

**ACCESS TO JUSTICE FOR PERSONS WITH DISABILITY IN KENYA:
INTERROGATING THE ADEQUACY OF THE LEGAL FRAMEWORK**

BY

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DECLARATION

I, **Alice Mukami Wachira**, the undersigned hereby declare that this is my original work and that it has not been presented in any other university.



10/07/2021

Signature..... Date.....

Supervisor

This project paper has been submitted for examination with my approval as a University Supervisor.

DR. Nancy Baraza

10/07/2021



Signature

Date.....

DEDICATION

This thesis is dedicated to my family who are my greatest support system. Your love and support has kept me on even when my batteries were low.

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The Persons with Disabilities (Cost, Care, Support and Maintenance) Regulations 2009

KOREA

The Constitution of the Republic of Korea

Anti-Discrimination against and Remedies for Persons with Disabilities Act (ARPD)

Welfare of Disabled Persons Act (WDPA)

Employment Promotion and Vocational Rehabilitation of Disabled Persons Act (EVDPA)

Act on Special Education for Persons with Disabilities (ASEPD)

Act on Right to Health and Access to Medical Services for Persons with Disabilities

Act on Promotion of Convenience for the Disabled, Senior Citizens, and Pregnant Women (APC)

Framework Act

Korean Sign Language Act

Special Act on the Preferential Purchase of Goods Produced by Persons with Severe Disabilities

Mobility Improvement for the Transportation Disadvantaged Act (MITDA)

Association of Progressive Communications (APC)

UNITED STATES OF AMERICA

Americans with Disabilities Act (ADA)

AUSTRALIA

The Disability Services Act of 1986

The Social Security Act 1991

The Disability Discrimination Act of 1992 (DDA)

INTERNATIONAL STATUTES

Universal Declaration of Human Rights (UDHR)

United Nation Convention on the Rights of Persons with Disabilities (UNCRPD 2006)

ABBREVIATIONS AND ACRONYMS

UNCRPD- United Nation Convention on the Rights of Persons with Disabilities

PWD- Persons with Disability

NCAJ-National Council for the Administration of Justice

CUC-Court Users Committee

BF-Barrier-free Certification

NHRCK- National Human Rights Commission of Korea

NHRCA-National Human Rights Commission Act

TTAS- Telecommunications Technology Association Standard

KCS-Korea Communications Standard

NIA-National Information Society Agency

TRS-Telecommunications relay services

FCC-Federal Communications Commission

TTY- TeleTYpe

TDD- Telecommunications Device for the Deaf

EEOC-Equal Employment Opportunity Commission

DOJ-Department of Justice

ABSTRACT

Kenya has a robust legal framework on the rights of Persons with Disabilities chiefly comprising of the Constitution of Kenya, 2010, the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD) and the Persons with Disabilities Act (PDA). The legal framework is

designed to ensure optimal protection for PWD, with respect to social, economic and political spheres. However, despite the legal framework, PWD continue to face considerable barriers in terms of access to justice. The study sought to investigate the legal challenges hindering PWD's access to justice. The study made a hypothesis that the Kenya's legal framework does not guarantee optimal realization of the right to access to justice for PWD. The study utilized the best practices approach and doctrinal methodologies. It analyzed the Republic of Korea, the United States of America and Australia with a view to identifying lessons which Kenya can emulate.

The study revealed that the definitions adopted by the legal framework have 'individualized and medicalized' disability in a way that does not highlight issues of justice nor emphasize the rights of PWD. In addition, even though PDA was enacted in 2003, the government is yet to develop special regulations to ensure complete operationalization of the Act. The study concludes that these inadequacies have negative legal implications on the rights of PWD in Kenya, especially their constitutional right of access to justice. The Republic of Korea, the United States of America and Australia have established and implemented effective legislative and policy measures that protect and enhance the rights of PWD whilst also promoting their access to justice. Kenya lags behind in its legislative and policy framework in enhancing and promoting access to justice by PWD and the framework should be reviewed to align with the UNCRPD, especially in promoting their access to justice.

CHAPTER ONE: GENERAL INTRODUCTION

1.0: Introduction and background of the study

Disability is any impairment or environmental and attitudinal barriers that hinder a person from effectively and fully participating in society on an equal basis with others.¹ In the African context, it has a broader definition as it includes developmental, neurological, intellectual, psycho-social, mental and physical impairments.² On the other hand, persons with disabilities (PWD) are those who have long-term sensory, intellectual, mental and physical impairments, by reason of whom they cannot participate effectively and fully in the society on an equal basis with others.³ Even when a person has the same type of disability as another, disabilities might affect them in varied forms. Various physical and mental disabilities that can impede or diminish a person's capacity to carry out daily tasks are classified as disability categories.⁴

Disability has been there since time immemorial. Although it has not changed, the perceptions of what it means have evolved overtime for the better.⁵ A sizable number of Kenyans have

¹ United Nations Convention on the Rights of Persons with Disabilities, Preamble (e). <<https://www.un.org/disabilities/documents/convention/convoptprot-e.pdf>> accessed 16 November 2021.

² Protocol to the African Charter on Human and People's Rights on the Rights of Persons with Disabilities in Africa Article 1. <https://au.int/sites/default/files/treaties/36440-treaty-protocol_to_the_achpr_on_the_rights_of_persons_with_disabilities_in_africa_e.pdf> accessed 16 November 2021.

³ United Nations Convention on the Rights of Persons with Disabilities, Article 1. .

⁴ Disabilities: Definition, Types and Models of Disability: Disabled World' <<https://www.disabled-world.com/disability/types/>> accessed 29 May 2021

⁵ Suzanne C. Smeltzer, Bette Mariani, and Colleen Meakim, ' Brief Historical View of Disability and Related Legislation'(Villanova University College of Nursing, January 28, 2017) <http://www.nln.org/docs/default-source/professional-development-programs/ace-series/brief-history-of-disability.pdf?sfvrsn=6> accessed 29 May 2021

disabilities.⁶ In addition, disability is a global reality although it is more prevalent in developing countries.⁷

Some view disability as a punishment for sin while others see it as a devilish creation. Disability was regarded as a flaw, deformity, or deficiency in the individual. As a result of disability misunderstandings, persons with disabilities were commonly feared and ostracized, shunned, harmed, or ridiculed. Even persons who obviously had disabilities were used to entertain people. Children and adults with severe disabilities were isolated from the public eye and confined to their houses. They were regularly denied access to things that available to other people, such as jobs, care, education, to have a family or a place in the society. PWD were labeled as "different," and their differences were perceived as negative. The society viewed disability as incapacity, and PWD were typically viewed as a burden on their families and the society at large.⁸

According to Maya Sabotello and Marianne Schulze,⁹ PWD have been involved in activism since the nineteenth century. Collective mobilization around issues of disability rights, on the other hand, did not begin until the 1960s and 1970s. The disability rights movement questioned the prevailing conception for medical observation as being middle-class, of white origin ,male "abled" body, exposing the limitations of scientific understanding concerning "illness and diseases" in the setting of disabilities.

⁶ Status of Disability in Kenya: 2019 Census Statistics - Development Initiatives' <<https://devinit.org/resources/status-disability-kenya-statistics-2019-census/>> accessed 29 May 2021. According to the census conducted in 2019 in Kenya, 2.2 percent of Kenyans (0.9 million persons) with a disability.

⁷ 'Disability Inclusion Overview' <<https://www.worldbank.org/en/topic/disability>> accessed 29 May 2021

⁸ *ibid*

⁹ Maya Sabotello and Marianne Schulze, 'Human Rights and Disability Advocacy' (University of Pennsylvania Press, Philadelphia 2014)

For years, the international disability community pushed to persuade governments on the need to enact a new convention to ensure that PWD could fully enjoy their human rights. The push led to the enactment of the United Nation Convention on the Rights of Persons with Disabilities (UNCRPD) in 2006.¹⁰ The Convention protects and promotes the right of PWD to have equal access to fundamental rights and freedoms.¹¹ Its core message is that PWD have equal rights and freedoms like everyone else. It encourages PWD to fully engage in all parts of life, addressing preconceptions, prejudices, harmful behaviors, and stigma associated with PWD.

In Kenya, decolonization opened up new options and potential for PWD. Not only did national independence guarantee majority rule, but it promised a citizenship that would be all-inclusive and a dedication to social justice too. The Kenya Union of the Blind was established in 1959. In 1964, held awareness campaigns as a result of which the Mwenda Committee for the Care and Rehabilitation of the Disabled was formed, and its published report served as a model for social and rehabilitation initiatives.¹²

Prior to the United Nations International Year of Disabled Persons in 1981, the Kenyan government named 1980 the Year for Persons with Disabilities and supported a variety of disability-related projects. In addition, the Attorney General established a Task Force in 1993 to look into laws that affect PWD. The Task Force collected information and published a report on the findings. As a result, the Persons with Disability Act (PDA) was passed in December 2003.¹³

¹⁰ *ibid*

¹¹ Convention on the Rights of Persons with Disabilities (CRPD) | United Nations Enable (n 3)

¹² Fikru Negash Gebrekidan, ‘ Disability Rights Activism in Kenya, 1959-1964: History from Below (African Studies Review vol. 55, No. 3 Cambridge University Press ,December 2012) 103

¹³ Kenneth Njogu, ‘Media and Disability in Kenya’ (Disability Studies Quarterly Vol 29, No 4 ,2009) <<https://dsq-sds.org/article/view/983/1171>> accessed 29 May 2021

The Constitution of Kenya, 2010 provides for the right to access justice,¹⁴ the right to fair trial¹⁵ and the right to a free interpreter.¹⁶ In addition, the Attorney General is mandated to make special rules to facilitate provision of pro-bono services to PWD.¹⁷ The rights of PWD to access justice in Kenya are further anchored in the UNCRPD and the PDA.

Persons with disabilities in Kenya face significant challenges in getting access to justice. National laws that do not give effect to the rights of PWD adequately might be a barrier. The justice system's institutional framework, which comprises court processes and law enforcement, can also present challenges. Barriers and impediments to the latter are usually complex, encompassing multiple types of inaccessibility as well as prejudice in various forms. The repercussions of such hurdles are considerable, as an inaccessibility to justice can exacerbate the challenges that PWD experience, making them vulnerable to abuse, including physical and sexual abuse. Justice delayed is also justice denied, so quick access to justice is critical.

1.1: The statement of the problem

Kenya has a robust legal framework on the rights of Persons with Disabilities chiefly comprising of the Constitution of Kenya, UNCRPD and PDA. The legal framework is designed to ensure optimal protection for PWD, with respect to social, economic and political spheres. However, despite the legal framework, PWD continue to face considerable barriers in terms of access to justice. The study seeks to investigate the legal challenges hindering PWD's access to justice. The problem of this study is that despite Kenya having laws and policies governing disability, persons

¹⁴ Article 48 of the Constitution of Kenya

¹⁵ Article 50 of the Constitution

¹⁶ Article 50 (m)

¹⁷ Persons with disabilities Act (No 14 of 2003)

with disability continue to face barriers while accessing justice because the legal framework is not adequate to address their plight.

The definitions adopted by the legal framework have 'individualized and medicalized' disability in a way that does not highlight issues of justice nor emphasize the rights of PWD. In addition, even though PDA was enacted in 2003, the government is yet to develop special regulations to ensure complete operationalization of the Act. The study seeks to investigate the legal implications of the inadequacies on the rights of PWD in Kenya, especially their constitutional right of access to justice.

1.2: Justification of the study

There are no adequate studies establishing the adequacy of the Kenyan legal framework in addressing disability. This study will extend the frontier of knowledge in the area of access to justice and disability with regard to the realization of the constitutional requirements for access to justice for PWD in Kenya. Further, the study will interrogate the Kenyan legal framework and employ the best practices approach to analyze the experiences of other jurisdictions with a view of proposing necessary amendments to the Kenyan legal framework and influence policy making to enhance better access to justice for PWD.

1.3: The objectives of the study

The broad objective of the study is to examine the barriers that PWD in Kenya face in terms of access to justice.

The specific objectives are as follows:

1. To examine the historical and theoretical underpinnings of access to justice for PWD.
2. To examine the Kenyan legal framework governing access to justice for PWD.

3. To identify the best practices from other jurisdictions on access to justice for PWD that can provide lessons which Kenya can emulate.
4. To offer recommendations for amendments to the Kenyan legal framework and to influence policy making to enhance access to justice and give effect to the rights of PWD.

1.4: Hypothesis

The study is based on the following hypothesis;

1. The Kenya's legal framework does not guarantee optimal realization of the right to access to justice for PWD.
2. The current inadequacies can be cured by amending the law and adopting better policies.

1.5: Research questions

1. What are the historical and theoretical underpinnings of access to justice for PWD?
2. What is the Kenyan legal framework governing access to justice for PWD?
3. Which are the best practices from other jurisdictions on access to justice for PWD that can provide lessons which Kenya can emulate?
4. What recommendations can be offered for amendments to the Kenyan legal framework and to influence policy making to enhance access to justice and give effect to the rights of PWD?

