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THE PLATFORM

FOR LAW, JUSTICE & SOCIETY

Why Military and Intelligence Chiefs Must Stay Apolitical

Chinese in Africa
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PUBLIC DIALOGUE

"Shaping Global Power: Kenya, China and Africa in a Multipolar World"

UNIVERSITY OF NAIROBI, CHANDARIA CENTRE

Wednesday, 9th April, 2025, 2:00pm to 5:30 pm

The Department of Political Science and Public Administration, University of Nairobi in Partnership with the Chinese in Africa / Africans in China Research Network and The African Media Hub at Strathmore University will host a Public Dialogue on **"Shaping Global Power: Kenya, China and Africa in a Multipolar World"**. In a world that is rapidly shifting from a unipolar to a multipolar order, the conversation surrounding Africa's place in global geopolitics has never been more urgent. Is Africa truly on the rise, ready to take its place as a global player? Or does the continent risk being left further behind in the global scramble for power and influence? This public dialogue will delve into these questions, using Kenya as a case study to explore the complexities of Africa's engagement with both the Global North and the Global South, with a particular focus on its evolving relationship with China. While much of the world views China and Africa as natural partners within the Global South, China's expanding global presence challenges this simplistic categorization. What does it mean for Kenya and other African nations when a rising power like China seeks to redefine its role on the world stage?

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Moderator

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Prof. Levy Obonyo
Panelist

Dr Cobus van Staden
Discussant

Moderator:

- **Dr Yoon Jung Park:** Adjunct Professor, African Studies, Georgetown University/Executive Director, Chinese in Africa/Africans in China Research Network

Panelists:

- **Prof Michael Chege:** Board Member, Chinese in Africa/Africans in China Research Network
- **Dr Oscar M. Otele:** Chairperson, Department of Political Science and Public Administration, University of Nairobi
- **Dr Bob Wekesa:** Director, African Centre for the Study of the United States, University of the Witwatersrand
- **Prof Levi Obonyo:** Dean, School of Communication, Language and Performing Arts, Daystar University

Discussant:

- **Dr Cobus van Staden:** Managing Editor, China Global South Project, University of Johannesburg

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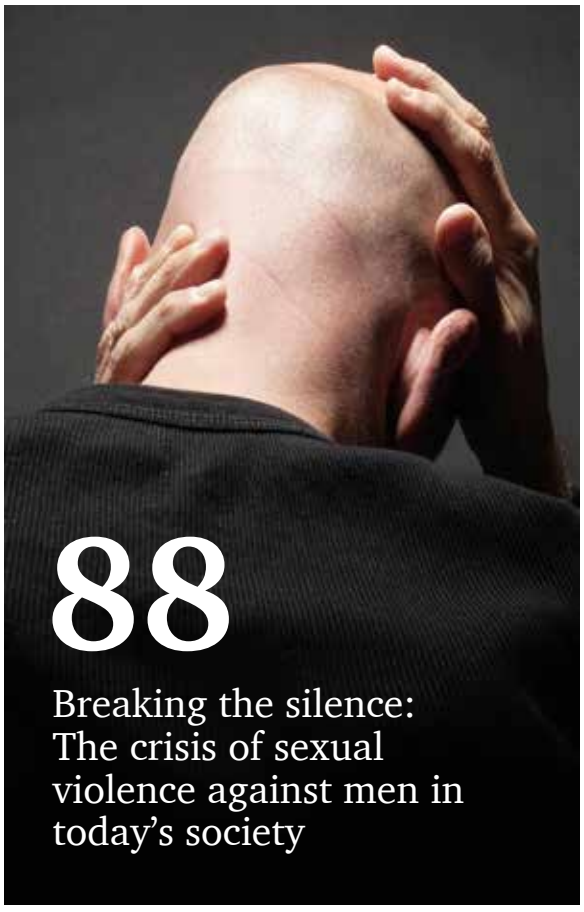

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EDITORIAL

Constitutional duty first: Why Military and Intelligence Chiefs Must Stay Apolitical

"Upholding the Rule of Law and Protecting Democracy by Avoiding Partisan Influence"

Kenya's democracy is anchored on the principle of constitutionalism, where every institution and public officer must operate within the confines of the law. Among the most critical guardians of this constitutional order are the Kenya Defence Forces (KDF) and the National Intelligence Service (NIS). Their leaders—General Charles Kahariri and Director General Noordin Haji—are bound by solemn oaths to serve the Republic, not any individual or political faction.

Recent reports suggesting that these security chiefs are unsettled by the "*Ruto must go*" chants raise serious concerns about their neutrality. Article 238 of the Constitution mandates that national security organs—including the military and intelligence services—must remain strictly non-partisan. Their duty is to protect Kenya's sovereignty and democratic framework, not to police political dissent or shield any leader from criticism.

Freedom of expression, guaranteed under Article 33, allows citizens to voice their opinions, including dissent against the government. The "*Ruto must go*" slogan, however discomforting to those in power, is neither illegal nor unconstitutional. For General Kahariri and Mr. Haji to express unease over such chants risks politicizing institutions that must remain impartial. This editorial underscores why Kenya's military and intelligence chiefs must stay out of politics, respect constitutional freedoms, and focus solely on their mandate: protecting the nation, not the presidency.

General Charles Muriu Kahariri, Chief of the Defence Forces of Kenya

1. The Constitutional Imperative: Security Organs Must Be Apolitical

Article 238(2) of Kenya's Constitution is unequivocal:

"*The national security organs shall perform their functions in the manner provided by the Constitution and the law, including… respect for the rule of law, democracy, human rights, and fundamental freedoms.*"

This provision reinforces that the military and intelligence services exist to safeguard Kenya's sovereignty—not to engage in political debates or suppress lawful dissent.

Noordin Haji, Director National Intelligence Service

Their loyalty is to the people of Kenya, not to any officeholder.

Historically, Kenya has suffered when security agencies blurred the lines between state protection and regime protection. The KDF and NIS must never be perceived as tools of political intimidation. If citizens suspect that these institutions are being used to stifle opposition, public trust in national security erodes—a dangerous precedent for any democracy.

Kenya's stability and democratic progress hinge on the professionalism and neutrality of its security institutions. The gains made over the years—particularly through the far-reaching Tonje reforms in the military and the Boinett reforms in the National Intelligence Service (NIS)—must not be eroded. These reforms were not merely administrative adjustments; they were foundational shifts that insulated our security organs from partisan interference, ensuring they serve the nation, not political interests.

The Tonje reforms, implemented in the late 1990s, restructured the Kenya Defence Forces (KDF) to foster meritocracy, reduce ethnic imbalances, and reinforce civilian oversight. They transformed the military into a disciplined, apolitical institution that respects constitutional order. Similarly, the Boinett reforms at the NIS redefined intelligence operations, emphasising professionalism, accountability, and a strict mandate against political meddling. These changes were critical in restoring public trust in institutions once viewed as tools of repression or favouritism.

Today, as Kenya navigates complex political and security challenges, the neutrality of these institutions must remain sacrosanct. Any regression—whether through politicised appointments, skewed operations, or the weaponisation of intelligence—would be a grave betrayal of the progress made. The security sector must never be allowed to slide back into the dark days of partisanship, where loyalty to individuals superseded duty to the state.

Kenya's future depends on institutions that uphold the rule of law without fear or favour. The sacrifices and vision behind the Tonje and Boinett reforms must not be squandered. Leaders, both in government and opposition, must commit to safeguarding these principles. The security apparatus belongs to the people—it must never be hijacked for political expediency.

Neutrality is not negotiable. The nation's security depends on it. General Kahariri and Mr. Haji must remember that their duty is to defend the Constitution, not to react to every political slogan that displeases State House.

2. Freedom of Expression Is Absolute—Unless It Incites Violence

The "*Ruto must go*" chants are a form of political expression protected under **Article 33(1):**

"*Every person has the right to freedom of expression, which includes freedom to seek, receive, or impart ideas or information.*"

Unless such chants explicitly incite violence (which they do not), they fall squarely within lawful dissent. Kenya's history is replete with protest slogans—from "*Yote Yawezekana bila Moi*" to "*No Reforms, No Peace!*"—that shaped democratic change.

