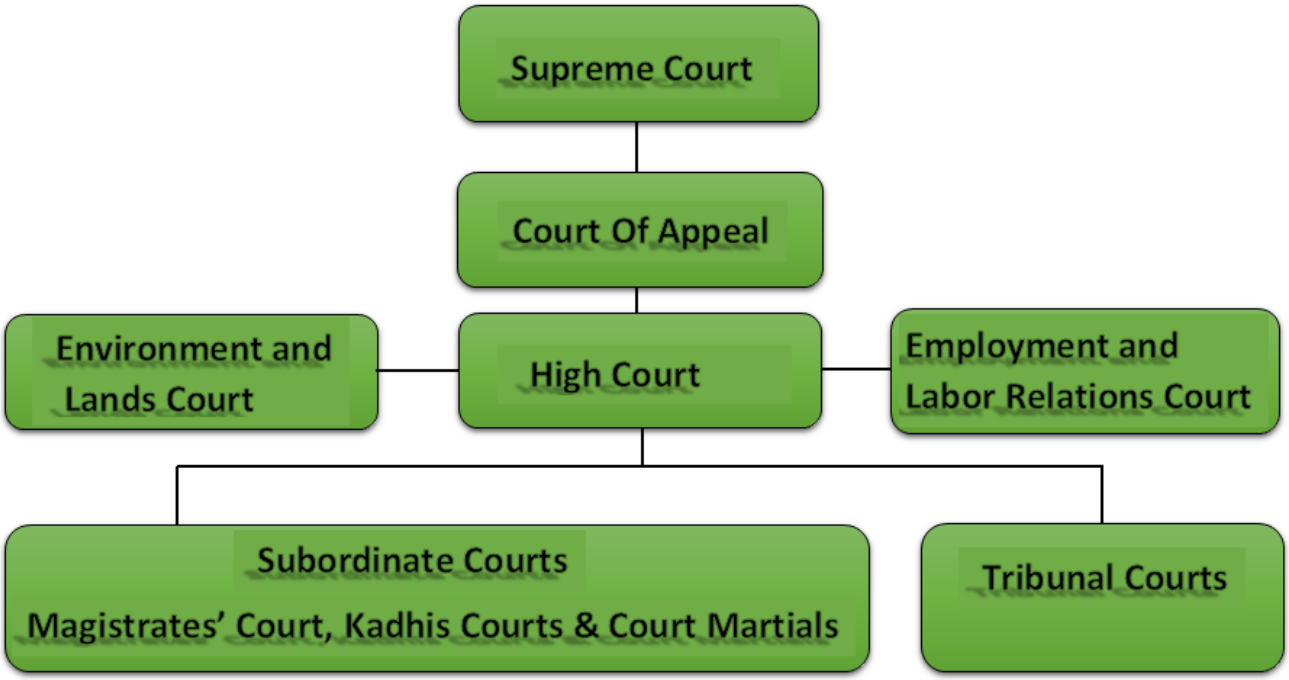
xi. *Promote justice and rule law initiatives; and*

xii. *Engage in any other activity to enhance access to justice."*

CUCs have additional mandates that include them being forums that nurture relationships among the justice sector stakeholders. This being a historical need born out of the Judiciary's perceived mystic nature that is upheld by the public. Secondly, they are forums where stakeholders have an opportunity to learn and adapt especially as a form of peer review, inculcating performance targets to alleviate bottlenecks in access to justice. Thirdly, they are mechanisms on which form part of the Judiciary transformation that began with the Judiciary Transformation Framework 2012-2016 (JTF).

To appreciate the presence of CUCs one has to look at the structure of the Judiciary of Kenya.

Figure 1



Each court except the Supreme. The Court Court of Appeal and the Tribunals as shown above has a CUC. The statistics from the State of the Judiciary Annual Report for the period between 2015 and 2018 showed an average of 120 active CUCs across the country[79].

To complement the NCAJ strategy the Chief Justices Mutunga and Maraga employed the multi-agency coordination approach through his offices by championed it in their strategic plans. In the Sustaining Judiciary Transformation Framework (SJT) it was noted that the judiciary through the Judiciary Transformation Framework 2012-2016 (JTF) had been implementing some of the recommendations from various reports on the Judiciary. The primary goal being the reduction of case backlog. Thereby the recommendations ranged from those regarding human resource capacity that is, the increase in the number of Judges, Magistrates, Researchers, and judicial staff to the improvement of case management practices, improved access to court by the opening of new courts and introduction of mobile courts; the introduction

[79] Judiciary, State of the Judiciary annual Report 2015/2016,2016/2017 and 2017/2018

and enactment of a Small Claims Act; embracing the use of Alternative Dispute Resolution; use of technology in court processes; the revision of various laws in that included, the Criminal Procedure Code, the Anti-Corruption and Economic Crimes Act, and the Civil Procedure Rules; improved coordination with other government agencies and initiation of interactive public education initiatives as regards court processes[80]. Some of these transformations especially, capacity building and dissemination of information are being advanced through CUCs.

2.8 Conclusion

The foregoing theoretical frameworks connote that access to justice is indeed a fundamental human right that is wielded through state organs. It is therefore the role of the state to advance it as part of the social contract theory. It is also resolved through the discussions by the participatory governance is ideal for an evolving legal regime. Therefore, principles of equality, fairness, and expeditiousness in the legal process is a common indicator of how well the justice system is serving its citizens. The constant delays experienced in the judicial system has been an unending reform agenda in the country. It is upon the Judiciary and all the justice sector actors to resolve it to advance access to justice.

[80] Ibid (n 3) pp 19

CHAPTER THREE

A CASE STUDY OF MILIMANI CUC AND ITS ROLE IN CASE BACKLOG REDUCTION

3.0 Introduction

Access to justice as a human right is a fundamental and constitutional mandated goal of the Judiciary. This is spearheaded through the court system that is required by the Constitutional, to dispense justice to all. Without unreasonable delay and undue regard to technicalities. To accomplish this, the Judiciary restructure its administration of justice by introducing policies that lead to organisational structure. These policies are contained in the initial Judicial Transformation Framework (JTF) and now the sustaining Judiciary Transformation and the Judiciary Strategic Plan. These policies go into institutionalising CUCs by activating the NCAJ.

On its part, the NCAJ went into its initial strategic plan from 2012 which was to establish CUCs in all court stations. Their main task being case backlog reduction. This chapter will analyse the impact that CUC has had in case backlog reduction strategies in Milimani High Court. This Court is arguably the largest court station in the country both structurally and the caseload it handles. The Focus of the study will be the criminal division this is because data from the Judiciary shows that in the Financial Year (FY) 2017/18, a total of 402,243 cases were filed in the Judiciary out of which 283, 788 were criminal cases and 118,455 were civil cases. In the same period, a total of 370,488 cases had been concluded in all courts which consisted of 243,821 criminal cases and 126, 667 civil cases. Also, there were 553, 187 pending cases during that period comprising of 219, 686 criminal cases and 333, 501 civil cases[81]. Further, according to the report the age of pending cases that were recorded were categorised to between 3- 5 years.

[81] Ibid n11 p 19,20

3.1 Structure and operations of the Milimani High Court CUC (Criminal Division)

The High Court of Kenya is established under article 165 of the Constitution and is administered and organised under the High Court (Organisation and Administration) Act no. 27 of 2015. The court enjoys unlimited original jurisdiction in criminal matters it, therefore, serves a large number of stakeholders in the criminal justice system. The administrative units include the main criminal division, the Anti-corruption division, and the Traffic Division.