1.6: Theoretical framework

1.6.1: Models of disability

1.6.1.1: Medical Model

People with disabilities, as per the medical model, vary from the norm. The medical model gave us terms like "spastic," "handicapped," "invalid," "cripple," and "retarded." This attitude toward

disability reinforces the notion that PWD are not equivalent to their peers who are able-bodied.¹⁸ The medical paradigm of disability interpretation, as Johnstone¹⁹ points out, encourages dualism, with the able-bodied being characterized as "superior" or "better" to PWD.

The medical model views disability as a flaw that requires cure or treatment, as well as special protection, which often leads to societal constraints.²⁰ The medical paradigm's focuses solely on the limitations imposed by a person's impairment, ignoring contextual influences that may aggravate or exacerbate a person's functional skills. As a result, the medical model tends to focus on the disabled person, rather than the factors that may be leading to the disabled person's disability.²¹

This medical approach is based on the idea that the person with disability should bear all of the difficulties connected with their condition, and that the disabled person should go out of their way to ensure that they do not cause any discomfort to others.²²

1.6.1.2: Social Model

The social model, which has its roots in the disabled people's movement, comprises a political repurposing of the term disability to express the socially created disadvantage and marginalization faced by individuals who have or are seen to have "impairments." The dichotomy between socially imposed exclusion and disadvantage, on the one hand, and individual mind and body qualities, on

¹⁸ Marno Retief and Rantsoa Letšosa, 'Models of disability: A brief overview', HTS Theologies Studies/ Theological Studies 2018, 74(1), a4738 <<https://doi.org/10.4102/hts.v74i1.4738>> accessed 26 April 2021

¹⁹ David Johnstone, 'An Introduction to Disability Studies' (Taylor and Francis Hoboken, 2012)

²⁰ Honor Woods and David Thomas, 'Working with people learning disabilities' (Jessica Kingsley Publishers, Toronto 2003)

²¹ Status of Disability in Kenya (n 5)

²² The Social and Medical Model of Disability — University of Leicester' <<https://www2.le.ac.uk/offices/accessability/staff/accessabilitytutors/information-for-accessability-tutors/the-social-and-medical-model-of-disability>> accessed 26 April 2021

the other, is at its core.²³ PWD, according to Purtell ²⁴ are persons who are disabled by the larger society, as well as the institutions and attitudes of that society.

In comparison to the medical paradigm, the social model offers a more inclusive approach. PWD are given proactive consideration as to how they can engage in activities on an equal footing with people who are not disabled. Certain adaptations are made to ensure that PWD are not alienated, even if they cost time or money.²⁵

1.6.1.3: Human Rights Model

According to the human rights model, all people, regardless of their disability, have certain unalienable rights. This concept emphasizes on perceiving PWD not as objects but as subjects, thereby putting the problem outside of the PWD and addressing how social and economic processes accommodate, or do not accommodate, the disability inequalities.²⁶ As the name implies, the model emphasizes on principles of human rights, and views disability from a human diversity perspective. In addition, it maintains that PWD have an inherent right to equality and that disability should not be a reason to reject or restrict people's rights. This includes the right to access to justice.²⁷

²³ Status of Disability in Kenya (n 5)

²⁴ Rachel Purtell, 'Music and the social model of disability', in J. Williams (ed.), *Music and the social model: An occupational therapist's approach to music with people labelled as having learning disabilities* (Jessica Kingsley, London, 2013) , pp. 26–32

²⁵ Status of Disability in Kenya (n 5)

²⁶ 'Introducing the Human Rights Model of Disability' (*Disability Advocacy Resource Unit (DARU)*, 30 January 2019) <<http://www.daru.org.au/how-we-talk-about-disability-matters/introducing-the-human-rights-model-of-disability>> accessed 25 April 2021

²⁷ *ibid*

The approach emphasizes a person's inherent dignity and prioritizes personal autonomy on issues touching on their lives and locates the major "issue" outside of the individual and in society.²⁸ Human rights, according to many, exist to safeguard the essential dignity of human existence. Indeed, they emanate from "the inherent dignity of the human person"²⁹ and must be focused on protecting and developing human dignity.³⁰ Jack Donnelly argues that the essence of human rights is to safeguard a life of dignity, a life worthy of a human being, a life that cannot be enjoyed without these rights.³¹ Human dignity has a lot of appeal since, most societies value human life more than that of other creatures due to the ability of humans to improve living conditions.

This study will adopt the human rights model's principle of contextualizing access to justice for PWD. Disabilities are now recognized as a human rights concern. UNCRPD has clearly reflected this concept in the international environment. Disability is viewed as a concept in the convention and other legal frameworks on disability, with a human rights inclusion approach.

1.7: Literature review

Investigating literature related to a research problem is very important. Its operations draw from a basic position among researchers that the more one knows about the peripheral investigations related to one's own study, the more knowledgeable one can tackle the problem embedded in one's own area of study.³² The study organizes the literature review into three themes, name, disability and human rights, access to justice and infrastructure of the courts.

²⁸ *ibid*

²⁹ United Nations Declaration on Human Rights.

³⁰ 'Introduction to Human Rights Theories' <<https://www.sfu.ca/~aheard/intro.html>> accessed 26 April 2021

³¹ Jack Donnelly, *Universal Human Rights in Theory and Practice* (Ithaca: Cornell University Press, 1989)p.17

³² Paul D Leedy, *Practical Research: Planning and Design* (4th edition, New York: Macmillan 1998)

Disability and Human Rights

On the issue of accessing human rights, Joseph Riungu³³ notes that various regimes deny PWD equal access to social amenities and public facilities like courts, tribunals, prisons and judicial systems on numerous occasions. He emphasizes that governments, as the first responsibility bearers, are responsible for ensuring the implementation of people's human rights. In this sense, he asserts that it is the responsibility of the government to ensure protection of human rights through adequate legal regimes. As a result, the government's responsibility to ensure the recognition of justice and the admittance of human rights for PWD necessitates input from a variety of stakeholders and is not solely accomplished through the convergence of government processes. Further, he observes that challenges of access to justice for PWD are predominant in developing countries.

The author has not reviewed the Kenyan legal framework governing disability. Further he does not give the specific recommendations on what policies, laws and programs need to be put in place to ensure enhanced access to justice for PWD. This study will interrogate the Kenyan legal framework and employ the best practices approach to analyze the experiences of other jurisdictions with a view of giving specific recommendations on reforms and policy making in order to realize enhanced access to justice for PWD.

Elizabeth Kamundia³⁴ observes that the right to legal capacity emphasizes that PWD have an innate ability to select their own destinies and have the decisions respected. She contends that the

³³Joseph G Riungu, 'Factors Affecting Access to Justice and Human Rights for Persons Living With Disabilities in Kenya' <<http://erepository.uonbi.ac.ke/handle/11295/109461>> accessed 9 March 2021

³⁴ Elizabeth Kamundia, *Independent Living for People with Disabilities in Kenya: Charting the Way Forward* (1st edn, Routledge, 2014)

basic drive for any government engagement should be to sustain a residuum of capacity and intervene to help people make their own decisions, with proper protections. Although the author recognizes the legal framework in Kenya addressing the plight of PWD, her main focus is on the provisions of UNCRPD. This study's main focus will be to interrogate the Kenyan legal framework governing disability against the best practices from other jurisdictions.

Access to Justice

The United States Institute of Peace³⁵ describes access to justice as more than just increasing a person's court access or ensuring legal assistance. People's ability to seek and get a solution for complaints in accordance with human rights standards is defined as their ability to access legal remedies in accordance with human rights standards. Marginalized persons do not trust the court process, they do not identify with it, face financial barriers, and they lack adequate sensitization on their rights. It includes protection under the law, legal education, legal support services and advice, adjudication, enforcement, and civil society oversight. This paper makes no specific recommendations for how to improve marginalized groups' access to justice. This study will propose specific policies in order to realize enhanced access to justice for PWD.

Magdalena Sepulveda and Kate Donald³⁶ while describing access to justice state that civil, economic, cultural, social and political rights must be realized and enjoyed, and also impunity

³⁵ United States Institute of Peace, 'Necessary Condition: Access to Justice' *para 7.8.1*' <<http://usip.org/guiding-principles—stabilization-and-reconstruction-the-web-version/rule-law/access-justice>> accessed 10 January 2021

³⁶ Magdalena Sepulveda and Kate Donald, '*Access to Justice for Persons living in Poverty: A Human Rights Approach*' (2014) 8

must be addressed. Human access to justice, according to the authors, obligates the state to have adequate remedies and empowers the populace to oversight the state. The state can discharge the duty by improving the capacity of the judicial bodies, disarming societal hurdles and promoting inclusion. According to the authors, under the human rights framework, states must ensure that everyone has equal access to justice by establishing a non-discriminative regime, enhancing judicial independence and incorporating fairness in dispute resolution forums. Whilst this article is important to this study as it views disability from a human rights approach, there is a need to first put up reforms to empower the marginalized to attain equality before the law.

Infrastructure of the courts

Kariuki Muigua and Kariuki Francis³⁷ explain that justice can be viewed from different perspectives; Restorative justice (corrective justice) or retributive justice is concerned with the principle of fairness in the sense of fair play; procedural justice is concerned with the principle of fairness in the sense of fair play; and economic justice is concerned with the principle of fairness in the sense of fair play. As a result, justice might have diverse meanings for different people. ADR can improve procedural and substantive justice, as well as increase access to justice can contribute to development by providing more channels for resolving conflicts.

They further argue that despite the importance of justice in national development, there are still a number of barriers to justice, particularly among the poor, such as a lack of financial resources; high court fees; a state's legal system with inadequate infrastructure/capacity; marginalization of minority groups; gender; and language barriers. The authors are of the view that these impediments prevent people from realizing their full potential in society. While this study appreciates this

³⁷ Kariuki Muigua and Kariuki Francis, "ADR, Access to Justice and Development in Kenya" 2014, Article presented at the Strathmore Annual Law Conference.

aspect, it contends that the discussion has taken a narrow approach as it only addresses one aspect of enhancing access to justice for marginalized groups like PWD which is alternative dispute resolution.

Kenneth Njiiri³⁸ investigates the difficulties that poor people, as well as the marginalized and illiterate, encounter in their quest for justice. Long distances to the courts, illiteracy, costly advocate fees, a lack of infrastructure to get to the courts, and a lack of information are just a few of them. As a result, he notes, the rights and fundamental freedoms of these groups of people are denied, violated, or infringed upon, causing them unhappiness and bias towards the courts, who are obligated to deliver justice to all regardless of social rank.

In his article, the author suggests that there is a need to reach the poor, uneducated, marginalized and those other disadvantaged people in society. As a result, ADR steps in to save the day. ADR, he says, is the rescuer for individuals seeking justice since it is more cost-effective and less expensive than litigation. Alternative dispute resolution, according to the author, is more flexible than litigation, which requires legal procedures to be followed. This author, like the other authors, takes a very narrow approach and fails to grasp that this step alone will not be enough to improve access to justice. Reforms must also consider the special needs of PWD who are involved in legal procedures.

³⁸ Kenneth Njiiri, 'Alternative Dispute Resolution and Access to Justice: The Kenyan Perspective <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3658004> accessed 27 April 2021

1.8: Research methodology

Research methodology describes procedures that are followed in carrying out a study.³⁹ The study will employ the best practices approach and doctrinal methodologies. The research is qualitative as it will review and analyze the already available data. Doctrinal research methodology is very useful in analyzing the legal, institutional and policy framework of a particular jurisdiction. It essentially analyses the history behind a particular legal proposition and the impact of the proposition in the legal framework.

In addition, the study will use best practices approach to analyze the experiences of other jurisdictions namely; the Republic of Korea, the United States of America and Australia with a view to identifying lessons which Kenya can emulate. The choice of these jurisdictions is informed by several factors; Australia was among the first countries to ratify UNCRPD.⁴⁰ In addition, she has comprehensive mechanisms for ensuring PWD's access to tribunals and court rooms, and friendly court procedures which protect the rights of PWD under UNCRPD.⁴¹

On the other hand, the United States of America has a commendable institutional framework and a robust legal regime on PWD.⁴² Further, the US regime on PWD has been in force for over 30 years, and has generated jurisprudence of global significance.⁴³ Lastly, the Republic of Korea has

³⁹ Olive M Mugenda and Abel G Mugenda, *Research Methods: Quantitative and Qualitative Approaches* (Nairobi, Kenya: ACTS Press 2003)

⁴⁰ Australia ratified the CRPD on 17 July 2008 and it came into force on 16 August 2008.

⁴¹ Ron McCallum AO, 'The United Nations Convention on the Rights of Persons with Disabilities: An Assessment of Australia's Level of Compliance' (Research Report, Royal Commission, October 2020) 61.