Freedom of expression is the lifeblood of democracy, the foundational virtue that ensures all others can flourish. In a society where voices are silenced, dissent stifled, and ideas suppressed, democracy withers into mere illusion. The right to speak freely—to question, criticize, and debate—is not just a privilege but a necessity, for it is through open discourse that truth emerges, power is held accountable, and progress is forged. A democracy thrives when its citizens can challenge injustice, expose corruption, and propose new visions without fear. To curtail this freedom is to suffocate the very essence of self-governance, for a people who cannot speak are a people who cannot truly be free. Let us never take for granted this sacred right, nor cease to defend it, for in its preservation lies the strength and vitality of democracy itself.

If security chiefs begin interpreting popular discontent as a "threat," they risk criminalizing opposition and sliding into autocratic tendencies. The NIS and KDF must not act as thought police. Their role is to assess genuine security risks—not to pathologize political criticism.

3. The Dangerous Path of Securitizing Politics

When intelligence and military officials voice unease with political slogans, they risk framing dissent as a security threat, effectively turning normal democratic discourse into a national security concern. This approach is dangerous and has precedents in Kenya's history. In the 1980s and 1990s, the Moi administration exploited security agencies to target political opponents under the pretext of maintaining "stability." Similarly, during the 2007-08 post-election crisis, security forces acted with bias, worsening societal fractures. Again in 2017, the heavy-handed military crackdown on protests tarnished Kenya's global reputation. To preserve stability, General Kahariri and Mr. Haji must steer clear of these past errors. Kenya's security institutions must remain impartial rather than suppressing legitimate criticism.

In recent years, Kenya has witnessed a troubling trend—the increasing securitization of politics, where state machinery, particularly security forces, is weaponized to suppress dissent, manipulate electoral processes, and stifle opposition. This dangerous approach undermines democracy, erodes public trust, and risks plunging the nation into cycles of instability.

Kenya's history with politically motivated security interventions is not new. From the crackdowns on protests to the disproportionate use of force during elections, the line between maintaining law and order and outright repression has often blurred. The 2017 post-election violence and the heavy-handed response to demonstrations against the Finance Bill 2024 are stark reminders of how quickly the state can resort to militarized solutions for political problems.

Securitizing politics creates a climate of fear. When opposition leaders are arrested on flimsy charges, when protests are met with live bullets instead of dialogue, and when institutions such as the Independent Electoral and Boundaries Commission (IEBC) operate under the shadow of state intimidation, democracy becomes a façade. The message is clear: conform or face the consequences. Moreover, this approach exacerbates ethnic and political divisions. Kenya's political landscape is deeply polarized, and using security forces

The chant "Trump must go" has been used in various political protests and rallies, particularly during Donald Trump's presidency (2017–2021) and after his time in office. Protesters and political opponents called for his removal during both impeachment trials and as Trump sought re-election, opposition groups mobilized with chants like "Trump must go" to support Joe Biden.

to tilt the balance in favor of the incumbent regime only deepens resentment. The youth, already disillusioned by unemployment and corruption, are further alienated when their grievances are dismissed as "security threats" rather than legitimate calls for reform.

True stability cannot be enforced at gunpoint. Kenya's leaders must remember that lasting peace comes from inclusive governance, not repression. The judiciary, civil society, and media must be allowed to function without intimidation. Security forces should protect citizens, not serve as political enforcers.

If Kenya continues down this path, the short-term "order" achieved through coercion will only breed long-term chaos. The choice is clear: uphold democratic principles or risk sliding into authoritarianism. The future of Kenya depends on which direction its leaders take.

4. Lessons from Other Democracies

In mature democracies, military and intelligence leaders maintain a strict policy of neutrality when it comes to political rhetoric, refraining from public commentary unless there are clear and direct threats, such as incitement to violence. This principle ensures that state institutions remain impartial and do not undermine democratic processes, even in the face of heated political debates or mass protests. For instance, in the United States, the Pentagon and CIA consistently avoid weighing in on political demonstrations, whether activists are chanting "*Trump must go*" or "*Biden must go*." Similarly, in South Africa, the military refrained from intervening when opposition parties led the "*Zuma must fall*" campaign, demonstrating respect for the boundaries between state security apparatuses and political discourse. Kenya's security chiefs would do well to adopt this same discipline,

The Kenya Defence Forces (KDF) is constitutionally mandated to remain apolitical and act as a neutral entity in national matters. However, like in many countries, the military's role occasionally intersects with politics, especially in matters of national security, governance, and emergency response.

upholding the integrity of democratic institutions by remaining above the political fray.

The restraint shown by security chiefs in established democracies underscores the importance of preserving public trust in state institutions. When military or intelligence leaders abstain from commenting on political matters, they reinforce the principle that power ultimately resides with the people and their elected representatives, not with unelected officials or coercive state organs. This approach not only prevents the militarization of politics but also safeguards against the perception that security forces are aligned with any particular faction, which could erode confidence in their impartiality. By emulating this model, Kenya's security chiefs can help foster a political environment where dissent is managed through dialogue and legal frameworks rather than through the intimidation or influence of armed forces. Such discipline is essential for maintaining stability and ensuring that democratic norms take root and endure.

5. What Should Kahariri and Haji Do?

The Kenya Defence Forces (KDF) and the National Intelligence Service (NIS) must publicly reaffirm their commitment to neutrality by issuing clear statements that emphasize their respect for freedom of expression and their non-involvement in political discourse. Such declarations would reinforce their constitutional mandate to remain apolitical, ensuring public trust in their operations. By distancing themselves from partisan debates, these institutions can maintain their credibility as impartial entities focused solely on national security. This approach would also serve to counter any perceptions of bias or undue influence, particularly in a climate where political tensions are high. A firm, unambiguous stance from the KDF and NIS would signal to both the government and the public that their role is to safeguard the nation, not to engage in or suppress political expressions, no matter how contentious they may be.

Redirecting attention to legitimate security threats is another critical step the KDF and NIS should take. Rather than allowing their resources and focus to be diverted by political slogans such as "Ruto must go," these institutions must prioritize addressing tangible risks such as terrorism, cyber threats, and border security. Kenya faces significant challenges in these areas, and any diversion of attention or resources toward policing political rhetoric would undermine their effectiveness in combating real dangers. By consistently highlighting their ongoing efforts to counter these threats, the KDF and NIS can reinforce their indispensable role in maintaining national stability. This focus would also serve as a subtle reminder to the government and the public that security agencies should not be weaponized to suppress dissent or target political opponents, as doing so would erode their operational integrity.

If summoned to discuss or act upon political chants, the KDF and NIS must firmly resist such pressure by reiterating that their mandate does not extend to policing opinions or political expressions. They should remind the government that their constitutional duty is to protect Kenya from external and internal security threats, not to interfere in democratic processes or curtail freedom of speech. By standing their ground, these institutions would set a crucial precedent, ensuring that they are not drawn into political witch hunts or used as tools of intimidation. This resistance would also demonstrate their commitment to upholding democratic principles, even in the face of potential backlash from political leaders. Ultimately, maintaining this principled stance is essential for preserving the long-term credibility and operational independence of Kenya's security agencies.

Conclusion: Defend Kenya, Not Individuals

The roles of General Charles Kahariri and Mr. Noordin Haji are of utmost importance in upholding Kenya's constitutional order, as mandated by Article 238, rather than serving the political interests of any individual leader. Their responsibility is to ensure the stability and security of the nation, free from partisan influence. The growing calls of "Ruto must go" reflect the democratic rights of citizens to express their views, and such expressions should not be misconstrued as threats to national security. By maintaining a strictly apolitical stance, the Kenya Defence Forces (KDF) and the National Intelligence Service (NIS) will demonstrate their unwavering commitment to the Constitution and, more importantly, to the Kenyan people. The strength of any democracy lies in the neutrality of its military and intelligence institutions, which must remain impartial to safeguard the nation's democratic principles. It is essential to preserve this neutrality to ensure Kenya's continued stability and adherence to the rule of law.

Republic of Kenya

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Social Transformation Through Access to Justice

COVER STORY

Countering disinformation and misinformation against the Judiciary: The role of courts and The Judicial Service Commission

A multi-pronged approach—combining transparency, technology, media engagement, legal safeguards, and public education—is essential to safeguarding the judiciary from disinformation. By fostering an informed citizenry and ensuring accountability, societies can resist false narratives that threaten judicial credibility.