The Milimani CUC is headed by the Presiding Judge. The other office bearers are the deputy chairperson, the secretary, and a treasurer who are all elected into office by the membership. However, there is a CUC practice across the country that the secretary and the custodian of all the CUC documents are usually from the Probation Department.

The CUC has membership represented from the other judges and magistrates in the division, The Office of the Director of Public Prosecution (DPP); The National Police Service; The Kenya Prisons Service; Probation and After-Care Services; The Witness Protection Agency (WPA); The Representative of County Government; The Commission on Administrative Justice(CAJ); The Independent Policing and Oversight Authority (IPOA); The relevant Constitutional Commissions; The Department of Children Services (DCS); the Nairobi LSK branch; The Ethics and Anti-Corruption Commission; Superintendent of the Nairobi county hospital; and Special interest groups that include Non-governmental Organisation (NGOs). The membership is usually not less than 35[82].

Operationally the CUC is required to meet at least once every quarter of the government FY. The meetings have to be documented and representative in terms of membership. The meeting

[82] NCAJ CUC Guidelines Revised 2019

agenda usually arises from emerging issues of the CUC however there are overriding objectives that form the focus areas as indicated in the CUC guidelines. Once the CUC has had a meeting they are to have required to inculcate their follow-up mechanism for each issue discussed until it is resolved. For instance, if the agenda was a discussion on delays in presenting prisoners in court it is expected that the officers in charge would respond and members would brainstorm on a probable solution[83]. This enhances accountability and strengthens the peer review mechanism that is semi-formal. These solutions or recommendations that will be discussed in the meeting are envisaged to ensure that chain of access to justice stays unbroken as well as foster efficiency.

Another way of holding CUC accountable is by requiring that they have annual workplans that advises the budgeting process for the Judiciary. The process advises the allocation of funds for the CUCs. The Milimani CUC receives funding for its quarterly meetings through judicial through this process hence ensuring its operations are sustained. Once the funding is disbursed it is upon the Chair of the CUC to call for meetings. The minutes of the meeting will then be prepared and sent to the NCAJ secretariat who are supposed to review and identify needs and challenges from various agencies, which act as a bottleneck to the expeditious delivery of justice and recommend effective solutions. They are also supposed to highlight the policy recommendations emanating from the CUC. These needs and challenges form the basis for the NCAJ's intervention.

As an illustration, it was reported that in the year 2017 there was a cross-cutting problem of coordination between the Police and Prosecutors that resulted in court delays. This was against a projected CUC workplan output for 2017 of improved Case Clearance rate. There was an equally laid out plan of activities to realise these include engagements that specifically target

[83] Analysis deduced from CUC minutes at NCAJ secretariat and participation in various CUC meetings.

the Police and Prosecution as the lead agencies. These activities included: Applying and executing a warrant of arrests within 3 months; Availing Police files on time; Providing witness statements on plea date; Bonding of witnesses within 7 days; timely service witnesses summons; production of accused persons and those in remand in court on time; and Proper storage, preservation, and availing of all exhibits. Against the emerging issue of lack of coordination, the CUC felt that their workplan would not be successfully implemented. To address this the NCAJ organised workshops for these agencies under the auspices of the Milimani CUC whose outcomes were to improve the synergy and reduce delays[84]. The workshop was designed to be as interactive as possible and at the end of it, there were action points that were to be implemented within the next 3 months before another forum would be organised to review the progress. From this intervention and others of similar nature, one would expect a reduction in case backlog in Milimani in the FY 2017/18. However, a look at the data as presented below the situation gives a different conclusion.

3.2 Caseload Analysis

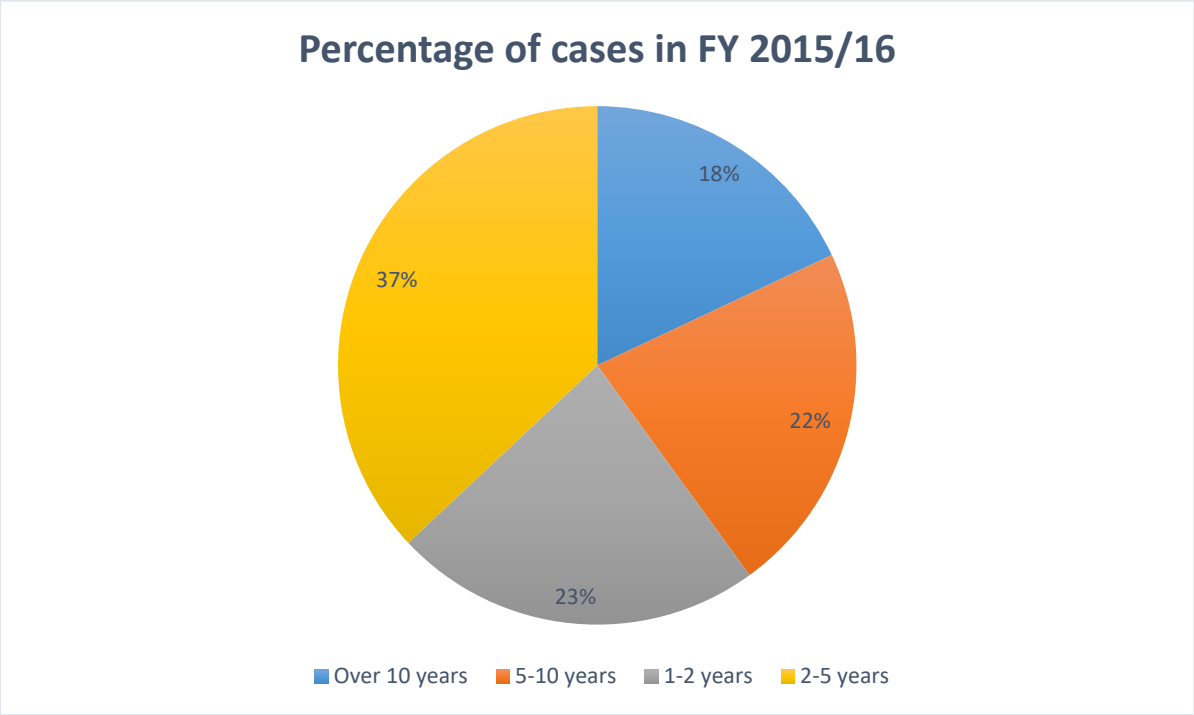
According to the State of the Judiciary Annual Report (SOJAR) of the FY 2016/17, the number of criminal cases pending in the High court was 3161[85] , and in the same report of FY 2017/18 the number 3694[86]. Most of these cases according to the report were aged between - years. They, therefore, fall in the backlog category. Notably, the report also indicates that the major complaint from the public to the Judiciary's ombudsman was on slow service by the court with 25 % of respondents categorising it as the biggest challenge they face[87]. This data, when tabulated empirically along with other divisions, paints a grim picture of the issue of the backlog and reasonableness in delay. The High Court has not pre-set timelines for the

[84] Sourced from NCAJ reports
[85] SOJAR 2017/18 at p37
[86] SOJAR 2017/18 at p 36.
[87] SOJAR 2017/18 at p15

determination of cases according to the active case management guidelines[88]. The timelines set at the pre-trial conference can be reviewed by the court at any time during the proceedings and may also be affected by factors beyond the court's cognition. However, this has not stopped other Nations to set timelines as shall be analysed in chapter 4.