⁴² The U.S. Department of Labor, 'Americans with Disabilities Act' <<https://www.dol.gov/general/topic/disability/ada>> accessed 16 November 2021.

⁴³ Mobility International USA, '30 Years of the ADA and Its Global Impact' <<https://www.miusa.org/news/2020/ada30>> accessed 16 November 2021.

been recognized by international communities for her great progress in implementing UNCRPD.⁴⁴ Furthermore, it will conduct desktop review and interrogate secondary sources of data especially statutes, government policies, journal articles, textbooks and case law.

1.9: Limitations

The study is limited to PWD. The study focuses mainly on access to formal justice for PWD. Experiences from other jurisdictions will be key in providing best practices which Kenya can emulate.

1.10: Chapter breakdown

Chapter One: General introduction

The chapter will offer a general overview of the structure of the entire study. First, the chapter will offer some background information made to bring the study into context. It will also cover the problem statement, justification of the study, study objectives, hypothesis, research questions, the literature review, research methodology, limitations and the chapter breakdown.

Chapter Two: The historical and theoretical underpinnings of access to justice for persons with disability.

This chapter will review the history and theoretical underpinnings of access to justice for PWD.

Chapter Three: The Kenyan legal framework governing access to justice for persons with disability.

⁴⁴ United Nations Human Rights Office of the High Commissioner (2014), *Committee on the Rights of Persons with Disabilities considers initial report of the Republic of Korea*. <<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15055&LangID=E>> accessed 16 November 2021.

This chapter will review the provisions of UNCRPD, the Constitution of Kenya 2010, and PDA and with regard to access to justice for PWD.

Chapter Four: Best practices from other jurisdictions on access to justice for persons with disability.

This chapter will identify the best practices from other jurisdictions on access to justice for PWD that can provide lessons which Kenya can emulate.

Chapter Five: Conclusion and Recommendations

This chapter will offer recommendations from the study for amendments to the Kenyan legal framework to influence policy making to enhance access to justice for PWD and give effect to their rights.

CHAPTER TWO

THE HISTORICAL AND THEORETICAL UNDERPINNINGS OF ACCESS TO JUSTICE FOR PERSONS WITH DISABILITY.

2.0: Introduction

This chapter examines the historical and theoretical underpinnings of access to justice for PWD. In doing so, it addresses the concept of justice and embarks on an analysis of theories underpinning access to justice for PWD which help understand the precarious situation of PWD and the need for their access to justice. These theories provide a normative framework for regulating things and a foundation for establishing legal processes that can bring about the desired societal change. They make recommendations for resolving practical issues and outline what the law is, what it should be, and how the legal landscape is defined in general.⁴⁵ Further, the chapter provides the background for access to justice for PWD which lays the foundation and sets the context for discussion on what access to justice entails.

Finally, this chapter highlights a broad range of barriers facing PWD in relation to access to justice. It is necessary to highlight these barriers so as to appreciate the adequacy (or the inadequacy) of the Kenyan legal framework in relation to access to justice for PWD which is the subject of this study.

⁴⁵ OE Eberechi and GP Stevens, 'Legal Theories Underpinning Access to Justice for Victims of Sexual Violence in Refugee Camps in Africa' (2016) 10 International Journal of Law and Political Sciences 2623 <<https://publications.waset.org/10004986/legal-theories-underpinning-access-to-justice-for-victims-of-sexual-violence-in-refugee-camps-in-africa>> accessed 26 June 2021

2.1: The concept of justice

The concept of justice is universal, and it encompasses concepts such as fairness, accountability, and outcome equity.⁴⁶ The three basic methods of justice are transitional, informal and formal justice systems.⁴⁷

2.1.1: Formal Justice Systems

The structure and competency of formal processes are determined by the government's laws, rules, and regulations. They are sponsored by the government and its role is to interpret and resolve legal disputes, as well as to establish who is responsible for breaking the law. Key participants in this system include judicial officers, lawyers, and government prosecutors, judiciary personnel and process servers. Outside of the courts, the formal justice sector might include methods like arbitration, mediation, and restorative justice. Officers of the law, such as police officers, work closely with both the formal and informal judicial systems.⁴⁸

2.1.2: Informal Justice Systems

Informal judicial systems draw their power from non-governmental social groups or community organizations. Social groupings or institutions can include community-based organizations, indigenous practices and customs, rituals and ethic-based identities. Policy makers in this sector emanate from the community and do justice by use of informal techniques. They can be paid by

⁴⁶ Beqiraj Julinda, 'Access to Justice for Persons with Disabilities' (2017) <<<https://www.un.org/esa/socdev/documents/disability/Toolkit/Access-to-justice.pdf>> accessed 6 March 2021

⁴⁷ Valesca Lema and Miriam Gomez, 'Access to Justice: Promoting the Legal System as a Human Right' https://www.researchgate.net/publication/338423278_Access_to_Justice_Promoting_the_Legal_System_as_a_Human_Right?enrichId=rgreq-af263df4f8bce3dba55a5029b1433aac-XXX&enrichSource=Y292ZXJQYWdlOzMzODQyMzI3ODtBUzo4NDQ2NTkzMjg4MTkyMDNAMTU3ODM5Mzg4NTMyNg%3D%3D&el=1_x_2&_esc=publicationCoverPdf > accessed 20 June 2021

⁴⁸ *ibid*

the parties or by an outside agency, or they can volunteer their services for free as part of their community duty. The public and the community can also play an essential part in informal procedures and decision-making.⁴⁹

2.1.3: Transitional Justice

It stems from victims' accountability and reparation, as well as their recognition of their dignity as citizens and human beings. As a means of dealing with this issue, some governments and organizations choose to ignore enormous abuses, but this undermines the values that any worthy judicial system must uphold. Massive atrocities and systemic abuses devastate nations, leaving behind fragility, vulnerability, instability, polarization, and a lack of resources for judicial and political institutions such as Parliament, prosecutors, courts and police. Citizens' trust in the government's ability to protect their rights and security is eroded when rights are violated. In this situation, communities are rarely destroyed, and social and political systems are rarely weakened. Transitional justice is defined by the necessity to respond legitimately to major rights breaches.⁵⁰

2.2: Theories of access to justice for persons with disability

2.2.1: The rule of law

The rule of law is the legal notion that a country should be governed by laws rather than arbitrary decisions made by government authorities. It generally relates to the function of law in society, particularly as a means of limiting behavior, especially that of government officials, with the underlying premise that no one is above the law.⁵¹ Individual rights are central to Dworkin's rule

⁴⁹ *ibid*

⁵⁰ *ibid*

⁵¹ *ibid*

of law theory, which posits that citizens have political and moral rights against the government. It requires the recognition of political and moral rights so that, to the extent practicable, they can be enforced on the basis of individual requests through traditional justice system. The aim of governing by an accurate public notion of individual rights, according to this definition, is the rule of law.⁵²

According to Allan, the rule of law is basically a collection of fundamental concepts and ideals that work together to give the legal system some stability and consistency. The rule of law is a collection of standards, expectations, and goals that includes conventional beliefs about human liberty and natural justice, as well as, more broadly, ideas about the necessities of justice and fairness in government-governed relations. The distinction between substantive and procedural fairness is difficult to make; both are based on protection of human dignity. The concept of the rule of law is intricately related to a number of fundamental institutional structures. The fundamental concept of equality, which is near and dear to our hearts, is about justice and fairness, and it demands that all citizens have an equal say in the legislative process.⁵³

Access to justice is impossible without the rule of law, because the rule of law encourages accountability for offenses perpetrated against any section of society, including PWD, by subjecting states, individuals, and corporations to the law. Individual rights are also prioritized by rule of law concepts, which include means for enforcing those rights.⁵⁴

⁵² ‘Dworkin’s Rights Conception of the Rule of Law in Criminal Law · Netherlands Journal of Legal Philosophy · Eleven Journals’ <https://www.elevenjournals.com/tijdschrift/rechtsfilosofieentheorie/2017/2/NJLP_2213-0713_2017_046_002_004> accessed 26 June 2021

⁵³ OE Eberechi and GP Stevens (n 36)

⁵⁴ *ibid*

2.2.2: Concept of Access

Access is considered in terms of ability and right, as well as how it pertains to access to justice. The ability to profit from things, such as material stuff, people, institutions, and symbols, has been classified as an ability. Ability is similar to power in that it is described as the ability of some actors to influence the behaviors and beliefs of others, and power is seen as arising from, but not always associated with, individuals. Power is also thought to be inherent in some types of interactions, and that it can originate from or flow through the intentional and unintended consequences or impacts of social relationships. The connection between PWD and the government invokes access as the ability that is the power, allowing PWD to claim their right to access to justice against violators. Access to justice is impossible without the authority derived from this relationship.⁵⁵

According to MacPherson, right-based access arises when the ability to profit from something is derived on legal, customary, or convention-based rights. According to modern theorists, access as a right has to do with claims, and a legitimate claim ought to be recognized in law or by customs and usages.⁵⁶

2.2.3: Theories of Right

Rights are the foundation for not abusing others or gaining access to justice. Rights have been defined as a moral term that refers to a person's freedom of action. Wenar defined rights as the entitlements not to conduct certain activities or to be in particular states, as well as the right for

⁵⁵ *ibid*

⁵⁶ *ibid*

others not to perform such actions or to be in such states. A contract establishes the link between rights and obligations, and a right in rem is correlative to duties that are in principle owed to everyone. This also indicates that a right holder must allow others who owe him or her a duty to carry out that duty.⁵⁷ The interest theory posits that the purpose of human rights is to safeguard and promote specific human interests, whereas the will theory claims that human rights are valid because of the unique human capacity for freedom.⁵⁸

Human rights, according to Nickel, are the "fundamental moral guarantee" that all people ostensibly have by virtue of being humans. The rights are tied to certain persons to exercise them, they have a high priority, and they are necessary rather than optional to follow. Human rights are commonly accepted to be consistent with the view that they belong to everyone and should be enjoyed by everyone, as well as independent in the context that they exist and can be used as requirements of justification.

Human rights have also been defined as universal rights that individuals possess simply because they are human, and are founded on the concept of individual human dignity. Dignity is defined as a person's importance and value, which causes others to respect them or causes them to respect themselves. The term "dignity" is used frequently in discussions about human rights.⁵⁹ Although inherent in nature, human rights are especially important for people with disabilities, whose rights must not be abused and must be upheld by those responsible for their care.

2.2.4: Theory of justice

⁵⁷ *ibid*

⁵⁸ *ibid*

⁵⁹ 'Human Rights Concepts' <<https://faculty.chass.ncsu.edu/slatta/hi216/documents/hrintro.htm>> accessed 26 June 2021

John Rawls,⁶⁰ the influential author of 'A Theory of Justice' aims to determine whether there is a distinction between justice and fairness. Fairness, according to his thesis "Justice as Fairness," implies evaluating what is just without regard for vested interests, bias, or partiality. Principles that are agreed upon in a situation where no one knows what their specific share is because they are not the consequence of entrenched interests, according to him.

He employs the approaches of hypothetical contract and reflective equilibrium to support his claims. Rawls assumes in his hypothetical Contract that people in every community can discuss and agree on the essential principles that will govern their society equitably, free of vested interests and partisanship. In reflective Equilibrium, justice as fairness starts with one of the most basic of all the choices that parties might make as conceptions of justice to manage their relationship.

Rawls⁶¹ clearly states in his later writings that it is incorrect to imply that the concepts of justice and fairness are not the same and that one is more fundamental than the other. A just society, according to Rawls, will adhere to laws that everyone would agree to in the first place. Because they are deliberating behind the veil of ignorance, people are unaware of their own circumstances or even their concept of the happy life. Deliberators are also unlikely to pick a society with racist, sexist, or other unequally discriminatory behaviours, such as those directed at PWD, because they may find themselves on the wrong side of these policies beyond the veil approach.

2.3: Background of Access to justice for persons with disability

Bachelet observes that PWD have been disregarded, abandoned, and misunderstood for far too long, and their rights have been simply rejected. Legislation, procedures, and practices continue to discriminate against PWD, and the judicial system plays a key role in preventing such results and

⁶⁰ John Rawls, *'A Theory of Justice revised'* (Ed Belknap Press 2004)

⁶¹ *ibid*

providing appropriate remedies when they do occur, especially when they are the result of unfair laws.⁶²

Every nation's civilization is still infected with the ancient belief that PWD are less than completely human, and hence unsuitable for opportunities that other people are entitled to.⁶³ PWD have been treated differently throughout history than those who conform to or fit cultural norms. The ideals of the society in which they are embedded are reflected in the justice systems. Individual and system prejudices, racism, and structural inequalities may be encountered when dealing with the court system and law enforcement officers for a variety of reasons.