By Platform Team

Introduction

The spread of disinformation and misinformation has become a significant threat to judicial independence and the rule of law in Kenya. Disinformation—the deliberate dissemination of falsehoods intended to cause harm, whether economic, political, or reputational—has been weaponized in an increasingly digitalized public sphere. Misinformation, though often spread without malicious intent, also contributes to a distorted public perception of judicial processes. Social media platforms, which have enabled rapid and unfiltered communication, are now key tools for undermining courts, bypassing institutional safeguards, and eroding public trust in the judiciary. Globally, political actors, including authoritarian leaders, have manipulated these platforms to delegitimize judicial institutions, weaken public discourse, and mobilize extremist supporters against constitutional checks on their power.

In Kenya, two former Presidents of the Law Society of Kenya, Senior Counsel Ahmednasir Abdullahi and Nelson Havi, have used their social media platforms, particularly X (formerly Twitter), to mount sustained attacks on the Judiciary. Their rhetoric, often laced with unverified

Brazil's judiciary, led by the Superior Electoral Court (TSE) and Supreme Federal Court (STF), established structured programs like the Permanent Program to Combat Disinformation (2021) and the Disinformation Alert System (SIADE). These initiatives combine real-time monitoring, partnerships with tech platforms, and rapid response mechanisms to debunk false narratives targeting elections and judicial integrity

allegations and outright fabrications, has sought to depict judges and magistrates as corrupt and compromised. Without presenting any credible evidence, they have repeatedly accused Supreme Court Judges of misconduct, creating a hostile digital environment that fuels public skepticism toward the Judiciary. This systematic campaign of disinformation and misinformation has significantly contributed to the erosion of confidence in the courts, further complicating the judiciary's ability to function as an impartial arbiter of justice.

Efforts to counter disinformation and misinformation often focus on fact-checking, promoting media literacy, and regulating digital platforms. However, these measures alone are inadequate when falsehoods are not just passively spread but are actively weaponized to delegitimize judicial institutions and destabilize democracy. When courts are targeted in an orchestrated effort to undermine their credibility, democratic resilience requires a robust institutional response. In such cases, judicial systems must reassess their institutional frameworks to determine the extent to which courts can and should take a proactive role in mitigating the impact of misinformation and disinformation.

Lessons from Brazil: Judicial resilience against disinformation

Brazil provides a compelling case study of how courts can respond to disinformation and misinformation campaigns that threaten judicial independence. Between 2018 and 2022, Brazil's *Supremo Tribunal Federal (STF) and Tribunal Superior Eleitoral (TSE)* played a decisive role in resisting a systematic assault on democratic institutions, largely orchestrated by former President Jair Bolsonaro. Disinformation and misinformation were central to Bolsonaro's


Former Brazil President Jair Bolsonaro.

strategy, as he sought to discredit the judiciary and other democratic institutions while consolidating power. Brazilian courts responded forcefully by issuing injunctions to remove false content, blocking social media accounts, expanding electoral regulations to curb digital manipulation, and initiating criminal proceedings against individuals and networks responsible for coordinated disinformation campaigns.

As Bolsonaro escalated his attacks on the Judiciary, even going as far as seeking the impeachment of a Supreme Court judge and proposing court-packing reforms to dilute judicial independence, Brazilian courts remained steadfast. The STF, vested with broad constitutional review powers and original criminal jurisdiction, leveraged its authority to safeguard democratic institutions. The TSE, as the country's highest electoral authority, not only enforced electoral regulations but also engaged in public education campaigns to counter falsehoods about the electoral system. One of the most significant judicial interventions came in the form of the *Fake News Inquiry*, which the STF launched to investigate digital disinformation campaigns that targeted judges and judicial institutions. Initially focused on online threats against Supreme Court justices, the inquiry expanded to expose an intricate network of coordinated disinformation efforts aimed at subverting democratic processes.

Beyond legal action, the Judiciary actively engaged in countering misinformation through public outreach. The STF launched fact-checking initiatives and public awareness campaigns to clarify its decisions and debunk false claims in real time. The TSE, in its rule-making capacity, enacted regulations such as Resolution 23714/2022, which empowered it to remove electoral disinformation without waiting for external complaints. This resolution also allowed the TSE to suspend social media profiles that repeatedly disseminated falsehoods, ensuring that electoral integrity was not compromised. Despite criticism, the resolution was upheld by the STF, reflecting the Brazil's judiciary's firm stance against the manipulation of public opinion through digital platforms.

Brazilian courts also set significant legal precedents that held politicians accountable for engaging in disinformation and misinformation. In a landmark ruling, the TSE declared Bolsonaro ineligible for public office for eight years due to his efforts to delegitimize the electoral system through falsehoods. The decision underscored the judiciary's critical role in safeguarding democracy by ensuring that political leaders could not use misinformation to manipulate public perception and erode democratic institutions.

The Judicial Service Commission (JSC) of Kenya faces significant challenges in protecting the judiciary from disinformation campaigns that undermine public confidence in the judicial system. As the independent constitutional body established under Article 171 of the Kenyan Constitution, the JSC plays a pivotal role in safeguarding judicial integrity while addressing the growing threat of misinformation that targets the judiciary.

Lessons for Kenya: Strengthening judicial defences against disinformation

Kenya faces a similar challenge, as courts are increasingly targeted by disinformation and misinformation campaigns that seek to weaken judicial independence. However, unlike Brazil, Kenya lacks a comprehensive institutional response to counter these threats. The Law Society of Kenya, which is legally mandated to uphold the professional ethics of advocates, has largely remained silent in addressing the ethical violations of its members who engage in systematic misinformation about the Judiciary. This institutional gap raises critical questions about the role of the courts and the Judicial Service Commission (JSC) in addressing the spread of falsehoods that undermine the rule of law.

The JSC, under Article 172(1) of the Constitution, has a duty to promote and safeguard judicial independence. Additionally, Article 172(1)(e) mandates the JSC to advise the national government on improving the efficiency of the administration of justice. Given this constitutional framework, the JSC should take a more active role in countering disinformation and misinformation targeting the judiciary. Courts must also explore legal avenues to hold accountable those who deliberately spread falsehoods about judicial officers, ensuring that digital platforms do not become unchecked arenas for eroding public trust in the judiciary.

Judicial responses to disinformation and misinformation should go beyond conventional fact-checking. The JSC should

Countering disinformation against Kenya's judiciary requires a multi-faceted approach that combines institutional reforms, technological solutions, legal protections, and collaborative strategies. While progress has been made through initiatives like Court Integrity Committees and anti-corruption frameworks, significant challenges remain in balancing accountability with independence, responding to rapidly evolving digital threats, and rebuilding public trust.

establish structured initiatives to counter false narratives, including a dedicated public communication strategy that actively engages with misinformation in real-time. Collaboration with digital platforms, as demonstrated by Brazil's partnership between the TSE and social media companies, could provide an additional layer of protection against the proliferation of judicial disinformation. Furthermore, the JSC should consider developing legal frameworks similar to Brazil's electoral disinformation regulations, which empower courts to act against falsehoods that threaten institutional integrity.

Ultimately, courts are the legitimate arbiters of the limits of free speech, and their role in adjudicating disinformation and misinformation is well-recognized globally. Cases involving the abuse of free expression through falsehoods are bound to reach courts, particularly when such falsehoods are used as tools to delegitimize courts and erode public confidence in the judicial system. In Brazil, where legislative attempts to curb disinformation stalled, courts had to take the lead in addressing this challenge. The Kenyan courts, too, must recognize that the spread of judicial disinformation is not merely an issue of digital governance but a direct attack on the rule of law. Courts have a constitutional duty to ensure that free speech is not weaponized to dismantle democratic institutions.

As the threats posed by disinformation and misinformation continue to grow, Kenyan courts and the JSC must adopt a comprehensive, proactive approach to protect the integrity of the judicial system. The resilience demonstrated by Brazilian courts provides a valuable model, showing that an assertive and well-coordinated judicial response can counter the spread of falsehoods, reinforce public trust, and safeguard the rule of law. Without such measures, the unchecked spread of disinformation and misinformation risks eroding not only the judiciary's credibility but also the very foundations of Kenya's constitutional democracy.