The data on the extent of the backlog reported that during the FY 2015/16 was that the total case backlog (that is cases over one year old) stood at 344,658. Out of these, 79,757 were aged between 1-2 years old; 125,633 cases were aged between 2-5 years; 76,832 cases were over 5 years and 62,424 cases were aged 10 years and above[89].

Figure 3



Statistically, in the FY 2016/17, the total case backlog was reported to be 315,378 cases. Out of these,83,046 cases were aged between 1-2 years; 113,766 cases were aged 2-5 years; 66,214 ranged at 5-10 years and 52, 352 cases were over 10 years in age from the filing date. The

[88] Judiciary of Kenya, Case Management guidelines
[89] Judiciary, State of the Judiciary annual Report 2015/2016 p38

Magistrate Courts and High Court had the highest case backlog at 199,536 cases (63 percent) and 94, 686 cases (30 percent) respectively[90].

Finally, in FY 2017/18, the total number of cases classified as backlog stood at 327,928 cases. Out of these cases, 55 percent were aged between 1 and 3 years, 23 percent between 3 and 5 years and 22 percent were over 5 years[91]. This is illustrated in figure 2 below.

Figure 4

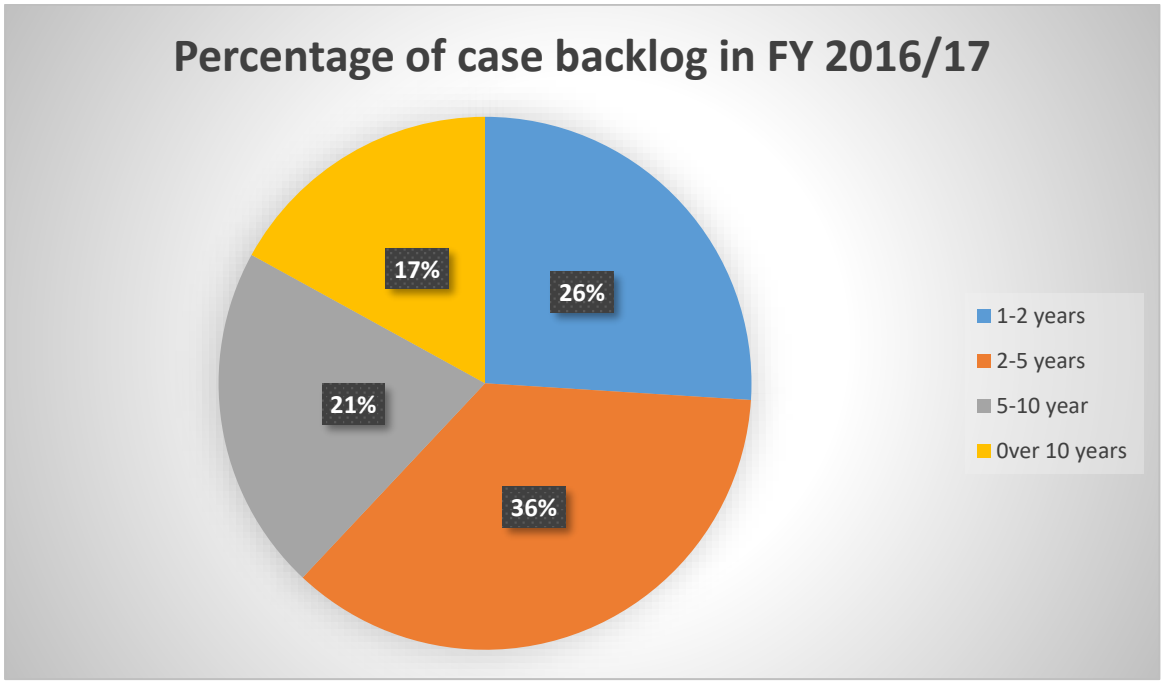
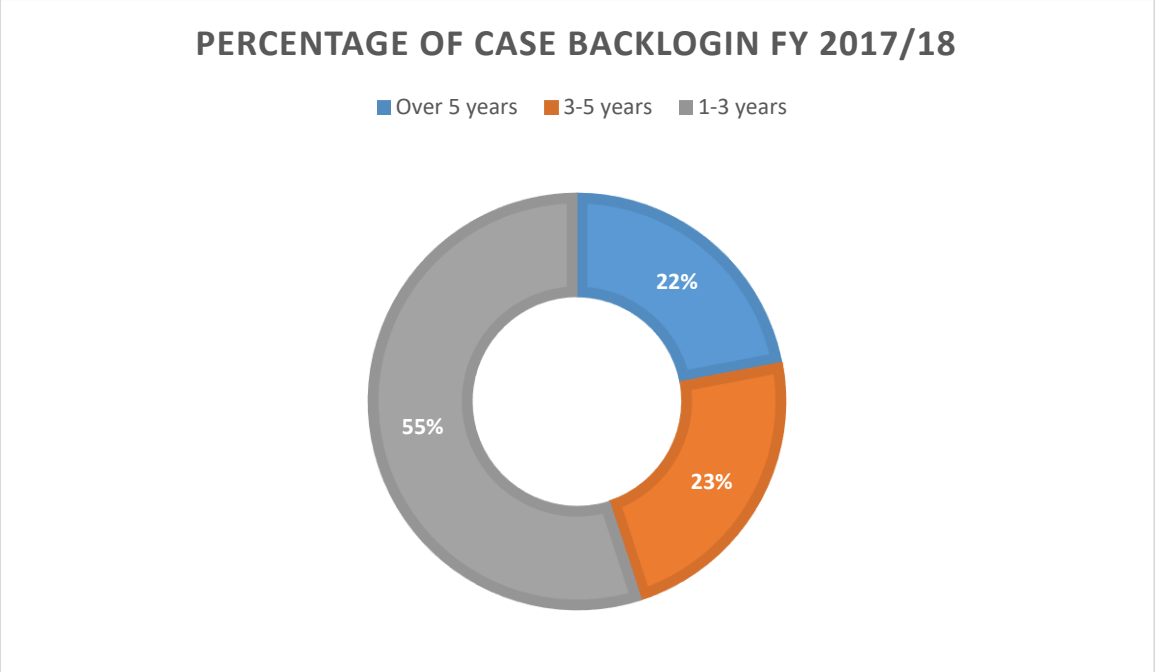


Figure 3

[90] Judiciary, State of the Judiciary annual Report 2016/2017 p27
[91] Ibid n 84 p 22



3.3 CUC activities and their impact on case backlog

The illustration aforementioned was one of the initiatives through the CUC to reduce the incidences of delay is one of the ways used by NCAJ to enhance access to justice. Other methods that have been documented include the Judicial open days and outreach programmes which were synonymous with the Mutunga reign. The open days are structure to be a public engagement forum. This being as a result of Justice being perceived as an illusion for years; that led to the public's frustration over the shroud of mystery that has been synonymous with continued Judiciary and its processes. In most cases, limited public engagement in judicial processes has been the main reason for the increased instances of dissatisfaction within and without the Justice system. Judicial officers, on the other hand, faced their frustrations which were categorised as economic, psychological problems and the lack of appreciation by the of judicial processes. They are also discouraged by the information barriers existing between judicial officers and the public, which results in the dismal perception of a judicial officer and the judiciary itself.