The concept of access to justice encompasses a method of reclaiming rights that have been ignored or violated. It is inextricably tied to the principles of natural justice, the right to a remedy that is effective, and the right to equality as a fundamental component of specific rights like the right to personal safety and liberty.⁶⁴

Simply expressed, access to justice refers to people's ability obtain remedies in by use of dispute resolution forums⁶⁵ which could be informal or formal institutions. People who have been harmed or mistreated in some way frequently seek restitution through the legal system and one can get involved in the legal system in the capacity of a witness.⁶⁶

⁶² Michelle Bachelet, ‘‘Access to Justice for Persons with Disabilities: From International Principles to Practice’’ <<https://binghamcentre.biiicl.org/publications/access-to-justice-for-persons-with-disabilities-from-international-principles-to-practice?cookieset=1&ts=1624270312>> accessed 21 June 2021

⁶³ ‘AUCD - Justin Dart’s 1990 ADA Statement’ <https://www.aucd.org/template/news.cfm?news_id=1413&parent=&parent_title=News%20/%20Document%20Search%20Results&url=/template/news_mgt.cfm?start=9504&sort=date%20desc,title> accessed 26 June 2021

⁶⁴ Valesca Lema and Miriam Gomez(n 35)

⁶⁵ Emma Senge Wabuke, Arnold Nciko and Abdullahi Abdirahman, ‘*Promoting Access to Justice in Kenya: Making the case for law clinics*’(The Platform, 11 October 2018) para 1

⁶⁶ S Ortoleva , ‘Inaccessible Justice: Human Rights, Persons with Disabilities and the Legal System’

According to Beqiraji and Lawrence McNamara,⁶⁷ PWD face disproportionate socioeconomic marginalization, which in turn results in poor standards of living and their exclusion from participating in community life.⁶⁸ Hindrances on access to justice, which are particularly prevalent among PWD, increase these bad effects. Disability can also be viewed as a cause and a result of poverty. Consequently, facilitating access to justice is one of the most important components of long-term development and poverty elimination.

Access to justice helps in achieving sustainable development and eradication of poverty.⁶⁹ The Kenyan Constitution 2010 affirms that everyone has the right to seek justice without any impediment.⁷⁰ The government should facilitate access to justice for all its citizens.

Access to justice is essential for democratic governance, the rule of law, and the fight against injustice and marginalization. There has been a plan for attaining inclusion based on a human rights-based approach to disability since the ratification of UNCRPD.⁷¹

Everyone should have equal protection under the law, a fair resolution of conflicts, meaningful participation, and the opportunity to be heard on an equality basis. States shall provide the necessary substantive, accommodations and support to ensure access to justice for PWD. The state should

<<https://papers.ssrn.com/abstract=2127888>> accessed 21 June 2021

⁶⁷ Julinda Beqiraj and Lawrence McNamara, 'Access to Justice for Persons with Disabilities: From International Principles to Practice' <https://binghamcentre.biiicl.org/publications/access-to-justice-for-persons-with-disabilities-from-international-principles-to-practice?cookieset=1&ts=1624873753> accessed 27 June 2021

⁶⁸ Julinda Beqiraj and Lawrence McNamara, 'Access to Justice for Persons with Disabilities: From International Principles to Practice' <https://binghamcentre.biiicl.org/publications/access-to-justice-for-persons-with-disabilities-from-international-principles-to-practice?cookieset=1&ts=1624873753> accessed 27 June 2021

⁶⁹ International Development Law Organization, 'IDLO in Kenya: Access to Justice' <<http://idlo.int/idlo-Kenya-access-justice>> accessed 8 January 2021

⁷⁰ The Constitution of Kenya 2010, Article 48

⁷¹ International Principles and Guidelines on Access to Justice for Persons with Disabilities <<https://www.un.org/development/desa/disabilities/wp-content/uploads/sites/15/2020/10/Access-to-Justice>> accessed 22 June 2021

promote equitable access by addressing barriers which stop PWD from benefiting from equality initiatives.⁷²

The right to a remedy that is effective, a fair and unbiased trial, and equality are all made up of, reliant on, and enhanced by the right to access to justice. The right refers to substantive access to justice, and fair trial requires the observance of procedural standards.⁷³

2.4: Barriers of access to justice

2.4.1: Access to physical infrastructure

Physical access to facilities, such as courts, police stations, and legal services, remains a problem for PWD in many nations. This is despite the establishment of legislative duties, primarily on courts and public buildings, to improve accessibility for individuals with disabilities, which are normally covered by anti-discrimination legislation. The most visible barriers to access are architectural elements, such as steps instead of ramps, which restrict PWD from accessing and using legal services in the same way that others do in a range of roles they may play in the justice system.⁷⁴

In *Paul Pkiach Anupa v AG*,⁷⁵ the court established that the physical structure of the Milimani Law courts hinders PWD from accessing the courts in a number of ways. Some of the physical barriers identified by the court were; some courts did not have ramp to facilitate access, the structures were not accommodative to persons using wheelchairs, the witness boxes were raised above the reach

⁷² *ibid*

⁷³ United Nations and the Rule of Law: Access to Justice < <https://www.un.org/ruleoflaw/thematic-areas/access-to-justice-and-rule-of-law-institutions/access-to-justice/> accessed 20 June 2021

⁷⁴ Eilionóir Flynn and others, 'Access to Justice of Persons with Disabilities' December 2019 https://www.ohchr.org/Documents/Issues/Disability/SR_Disability/GoodPractices/CDLP-Finalreport-Access2JusticePWD.docx accessed 22 June 2021

⁷⁵ *Paul Pkiach Anupa & Another v Attorney General & Another* (2012) eKLR

of persons on wheel chairs, the parking bays were not friendly to PWD and some court entrances were too thin for a wheel chair to pass through.⁷⁶

The Kenya's legal framework requires both public and private persons to undertake positive measures to eliminate physical barriers for PWD. The framework confers upon PWD the right to a friendly barrier-free environment, to facilitate their mobility and access to social amenities like roads and buildings.⁷⁷ In addition, owners of public buildings are mandated to undertake structural changes on the buildings with a view to making them suitable for PWD.⁷⁸ The duty to promote physical access and eliminate barriers does not only bind public entities, but applies to private entities. In *Cradle v Nation Media Group*,⁷⁹ the court held that the duty to provide ramps on buildings for the benefit of PWD binds corporate citizens.⁸⁰

2.4.2: Access to information for persons with disabilities

While physical access to facilities is necessary, access to information is critical from the start of the legal process. It would be pointless if PWD could physically enter the courtroom but couldn't comprehend or communicate because of a lack of proper information and accommodations during the proceedings.⁸¹

Information accessibility is not limited to legal knowledge or information on legal proceedings, however this is a benefit. It also includes all other relevant information, such as contact information

⁷⁶ Ibid.

⁷⁷ The Persons with Disability Act s 21.

⁷⁸ The Persons with Disability Act s 22.

⁷⁹ *Cradle – Children Foundation (suing through the Trustee Geoffrey Maganya) v Nation Media Group Limited ex parte Cradle – Children Foundation (suing through Geoffrey Maganya)* [2012] eKLR

⁸⁰ Ibid.

⁸¹ *ibid*

for lawyers with the requisite level of experience in disability issues and existing public, private, and non-profit resources for PWD seeking justice.⁸²

Some PWD may require communication accessibility in order to speak with staff in the court system, both inside and outside the hearing process, in addition to obtaining information. The lack of knowledge about disability concerns by law enforcers and the justice sector is a major obstacle to early entry to the legal system.⁸³

2.4.3: Attitudinal Barriers

PWD may be considered and treated as less credible at all stages of the legal process, including when reporting a crime, deciding whether or not to serve as a witness, making legal decisions, and seeking remedies for alleged violations of the law, due to negative attitudes and false beliefs or assumptions on the part of relevant actors such as cops, legal professionals, and the judiciary.⁸⁴

2.4.4: Economic Barriers

Persons with disabilities make up a disproportionately large proportion of the worlds poor. Lack of financial resources can have a direct impact on one's ability to access justice in a variety of ways. It can have an impact on one's capacity to retain and pay for quality legal counsel if it is not offered for free.⁸⁵ This is because litigation can be lengthy and expensive.

2.4.5: Production of Evidence Barriers

⁸² *ibid*

⁸³ *ibid*

⁸⁴ Beqiraj Julinda (n 37)

⁸⁵ *ibid*

In addition, the rights of PWD of access to justice are hindered by the Kenya's laws on production of evidence before dispute adjudication forums. To a great extent, the Kenya's regime does not offer special protection for persons with mental or learning disabilities, despite the fact that these disabilities prejudice their ability to tender evidence before the courts. In most instances, courts have an issue with the creditability of evidence tendered by a witness or a victim who could not hear or see, and thus weakening the case in question.⁸⁶

The Act does not recognize the legal capacity of persons with mental disability.⁸⁷ In addition, it does not mandate the state to provide assistance in form of intermediaries and sign language interpreters for witnesses with disabilities. Although the provision of intermediaries is provided for under the Prevention of Torture Act⁸⁸ and the Sexual Offences Act,⁸⁹ The Evidence Act is very general and does not appreciate the unique challenges facing PWD.⁹⁰ The best the Act does it to allow dumb witnesses to use signs.⁹¹

2.5: Conclusion

This chapter explored the concept of justice and made a case that the legal principles advanced by the theories underpin the essence of promoting access to justice for PWD. These theories give universal human rights standards and are capable of organizing and simplifying collective use thus bringing order to society as a result. ⁹²

⁸⁶ Government of Kenya (2011), 'Kenya's Initial Report Submitted under Article 35 (1) of the United Nations Convention on the Rights of Persons With Disabilities' 27.

⁸⁷ Government of Kenya (2011), 'Kenya's Initial Report Submitted under Article 35 (1) of the United Nations Convention on the Rights of Persons With Disabilities' 15. <https://www2.ohchr.org/SPdocs/CRPD/futuresession/CRPD.C.KEN.1_en.doc> accessed 16 November 2021.

⁸⁸ Prevention of Torture Act No. 12 of 2017 Section 16.

⁸⁹ The Sexual Offences Act No. 3 of 2006 Section 31(4)(b).

⁹⁰ The Evidence Act, Cap 80, Laws of Kenya.

⁹¹ The Evidence Act, Cap 80, s 126.

⁹² OE Eberechi and GP Stevens (n 36)

Further, the chapter provided the background for access to justice for PWD. It demonstrated that PWD lack adequate access through which they can redress their grievances. It makes a case for introduction of a regime that promotes access to justice for PWD.

This chapter also highlighted a variety of overarching barriers faced by PWD in relation to access to justice. This should bring into focus the discussion on the way forward to overcome the identified barriers faced by PWD.

The next chapter interrogates the Kenyan legal framework governing access to justice for PWD.

CHAPTER THREE

THE KENYAN LEGAL FRAMEWORK GOVERNING ACCESS TO JUSTICE FOR PERSONS WITH DISABILITY

3.0: Introduction

This chapter presents an analysis of the laws governing access to justice for PWD in Kenya. It lays out the various provisions of the legal framework which include UNCRPD, the Constitution of Kenya, 2010 and PDA. It seeks to investigate the efficacy of the framework in enhancing access to justice for PWD in Kenya. It includes an analysis of government interventions introduced to enhance access to justice and reduce discrimination against PWD. In doing so, the analysis also

seeks to establish the shortcomings of the legal framework and why despite the provisions of the legal framework, PWD in Kenya continue face barriers while accessing justice access.

3.1: United Nations Convention on the Rights for Persons with Disabilities (UNCRPD)

3.1.1: Preface

UNCRPD aims at preserving the rights and dignity of PWD.⁹³ It was established in response to extensive discrimination against PWD.⁹⁴ It addressed PWD's civil, political, economic, and social rights, as well as two perspectives on disability, one from the standpoint of global public health and the other from the standpoint of human rights. In addition, it counteracts the detrimental effects of society's attitudes toward PWD.⁹⁵ Human rights have risen to prominence as a crucial global approach to social justice for the marginalized, such as PWD. The international community has adopted various legal instruments to protect the welfare of PWD, and provide avenues through which they too can enjoy human rights and participate in the community life.⁹⁶

In Kenya, the CPRD was signed into law in 2007 and ratified in 2008.⁹⁷ By dint of Article 2(6) of the constitution, the UNCRPD is part of the Kenyan law. From 2003 to 2006, Kenya was a part of the team that developed UNCRPD by sending representatives to international conferences. The treaty is more binding than the earlier international commitments.⁹⁸ UNCRPD's purpose is to

⁹³ < https://en.wikipedia.org/wiki/Convention_on_the_Rights_of_Persons_with_Disabilities > accessed 2 August 2021

⁹⁴ Lenore Manderson, 'Disability, Global Legislation and Human Right' (Development, Palgrave Macmillan; Society for international Development, Vol 47(2) 2004) 29-35

⁹⁵ World Disability Report https://www.who.int/disabilities/world_report/2011/report accessed 2 August 2021

⁹⁶ Gilbert Oduor Onyango, 'A socio-legal critique of the legal framework for the promotion of rights of persons with disabilities in Kenya' (International Institutional of Social Studies, The Hague, The Netherlands December 2012)

⁹⁷ Journey towards the CRPD in Kenya <https://www.globaldisabilityrightsnow.org/impact/kenya/journey-toward-crpd-kenya> accessed 28 July 2021

⁹⁸ Ibid. United Nations' Declaration on the Rights of Persons with Disabilities.

promote, protect, and ensure that all PWD have full access to all human rights and basic freedoms, and human dignity.⁹⁹

3.1.2: Provisions of the CRPD on access to justice

Although all articles of the UNCRPD relate to access to justice, the articles mentioned hereunder are of particular importance. Over the years, determination of what ‘disability’ is has been an issue of debate amongst scholars. Indeed, the CRPD sought to settle this in Article 2 where it comprehensively offered the meaning of the term ‘discrimination on the basis of disability’. It defines it as any isolation founded on disability with the intention to prejudice the enjoyment of human rights and full participation in all spheres of life.¹⁰⁰

The said definition under Article 2 of the UNCRPD comprehensively includes almost all sorts of discrimination including the failure to offer ‘reasonable accommodations.’ This Article ought to be read in conjunction with the one on reasonable accommodations because PWD require assistance in order to compete successfully in society. Interesting, it defines ‘*reasonable accommodation*’ appropriate interventions designed to ensure equality for PWD.¹⁰¹ In order for any national policy to assist PWD, it must take into account these two definitions, which will improve PWD chances.