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QUESTIONING JUDICIAL DECISIONS

Reawakening a sleeping monster: Digital clampdown, cyber laws and their impact on freedom of expression in Kenya

By Kipkoech Nicholas Cheruiyot

By Tabitha Mbuthia

Abstract

Kenya has seen a deterioration in the protection of the right to freedom of expression (FOE) in the recent past. This has been seen through several measures the government and its agencies took to restrict FOE. The fights against the right to FOE have been seen both online and offline in equal measure, mostly through digital clampdown, unchecked government surveillance, tramped up charges against government critics, enforced disappearance and extrajudicial killings. This was mainly seen during the protests against the 2024 Finance Bill in June 2024, where the government among others shut down the internet, restricted FOE digitally, disappeared the participants of the protests and prosecuted those who encouraged the protests whether online or physically. These repressive acts, which are still going on to date are an affront to the right to FOE under the 2010 Constitution of Kenya (Constitution), regional and international legal instruments. These acts only lead to the reawakening of a sleeping monster, a monster that devoured the citizens' freedom to question the authority and call the government to account. This monster slept during the end of President Moi's tenure and was buried when Kenyans conferred the 2010 Constitution on themselves, ushering in among others essential values of human rights, equality, freedom, democracy, social justice and the rule of law.[1]

Freedom of expression in Kenya is protected under Article 33 of the 2010 Constitution, which guarantees every citizen the right to seek, receive, and impart information and ideas. However, this right is subject to limitations related to hate speech, incitement to violence, and defamation.

[1]The 2010 Constitution of Kenya (Constitution), the Preamble.

This article looks at these pertinent issues in relation to the continued violation of the right to FOE. It looks at the continued threat to FOE, moves by the government and government-sanctioned agents to restrict this right and the implications that the same have on this constitutional right. It also looks at some of the Kenyan legislations that restrict the right to FOE, and the justifications under the legislations. In particular, it assesses the limitations to the right to FOE under the Data Protection Act, 2019, the Computer Misuse and Cybercrimes Act, 2018 and their constitutionality. Importantly, this article will look at the important role that the right to FOE has in an open and democratic society, in a bid to show how the government has and continues to roll back on the protection of the fundamental human rights of the Kenyan people.

1. Introduction

In the recent past, Kenya has witnessed drastic deterioration in the protection of the right to FOE. This has stemmed from the overt violations of the FOE by restricting expressions and the flow of information through implementing internet shutdowns, restricting digital expression and targeting protestors through arrests and disappearances.[2] These repressive acts have become more pronounced after the 2024 Finance Bill protests, casting a long shadow on Kenya's commitment to human rights protection.[3]

On 25th June 2024, Kenya experienced the second internet shutdown following the mega protects that occurred due to the punitive Finance Bill, 2024.[5] This was done despite the knowledge that the internet is an integral part of communication affecting the manner in which people communicate, have access to information and actively participate in social, political and economic activities.[6] The reasoning behind it has been attributed to Safaricom and Airtel pointing to outages on undersea cables.[7] However, government intervention seems to be a major factor, as the disruptions indicate a deliberate effort to regulate the flow of information.[8] Additionally, there appear to be several unanswered questions especially due to the timing of the failure, and how the shutdowns display a deliberate effort to contain the expression and flow of information rather than a mere technical failure.[9] This directly contradicts official statements, which denied any such internet shutdown was planned.[10] Such actions are akin to the ones witnessed in 2022, where the police used excessive force including water cannons to disperse protesters who went to the streets to demand an

[2]D Kabiru, 'Surge of abductions and killings in Kenya: A call for immediate action and accountability' <https://www.knchr.org/Articles/ArtMID/2432/ArticleID/1206/Surge-of-Abductions-and-Killings-in-Kenya-A-Call-for-Immediate-Action-and-Accountability> (accessed 24 February 2025).
[3]F Maugo, 'Whispers in the void? The hidden crisis of enforced disappearances undermining Kenya's commitment to human rights and justice' (Social Science Research Network, 15 November 2024) <https://papers.ssrn.com/abstract=5033036> (accessed 24 February 2025).
[4]This was following the first internet shutdown which happened in 2023, when the government blocked Telegram during the national examinations. For more, see Accessnow, '#KeepItOn throughout protests in Kenya' (Access Now) <https://www.accessnow.org/press-release/kenya-protests-internet-shutdown/> (accessed 24 February 2025).
[5]D Abiero, 'Technology-facilitated rights and digital authoritarianism: Examining the recent internet shutdown in Kenya' (Centre for Intellectual Property and Information Technology Law, 9 August 2024) <https://cipit.org/technology-facilitated-rights-and-digital-authoritarianism-examining-the-recent-internet-shutdown-in-kenya/> (accessed 24 February 2025).
[6]M Reglitz. 'The socio-economic argument for the human right to internet access.' (2023) 22 Sage Journals 441
[7]H Kimuyu, 'Safaricom CEO explains why there was a network outage on Tuesday | Nation' <https://nation.africa/kenya/business/safaricom-ceo-explains-why-there-was-a-network-outage--4670198> (accessed 1 July 2024).
[8]APC, 'Digital protests, access and freedoms in Kenya' <https://www.apc.org/en/news/digital-protests-access-and-freedoms-Kenya> (accessed 20 February 2025).
[9]D Abiero (n 5).
[10]A Ajibade, 'Kenya's regulator denies plans to shut down internet amid Finance Bill 2024 Protests' <https://techpoint.africa/2024/06/25/kenya-denies-shut-down-internet/> (accessed 24 February 2025).

explanation for the increased cost of living and following alleged electoral malpractices in 2022.[11]

Digital authoritarianism is imposed whereby the government intends to regulate access and spread of information and silence dissent under the pretext of safeguarding national security and maintaining public order.[12] This is mainly through stopping further political unrest by preventing the spread of misinformation and control of public sentiments.[13] Indeed, the intended effects were to stabilize the regime but at the dire cost of human rights, public trust and economic stability.[14] In fact, according to NetBlock's cost of internet shutdown calculator, Kenya loses approximately Ksh1.8 billion in GDP for every hour of a total internet shutdown.[15] The implications were harsh for businesses and individuals who are reliant on the internet for their livelihoods. Cutting off internet access hindered coordination, silenced dissent, and restricted democratic participation by protesters. This is not only a threat to human rights in Kenya but also within the African region, contributing to the several incidences of human rights repression by several governments recorded in 2024, specifically targeting the right to FOE.[16]

Since the protests in June 2024 erupted, Kenya has continuously seen a rise in various government incidences which are only aimed at silencing the protesters and in effect violating their constitutional right to FOE. This not only affects the citizens' FOE but also their right to assemble, demonstrate and picket under Article 37 of the Constitution.[17] This is despite the rising calls by among others human rights defenders, human rights institutions and Civil Society Organisations documenting violations of the right to FOE and calling upon the government to refrain from criminalising protests and expression and strictly following the letter of the law.[18]

According to the Kenya National Commission on Human Rights, an independent human rights institution in Kenya, just two weeks after the protests in June 2024 erupted, there were recorded up to thirty-nine (39) deaths.[19] This is in addition to up to thirty-two (32) incidences of enforced or involuntary disappearances and up to six hundred and twenty-seven (627) instances of arrests of protestors.[20] Furthermore, as of December 2024, there have been at least eighty-two (82) cases of abductions of government dissenters.[21] Those arrested were not only subjected

[11]Amnesty International, 'Human rights in Kenya' (Amnesty International) <https://www.amnesty.org/en/location/africa/east-africa-the-horn-and-great-lakes/kenya/report-kenya/> (accessed 21 February 2025).
[12]K Bhatia, M Elhussein, BKreimer and T Snapp, 'Protests, internet shutdowns, and disinformation in a transitioning state' (2023) 45 Sage Journals. Available at <https://doi.org/10.1177/01634437231155568> (accessed 19 February 2025).
[13]KG Kanchan and G Ansurkar, 'Need of internet control and censorship' (2023) 10 *International Journal of Scientific Research in Science and Technology* 797.
[14]S Mbego, 'Don't turn off internet - Kenyan govt urged | CIO Africa' <https://cioafrica.co/dont-turn-off-internet-kenyan-govt-urged/> (accessed 25 February 2025).
[15]V Owino, 'Internet services disrupted as Kenyans Stage anti-tax protests - The EastAfrican' <https://www.theeastafrican.co.ke/tea/news/east-africa/internet-services-disrupted-as-kenyans-stage-anti-tax-protests-4669940#google_vignette.> (accessed 25 February 2025).
[16]J Biegon, 'Incoming AU leadership must prioritize human rights' (Amnesty International, 13 February 2025) <https://www.amnesty.org/en/latest/news/2025/02/african-union-incoming-leadership-must-prioritize-and-stand-up-for-human-rights/> (accessed 21 February 2025).
[17]The Constitution, art 37.
[18]See for example Amnesty International in 'Kenya security must uphold their constitutional obligations to protect and facilitate peaceful protestors' (Amnesty International, 2 July 2024) <https://www.amnesty.org/en/latest/news/2024/07/kenya-security-services-must-respect-fundamental-rights-during-nationwide-protests/> (accessed 21 February 2025).
[19]D Mule, 'Update on the status of human rights in Kenya during the Anti-Finance Bill Protests, Monday 1st July, 2024' (Kenya National Commission on Human Rights) <https://www.knchr.org/Articles/ArtMID/2432/ArticleID/1200/Update-on-the-Status-of-Human-Rights-in-Kenya-during-the-Anti-Finance-Bill-Protests-Monday-1st-July-2024> (accessed 21 February 2025).
[20]As above.
[21]KNCHR, 'Statement on the recent surge of abductions/enforced disappearances in Kenya' (Kenya National