The courts, therefore, open up to the concept of open days and outreach activities. During open days like the ones conducted by Milimani, the courts put up desks at the venue, and the various

agencies in the CUC to man a desk. The public is invited to the open day through mass media a week prior. Usually, after sensitisation on the mandate of all the agencies in the justice system the public is invited to visit the desk and inquire on all issues that they may have as regards an existing case in court or the services being offered. The officers' present answer and record queries raised. Any follow up on issues raised by the members of the public is done after the open day. The problem with this process is that there is no documentation on successful post open day audit or debrief on its impact on the caseload. An outreach activity on its part is usually done like the open day but on a smaller scale.

Apart from these activities, the CUC has had various institutional visits especially to the ones frequented by its clients. These include the prisons and remands, the Mathari hospital, selected police stations, and children rehabilitation centres. These visits were earmarked to gauge the conditions of the holding facilities as well as an opportunity to engage with the court users being held there. After such a visit the CUC then comes up with proposals for improvements in case any problems or challenges had been identified. Some of the problems that were reported from these institutions include the issue of inadequate infrastructure, human resources, and funding. These are issues that are incorporated in the CUC reports for NCAJ intervention. Similarly, there has been no following on how these activities impact caseload statistics.

3.4 The Challenges Milimani CUC Face That Impedes Case Backlog Reduction

This CUC has documented that they have lacked funding to implement some of the activities they had drawn up. This is due to the limited funding channelled through the judiciary's budget. This hence affects some of their outputs that could have resulted in case backlog reduction[92].

The judiciary has introduced several measures to reduce the backlog and improve access to justice. These measures include Active Case Management Guidelines, the Bail and Bond

[92] SOJAR Report 2017/18 p432

Policy Guidelines, and the Sentencing Guidelines. However, these have not resulted in the elimination of the case backlog. Part of the reason is the lack of adequate implementation of the policy measures due to several reasons. One is the lack of leadership in spearheading this initiative through the CUC by initiating continuous capacity building for its stakeholders as regards the policy guidelines. Secondly, some officers have not fully embraced these measures, and many may have a limited understanding of their application. This limitation is compounded by the absence of systematic training on the implementation of bail and bond policy and alternatives to imprisonment[93].

The other challenge falls on customer care desks. As the first point of contact with litigants visiting courts, customer care desks provide an important service to court users. They provide information to court users and act as the link with the citizens. The Milimani Customer care desk is one of the most effective however it has no mechanism for other criminal justice actors to visit them to provide the required information. It is imperative to transform customer care desks to customer care centres would make them more efficient and assist them to serve their intended purpose[94]. This is borrowing on the *Huduma center* concept already popularised in the provision of key government services in Kenya, which involves a one-stop-shop where a citizen accesses all the critical services. Applied to the criminal justice system, a customer care centre would have all the key staff in the criminal justice system providing services at the same place – including from ODPP, KPAS, the police, and the Judiciary. Besides, such customer care centres would employ technical solutions to be linked to criminal justice institutions to be able to follow up on matters in real-time. The presence of computers and phones at the customer care centres is therefore essential.

[93] UNODC, Baseline Study, Programme for Legal Empowerment and Aid Delivery in Kenya, 2018 ,p 13
[94] Ibid p 5

The above scenario leads to the fourth challenge for this CUC. That is the slow process of digitization. In a world ripe with constant technological advancement the Judiciary has yet to get digitized. The process had been begun during Mutunga's regime but was put on hold due to corruption and mismanagement. The SJT had spelt out its vision to revolutionise and improve Information Communication Technology (ICT) as an enabler of the dispensation of justice. The process has however been slow and concepts such as e-filling, automation of registries, court recording transcription, and the use of the internet to ease communication with its stakeholders have not been utilised as a case backlog reduction mechanism.

Lack of sufficient Human and infrastructural resource capability to support the court optimally. The Judiciary has been bogged by budgetary constraints that they cite to impede access to justice and hence a slow reduction in case backlog. This issue, therefore, affects the Milimani law courts.

3.3 Conclusion

Apart from the unnecessary time spent going through the judicial proceedings, there are other challenges posed to the court users. These include the additional expenses the litigants, the witnesses, and the victims, as well as the defendants, will have to deal with as they pursue their right to expeditious delivery of justice. Excessive length hampers the ideal access to justice, particularly for the underdogs, as it is not prejudicial to the most resource-rich opponent, who can weather out a long proceeding to force a convenient settlement or discontinuation of legal action by the opposing party[95].

The amounts of money spent in lengthy judicial proceedings also affect the channels of administration of justice and trickle down to the taxpayers. The wastage of resources is quite

[95] Michael Heise, "*Justice Delayed? An Empirical Analysis of Civil Case Disposition Time*"(2000)Vol 50,4,CCDT 813

often one of the causes of the backlog, which results in litigants suing the state for damages. The unreasonable delay from the court proceedings is part of the extra resources that would have been effectively utilised improving the access to justice through the courts.

Granted that measuring the effectiveness of justice systems cannot be a simplistic exercise, justice must be meted out expeditiously. Most legal analysts and theorists agree that justice cannot just be measured in, for example just a matter of statistics and daily court returns. The time taken to conclude a case is a fundamental right for all parties which requires efficacy ('justice delayed is justice denied'), but too at the same time, it is cautioned that if more emphasis is laid on the time taken in court it may lead to miscarriages of justice ('justice hurried is justice buried'). What then is an effective Justice system? This is one according to this study is one that has some fundamental principles of governance which are: the high quality presented within the justice system, its independence, and the efficiency with which it operates. Therefore, to comprehensively answer the question as to whether interagency coordination is a solution for the backlog in Kenya a look at other jurisdictions and analyse their coordination mechanism within the justice system that is geared towards a reduction in backlog.

CHAPTER FOUR

INSTITUTIONAL ANALYSIS IN A REGIONAL AND GLOBAL LENS: LESSONS FOR KENYA

4.0 Introduction

It is important to now focus on a comparative analysis of inter-agency coordination regionally and internationally. This chapter will focus on Uganda, Singapore, and the EU as they seek to reduce delays in court by adopting a multi-agency approach.

4.1 The Ugandan Comparative

The Uganda justice system came up with an initiative aimed at tackling the case backlog. It was dubbed 'chain-linked initiative'. In the late 1990s, the players in the Ugandan criminal justice were faced with numerous challenges including delayed proceedings, poor coordination of structures, and missing files. Upon the identification of the problems facing the system, they set out on a mission to come up with some collective solutions to the problems[96]. The genesis of this arrangement was the town of Masaka. The initiative had the primary objective of strengthening coordination, cooperation, and communication (3Cs) among the duty bearers in the criminal justice system. Under that initiative, the criminal justice focus was on stabilising and building the capacities of the sector agencies by providing equipment, training programmes, and facilitating transport. The pilot of this was successful in an almost total reduction of criminal case backlog in magistrate courts and as a result of the programme was rolled out to various magistrate courts across the country. This initiative was an indication that when the unity of purpose among the criminal justice agencies bore positive results. It was after this that the Justice Law and Order Sector (JLOS) in 2001[97] was initiated. The JLOS further led to the creation of the countrywide and regional structures including the District Chain Linked Committees as well as Regional Chain Linked Committees and the Chain Linked

[96] Ibid n3 p37-38
[97] Ibid

Advisory Board[98]. Their mandate being…" *to oversee and coordinate improvements in the administration of justice and maintenance of law and order; enhance case management and reducing case backlog; be the focal point for JLOS Circuit and district activities; iron out misunderstandings between stakeholders and enhance the 3Cs, strive to remove impediments in the chain of justice; and ensure that all institutions respect, observe and promote the bill of rights in the Constitution especially on the timely delivery of justice, fair trial rights, rights of suspects and persons in detection[99]."*

The creating of these structures had their peculiar problems that ranged from, underperformance, failure to have regular meetings, and lack of implementation mechanism for recommendations from the sector meetings. This was coupled with the funding issues that included mismanagement of the resources that eventually went on to undermine the success of the chain-linked initiative[100]. As a form of a proposal, the report advocated for the creation of a Court Users Committee to provide the court with an opportunity to receive feedback from its operation. This was as a result of their experience derived from their own Commercial Court that had suggested that courts do establish a court users committee and also ensure that their stakeholders agreeable to meet regularly to discuss what is going at the court. The report recommended the use of stakeholders as a way to reduce the backlog in a court having seen that it was working in some courts in the country and other jurisdictions[101].