The UNCRPD obligates states to promote the achievement of all human rights and freedoms without any form of discrimination.¹⁰² This is to be achieved through the adoption of the appropriate legal and policy interventions.¹⁰³ Further, states are required to ensure their respective

⁹⁹ Article 1 of the UNCRPD

¹⁰⁰ Convention on the rights of Persons with Disabilities, Article 2

¹⁰¹ *ibid* Article 2

¹⁰² *ibid*, Article 4

¹⁰³ *ibid* Article 4(1) (a)

legislations are in support of PWD. This is achieved through legal reforms to ensure more protection for PWD against discrimination.¹⁰⁴ It is also the obligation of the states to initiate necessary policies and programs that promote the human rights of PWD.¹⁰⁵ It further prohibits states from contravening its provisions CRPD.¹⁰⁶ Finally, in the fight against discrimination, states must ensure that it is eliminated in all sectors including private enterprises.¹⁰⁷

Article 5¹⁰⁸ of the convention requires states to ensure equality before the law, proscribe discrimination of PWD, facilitate suitable accommodation for PWD and undertake affirmative actions to ensure realization of real equality for PWD. These clauses obligate Kenya to take all necessary steps, including ensuring that PWD have adequate legal equality protections founded on the constitution. Article 12¹⁰⁹ requires governments to have adequate legal recognition for PWD, as well as provide mechanisms to enhance their full participation in all aspects of life. Article 13¹¹⁰ emphasizes the duty of states to ensure PWD have adequate access to justice by providing necessary accommodations, as well as facilitative support in legal proceedings.

The Convention under Article 14¹¹¹ places high premiums on personal liberty and mandates states to uphold PWD's right to liberty by protecting the rights as well as ensuring that PWD's are not derived off their liberty arbitrarily. The states are required to follow due process and human rights whenever they wish to tamper with the PWD's right to liberty. Implementation of Article 14 is key for PWD because they have been subjected to great human rights violations while are in custody

¹⁰⁴ *ibid* Article 4(1) (b)

¹⁰⁵ *ibid* Article 4(1) (c)

¹⁰⁶ *ibid* Article 4(1) (d)

¹⁰⁷ *ibid* Article 4(1) (e)

¹⁰⁸ *ibid*

¹⁰⁹ *ibid*

¹¹⁰ *ibid*

¹¹¹ *ibid*

or are detained in those institutions and they might lack the ability or freedom to seek legal redress against such violations.¹¹²

Article 16¹¹³ of the UNCRPD gives PWDs protection from abuse, violence and exploitation by requiring national governments to undertake suitable state interventions to protect PWD as well as introducing public sensitization and powerful information sharing channels on cases of exploitation on PWD. Lastly, Article 23¹¹⁴ of the convention accords PWD the right to a private family life and obligates the states to introduce measures to ensure PWD have equal opportunity to participate in the family institution.

3.2 Protocol to the African Charter on Human and People’s Rights on the Rights of Persons with Disabilities in Africa

The Protocol places high premiums on the PWD’s right to access justice. The Protocol has an entire article dedicated to ‘access to justice’ under which it underscores the duty of the state to promote the right.¹¹⁵ The state is mandated to protect the right by providing suitable infrastructure and special accommodations for PWD, with a view to ensuring their effective participation in legal proceedings.¹¹⁶ The state is required to take reasonable positive steps towards eliminating discriminatory practices sanctioned by customary dispute resolution processes.¹¹⁷ In addition, the state is mandated to offer legal assistance to PWD, as well as train judicial officers and law enforcers on the rights of PWD.¹¹⁸

¹¹² Access to Justice for Persons with Disabilities
<https://www.un.org/esa/socdev/documents/disability/Toolkit/Access-to-justice>> accessed 27 July 2021

¹¹³ UNCRPD (n 78)

¹¹⁴ UNCRPD (n 78)

¹¹⁵ Protocol to the African Charter on Human and People’s Rights on the Rights of Persons with Disabilities in Africa Article 13.

¹¹⁶ Article 13 (1).

¹¹⁷ Article 13 (2).

¹¹⁸ Article 13 (3).

Even though Kenya is yet to ratify the Protocol, the Protocol has positive attributes which foster its chances of making Africa a better continent for PWD. For starters, the Protocol appreciates the unique African context and pays attention to African concerns and practices.¹¹⁹ Unlike the UNCRPD which takes an international face, the Protocol addresses African-specific challenges like superstitions, traditional beliefs and harmful practices.¹²⁰ In addition, it provides protection for persons with albinism, it provides for access to justice, and protection of positive African values, all of which are not provided for under UNCRPD.¹²¹ Protocol is in line with the main objective behind its enactment, which was the need to see disability rights in Africa through an African-specific context.¹²²

3.3: The Constitution of Kenya, 2010

Though the 1963 Kenyan Constitution forbade discrimination on numerous factors like tribe, race and colour,¹²³ it fell short of including ‘disability’ as a factor of discrimination. Therefore, any form of protection from discrimination on this factor was only afforded by UNCRPD.¹²⁴ On the said 19th May 2008, the CRPD was domesticated and converted into Kenyan law through the Kenyan Constitution. Prior to 2008, protection of PWD could only be afforded by court through

¹¹⁹ Grace Antwi-Atsu, ‘The African Disability Protocol: a call to leave no one behind’ <<https://www.sightsavers.org/blogs/2021/08/the-importance-of-the-african-disability-protocol/>> accessed 16 November 2021.

¹²⁰ Sightsavers, ‘The African Disability Protocol’ <https://campaigning.sightsavers.org/adp/?_ga=2.117892169.1180549790.1637142764-1150399735.1637142764> accessed 16 November 2021.

¹²¹ KNCHR (2020), Advisory to The Ministry of Labour, Social Security and Services on Kenya’s Ratification of the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Persons With Disabilities In Africa 15-17.

¹²² Louis Oyaro, ‘Africa at Crossroads: The United Nations Convention on the Rights of Persons with Disabilities’ (2015) 30 (2) American University International Law Review 360.

¹²³ International Labour Organization, ‘Inclusion of People with Disabilities in Kenya’ https://www.ilo.org/wcmsp5/groups/public/@ed_emp/@ifp_skills/documents/publication/wcms_115097 accessed 2 August 2021

¹²⁴ Kenya became a signatory on the 30th March 2007 which was later ratified on the 19th May 2008.

principles of justice fairness and natural law. This constitutional and legal protection of human rights is crucial because it expresses the state's commitment to human rights, at least formally.¹²⁵

In Kenya, PWD have the right to have their dignity, their fundamental freedoms and human rights respected. This protection was extensively provided for in the 2010 Constitution. The hallmark of this protection is in the constitutional provisions which protect human dignity and enhance social justice.¹²⁶ It further places responsibility of taking up interventions to enable PWD achieve their potential and create social fairness.¹²⁷

Of importance is Article 22(1)¹²⁸ which provide for the right of any person to approach the court for relief on violation of constitutional protections. The redress can be sought on a representative capacity for the benefit of PWD.¹²⁹ Such an action can be instituted in the High Court of Kenya.¹³⁰

The Constitution, Article 27 outlaws discrimination and obligates all persons to shun discriminatory practices on a variety of grounds as well as ensure equality.¹³¹ The provision seeks to advance full realization of all constitutional guarantees¹³² and requires the state not to sanction discriminate on any grounds.¹³³

Article 28 guarantees the right to human dignity. This is an inherent and inalienable right that is enjoyed even by every person who is under a disability. This right is best explained

¹²⁵ International Principles and Guidelines on Access to Justice for Persons with Disabilities(n 61)

¹²⁶ Constitution of Kenya, Article 19(2)

¹²⁷ The Constitution of Kenya, 2010

¹²⁸ *ibid*

¹²⁹ *ibid* Article 22(2)

¹³⁰ *ibid* Article 165(3) (b)

¹³¹ *ibid* Article 27(1)

¹³² *ibid* Article 27(2)

¹³³ *ibid* Article 27(4)

by the UDHR¹³⁴ to the effect that humans have equal dignity and freedom at birth. This is a right that even persons born with disability enjoy.

Also important to the protection of PWD is the constitutional entitlement to fair administrative action. The Constitution gives Kenyans a right to fairness as well as the right to have their disputes determined expeditiously.¹³⁵ Further, there is a wrongful administrative actions impacting a fundamental right, the person to be affected must be given written reasons. This means that PWD are also entitled to written reasons where an administrative action is likely to interfere with any of their rights.

Further, on the issue of access of justice, all persons regardless of their standing, should be treated fairly by courts and tribunals. The courts and tribunals should ensure that justice is delivered quickly and without undue regard for procedural details. This is indeed the spirit of the Constitution under Article 48 which provides for the right of access to justice.

The right of access to justice is intertwined to the right to fair hearing under Article 50 of the Constitution.¹³⁶ Kenyans have a right to have their disputes resolved through recognized independent dispute resolution avenues. Accused persons have a right to get an interpreter in cases of language barriers.¹³⁷ The accused person may opt to use an intermediary to held with communication.¹³⁸ This would come in handy especially where the accused person is deaf or dumb.

¹³⁴ Universal Declaration of Human Rights

¹³⁵ Constitution of Kenya Article 47(1)

¹³⁶ *ibid*

¹³⁷ *ibid* Article 50(2) (m)

¹³⁸ *ibid*

The Constitution further made a milestone in Article 54 where it specifically provided for the rights of PWD. Importantly, it provides for the right to be addressed and treated with dignity.¹³⁹ Further, such persons are entitled to basic education in facilities compatible with their specific and unique needs.¹⁴⁰

For the longest time, most of the public utilities ignored the unique needs of PWD. The Constitution therefore protected the right of such persons to access such public places (e.g. public toilets), public transport and access to information.¹⁴¹ Importantly, the public places include the right to access court rooms. The right to access information¹⁴² cannot be achieved without the right of PWD to use braille and sign language as well as the right to access assistive devices.

3.4: Persons with Disabilities Act (PDA)

The Act was enacted in 2003.¹⁴³ It is Kenya's first disability-specific legislation and it establishes a legal framework that prohibits all forms of discrimination against PWD. It was enacted to protect the rights of PWD, to ensure equal opportunity, and create relevant institutions.¹⁴⁴ PDA was enacted in response to lobbying from the civil societies, with the goal of reducing discrimination that was being perpetuated against PWD.¹⁴⁵

The Act defines both the term 'disability' as impairments that prevent a person from fully participating in spheres of life¹⁴⁶ and the term 'discriminate' as doing negative differential

¹³⁹ *ibid* Article 54((1) (a)

¹⁴⁰ *ibid* Article 54(1) (b)

¹⁴¹ *ibid*

¹⁴² *ibid*

¹⁴³ PDA No. 14, 2003 (CAP 133 of the Laws of Kenya)

¹⁴⁴ *Ibid*. It creates the National Council for People with Disabilities

¹⁴⁵ Access to Justice for Persons with Disabilities (n 90)

¹⁴⁶ Persons with Disability Act, Section 2

treatment on the basis of disability.¹⁴⁷ The 2019 proposed amendment of this Act defines ‘*disability*’ as any visual, auditory impairment that hinder one from equally participate in all aspects of social life, namely social economic or environmental.¹⁴⁸ The phrase "social, economic, and environmental participation" is misleading because PWD are limited by society and/or the environment, not by their capability to participate in their environment.