Kizza Besigye a prominent Ugandan politician, physician, and opposition leader. He has been a key figure in Uganda's political landscape, particularly as a strong challenger to President Yoweri Museveni.

to unlawful detention but also tortured in police custody using batons and rifle butts.[22] These numbers showcase the troubling abduction crisis happening in Kenya due to people airing their views against the government. Among those arbitrarily arrested are human rights activists, journalists and online protesters. As has been reported, this occurs in broad daylight whereby unidentified armed individuals who are linked to the security service carry out the abductions and either torture or extrajudicially kill them.[23] This has been exacerbated by kidnapping prominent political critics[24] who are not just Kenyan citizens but also those not of Kenyan descent such as Tanzanian Maria Sarungi Tsehai, Ugandan Kizza Besigye and South Sudanese Morris Mabior.[25] To add salt to the injury, it was discovered that Safaricom, a major telecommunication company in Kenya was assisting in these abductions by unlawfully sharing private information such as location data about the targets with the police officers.[26] This is not just a violation of Kenyan citizens and non-citizens' right to freedom of expression but is also a clear violation of the data protection laws and principles.[27]

[21]KNCHR, 'Statement on the recent surge of abductions/enforced disappearances in Kenya' (Kenya National <https://www.knchr.org/Articles/ArtMID/2432/ArticleID/1213/Statement-on-the-Recent-Surge-of-AbductionsEnforced-Disappearances-in-Kenya> (accessed 25 February 2025).

[22]KNCHR, 'Statement on the protests against abductions and enforced disappearances in Kenya' (Kenya National Commission on Human Rights) <https://www.knchr.org/Articles/ArtMID/2432/ArticleID/1214/Statement-on-the-Protests-against-Abductions-and-Enforced-Disappearances-in-Kenya> (accessed 25 February 2025).

[23]As above.

[24]In December 2024 for example, key political figures including Busia Senator Okiya Omtatah and former presidential candidate Reuben Kigame were arrested.

[25]Article 19, 'Kenya: Release and stop attacks on government critics' (ARTICLE 19, 25 January 2025) <https://www.article19.org/resources/kenya-release-and-cease-attacks-on-government-critics/> (accessed 20 February 2025).

[26]M Siele, 'Kenya's Safaricom faces abductions backlash' (7 January 2025) <https://www.semafor.com/article/01/07/2025/kenyas-safaricom-faces-abductions-backlash> (accessed 25 February 2025).

[27]As above.

2. Curtailing dissent: The weaponization of legislation to stifle freedom of expression

The Constitution establishes the framework for respecting and safeguarding fundamental rights and freedoms as outlined in the Bill of Rights, which is recognised as one of the most transformative, progressive and liberal human rights frameworks in the region.[28] Article 33 of the Constitution provides for the right of the freedom of expression.[29] This includes the freedom to seek, receive or impart information or ideas.[30] Article 35 further provides for the right to access information, stating that "(1) Every citizen has the right of access to - (a) information held by the State; and (b) information held by another person and required for the exercise or protection of any right or fundamental freedom."[31] These rights, including the freedom of expression and access to information, must be upheld, protected, and enforced by all government institutions, agencies, and individuals.[32]

These rights empower individuals to articulate grievances, seek redress, exercise their entitlements and claim their rights. Indeed, a society that lacks free speech and unrestricted information flow, faces the risk of uninformed decision-making.[33] This highlights the deep interconnection between FOE and other fundamental rights, including access to information, belief, opinion, media freedom, association, and protest.[34] However, the government of Kenya has been keen on violating these rights which has also led to the erosion of the government's trust in upholding fundamental rights. This has been seen through digital clampdown, unchecked government surveillance, trumped-up charges against government critics, enforced disappearances, and extrajudicial killings.

Governments worldwide have increasingly weaponized legislation to suppress freedom of expression, particularly against journalists, activists, opposition politicians, and ordinary citizens. By passing vague or overly broad laws, authorities can criminalize dissent, restrict press freedom, and control digital spaces.

Moreover, the government has justified its actions via acts of parliament. Such include Section 51 of the Data Protection Act which exempts data protection requirements in cases related to national security and public order.[35] This provision has been used to justify state surveillance, enabling security agencies to exploit personal data under the

[28]The Constitution of Kenya, Chapter 4. In *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* [2014] eKLR, the Supreme Court of Kenya observed that the 2010 Constitution of Kenya was transformative, committing Kenya to a new path. That include reconstituting and reconfiguring Kenya: "from its former vertical, imperial, authoritative, non-accountable content under the former Constitution to a state that is accountable, horizontal, decentralized, democratized, and responsive to the principles and values enshrined in Article 10 and the transformative vision of the Constitution."
[29]The Constitution, art 33(1).
[30]The Constitution, art 33 (1) (a).
[31]The Constitution, art 35.
[32]The Constitution, art 10.
[33]D Kiprono, 'Court ruling recognises freedom of expression as an instrumental right - ICJ Kenya' (29 March 2024) <https://icj-kenya.org/news/court-ruling-recognises-freedom-of-expression-as-an-instrumental-right/, https://icj-kenya.org/news/court-ruling-recognises-freedom-of-expression-as-an-instrumental-right/> (accessed 25 February 2025).
[34]As above.
[35]Data Protection Act, 2019 sec 51(2).

The Computer Misuse and Cybercrimes Act is a law used in various countries to regulate online activities, combat cybercrime, and address digital offenses. However, in some cases, governments have weaponized it to suppress freedom of expression, target activists, and silence opposition voices.

guise of national security.[36] Consequently, activists and journalists have been subjected to intrusive surveillance, undermining their privacy and freedom of expression. Such acts are restrictive on freedom of expression and have far-reaching consequences on the rights and personal freedoms of journalists and citizens in Kenya, especially those that rub the government the wrong way.[37]

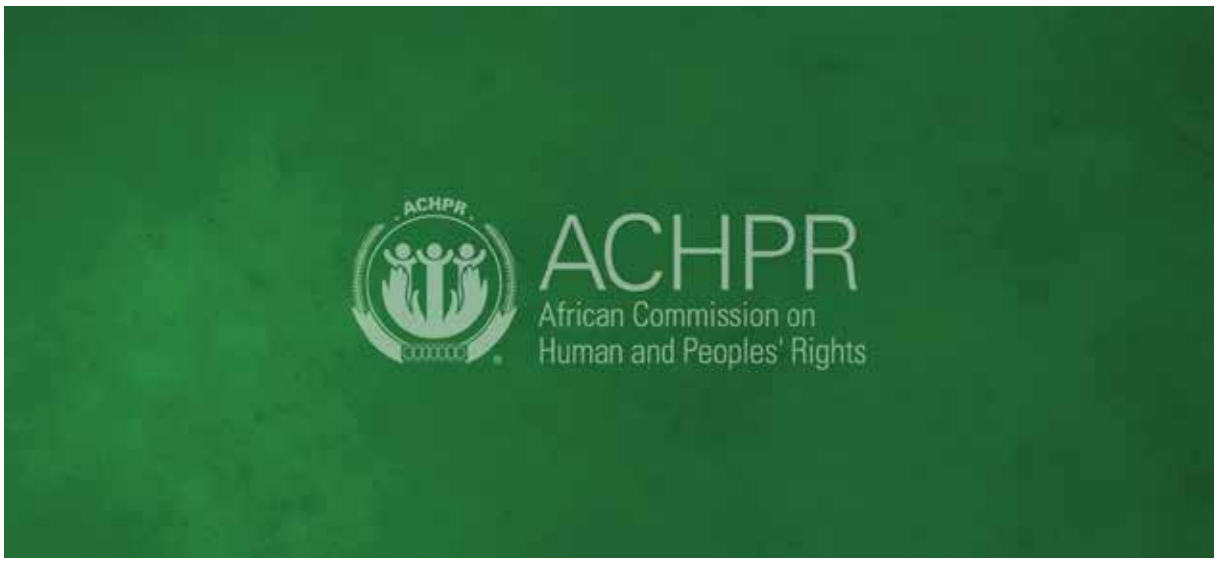
Another problematic legislation is the Computer Misuse and Cybercrimes Act in terms of some of its provisions. The Act provides for limitations in terms of the exercise of the right to freedom of expression, criminalising any act that falls outside the legal bounds. Section 22 of the Act imposes a fine of up to Ksh five million or imprisonment for up to two years or both for anyone who intentionally publishes false and misleading information.[38] This is regardless of the nature of the publication, be it in print, broadcast or over a computer system.[39] Its criminalisation of 'false information' and 'cyber harassment' has been exploited to prosecute government critics. The *Bloggers Association of Kenya (BAKE) v Attorney General (AG) & others*[40] case contested such provisions, that is, sections 22 and 23 and