4.2 The European perspective

In the European system, several countries have experienced a weighty caseload and an unreasonable delay in their judicial processes. This is especially the case in civil matters as is

[98] Ibid
[99] Ibid
[100] Ibid
[101] Ibid

in Kenya, with criminal cases being the most affected[102]. The principle of judiciousness in the resolution of disputes is a fundamental principle enshrined by Article 6 of the European Convention of Human Rights, which states that: "*everyone is entitled to a fair and public hearing within a reasonable time".*

The reasonable time provision in criminal proceedings is aimed at ensuring that *"accused persons do not have to remain too long in a state of uncertainty as to the outcome of the criminal accusations against them"*. In criminal cases, time is clocked from the moment a suspect is charged. However, in certain instances, time will begin to run before the case is presented in court for trial, for example from the time of arrest or from the onset of preliminary investigations[103].

Illustration: In *Malkov v. Estonia*[104], the applicant, in this case, had been complained of the lengthy investigation into his case that had begun on 6 August 1998and had concluded with his conviction in 2008. The ECtHR restated its position that in criminal cases time will start running from the moment a person is charged. Charging of an accused person in the jurisdiction can happen outside the court precincts. In determining whether a person has been charged the court will test been greatly affected. In this matter, the court recognised 17 August 2001 as the date charges were pressed against the accused and 22 April 2009 as the penultimate date of the proceedings when the Supreme Court declined the appeal by the accused. In sum, the whole proceeding had taken seven years and eight months to conclude. The court held that the proceedings were excessively long hence violating Article 6 (1) of the ECHR. This was remedied by a reduction of the applicant's sentence.[105]

[102] Philip Langbroek, Matthew Kleinman, *Backlog Reduction Programmes and weighted caseload methods for South East Europe, two comparative inquiries,*(2016) Regional Cooperation Council (RCC) www.rcc.int accessed on 10 January 2019 p7
[103] ECtHR, Ringeisen v. Austria, No. 2614/65, 16 July 1971, para. 110.
[104] ECtHR, Malkov v. Estonia, No. 31407/07, 4 February 2010.
[105][105] ECtHR, König v. Germany, No. 6232/73, 28 June 1978, para. 110.

There are four ways the EU court uses to gauge reasonableness in criminal and non-criminal proceedings: first is determined by how complex the case is; second determined by how the complainant conducts; third is determined by the conduct of the relevant authorities; fourth is determined by what the complainant stands to lose or gain.[106] In utilising these criteria, the ECtHR has, for example, ruled that 10 years and 13 years be unreasonable for criminal proceedings[107]. It has equally found 10 years to be unreasonable for civil proceedings and 7 years for disciplinary proceedings[108]. The levels that the cases pass through within the jurisdiction (for example, the time is taken in the appeal process) is also taken into account when measuring the reasonableness. The repercussion of delay at each level is taken into consideration when evaluating what is reasonable. A balance must, however, be achieved between the speedy conclusion of cases and fair justice. For example, the need for the expeditious conclusion of a case must not deny an accused of the right of defence.

Having been persuaded by these principles, the Council of Europe established the Commission for the Efficiency of Justice (CEPEJ) on 18 September 2002[109] . It was created as one of the Committee of Ministers of the Council of Europe.

The formation of the CEPEJ was symbolic of the impetus by the Council of Europe to advance the Rule of Law and Fundamental Rights in Europe, based on the European Convention on Human Rights, and especially on the right to liberty and security enshrined in its Articles 5, right to fair trial espoused in Article 6, the right to an effective judicial remedy stated in article 13, and the Prohibition of discrimination contained in Article 14.

The CEPEJ duties include the continuous exploration of the prospects that the new information technologies (IT) have to offer in the improvement of efficiency of the justice system. To

[106] ECtHR, Milasi v. Italy, No. 10527/83, 25 June 1987
[107] ECtHR, Baggetta v. Italy, No. 10256/83, 25 June 1987.
[108] ECtHR, Deumeland v. Germany, No. 9384/81, 29 May 1986, para. 90
[109] Resolution Res(2002)12establishing the European Commission for the efficiency of justice (CEPEJ)

realise their mandate, the CEPEJ pilots its programs, conducts surveys and data collection, outlines statistical tool and protocols, approves documents (reports, advice, guidelines, action plans, among others), cultivates relationships with relevant personnel, non-governmental organisations, research institutes, and information centres, organises trials, facilitates networks of legal professionals[110].

Its defined tasks are:

i. To review data collected from the justice system analyse the results of the judicial systems;
ii. To highlight the challenges presented in the task;
iii. To give recommendations on how to improve the identification of data and its collection, on the one hand, the evaluation of the functions in the system under review;
iv. Be of assistance to the member states; and
v. To recommend suitable circumstances in which the Council of Europe would be required to elaborate a new legal instrument[111].

The EU heads of stations went a step further and adopted at their 3rd summit in Warsaw[112], a measure that would be utilised in the appraisal and support functions of the CEPEJ to guide member states in the expeditious delivery of justice. They also invited the Council of Europe to strengthen cooperation with the European Union in the legal field, including cooperation with the CEPEJ[113].

[110] Ibid
[111] Ibid
[112] 16-17 May 2005)
[113] Ibid n103

When CEPEJ developed its Framework Programme (CEPEJ 2004-19) it highlighted the three most critical issues bedeviling the European judicial system. These were:

> *"1.The principle of balance and overall quality of the judicial system; 2. The need to have efficient measuring and analysis tools defined by the stakeholders through consensus; and 3. The need to reconcile all the requirements contributing to a fair trial, with a careful balance between procedural safeguards, which necessarily entail the existence of lengths that cannot be reduced, and concern for prompt justice*[114]."

To ensure compliance with the provision and to tackle the various factors that result from a delay, the EU went further to introduce an information tool known as the Justice Scoreboard. Its main objective is a system of collection reliable and comparable data was launched in 2013 in all Member States on an annual basis. The EU Justice Scoreboard is set to recognise the quality, independence, and efficiency as important contains information of an effective justice system. After the tool was introduced and piloted in some of the countries it was concluded that it was important to include as a measurement protocol that increased cooperation with external institutions (for instance advocating collaborative initiatives and signing MoUs with police, public prosecutors, medical institutions, and social care institutions, ensuring there is swift service of process through the mailing system, improving user satisfaction (for instance: via opinion polling system with court users to gauge the level of their trust and overall satisfaction with court's services, among others). As a follow-up to this proposal, the European Commission developed a qualitative and quantitative tool for public administration. Therein the report highlights consulting with court users as a way of improving judicial service[115].