Section 3 of this Act establishes a state corporation known as the National Council for PWD.¹⁴⁹ Its principal mission is to promote and protect opportunity for PWD, as well as the realization of their human rights, so that they can live decent lives.¹⁵⁰ PWD-based bodies nominate members. It also has ministry appointees, representatives from employers union, trade unions, and the AG. It is led by a Chairman who is not a member of the board, and the Secretariat oversees the day-to-day operations. PWD must make up at least twenty of the Council's maximum twenty-seven members. With the Minister's permission, the Council may co-opt one member. The Council is required to hire a director who will communicate with ministers and other relevant institutions and organizations for the benefit of the disabled and to ensure that the Council's mandate is fulfilled.¹⁵¹

The Council's mandate includes, among other things, coordinating and liaising with appropriate government departments and agencies on disability issues. The Council is further tasked to issue adjustment orders, advising the minister on steps to enhance the wellbeing or rehabilitation of PWD in accordance to any international treaty or agreement, consulting with the relevant

¹⁴⁷ *ibid*

¹⁴⁸ Persons with Disabilities (Amendment) Bill, 2019

¹⁴⁹ Persons with Disability Act, Section 3

¹⁵⁰ National Council for Persons with Disabilities website <ncpwd.go.ke> accessed 3 August 2021

¹⁵¹ *ibid*

department of government on the development of appropriate learning and training programs for PWD.¹⁵² This Council also has the mandate to evaluate the efficacy of such curricula.

The Council is also required to work hand in hand with the national census to ensure the correct population of PWD is captured.¹⁵³ Such information is necessary in ensuring that disabled persons have access to suitable and affordable housing.¹⁵⁴ For this reason, PWD are required to register with the Council.¹⁵⁵ The registration should designate individuals whose disability conditions necessitate ongoing medical treatment¹⁵⁶ so as to expedite subsidization of medical services.

Further, the Council is mandated to register institutions and organizations that provide welfare services for disabled persons, as well as locations where rehabilitation services are delivered. After the registration of such entities, the Council is required to assist in the placement of the enlisted PWD with the suitable medical and rehabilitation institutions. The Council's functions require it to give direct material assistance to PWD.

In the end, the Council's mandate revolves around ensuring it improves the welfare of PWD.¹⁵⁷ These include, among other things, designing policies aimed at achieving equal opportunities for PWD; ensuring that the accurate statistics on PWD are captured by National Census; issuing orders requiring the adaptation of buildings to ease for PWD; advising on steps to curb any discrimination against PWD; and encouraging others to do the same.¹⁵⁸

¹⁵² PDA, Section 24

¹⁵³ *ibid* Section 7(1) (b) (ii)

¹⁵⁴ *ibid* Section 7(1) (h)

¹⁵⁵ *ibid* Section 7(1) (c) (i)

¹⁵⁶ *ibid* Section 7(1) (c) (iv)

¹⁵⁷ *ibid*, Preamble

¹⁵⁸ National Council for Persons with Disabilities website(n 119)

The Act mainly ensures that PWD can exercise their rights in a free and fair society.¹⁵⁹ Such rights include employment rights;¹⁶⁰ the right to education¹⁶¹; the right to special and non-formal education¹⁶²; the right to health.¹⁶³ PWD also have a right to a barrier-free and disability-friendly environment,¹⁶⁴ as well as the right to sports and recreation.¹⁶⁵ Indeed, the civil rights (1st Generation of human rights) as contained in Part IV of this Act include the right to vote.¹⁶⁶ It therefore requires that voting places be made accessible to people with disabilities.¹⁶⁷

Importantly, the rights outlined in the Preamble of PDA are well listed under the Act, which addresses rights and benefits of PWD. The Act's Section 11¹⁶⁸ deals with the realization of PWD people's rights. It states that the government must use all available resources to ensure complete realization of the rights of PWD outlined in this section.

The legal system is addressed in Section 38¹⁶⁹. It stipulates that PWD shall be provided with legal representation whenever they are charged with a capital offense or in any judicial process involving a breach of their rights or the deprivation of their property. The AG, working together with the Council and the Law Society of Kenya, is mandated to formulate regulations on pro bona services for PWD. The said regulations must deal with situations concerning the infringement of PWD's rights or deprivation of property. The Chief Justice is also required to issue rules allowing PWD

¹⁵⁹ Notably is Part III of PDA, which is entitled 'Rights and Privileges of Persons with Disabilities'

¹⁶⁰ PDA Section 12-17

¹⁶¹ *ibid* Section 18

¹⁶² *ibid* Section 19

¹⁶³ *ibid* Section 20

¹⁶⁴ *ibid* Section 21-27

¹⁶⁵ *ibid* Section 28

¹⁶⁶ *ibid* Section 29

¹⁶⁷ *ibid* Section 30

¹⁶⁸ *ibid*

¹⁶⁹ *ibid*

to be exempted from paying fees in instances where free legal services have been gained through the Attorney General's regulations.¹⁷⁰

Further, the Chief Justice is obligated to create rules on the use of interpreters, Braille and other assistive devices for PWD who attend court.¹⁷¹ A disabled person who is facing any criminal charge is also entitled to bail.¹⁷² Where they have to be held in custody, they must be held in facilities that have been modified in compliance with the Minister's regulations. The Chief Justice is also mandated to take ensures swift resolution of matters involving disabled persons, taking into account their nature of the disability in question.¹⁷³

Rules established under the PDA provide guidelines for institutions that which handle people with severe disabilities.¹⁷⁴ Under these Regulations,¹⁷⁵ the Council is mandated to advise the local governments, community-based institutions, in the introduction of welfare programs which touch on the basic wellbeing of PWD, as well as those in conflict with the law.¹⁷⁶ The program for efficient rehabilitation and inclusion in the community mainly involves building the capacity of children and PWD.

3.5: An overview of the shortcomings of the legal framework

The UNCRPD avoids providing an explicit definition of the term 'persons with disabilities.' However, in its Preamble, it state that disability or impairment results from environmental barriers that prevent them from equally participating in the community life. This perspective on disability,

¹⁷⁰ PDA, Section 38(2) (a)

¹⁷¹ *ibid* Section 38(2) (b)

¹⁷² *ibid* Section 38(2) (c)

¹⁷³ *ibid* Section 38(4)

¹⁷⁴ The Persons with Disabilities (Cost, Care, Support and Maintenance) Regulations 2009

¹⁷⁵ The Persons with Disabilities (Cost, Care, Support and Maintenance) Regulations 2009

¹⁷⁶ *ibid* Regulation 3

as opposed to the medical model, assumes the social model of disability, which, describes the problems that people with impairment face due to external factors. The medical model, on the other hand, views a person's impairment as the source of one's inability to fully engage in society. The UNCRPD defines disability as impairments which prevent one from equally participating in the society.¹⁷⁷

In Kenya, the definitions have 'individualized and medicalized' disability, in which case PWD are evaluated in terms of 'functional limits, where disability is defined as blindness, deafness, or other forms of changes in body structures, and therefore considered as 'an individual problem.' Medically oriented definitions do not highlight issues of justice or emphasize the rights of PWD, leading to 'people being asked about their impairments' or perceiving the site of the problem facing PWD as their body and viewing them through the lens of their disability.¹⁷⁸

The provisions for access of justice stipulated in PDA are commendable. Though this Act was passed in 2003, the rules under section 38¹⁷⁹ were never developed. This was therefore a great injustice. Legal aid is almost exclusively granted to people accused of capital crimes in Kenya. The National Council for the Administration of Justice (NCAJ) is responsible for establishing standards and policies on access to justice. This body is represented at the county level by the Court Users Committee (CUC), which should include two representatives from the PWD community.¹⁸⁰

¹⁷⁷ Karen Koech, 'Has the ten years of the Constitution 2010 improved the lives of Persons with Disabilities?' <<https://www.theyouthcafe.com/perspectives/has-the-ten-years-of-the-2010-constitution-improved-the-lives-of-persons-with-disability>> accessed 6 August 2021

¹⁷⁸ Gilbert Oduor Onyango(n 74)

¹⁷⁹ ibid

¹⁸⁰ The Kenya National Commission on Human Rights, 'A Briefing Paper on Implementing Article 12 of the Convention on the Rights of Persons with Disabilities regarding Legal Capacity in Kenya'(2016) pg 30

PDA was drafted before the CRPD was fully developed and adopted, great disservice to PWD in Kenya. This is due to the Act's lack of provisions for effective punishments for violations of any human rights.¹⁸¹ The rights under PDA fall well short of the UNCRPD's. PDA's phrasing does not give disabled people a sense of entitlement. As a result, a Person with Disabilities cannot reasonably enforce PDA. In order to be protected from all of the rights that a disabled person is entitled to, one must seek beyond PDA and invoke the UNCRPD. Second, positive action programs should be introduced to remedy historical injustices suffered by PWD, as PDA does not confer a clear cut right for PWD to enforce their protection against discrimination.¹⁸²

3.5 Kenyan Jurisprudence on Access to Justice for PWD

Kenyan courts have generated a robust jurisprudence underscoring the PWD's right to access to justice and fair hearing. The High Court in 2014 adopted a variety of interventions to ensure fair trial of an accused person who could not speak.¹⁸³ The court permitted the use of intermediaries, gestures and signs, special court sittings, administration of special written oaths and the use of pre-prepared questions to aid in statement recording.¹⁸⁴ The courts have also described the role of the intermediaries as purely facilitative, by way of passing communication between the witness and the court, and offering explanations where necessary.¹⁸⁵ In addition, the intermediary must not be having any interest in the dispute and must be capable of understanding the PWD's mode of communication.¹⁸⁶

¹⁸¹ Gilbert Oduor Onyango(n 74)

¹⁸² *ibid*

¹⁸³ Republic v Elijah Weru Mathenge, High Court of Kenya at Nairobi (2014) eKLR

¹⁸⁴ Republic v Elijah Weru Mathenge, High Court of Kenya at Nairobi (2014) eKLR

¹⁸⁵ M. M v Republic Criminal Appeal No. 41 of 2013 reported in [2014] eKLR

¹⁸⁶ Republic v Elijah Weru Mathenge [2017] eKLR

The courts allow mentally retarded persons to testify through their close relations. In, the court allowed a mentally retarded complainant to give evidence through a grandparent.¹⁸⁷ In other instances, courts are willing to allow evidence which has been pre-recorded as well as organize special sittings to examine the evidence given by a vulnerable witness.¹⁸⁸ The courts have held that trial courts are mandated to take into consideration the accused persons' nature of disability as well as ensure that the accused person receives requisite facilitations to defend the case.¹⁸⁹

Kenyan courts question the legality of court processes especially where the PWD was not accorded a fair opportunity to defend. In *Macharia Kiama v Republic*, the court quashed the conviction of a PWD because the PWD did not understand the sign language provided during his trial, as a result of which he could not cross-examine prosecution witnesses.¹⁹⁰ Similarly in *Kenga Hisa v Republic*, a conviction was rendered a mistrial because the interpreter supplied to aid the accused person did not have sufficient knowledge of sign language.¹⁹¹

3.6: Conclusion

This chapter looked over the provisions of legal framework governing access to justice for PWD in Kenya. It has discussed the various provisions of the UNCRPD, the Constitution of Kenya and PDA. It looked at the measures that the government has implemented in an effort to enhance access to justice for PWD and at the same time pinpointing some of the shortcomings of the provisions of the said legal framework. From the analysis, it is clear that Kenya has a robust legal framework

¹⁸⁷ David Muchiri Njue v Republic, HC Criminal Appeal No. 8 of 2014 (reported in [2016] eKLR)

¹⁸⁸ Republic v Elijah Weru Mathenge [2017] eKLR

¹⁸⁹ S.K. v Republic, High Court of Kenya at Migori (2020) eKLR

¹⁹⁰ Macharia Kiama v Republic, High Court of Kenya at Nyeri (2019) eKLR

¹⁹¹ Kenga Hisa v Republic, High Court of Kenya at Malindi (2020)

enacted in this respect. However, the enforcement and implementation aspects are lacking in the actualization of the principles set out in these legislations.

Further, this chapter has made it clear that the medical model has numerous shortcomings in its definition of disability and its consequent application in developing interventions for PWD. This has enhanced the discrimination of PWD which has in the end complicated their access to justice.

Chapter Four will therefore identify the best practices from other jurisdictions on access to justice for disabled persons in an effort to get lessons Kenya can emulate.

CHAPTER FOUR

BEST PRACTICES FROM OTHER JURISDICTIONS ON ACCESS TO JUSTICE FOR PERSONS WITH DISABILITY

4.0: Introduction

This chapter explores the best practices from other jurisdictions on access to justice for PWD that can provide lessons which Kenya can emulate. It has already been established from the previous chapter that despite Kenya having a robust legal framework governing disability, PWD still face barriers with regard to access to justice. It is thus imperative that Kenya learns from the experiences of other jurisdictions to actualize the principles set out in the legislation.