[36]As above.
[37]See for example the sentiments by Article 19 on similar provisions under the Official Secrets Act, 1968 which is restrictive especially for journalists. For more, see Article 19, 'Kenya: Official Secrets Act incompatible with freedom of expression standards' (ARTICLE 19, 14 September 2020) <https://www.article19.org/resources/kenya-official-secrets-act-incompatible-with-freedom-of-expression-standards/> (accessed 25 February 2025).
[38]Computer Misuse and Cybercrimes Act, 2018 sec 22 (1).
[39]As above sec 23.
[40]*Bloggers Association of Kenya (BAKE) v Attorney General & 3 others; Article 19 East Africa & another (Interested Parties)* [2020] eKLR.

argued that they could be used to suppress dissent and curtail freedoms of expression and access to information. However, the court unfortunately dismissed the petition but it still served to highlight the urgent need for advocacy on laws that encroach upon the freedom of expression. Section 27 of the Act further criminalises any wilful making of any communication that is likely to cause apprehension or fear of violence or either partly or wholly indecent or grossly offensive and detrimentally affects that person.[41] The use of such subjective language as 'detrimentally affecting that person' and the ambiguity in the wording of this legislation may result in an overboard limitation of freedom of expression, rendering such provision unconstitutional.[42] The High Court dismissed the BAKE petition, even though section 27 has the potential of being used against citizens for making any unfriendly statements against public officials as has been witnessed before. In *Geoffrey Andare v AG* for example, the High Court was called upon to declare the unconstitutionality of similar provisions under the Kenya Information and Communication Act (KICA).[43] Section 29 of KICA criminalised any act of a person who uses telecommunication to send a message that is indecent, of menacing character or obscene or causes annoyance or inconvenience.[44] The High Court declared this section as unconstitutional for using broad, vague and uncertain terms that individuals do not know the parameters within which their communication falls[45] and in effect violating article 33 on the right to freedom of expression.[46]

While freedom of expression is a fundamental human right, it is not absolute. Governments and legal systems place reasonable restrictions to balance individual rights with public interest, national security, and social harmony. However, in some cases, these limitations are misused to suppress dissent.

[41]Computer Misuse and Cybercrimes Act, 2018 sec 27.
[42]A Sugow, M Zalo and I Rutenberg, ' Appraising the impact of Kenya's cyber-harassment law on the freedom of expression' (2021) 1 *Journal of Intellectual Property and Information Technology Law (JIPIT)* 94.
[43]*Geoffrey Andare v Attorney General & 2 others* [2016] eKLR.
[44]Kenya Information and Communication Act, 1998 sec 29.
[45]As above para 78.
[46]As above para 99.



The African Commission on Human and Peoples' Rights (ACHPR) is a regional human rights body responsible for promoting and protecting human rights across Africa. It was established in 1987 under the African Charter on Human and Peoples' Rights (also known as the Banjul Charter).

The presence in Kenya of legislations that criminalise freedom of expression is an affront to the national, regional and international human rights standards. The acts by the government and government-sanctioned agents stand contrary to Kenya's negative obligations to refrain from intruding in the lives and personal liberties of the Kenyan people.[47] The Kenyan legislations, some of which have been referenced earlier and their attendant provisions go against the regional principles on freedom of expression. These include the decision in *BAKE*, which failed to recognise the recent developments on the right to freedom of expression and access to information both regionally and internationally. The African Commission on Human and Peoples' Rights (The Commission) has been emphatic in calling upon member states to decriminalise expression and refrain from using public order and sedition laws to restrict freedom of expression. In particular, the Commission under Principle 22 of the Declaration of Principles on Freedom of Expression and Access to Information in Africa of 2019 (Declaration) urges States to repeal all legislations that criminalise sedition, insult and publication of false news.[48] The Commission is clear that any custodial sentences for the offence of defamation and libel violate the right to freedom of expression.[49] Additionally, freedom of expression shall not be restricted on the grounds of public order or national security, unless there is a real risk of harm being done and there is a close link between the harm and the expression.[50] Criminalising speech undoubtedly stifles dissent and compromises the enjoyment of freedom of expression,[51] which unfortunately is one

[47]As above para 39.
[48]ACHPR Declaration of Principles on Freedom of Expression and Access to Information in Africa (ACHPR Declaration), 2019 principle 22 (2).
[49]ACHPR Declaration principle 22 (4).
[50]ACHPR Declaration principle 22 (5).
[51]Centre for Human Rights, 'African Commission publishes revised Declaration of Principles of Freedom of Expression and Access to Information in Africa amid COVID-19 Crisis' (Centre for Human Rights, 23 April 2020) <https://www.chr.up.ac.za/expression-information-and-digital-rights-news/2056-african-commission-publishes-revised-declaration-of-principles-of-freedom-of-expression-and-access-to-information-in-africa-amid-covid-19-crisis> (accessed 24 February 2025).

of the objectives that the government has been intent on achieving. The Declaration only allows for the criminalisation of a prohibited speech as an option of last resort,[52] and only within the standards provided for by law and in strict compliance with the international human rights law and standards.[53] Unfortunately, the standards and means which have been applied to limit freedom of expression fall short of the constitutional and legal standards, and regional and international principles.

3. Limitation of the right to freedom of expression and their constitutionality

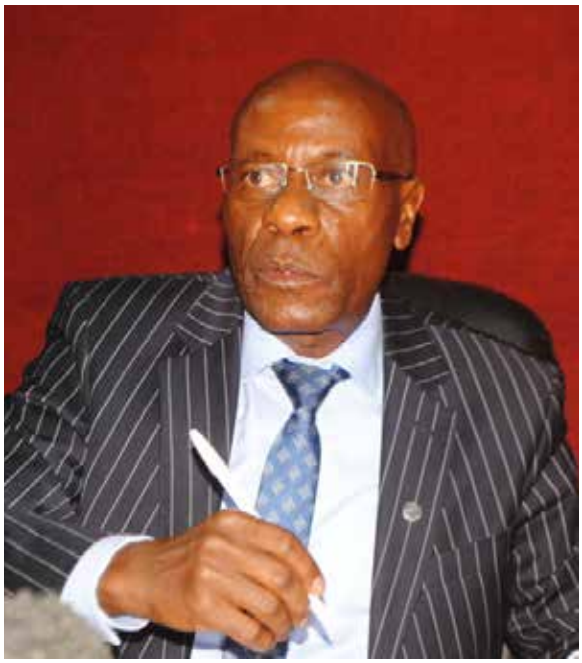
The moves by the government to crack down on those seeking to express themselves and show displeasure with the government operations limit the right to freedom of expression extra-constitutionally. The Constitution is emphatic that everyone has a right to freedom of expression, which includes the freedom to seek, receive or impart information or ideas.[54] It is clear from the text that this right is constitutionally protected, and is guarded against any abuse or infringement by the government, government official or any of their agents. While this right just like many rights or fundamental freedoms under the Bill of Rights is not absolute,[55] but it can only be limited based on the clear provisions of the Constitution and the law.[56] The right to freedom of expression can only be limited if it extends to propaganda for war, incitement to violence, hate speech or advocacy of hatred that constitutes ethnic incitement, vilification of others or incitement to