[114] Ibid
[115] Ibid

4.2.1 Consulting with Court Users

As the symbol of public justice public, the judiciary is held accountable by its citizens. In the words of the European Court of Human Rights (ECtHR),

> *"Public confidence in the judicial system ... is one of the essential components of a State based on the rule of law"*[116].

In recognising this the European judiciaries are cognizant of the fact that the flow of dialogue with the public is a way of assuring that justice is being delivered and is seen to be done. In case of legitimate concerns arising then materialise, then corrective action can be taken in time. This calls for the courts to become open-minded and to see the administration of justice as a service to the public. There leading to an interrogation of the court users' expectations from the system, the expected standards of service delivery, and whether the service matches those expectations and standards.

Across the EU they have adopted the approach of customer satisfaction surveys which are commonplace - not with the outcome of judgments, of course, but with the system and the process (beforehand, during, and afterward). It was reported in the 2017 EU Justice Scoreboard found that 13 member states had issued surveys to court users and legal professionals. Additionally, 14 member states made a follow-up to the surveys taken that used a variety of metrics such as using survey results as input for periodic reporting, or an analysis of the justice system, or for transforming the functioning of certain courts among others the CEPEJ.

As a result, CEPEJ has produced a model study and operational guidance from this process[117].

[116] ECHR(2013),Guide on Article 6-Right to fair trial(CivilLimb), accessed on www.echr.coe.int
[117] EU Commission, (2017), *Quality of Public Administration: A toolbox for Practioners*, European Institution of Public Administration

4.3 Singapore's strategy in dealing with ineffective leadership at the Judiciary

In building its ideals for judicial reform, Singapore' reformists studied and analysed these obstacles and grappled with their negative impacts. These obstacles having a similarity to those in the judiciary of Kenya today and can be tragic when faced with the rapid social-economic development and evolution. The obstacles are as follows:

i. Lack of proper management in the vertical and horizontal levels of the organisation
ii. Lack of leadership
iii. Lack of institutional policies and the existences of competing priorities
iv. Centralised model of organisational management
v. Lack of systems to develop leadership skills
vi. An inefficient top-down communication system[118]

According to the World Bank Report, these six barriers can occur naturally as part of the endeavour to change to reliable and focused management. They are co-existent co-mingled enough to activate a vicious cycle from which it is difficult to escape. Therefore interrogating them to understand them and their interrelationships is important to come up with solutions that will reform the Judiciary. Problems in coordination are disincentives to innovative thinking and strategic delivery of an institutional mandate. They also lead to suboptimal decisions, slow implementation of sector-wide programs, administrative failures that lead to mistrust and poor communication between functions. In most cases, stakeholders whose opinions are not taken into consideration become belligerent and passive. This results in an unsuccessful top team and lack of novel protocols, poor vertical communication and user focus, poor management capabilities, and the deterioration of coordination across functions and units top-down or laissez-faire management. These negative impacts to reforms become amplified which leads to

[118] , Waleed H.Malik, *Judiciary-Led reforms in Singapore: Framework, Strategies and Lessons*, Worldbank 2007 936-30

greater resentment, mistrust, and a broken down interaction. The problems of poor coordination have a historical genesis for judicial bodies. All Judiciaries have the advantage of being a national monopoly in the administration of Justice. There is therefore the assumption that has no competition and thereby no need to improve its collaboration with the auxiliary bodies. Also, there is the traditional view that individual judges are opinion setters and therefore their judgments are the best production of the system. Creating a cartel of perceived important judges forgetting that the judiciary is also served by other judges, registrars, and court administrative staff from clerks to bailiffs and by extension its users that include the agencies that serve it[119]. An accredited skilled staff that is dedicated to working together in common tasks to develop the judiciary is ideal. For this to work an efficient leadership is required to maintain the sometimes delicate balance and to ensure smooth coordination. The leadership is hierarchical for administrative purposes and will report directly to leaders of the judiciary (the chief justice in the case of Singapore and Kenya). The tasks of this think tank team are to constantly appraise judicial performance, ignite conversations, come up with resolutions, and initiate the restructuring of the organisation when necessary. They are tasked with drawing a roadmap and coordinating specific functions that are aimed at the judicial goals. Drawbacks to their effectiveness included a broken trust, lack of communication and cohesion, and open hostilities among them.[120]. Unfortunately when the top management is ineffective it reflects on the lower levels where there is likely a tense relationship, having to balance and serve caught competing forces. Such a team will not focus on strategic initiatives. The other challenge will be bringing everyone to understanding and dedicating themselves to a common strategic vision this is because not all employees in the judiciary's top echelons have an appreciation of their system's strategic direction[121]. They may be oblivious of the fact that to transform there has to change

[119] Ibid
[120] Ibid
[121] Ibid

work-related strategies. Most importantly, top management may have a challenge in relying on its staff on how they related to the strategic objectives of each administrative unit. Having a vague understanding of the transformative roadmap and the targets it is difficult for the lower level to make decisions. When presented with these unforeseen circumstances, it is characteristic of them to either blindly play by the rules or regularly seeks directions from their superiors because they are unsure of the organisation strategic vision. This may result in an ineffective and bureaucratically inept system and hence an overall increased backlog. Difficulties in both downward and upward communication will be an obstacle to strategic implementation. An ineffective trickle-down communication produces confused an unfocused workforce or lack of appreciation of the organizational strategy. The lack of a proper information flow will result in mistrust making it impossible to realise the common goals and vision of the judiciary. Without a clear, common pathway, a judiciary cannot be objective and rigorous, which can be costly. This is due to the complexities that present themselves in administering justice in the modern and globalised world. Its processes and outcomes must be in toe with and match the fast-paced society.[122]

The judicial system has to be in sync with society and respond to the sociological evolution. The administration of justice is a relatable public service. There must be clarity of objectives and strategies for any service-providing entity. An organization's management style can be divided into either top-down or laissez-faire. Top-down managers rely on their comprehension and business acumen in making decisions. Their abilities are so admirable that the lower level associates consider them infallible[123]. This produces an overly reliant junior workforce that lacks innovations and general disorganisation at the lower levels. Similarly, a lack of empowerment from the top results does in slower decision making and its actualisation of

[122] Ibid
[123] Ibid

objectives. A laissez-faire style of management is characterised by little involvement and visibility which produces barriers to the implementation of the organisations' strategic objectives. Typically, such managers have limited contact with those who are one or two levels below.[124]. They do not rely on the strategic direction or vision of the organization. These managers are oblivious to conflict, fail to come up with solutions for the organisational challenges that face the team members, functions, and businesses. These two styles in retrospect pose obstacles in the development of effective leadership and the whole organisation. Top-down managers are control-driven and therefore averse to changes in the management styles. Laissez-faire managers on the other hand are afraid of the escalation of conflict if they become involved. In both instances, communication is the root of the problem with the weak upward communication preventing managers and their teams from understanding the repercussions of their management style. The management of the Kenyan judiciary that leads the CUCs easily falls into either category, both of which can have institutional and administrative flaws that hamper organizational synergy and information flow.

Malik, therefore, recommends that each judiciary must devise for itself a "halfway" house or another workable formula for channelling information and making decisions in ways that minimize unnecessary conflicts or misunderstandings. Unfortunately, many judiciaries lack systems that cultivate knowledge acquisition and development especially as appertains leadership skills and management for judges and court administrators. For instance, in Kenya, the NCAJ has not documented strategies for leadership training for CUCs.