The chapter will therefore expound on legal measures undertaken by the Republic of Korea, the USA and Australia to enhance and promote access to justice for individuals with disabilities. The said countries boast of having the best practices across the globe in promoting, safeguarding and enforcing the rights of disabled persons. This chapter therefore aims to demonstrate practices from

the Republic of Korea, United States of America and Australia on access to justice for PWD that are worthy to be emulated.

4.1: Korea

The UNCRPD was indeed essential in shifting the country's attitude on disability issues.¹⁹² It changed the view on disability from charity-based welfare measures to one based on human rights. The CRPD positively influenced the perceptions held by government officials and disability rights advocates who were involved in the development and enforcement of disability policy. UNCRPD had a significant impact on the passage of the 'Anti-Discrimination Against and Remedies for Persons with Disabilities Act' (ARPD). This Convention further helped the creation of a shared social understanding of the necessity of such anti-discrimination legislation. As a result, the ARPD increased societal awareness of human rights and discrimination, particularly among PWD.¹⁹³

The ARPD was adopted by the Republic of Korea government to ban discrimination against PWD. The protection for PWD is also anchored in other statutes¹⁹⁴ which emphasize on equal protection for PWD.¹⁹⁵

¹⁹² The United Nations Website < <https://www.un.org/development/desa/disabilities/news/news/democratic-peoples-republic-of-korea-ratifies-crpd-total-ratifications-172.html> > accessed 2 September 2021 The Democratic People's Republic of Korea ratified the UNCRPD on 9 December 2016.

¹⁹³ Korean DPO and NGO Coalition for UN CRPD Parallel Report, 'Parallel Report for the UN Committee on the Rights of Persons with Disabilities' (September 2014)

¹⁹⁴ The Welfare of Disabled Persons Act (WDPA) Korea, the Employment Promotion and Vocational Rehabilitation of Disabled Persons Act (EVDPA), the Act on Special Education for Persons with Disabilities (ASEPD), and the Act on Right to Health and Access to Medical Services for Persons with Disabilities.

¹⁹⁵ Catalina Devandas-Aguilar, ' Answer to the Questionnaire from the Special Rapporteur on the Rights of Persons with Disabilities'

https://www.ohchr.org/Documents/Issues/Disability/DisabilityInclusivePolicies/States/PM%20republic%20of%20Korea_ENG.docx accessed 5 September 2021

4.1.1: Definitions

The Republic of Korea's Constitution confers upon its citizens the right to human dignity.¹⁹⁶ The law defines a person with disabilities¹⁹⁷ as someone whose social engagement is impaired by a physical or mental disability for an extended period of time. It further describes physical and mental disabilities as impairments to major external physiological functions and internal organs, as well as impairments induced by psychological development disorder or mental disease.¹⁹⁸ A similar definition has been advanced by ARPDA.¹⁹⁹ The EVDP Act defines disability as someone whose long-term professional life is significantly limited due to some impairment²⁰⁰ while other statutes define it as a situation in which a person's daily or social activities are severely limited for a considerable time due to social, physical and mental causes.²⁰¹

4.1.2: Public buildings

In 2014, the government of the Republic of Korea revised her laws²⁰² in an effort to protect the right to access public facilities by PWD. As a result, when constructing a new public building in Korea, the contractor must obtain 'Barrier-free (BF) Certification' from the local and central government." The ARPDA also mandates that public bodies, including the federal, state, and municipal governments, make "reasonable accommodations" to PWD. In Korea, public bodies must spend sufficient budget resources to support PWD's right to reasonable accommodation.²⁰³

¹⁹⁶ Article 10 of the Constitution of the Republic of Korea

¹⁹⁷ Welfare of Disabled Persons Act

¹⁹⁸ Article 2 of the WDPA

¹⁹⁹ Public Law No. 8341 First Enacted April 10, 2007

²⁰⁰ Employment Promotion and Vocational Rehabilitation of Disabled Persons Act Article 2(1).

²⁰¹ Article 2(7) of The National Human Rights Commission Act.

²⁰² the Act on Promotion of Convenience for the Disabled, Senior Citizens, and Pregnant Women (APC)

²⁰³ Catalina Devandas-Aguilar (n 153)

The laws and the institutions²⁰⁴ protect interests of PWD, while travelling and using facilities and transportation services securely and easily. In 2014, the Republic of Korea's government updated the APC, requiring governments to obtain "Barrier-free (BF) Certification" while constructing new public buildings. In addition, the government launched a social initiative²⁰⁵ to promote the rights of PWD to access public facilities.²⁰⁶

4.1.3: Remedies for discriminatory acts

Refusing to give reasonable accommodations to PWD without justifiable grounds is discrimination, according to Article 4 of the ARPDA, which specifies discriminatory acts.²⁰⁷ Once a discriminatory act has been established, the following remedies are considered: a recommendation for correction from an independent commission,²⁰⁸ a ministerial order for correction; an administrative fine of not more than thirty million Korean Won; or a prison sentence of up to three years.²⁰⁹

According to the ARPDA, anyone who has incurred an injury as a result of a discriminatory act prohibited by the ARPDA, or anyone who is aware of such a fact, is at liberty to report to the relevant agency.²¹⁰ Those found responsible for any violation are required to remedy the wrong.²¹¹

A minister has power to enforce a recommendation where the guilty person fails to comply with it

²⁰⁴ The Mobility Improvement for the Transportation Disadvantaged Act (MITDA) and the Association of Progressive Communications (APC)

²⁰⁵ The "4th National Plan for Convenience Promotion 2015-2019"

²⁰⁶ *ibid*

²⁰⁷ ARPDA, Article 4

²⁰⁸ National Human Rights Commission of Korea (NHRCK)

²⁰⁹ *ibid*, Article 50

²¹⁰ National Human Rights Commission Act, Article 38. The National Human Rights Commission of Korea (NHRCK).

²¹¹ ARPDA, Article 41

without justification.²¹² In addition, anyone who fails to comply with the corrective order without justification faces a fine of up to thirty million Korean Won in administrative fines.²¹³

Courts can also give remedies for discriminatory acts prohibited by the Act, according to the ARPDA. This Act states that anyone who causes injury to others in violation of the Act's provisions is liable for compensating the person who was affected as a result of the violation. If prejudice against a victim is clearly conveyed to the victim litigant, courts issue interim orders to suspend the discriminatory act until the case is determined.²¹⁴

The NHRCK has the authority to receive a complaint or make a recommendation when a discriminatory act is committed that is prohibited by the ARPDA. The NHRCK's Disability Rights Divisions 1 and 2 are primarily responsible for safeguarding PWD from discrimination. The Ministry of Justice has also established the "Committee on Discrimination Remedies for PWD" to assess whether an order for correction of a discriminatory act against PWD can be issued.²¹⁵

4.1.4: Employment of persons with disabilities

The EVDPA mandates the central and municipal governments to ensure that at least three percent of all public employees are PWD. It also provides that any business owner who employs at least fifty people on a regular basis must hire PWD to fill up to five percent of the overall workforce. These policies attempt to create a fair playing field for those with and without disabilities in the workplace.²¹⁶ The Republic of Korea's government passed laws to help people with severe

²¹² *ibid*, Article 43

²¹³ *ibid*, Article 49

²¹⁴ *ibid*, Article 48

²¹⁵ ARPDA, Article 40

²¹⁶ Act No. 14839, Jul. 26, 2017(Laws of the Republic of Korea)

disabilities who are having trouble breaking into the labour market.²¹⁷ According to this Special Act, public entities are required to spend no less than one percent of their yearly total spending on items or services made by persons with severe disabilities.²¹⁸

4.1.5: Right of access to information

PWD have extensive information rights.²¹⁹ The Telecommunications Technology Association Standard (TTAS) was also established by the Korean government to allow people with impairments access web-based material on an equal footing with people without disabilities. Furthermore, in accordance with the Framework Act on Broadcasting Communications Development, the Korean government developed a Korea Communications Standard (KCS) guideline to ensure access to information for PWD. It also produced a smart-work accessibility guideline for people with impairments based on this guideline.²²⁰

The National Information Society Agency (NIA) has been giving training to persons and officials from government agencies, educational institutions, and medical facilities in accordance with the terms of the ARPDA ²²¹ and the Framework Act²²² on National Information. The Republic of Korea's government has provided a personal assistant service, disability pensions, disability benefits, housing allowance or housing welfare services, adulthood guardianship and communication support for their welfare promotion and reasonable accommodation.

²¹⁷ The Special Act on the Preferential Purchase of Goods Produced by Persons with Severe Disabilities

²¹⁸ Korean DPO and NGO Coalition for UN CRPD Parallel Report (n152)

²¹⁹ The Welfare of Disabled Persons Act (WDPA) and the Framework Act on National Information.

²²⁰ *ibid*

²²¹ ARPDA (n 157)

²²² Act No.11690, 23. Mar, 2013

4.1.6: Use of sign language

Sign language interpreters have been accredited by the relevant Minister to successfully support communication between persons with hearing disabilities and those without disabilities, according to Article 19 of the Framework Act²²³ on Private Qualifications. The Korean Sign Language Act makes sign language one of the country's official languages.

4.1.7: Services to persons with disabilities

PWD in Korea have access to a variety of service delivery arrangements. Direct provision, public-private partnerships, community-based or non-governmental organization collaborations, and contracting out are just a few examples. Social welfare services, including as help for PWD, have been supplied through general government accounts, which are mostly funded by taxes. The Republic of Korea's government also runs the National Health Promotion Fund, which provides medical and health promotion services to the general people. Basic senior pensions have also been provided to help the elderly with long-term care. In addition, numerous voucher systems exist in Korea for the efficient delivery of social services.²²⁴

Article 5 (Collection of Opinions and Participation of PWD and Guardians) and Article 53 (Support for Independent Living) of the WDPA, as well as Article 8 (Guarantee of the Rights to a Fair Trial) of the WDPA, the government also collects opinions from PWD and ensures their right to self-determination as a way of supporting and using the said services.²²⁵

²²³ Ibid

²²⁴ Korean DPO and NGO Coalition for UN CRPD Parallel Report(n 152)

²²⁵ Act No. 11521, Oct. 22, 2012 (Republic of Korea)

4.2: United States of America

The principal source of protection for PWD in the USA is the Americans with Disabilities Act (ADA). This Act was enacted in the 1990 and considerably revised in 2008. It covers almost all areas affecting PWD's social and economic lives.²²⁶ The Act prohibits any form of discrimination based on employment in public service, as well as in the use of public transport. This principle is equally applied to US-Congress house. It protects PWD or their close relations. It defines a PWD as one with an impairment which limits their ability to engage in life activities.²²⁷

4.2.1: Employment

ADA requires employers with 15 employees to offer equal opportunities to PWD qualifying for the vacancies. It forbids discrimination in employment practices and mandates employers to provide reasonable accommodations for PWD. The obligation applies to both employers and religious organizations.²²⁸ The Act has channels for filing complaints, has institutions for receiving and acting on the complaints and has timelines within which the complaints must be redressed.²²⁹

4.2.2: State and Local Government Activities

The government is obligated to facilitate the ability of PWD's to access and enjoy public utilities and social amenities.²³⁰ When it comes to new construction and renovations, state and local governments must adhere to strict architectural guidelines. The government is required to provide

²²⁶ U.S Department of Justice, *Civil Rights Division, Disability Rights Section ' A Guide to Disability Rights Laws (February 2020)* < <https://www.ada.gov/cguide.htm> > accessed 5 September 2021

²²⁷ *ibid*

²²⁸ Title I of the ADA

²²⁹ The Equal Employment Opportunity Commission (EEOC).