Freedom of expression is a fundamental human right, but it is not absolute. Most legal systems, including national constitutions and international human rights frameworks, allow for reasonable limitations to balance individual rights with public order, national security, and societal interests. However, these limitations must be legal, necessary, and proportionate to comply with constitutional and human rights standards.

cause harm or is based on any ground of discrimination under article 27(4) of the Constitution.[57]

The recent wave of abductions since the eruption of the Gen-Z protests in June 2024 falls short of the Constitutional and legal requirements for the limitation of the right to freedom of expression. The protests and the attendant agitations were a form of social accountability, mainly characterised by the rejection of the 2024 Finance Bill, and a call for accountability of the elected leaders in the performance of their public duties and management of public resources.[58] That in itself cannot be interpreted to amount to any act under articles 24, 27 and 33 of the Constitution and the law warranting

[52]ACHPR Declaration, principle 23 (2).
[53]ACHPR Declaration, principle 9. The only justifiable limitations are is the limitation is prescribed by law; serves a legitimate aim; and is a necessary and proportionate means to achieve the stated aim in a democratic society. See also principle 28 on access to information.
[54]The Constitution, art 33 (1) (a).
[55]Article 25 provides for the rights which cannot be limited under any circumstance. These rights include freedom from torture and cruel, inhuman or degrading treatment or punishment and freedom from slavery or servitude.
[56]The Constitution, art 24(1).
[57]The Constitution, art 33(2).
[58]WK Shilaho & L Monyae, 'Kenya's historic Gen-Z led protests: The Issues' (ACCORD) <https://www.accord.org.za/analysis/kenyas-historic-gen-z-led-protests-the-issues/> (accessed 19 February 2025).


High Court judge John Mativo

the limitation of such expression. Such expressions of discontent have however been followed by continued waves of brutal and massive crackdown and abduction of activists by security forces, killing of unarmed protesters and intimidation of sympathizers, actions which are akin to those of the Moi dictatorship.[59] Such acts as was seen during the late former President Moi's time[60] can only be aimed at silencing dissent, causing fear among the citizens and in effect allowing a rogue regime to operate without anyone holding it accountable. Such a self-serving government can in effect operate with impunity, without paying any regard to the fundamental rights and interests of its citizens. The High Court of Kenya, just like other progressive courts across the region has stood strongly in opposition of that position, standing as a guardian of the Constitution and preventing the government and its agents from driving the country into a state of anarchy.

A case example of incidences in which the High Court has stood tall in the protection of the right to freedom of expression is the case of *Jacqueline Okuta & another v Attorney General & 2 others*, where the High Court sitting in Nairobi and presided over by Justice Mativo stated that freedom of speech and expression is a highly treasured value in a spirited democracy.[61] Justice Mativo further stated that freedom of expression has been considered a prized asset to individuality and the overall progression of a thinking society since it permits arguments, allows dissent to have a respectable place, and honours contrary stances.[62]

This was also seen in R*obert Alai v The Hon Attorney General & another*, where the petitioner had been accused under section 132 of the Penal Code of undermining the authority of a public officer by posting the following statement on their X (formerly Twitter) account: "***Insulting Raila is what Uhuru can do. He hasn't realized the value of the presidency. Adolescent President. This seat needs maturity.***"[63] While declaring section 132 of the Penal Code as unconstitutional,[64] the Court authoritatively stated that Kenya is a democratic state, with a democratically elected leadership.[65] As

[59]PT Zeleza 'Paul Tiyambe Zeleza - The Gen Z uprising in Kenya - The Elephant' (2 July 2024) <https://www.theelephant.info/opinion/2024/07/02/the-gen-z-uprising-in-kenya/> (accessed 17 February 2025).
[60]G Lynch, 'Kenya's former president Daniel Arap Moi mastered the art of silencing critics – Why his tactics wouldn't work today' (The Conversation, 22 July 2024) <http://theconversation.com/kenyas-former-president-daniel-arap-moi-mastered-the-art-of-silencing-critics-why-his-tactics-wouldnt-work-today-235026> (accessed 17 February 2025).
[61]*Jacqueline Okuta & another v Attorney General & 2 others* [2017] eKLR.
[62]As above.
[63]*Robert Alai v The Hon Attorney General & another* [2017] eKLR para 19.
[64]Notably, section 132 of the Penal Code was among the provisions flagged by the United Nations Human Rights Committee in its Periodic Report on Kenya's implementation of the ICCPR due to its use to limit among others online expression and to quell government criticism. For more, see the United Nation Human Rights Committee 'Concluding observations on the fourth periodic report of Kenya' (2021) paras 42-43 available at https://digitallibrary.un.org/record/3925702?ln=en&v=pdf#files (accessed 18 February 2025).
[65]*Robert Alai v The Hon Attorney General & another* para 30.

While freedom of expression is fundamental, it is not unlimited. However, limitations must be clearly defined in law, Justified for public interest and proportionate and not excessive.

such, the Kenyan people have a democratic right to discuss the affairs of their government based on their constitutional right to freedom of expression under Article 33 of the Constitution.[66] The Court further stated that the people cannot therefore freely express themselves if they do not criticize or make comments about their leaders and public officers.[67] The Court was keen to note that the section, just as has been seen in the recent past (our emphasis), was introduced to suppress dissent among the natives with the sole aim of protecting and sustaining colonial power.[68] The resultant effect was to instil fear and submission among the people.[69] Such a position however no longer has a place in the present constitutional dispensation.

While criticism of government officials may rather cause discomfort, public officials need to be prepared for this[70] due to the important role that they play in the management of public affairs including resources, and the clear constitutional provisions that allow citizens to exercise the right of questioning their leaders in an open and democratic society.[71] The Malawian High Court succinctly captured this position in the case of *R v Harry Nakandawire & Another*.[72] The Court stated that freedom of expression should not be restricted to speaking only about those things that delight the power in office, but should also extend to those things that have the capacity to displease and even annoy.[73] It further stated that people should not in that

[66]As above.
[67]As above.
[68]As above para 34.
[69]As above.
[70]See for example the Nigerian Court of Appeal in *Arthur Nwankwo v The State* (1983) (1) NCR 383.
[71]As above para 33.
[72]R v Mkandawire & Another (5 of 2010) [2010] MWHC 5 (7 October 2010).
[73]As above.

sense be barred from expressing themselves on any issue merely because doing so will discomfort certain quarters since the remedy in such instances should not be to bar expression but to allow any offended party to file a civil suit.[74]

The recent moves by the government to restrict the right to freedom of expression fall short of these requirements and otherwise seek to drive fear among the citizens without any lawful justifications for such intimidation. It is worth noting that any restriction of the right to freedom of expression in an open democracy must be imposed by legislation, and it has to be shown that the limitation is reasonable and justifiable in an open and democratic society.[75] It must also be based on dignity, equality and freedom, considering the nature of the right or fundamental freedom to be limited, the importance of the limitation purpose, its nature and extent, the enjoyment by others of their rights and consideration as to whether there are less restrictive means to achieve the purpose.[76] The Constitution and the law, coupled with the jurisprudence from the Kenyan courts and international human rights law give no room for pedestrian and sweeping restrictions on the right to freedom of expression. Any restriction of this right has to conform to the law, and must not be conducted in a manner as has been seen in the recent past, including through intimidation and enforced disappearance which only end up reversing the gains made and making a mockery of the constitutional rights and fundamental freedoms.

4. Freedom of expression from a regional and international perspective

The African Charter on Human and Peoples' Rights under Article 9 guarantees everyone the right to express and disseminate their opinions within the law.[77] The Commission in 2019 adopted a Declaration of Principles of Freedom of Expression and Access to Information within the African continent, affirming the provisions of article 9 of the Charter.[78] The declaration classifies freedom of opinion as a fundamental and inalienable human right, which is indispensable for the exercise of freedom of expression, and which shall not be interfered with by States.[79] States parties are mandated to protect the rights to freedom of expression and access to information from any form of interference, whether online or offline.[80]

Given that the right to freedom of expression is not absolute, the Declaration adopts a three-part test to any limitation of the right. Thus, the exercise of the right to freedom of expression shall only be limited by States if the limitation:[81]

(a) Is prescribed by law;
(b) Serves a legitimate aim; and
(c) Is a necessary and proportionate means to achieve the stated aim in a democratic society.