The assumption is that a leader of the CUC is defined by his or her seniority in the judiciary and the appointment he or she holds. This as is usually the case results in inefficient leadership and inadequate management in the system. Where there is a lack of top-level leadership, the

[124] Ibid

judiciary and CUCs perform dismally, especially where the staff depends on their superiors to make decisions on their behalf. While court clerks or bailiffs are lower-level employees one needs to take cognizance of the fact that they are also their own spaces when dealing with the court users who come to them for matters within their duties. They are the users' initial point of contact when they approach the judiciary, and their service can shape the court users' perception of the judiciary. Having the requisite leadership skills can aid in discharging their roles satisfactorily which will be critical for the wholesome court users' satisfaction in the system[125]. A visionary judiciary, therefore, formulates a structure in which its personnel takes part in decision making at all levels. This is to counter a situation where these six barriers diminish organisational effectiveness. Management styles affect the team effort for the judiciary. Higher managers may access information directly from the lower levels side-stepping the middle managers. Laissez-faire managers will avoid the accountability call for their subordinates for coordinated decision making. Where there is a lack of an efficient top team, strategic direction, and priorities of the judiciary become unclear. Interests of the middle managers will not be subordinated to the needs of the whole organisation. The lower levels will therefore see the inconsistencies in priorities within their functions. It is important to have a clear, compelling statement of the strategic challenges facing an organization. This is a tool to ensure the Judiciary is effective and responsive to court users' hopes and aspirations and cultivating a workforce that does not focus its energy inward[126].

4.4 Conclusions

The discussion on how Uganda, Singapore, and countries under the European Union are handling case backlog by incorporating court users through periodic satisfaction surveys make it imperative for Kenya to embarks on this dynamism. It has been concluded by that Lorizio[127]

[125] Ibid
[126] Ibid
[127] Ibid n35

that among all the institutions, the market responds to a reliable and effective justice. This is important since the market is characterised by relationships, agreements, and connections among people, which are based on trust. The presence of an effective justice system generates a process of self-respect that results in a greater efficiency; once this is realised then the perception levels will improve the honouring of contracts and this will reduce instances of corrupt efficiency as opportunism tries to reign in the system. Generally speaking, there is the belief that the reduction in competition among the firms in the economy is a result of the fragile production system coupled with the new competitive environment. These insufficiencies are dependent on internal factors of a firm - such as the small size and limitations connected with familial management models - and on external factors. These factors include the complicated and haphazard regulatory regimes, lengthy judicial procedures, incessant bureaucratic channels, and the lack of protections for contracts.[128]. A clogged and slow justice system affects the economic structures by firms performing inefficiently due to them the uncertainty in the process. This increases monopolies as firms chose to cut their losses that may result from the malfunctioning institutions. In this way, the inefficiency of the justice system results in the reduction of options by the economic agents having a standard that churns out both internal feedback about court management from judges and court staff and external feedback from defendants, witnesses, and lawyers' problem of delays will be significantly be reduced. Hence CUCs need to be empowered to dialogue through surveys, questionnaires, and small group work which are received by the NCAJ and acted upon. The recommendations from the Justice Ouko report were not in vain it was the raw feelings of the litigants and practitioners that CUCs would become the ultimate bridge of justice. The failure by them to alleviate the issue of case backlog is indeed imperative to try new and tested dimensions.

[128] Ibid

CHAPTER FIVE

FINDINGS AND CONCLUSION

5.0 Findings and Conclusions

This study sought to find out to reflect on CUCs and their role in the reduction of case delays in the Judiciary as a medium of access to justice. The study was premised on theories of access to justice which have been incorporated in the spirit of the Constitution and the principles of good governance. The study was also keen on evaluating these themes of expeditious delivery of justice, as interpreted in the Judicial Transformation framework, The Sustaining Judiciary Transformation, and the Judicial Services Act. This has been defended by giving some recommendations that would ensure CUCs improve on their performance in contributing towards reduced delays in the judicial system.

Whereas the involvement of justice sector actors in the programs for case backlog reduction has been seen to reduce the backlog in the Judiciary as per Article 159 of Constitution there seems to have been no measured tool manage CUCs programme to achieve its ultimate objective. The study has explored in chapter 1 the various waves of access to justice that have been propelled the use of formal and informal methods in the adjudication of cases. This wave also highlighted the need for involvement of all the users of the justice system if finding solutions to justice sector problems. This approach was what has been explored in chapters three and four where there was found that there exist relevant legal and institutional frameworks where programs to reduce case backlog can be explored. The structures of the Judiciary viz a viz the court users committees have been analyse for effectiveness in this mandate. The finding is that there still need to protocols and tools for inter-agency coordination and cooperation from the national level to the local level. There has been found that CUC coordination also lacks proper leadership and necessary secretariat support to optimum deliver on some of the indicators.

The NCAJ has taken steps in the establishment of CUCs and it would be imperative that measurements of their work are done periodically. It has been discussed in chapter four on how the option of the chain-linked justice sector in Uganda was deemed necessary until challenges of coordination and funding crippled it. The analysis also confirmed the need to have court users and how they have been perceived to be a game-changer in the reduction of case backlog. Among the European nations, this method has further been tested by incorporating court users' surveys. This is a faster-initiating stakeholder coordination programme in several countries under the auspices of the EU. The satisfaction survey has been hailed as a measurement tool that would work effectively to gauge the justice system's effectiveness through the internal and external lens of the court users. These findings have been elaborated in the presiding chapters for the basis of this Study's recommendations on creating an effective CUC mechanism.

The following are the possible proposals emanating from the study:

1. First is fully operationalizing and institutionalized the NCAJ to make it operational. Currently, it operates with a skeletal staff and lacks the necessary human capital to undertake its mandate.
2. Continuous training on leadership and management for the CUCs.
3. Due to the critical role that NCAJ and CUCs play in coordination within the justice system, it is recommended that support be extended to sustain their institutionalisation process. This includes a review of the legal framework establishing NCAJ, and the establishment of a unit for data collection and analysis. The unit would be established within NCAJ to collect and analyse data on the progress of implementation, among other things, regularly.
4. Developing a reward system for CUC. This will encourage participation and innovation.

5. Use of public forums where the work of the CUCs can be presented to the general public for comments.
6. Allow a discreet way in which the public can raise concerns of failings of the CUCs, for example, a suggestion box or hotline.
7. Commissioning a baseline survey for the state of court users Committees will advise the administration on areas that need to be revamped.
8. Periodic review of the NCAJ strategic plan to guide its evolution within the changing dynamics of the justice sector. It has been observed that its identity is also comingled with the Judiciary since its constitutive statute in the Judicial Services Act. It would be therefore important to explore fresh legislation on NCAJ to ensure its autonomy.

9. Creating a robust Access to Justice Innovation department within the NCAJ: this will lead to the development of improved case management by developing efficiency tools for court users to measure their satisfaction as well as find out on areas that need improvements. It is notable Delays are in part caused by other actors, especially ODPP, but the judiciary too may have contributed to the delays. Such a tool would contain anonymised information to establish the respondent's role in the proceedings (including if the plaintiff or defendant, whether the judgment found in their favour), examples of questions for direct court users might include: How accessible was the court (access, signage, waiting conditions)? Were the proceedings clear? How satisfied were you with information on the court system and/or your rights? How quickly was the case dealt with (time lapse between summons and hearings, punctuality of proceedings, delivery of decision, etc.)? What was your experience of the judge, prosecutors and non-judicial court staff (attitudes, politeness, competence)? Whatever the outcome, was the court process impartial? Were the judgment and reasoning well-communicated? To what extent do you trust the justice system? Were you informed about how the judgment rendered will be enforced?