²³⁰ Title II of the ADA

other means of access in inaccessible older facilities, as well as communicate efficiently with those who have communication impairments. Public bodies are obligated to adopt non-discriminative regulations and practices unless they can demonstrate that such an approach would essentially change the nature of the regulated activity.²³¹

The regime has a timeframe within which complaints escalate from one forum to another, and sometimes solved by department-sponsored mediation program in some circumstances. When the department has investigated a situation and been unable to address violations, it may file a lawsuit.²³² Private litigation in Federal court may also be used to enforce this provision. Before proceeding to court, you do not need to submit any complaint anywhere nor do you need to receive a "right-to-sue" letter.²³³

4.2.3: Public Transportation

City buses, public rail travel and other forms of Public transportation services, are well covered under the transportation provisions. Authorities involved in the transportation sector should therefore not discriminate against PWD. Therefore, in purchase of new vehicles or lease of used buses, authorities must ensure that the accessibility requirement as that would be to an undue burden on the disabled person.²³⁴ Overtime, *paratransit* are used to mainly be person who cannot use the standard transit system on their own.²³⁵

²³¹ *ibid*

²³² *ibid*

²³³ *ibid*

²³⁴ *ibid*

²³⁵ U.S Department of Justice, *Civil Rights Division, Disability Rights Section*(n 180)

4.2.4: Public accommodation

ADA mandates that public accommodations²³⁶ adhere to basic anti-discrimination guidelines that proscribe unequal treatment, segregation and exclusion of PWD. They must also adhere to particular requirements such as architectural standards for public buildings, appropriate policy, and practice, and procedure modifications, effective communication with persons who have communication impairments. Furthermore, given the public accommodation's resources, they have a duty to eliminate barriers on existing buildings provided doing so is simple and inexpensive.²³⁷

The Department of Justice can receive complaints of public accommodation breaches. The department is permitted to file a case where there are discriminatory practices and where such a conduct is a matter of public interest. Cases may be sent to a Department-sponsored mediation program under certain circumstances. When there is a pattern or practice of discrimination in violation of public accommodation, or when an act of discrimination raises an issue of general public concern, the Department is permitted to file a case. Private litigation can also be used to enforce public accommodations and one does not need to register a complaint anywhere nor even obtain a "right-to-sue" letter.²³⁸

4.2.5: Telecommunications Relay Services

Part IV of the ADA protects the interests of persons with hearing and speech impairments. Such concerns mainly involve the telephone and television access services. It mandates the

²³⁶ Restaurants, retail stores, hotels, movie theaters, private schools, convention centers, doctors' offices, homeless shelters, transportation depots, zoos, funeral homes, day care centers, and recreation facilities such as sports stadiums and fitness clubs are examples of public accommodations that private entities own, lease, lease to, or operate

²³⁷ Ibid

²³⁸ U.S Department of Justice, *Civil Rights Division, Disability Rights Section*(n 180)
Title III of the ADA

establishment of a framework to each communication amongst PWDs. Minimum TRS²³⁹ service standards have been established by the Federal Communications Commission (FCC). Federally financed public service announcements must also be captioned under Title IV.²⁴⁰

The law mandates corporates in telecommunications sector to ensure accessibility of the services to PWD.²⁴¹ As a result of such requirements, PWD have access to variety of products and services previously unavailable to them.

4.3: AUSTRALIA

Australian has several key legislations geared towards protecting the interests of PWD.²⁴² The Australian Human Rights Commission²⁴³ estimates that in every five (5) Australians, one has disability. Unfortunately, most of these persons face a great deal of obstacles in their daily lives. These obstacles are experienced all over including places of work, school, sports, transportation etc. The Disability Discrimination Act, 1992 (DDA) has indeed illegalized discriminatory practices against PWD. It further supports creation of equal rights and opportunities and their equal access by PWD. The mandate of enforcing this Act is placed on the Disability Discrimination Commissioner. The commissioner works together with other governments, and private entities to enhance discharge of the statutory mandates.

²³⁹ interstate and intrastate telecommunications relay services (TRS) 24 hours a day, 7 days a week by common carriers (telephone companies). TRS allows callers who use TTYs (also known as TDDs) and callers who use voice telephones to interact with each other via a third-party communications assistant.

²⁴⁰ *ibid*

²⁴¹ Section 255 and Section 251(a)(2) of the Communications Act of 1934, as amended by the Telecommunications Act of 1996

²⁴² The UNCRPD, Disability Discrimination Act, Disability Service act 1986 and the Social Security Act.

²⁴³ The Australian Human Rights Commission, 'About Disability Rights' < <https://humanrights.gov.au/our-work/disability-rights/about-disability-rights> > accessed September 3 2021

4.3.1: Definition of disability

The law ensures non-discrimination and protects people with disabilities' equality. It outlaws discrimination of PWDs in all spheres.²⁴⁴ The Disability Discrimination Act 1992²⁴⁵ gives a comprehensive definition of the term '*disability*'. This definition can also be viewed as circumstances when a person is considered as with a disability. It includes instances where one cannot normally undertake bodily functions²⁴⁶ and also includes disorders which disturb one's judgment, emotions and behavior in general.²⁴⁷ The Act illegalizes any form of discrimination against a person based on a disability while in any sectors of public life.²⁴⁸

This is meant to protect persons who currently have a disability or had it in the past, as well as prospective future disabilities. It also protects them against any ridicule made for the reason of having assistive mechanisms or personnel.²⁴⁹ In addition, the Act proscribes discrimination against PWD in all aspects of their social, economic and political endeavors.²⁵⁰

4.3.2: Disability standards

The Attorney-General may issue Disability Standards outlining the PWD's rights to equal access in greater depth and certainty than the Act itself allows.²⁵¹ The standards provide further measures that need to be adopted in an effort to curtail discrimination against PWD in several spheres and

²⁴⁴ **The Disability Discrimination Act 1992**

²⁴⁵ Disability Discrimination Act, Section 4 on Interpretation

²⁴⁶ *ibid*, Section 4(a)

²⁴⁷ *ibid* Section 4(g)

²⁴⁸ Disability Discrimination Act.

²⁴⁹ The Australian Human Rights Commission, 'About Disability Rights' (n 195)

²⁵⁰ The Australian Human Rights Commission, 'About Disability Rights' (n 195)

²⁵¹ Part 6 of the DDA on Disability Discrimination Commission

areas.²⁵² The standards touch on access to public buildings, public transportation and accessibility requirements for public transportation, education and training facilities. It prohibits discrimination of PWDs in each state and territory.²⁵³

4.3.3: Remedies for discrimination acts

One can lodge a complaint after the occurrence of a discriminating act.²⁵⁴ An advocate, solicitor or trade union may file a complaint on behalf of a victim who has faced discrimination. No charges are payable for institution of such a complaint. The complaint must be written down. The Commission provides a complaint form that can be filled out and sent to the commission via mail, fax, or online through the commission's website. Any language can be used to file a complaint. The Commission can arrange for a translator or interpreter if the complainant requires one.²⁵⁵

Once the Commission is in receipt of a complaint covered by the Disability Discrimination Act, investigation is initiated by the President of the Commission. Thereafter, alternative dispute resolution mechanism such as conciliation is initiated in an attempt to settle it. In such circumstances, the Commission's role is to obtain both sides of the issue. Thereafter, it assists individuals concerned in resolving the complaint. If this complaint is not solved through ADR, it might escalate further to the courts.²⁵⁶

Like other countries, Australia acknowledges the rights of PWD to freedom of movement, choice of abode, and nationality. Australia also declares that it is of the opinion that provisions of UNCRPD should not be interpreted to confer entry rights to non-nationals, and that the convention

²⁵² Work, housing, education, access to premises, and the provision of goods and services

²⁵³ *ibid*

²⁵⁴ To the Australian Human Rights Commission.

²⁵⁵ *ibid*

²⁵⁶ *Ibid*. The Federal Court of Australia or the Federal Magistrates Court.

has no bearing on Australia's health entry conditions for non-nationals. The legal framework has comprehensive mechanisms on provision of assistance services.²⁵⁷ The Government is mostly responsible for employment services under this Act and accommodation and other support services are prioritized by the states and territories.²⁵⁸

4.3.4: Disability funding and support services

The Disability Services Act of 1986 was enacted mainly to enable persons with disabilities access essential services they need participate in community life, to promote services for PWD that help them integrate into society, and to help PWD achieve positive outcomes like increased independence and employment.²⁵⁹

The Social Security Act 1991 on the other hand lays need for receiving the different forms of social security benefits. When developing legislation, a policy or a program, one needs to take account of the rights of PWD in Australia. They have a right to access public facilities such as housing, hospitals, roads; right to access information and other communication services such as Internet and emergency services. They also entitles to good standard of living and housing and right to employment. They also have a right to access dispute resolution forums.

4.4: Conclusion

This chapter has discussed the legislative and policy framework on access to justice for PWD in the Republic of Korea, USA and Australia. It has interrogated the provisions in the various pieces of legislation aimed at promoting access to justice and giving effect to the rights of PWD. By doing

²⁵⁷ **The Disability Services Act, 1986**

²⁵⁸ Disability law in Australia <https://raisingchildren.net.au/disability/disability-rights-the-law/law/disability-law> accessed September 3 2021

²⁵⁹ Ibid

so, this chapter appreciates the ways in which the legal frameworks governing disabilities in the said countries have been designed. The Republic of Korea, the United States of America and Australia have established and implemented effective legislative and policy measures that protect and enhance the rights of PWD whilst also promoting their access to justice.

This chapter having utilized the best practices approach to analyze the experiences of other jurisdictions demonstrates that Kenya lags behind in its legislative and policy framework in enhancing and promoting access to justice by PWD. Kenya needs to align its legislative and policy framework to reflect the text of the UNCRPD in terms of protecting, enhancing and implementing the rights of PWD and in promoting their access to justice. The next chapter is the conclusion and recommendations of this study.

CHAPTER FIVE

CONCLUSIONS AND RECOMMENDATIONS

5.1: Conclusions

This study interrogates whether the Kenyan legal framework governing disability is adequate in promoting access to justice for PWD. The study conclusion provides a nexus on the objectives of the study which *inter alia* include: to examine the historical and theoretical underpinnings of access to justice for PWD; to examine the Kenyan legal framework governing access to justice for PWD; to identify the best practices from other jurisdictions on access to justice for PWD that can provide lessons which Kenya can emulate; to offer recommendations for amendments to the Kenyan legal framework and to influence policy making to enhance access to justice for PWD.

Chapter one outlined a broad overview and layout of the research. Chapter two reviewed the history and theoretical underpinnings of access to justice for PWD. It explored the concept of justice and argued for the application of legal principles underpinning access to justice for PWD. These theories provide universal standards for human rights and have the ability to organize and streamline the collective use, and therefore bring order to society. Further, the chapter provided the background for access to justice for PWD and highlighted a variety of overarching barriers faced by PWD in relation to access to justice.

Chapter three looked at the provisions of legal framework governing access to justice for PWD. The chapter discussed the provisions of the UNCRPD, Constitution of Kenya, 2010 and PDA. It analyzed government measures introduced to enhance access to justice for PWD and at the same time pinpointing some of the shortcomings of the provisions of the legal framework governing access to justice for PWD in Kenya. It is clear from the analysis that Kenya has a robust legal

framework enacted in this respect. However, the enforcement and implementation aspects are lacking in the actualization of the principles set out in these legislations.

Further, this chapter established the shortcomings of employing the medical model as a tool of defining disability. The model permits discrimination of PWD thus creating barriers for their access to justice.

Chapter four analyses the treatment of PWD in the Republic of Korea, the United States, and Australia. It looked into the provisions of several pieces of legislation intended at improving access to justice and ensuring that PWD's rights are respected. This chapter appreciates the structure of the legal frameworks governing disabilities in the aforementioned countries by doing so. The Republic of Korea, the United States of America, and Australia have all designed and implemented successful legislative and policy measures to safeguard and strengthen the rights of disabled people while also encouraging their access to justice.

The chapter having used the best practices approach to analyze the experiences of other jurisdictions demonstrates that Kenya lags behind in its legislative and policy framework in enhancing and promoting access to justice for PWD. It reveals the need for Kenya to align her legal framework with UNCRPD in terms of promoting access to justice for PWD.

Chapter five concludes that despite Kenya having a robust legal framework enacted to promote access to justice for PWD, the enforcement and implementation aspects are lacking in the actualization of the principles set out in these legislations. The study recommends policy and legislative interventions with a view to promoting PWD's rights to access to justice.

5.2: Recommendations

- a) The definition of disability in the Constitution of Kenya and PDA should be amended to be broad so as to include PWD who would otherwise fall outside the current scope. By defining “disability” so precisely, some groups feel excluded by the definition. Further, disability means different things to different people depending on their area of origin, the type of impairment or the context of handicapping.
- b) The preamble of PDA should be amended to lay out the philosophical foundation that will underpin the statute and set the tone for the rest of it. This way determining whether PDA is based on anti-discrimination or on social welfare will be easier.
- c) Kenya should base her framework on human rights-based model. It should transit from the medical model to the social model, because it emphasizes on civil rights, social discrimination, and stigma.
- d) Affirmative action and other methods should be used to boost PWD’s the representation in special interest organizations and in leadership positions. To be effective, affirmative action must be made mandatory.
- e) The parliament should enact laws to give effect to the constitutional provisions relating to the rights of PWD. Therefore, the government must establish a facilitative policy, legislative environment, and institutional structures to promote equal opportunity and economic empowerment for PWD.
- f) The government should implement rights-based approaches to safeguard PWD from discrimination. Establishing a disability human rights paradigm is an inclusive strategy that recognizes the intrinsic human worth of all people rather than valuing them based on their measurable functional ability to contribute to society.

- g) The government should conduct public awareness campaigns about disability rights and laws, including civic education.
- h) PDA should be amended to require that all facilities, both public and private, including courthouses, be designed with accessibility and usability for PWD in mind. The certification of public spaces as barrier-free living environments should be implemented.
- i) The government should establish regulations to ensure that public transportation services, including terminals where passengers are picked up and dropped off, are disability friendly and accessible to PWD.
- j) The government should put policies in place to ensure that five per cent of the job opportunities stipulated in PDA are taken by PWD.
- k) Kenya should ratify the Optional Protocol to UNCRPD in order to fully realize the purpose of UNCRPD.

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