This data would in turn be analysed by the NCAJ data unit and later be tabled at the NCAJ council to seek improvements that may include capacity building or the introduction of necessary policies and guidelines for the sector through CUCs.

5.2 Conclusion

Although the NCAJ and by extent CUCs have been deemed visionary they exist to provide solutions to an issue that has had discourse in the Judiciary for the two regimes since 2010. It is upon the sector heads that constitute the NCAJ to embrace the vision of an effective justice system for the benefit of the common man. The study has explored options to enhance the effectiveness of CUCs and has highlighted why the issue of case backlog still exists even where there is a semi-formal mechanism to deal with it. This mechanism must be studied further to improve effectiveness and maybe include it as the sixth wave of access to justice.

REFERENCES

1. Adrienne E Van Blerk, Jurisprudence: An introduction, (1st edn 2002)
2. Alberta Civil Liberties Research Centres(ACLRC), "What is access to justice?" http://www.aclrc.com/what-is-access-to-justice accessed on 8 March 2019
3. Benjamin Nwabueze, Constitutionalism in the Emerging States (C Hurst & Company 1973)
4. Brian Bix, Jurisprudence: Theory and Context, (7th edn, Sweet and Maxwell 2009) 113
5. Brian H. Bix, Jurisprudence: Theory and Context,(7th ed) sweet and Maxwell 2015
6. Brian Otieno, "Case backlog to be cleared, says CJ", (The Star 21 August 2018) https://www.the-star.co.ke/news/2018/08/21/cases-backlog-to-be-cleared-says-cj_c1805859 accessed on 9 January 2019.
7. Joanne Scott and Susan Sturm(2006), Courts as Catalyst: Rethinking Judicial Role in new governance
8. Judicial Service Act Cap 185B laws of Kenya
9. Cheema, S.G. and Maguire, L. (2004) "Democracy, Governance and Development: A Conceptual Framework", New York. United Nations Development Programme
10. Connie Ngondi- Houghton, Access to Justice and the Rule of Law in Kenya
11. Constitution of Kenya 2010
12. Dr. Willy Mutunga, "The progress report on the transformation of the judiciary the first one hundred and twenty days"(Kenya Law Reports blog, 19th October 2011)< http://kenyalaw.org/kenyalawblog/progress-report-on-the-transformation-of-the-judiciary/> accessed on 9 January 2019.
13. ECHR(2013),Guide on Article 6-Right to fair trial(CivilLimb), accessed on www.echr.coe.int
14. EU Commission, (2017), Quality of Public Administration: A toolbox for Practioners, European Institution of Public Administration

15. European Union Agency for Fundamental Rights and the Council of Europe publication (2016)https://fra.europa.eu/en/publication/2016/handbook-european-law-relating-access-justice accessed 10 August 2019
16. Faisal Bhabha, Institutionalizing access to justice' judicial legislative and grassroots dimensions (2001) 33QLJ 139
17. Gardner, John, Hart on Legality, Justice, and Morality (May 13, 2010). Oxford Legal Studies Research Paper No. 44/2010. Available at SSRN: https://ssrn.com/abstract=1606463 or http://dx.doi.org/10.2139/ssrn.1606463 accessed on 16th November 2018
18. Hermanus Phillipus Steyn v Giovanni Gnecchi-Ruscone 2013 eKLR
19. Hilaire Barnett, Constitutional & Administrative Law(5th ed), Cavendish Publishing 2004
20. ICCPR 1976 UNTS 171
21. Jody Freeman, The Private Role in Public Governance, 2000.
22. John Rawls, extracts of 'Theories of Justice' in Michael Freeman FBA, Lloyd's Introduction to Jurisprudence (9th edition) Sweet and Maxwell 2014
23. John Rawls, Justice as Fairness: A Restatement (2001) Harvard University Press <https://books.google.co.ke/books accessed on 9 January 2019
24. John Gastil and Peter Levine, the Deliberative Democracy Handbook: Strategies for Effective Civic Engagement In The 21st Century 2005; Nancy Roberts, Public Deliberation in an Age of Direct Citizen Participation, 2003.
25. Judiciary of Kenya, JTF Blueprint, < https://www.judiciary.go.ke/about-us/our-blueprints/> accessed on 9 January 2019
26. Judiciary of Uganda Report, 2017
27. Judiciary, State of the Judiciary annual Report 2015/2016
28. Judiciary, State of the Judiciary annual Report 2016/2017
29. Judiciary, State of the Judiciary annual Report 2017/2018

30. Judiciary, Sustaining Judiciary Transformation(SJT): A service Delivery Agenda 2017-2021, (Jomo Kenyatta foundation 2017)
31. Kenya Vision 2030
32. Kibaara I Laibuta Access to Civil Justice in Kenya an Appraisal of the Policy and Legal Frameworks (2012)(Doctoral Dissertation, University of Nairobi)
33. Kibaara I Laibuta, Access to Civil Justice in Kenya an Appraisal of the Policy and Legal Frameworks (2012)(Doctoral Dissertation, University of Nairobi)
34. Li Wen Jie & 2 others v Cabinet Secretary, Interior and Coordination of the National Government & 3 others (2017) eKLR
35. Marilene Lorizo, Efficiency of the Justice and economic Systems(2013) Procedia Economics and Finance 17(2014) 104-112 www.elsevier.com/locate/procedia accessed 10 august 2019,
36. Michael Freeman FDA, Lloyd's Introduction to Jurisprudence, (9th ed, Sweet & Maxwell 2014)
37. Michael Heise, "Justice Delayed? An EmpiricalAnalysis of Civil Case DispositionTime"(2000)Vol 50,4,CCDT 813
38. NCAJ CUC Guidelines revised 2019
39. Patricia Kameri Mbote and Migai Akech, Kenya: Justice Sector and the Rule of Law, Open Society Initiative for Eastern Africa(2011)
40. Patricia Kameri Mbote and Migai Akech, Kenya: Justice Sector and the Rule of Law, Open Society Initiative for Eastern Africa(2011)
41. Philip Langbroek, Matthew Kleinman, Backlog Reduction Programmes and weighted caseload methods for South East Europe, two comparative inquiries,(2016) Regional Cooperation Council (RCC) www.rcc.int accessed on 10 January 2019

42. Philip Langbroek, Matthew Kleinman, Backlog Reduction Programmes and weighted caseload methods for South East Europe, two comparative inquiries,(2016) Regional Cooperation Council (RCC) www.rcc.int accessed on 10 January 2019
43. Republic of Kenya, Final Report Taskforce on Judicial Reforms, (5th version), Government Press Nairobi, 2010
44. The United Nations, 1948, UNGA res. 217 A(III)UDHR
45. Thomas Hobbes, Levithian,(1951) ed Macpherson, 1968)
46. UNDP September 1997, Decentralized Governance Programme: Strengthening Capacity for People -Centered Development, Management Development and Governance Division, Bureau for Development Policy
47. United National Organisation, Access to justice,www.un.org/ruleoflaw/thematic-areas/access-to-justice-and-rule-of-law-institutions/access-to-justice/ accessed on 8 March 2019
48. United Nations, Access to Justice,(2012) www.un.org/ruleoflaw/thematic-areas/access-to-justice-and-rule-of-law-institutions/access-to-justice accessed 16 July 2019
49. Yash P.Ghai, Constitution and Constitutionalism: the Fate of the 2010 Constitution, 2014