The Declaration has defined a limiting law to include a law that is clear, precise, accessible and foreseeable and that effectively safeguards against abuse.[82] A limitation is deemed to serve a legitimate

[74]As above.
[75]*Seventh Day Adventist Church (East Africa) Limited v Minister for Education & 3 others* [2017] eKLR para 8. See also *Katiba Institute & 8 others v Director of Public Prosecutions & 2 others; Ayika (Interested Party)* (Petition E016 of 2023) [2024] KEHC 2890 (KLR) (18 March 2024) (Judgment) para 132.
[76]As above.
[77]African Charter on Human and Peoples' Rights, 1981 art 9 (2).
[78]ACHPR Declaration of Principles on Freedom of Expression and Access to Information in Africa, 2019.
[79]ACHPR Declaration, principle 2.
[80]ACHPR Declaration, principle 5.
[81]ACHPR Declaration, principle 9 (1).
[82]ACHPR Declaration, principle 9 (2).

While Kenya's legal framework for free speech is strong on paper, implementation gaps and growing digital restrictions threaten these rights. The country's vibrant civil society and independent judiciary provide important counterweights to government overreach, but constant vigilance is needed. As Kenya approaches its next election cycle, protecting freedom of expression will be crucial for maintaining democratic governance.

purpose if the objective of the limitation is to preserve the respect and reputation of others, and if the limitation is to protect national security, public order or public health.[83] For it to be necessary and proportionate, the limitation shall among others originate from a pressing and substantial need that is relevant and sufficient, and be such that the benefit of protecting the stated interest outweighs the harm to the expression and disclosure of information.[84]

The right to freedom of expression is also provided for under Article 19 of the International Covenant on Civil and Political Rights (ICCPR). Everyone therein is guaranteed the right to hold opinions without any interference,[85] including the freedom to seek, receive and impart information and ideas of all kinds.[86] The right to freedom of expression can only be limited under the ICCPR as provided by law and are necessary for the respect of the rights and reputation of others, and for the protection of national security, public order or public health morals.[87]

The African Court has pronounced itself on the right to freedom of expression under the African Charter and the ICCPR, its limitations and how far a State can go in limiting the exercise of this right. The Court in *Ingabire v Rwanda* keenly observed

[83]ACHPR Declaration, principle 9 (3).
[84]ACHPR Declaration, principle 9 (4).
[85]International Covenant on Civil and Political Rights, 1996 (ICCPR) art 19 (1).
[86]ICCPR art 19 (2).
[87]ICCPR art 19 (3).

Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive, and impart information and ideas through any media and regardless of frontiers.

that freedom of expression protects not only information or opinions that are favourable or considered inoffensive, but also that offend, shock or disturb a State or any section of the population.[88] Earlier, in *Lohe Issa Konate v Burkina Faso*, the African Court, while referring to Article 19 (3) of the ICCPR and the jurisprudence of the African Commission stated that the term 'within the law' under the African Charter is used to envisage a possibility where restrictions may be imposed on freedom of expression, provided that such a restriction is provided by law, serve a legitimate purpose and are proportionate to the set objective and necessary in a democratic society.[89] On the proportionality test, the African Commission in *Zimbabwe Lawyers for Human Rights & Associated Newspapers of Zimbabwe v Zimbabwe*[90] stated that the principle of proportionality seeks to determine whether there has been a balance between the protection of rights and fundamental freedoms of an individual and the interests of the society as a whole. Accordingly, the Commission took the view that to determine the proportionality of an action, several questions ought to be asked, such as; are there sufficient reasons to justify the action? Is there a less restrictive solution? Does the action destroy the essence of the rights guaranteed by the Charter?[91] It is thus imperative for Kenya as a State party to the African Charter to ensure that there is no interference with the right to freedom of expression. In the event that there is any such interference or limitation, then it should conform to the legal requirements and strictly adhere to the international human rights standards and principles.

[88] *Ingabire Victoire Umuhoza v Republic of Rwanda*, Application No. 003/2014, Para 143.
[89] *Lohé Issa Konaté v The Republic of Burkina Faso*, Application No. 004/2013 paras 145- 161.
[90] *Zimbabwe Lawyers for Human Rights & Associated Newspapers of Zimbabwe v Zimbabwe*, Communication No. 284/03 para 176.
[91] As above.

5. The role of freedom of expression in an open and democratic society

The right to FOE plays an important role in an open and democratic society. Strictly speaking, a society cannot be completely open and democratic without strong protection of the right to FOE, as it is indispensable to nearly every form of freedom.[92] The High Court of Kenya has noted that the right to FOE characterised by among others uninhibited speech is a defining feature of truly democratic societies and institutions, and can only be restricted in the clearest of circumstances.[93] The United Nations Human Rights Committee (the Committee) has underscored the importance of the right to FOE in its General Comment number 34 on article 19 of the ICCPR, stating that the right to freedom of opinion and expression are indispensable condition for the development of a person, and are essential for any society.[94] Importantly, these rights constitute the foundation for every free and democratic society.[95] The Committee further holds that the right to FOE is a necessary condition for the realisation of the principles of transparency and accountability, which are essential for the protection and promotion of human rights.[96] Additionally, the right to FOE is interconnected with other rights and forms the basis for the full enjoyment of other human rights such as the rights

Freedom of speech is a fundamental human right, and Kenya's Constitution (2010) explicitly protects it under Article 33. However, like many democracies, Kenya faces challenges in fully upholding this right while balancing other societal concerns.

[92]Palko v Connecticut [1931] 283 US 359 (369).
[93]*Chirau Alimwakwere v Robert M. Mabera & 4 Others* [2012] eKLR para 20.
[94]The United Nations Human Rights Committee General Comment No.34 on Article 19: Freedoms of opinion and expression, available at <https://www.ohchr.org/en/documents/general-comments-and-recommendations/general-comment-no34-article-19-freedoms-opinion-and> (accessed 19 February 2025) para 1.
[95]As above.
[96]As above para 3.

Freedom of expression is a cornerstone of democracy and open societies. It enables citizens to engage in public discourse, hold governments accountable, and participate in decision-making. Without it, democracy weakens, and authoritarian tendencies can take root.

to freedom of assembly, association and the right to vote.[97] This closely mirrors the position of the African Commission as contained under among others the Declaration of Principles on Freedom of Expression and Access to Information. The Commission is clear that the respect, protection and fulfilment of the freedom of expression is crucial and indispensable for the free development of the human person, the creation and nurturing of democratic societies and enabling the exercise of other rights.[98]

Other Courts within the region and globally have also risen to the occasion, pronouncing themselves on the important role played by the right to freedom of expression in a democracy. The High Court of South Africa in *Khumalo v Holomisa* has held that the right to FOE is integral to a democratic society for many reasons, one being that it is constitutive of the dignity and autonomy of human beings.[99] Without the right to FOE, the citizens' ability to make responsible decisions and participate in any public life will be stifled.[100] The Supreme Court of Zimbabwe has gone further to state that the right to freedom of expression has four main objectives, which are to help an individual attain self-fulfilment, assist in the discovery of truth and in promoting political and social participation, strengthen the capacity of an individual to participate in decision-making and provide a mechanism by which it would be possible to establish a balance between stability and change.[101] The Supreme Court of the United States of

[97]As above para 4.
[98]ACHPR Declaration, principle 1.
[99]Khumalo and Others v Holomisa (CCT53/01) [2002] ZACC 12; 2002 (5) SA 401; 2002 (8) BCLR 771 (14 June 2002) para 21.
[100]As above.
[101]*Mark GovaChavunduka and Another v The Minister of Home Affairs* Supreme Court Civil Appeal No. 156 of 1999 (Unreported).

America has equally stated that freedom of expression is absolutely indispensable for the preservation of a free society where the government is based on the consent of an informed citizenry and is dedicated to the protection of the rights of all, even the most despised minorities.[102]

Any interference with the right to freedom of expression not only affects personal liberties but also societal well-being due to the inability of citizens to express themselves on critical personal, social and political issues. Any unchecked restriction on the right to FOE as has been seen in the recent past in Kenya thus threatens to water down the gains which have been made over time through various struggles and agitations including the quest for a new Constitution in a bid to ensure that Kenya is a free, open and democratic society.[103] At the centre of these struggles and the quest for a new constitution was a struggle for genuine democracy and expanded freedom of expression. The attempt to restrict the right to freedom of expression threatens to erode efforts made in decades to ensure the enjoyment of freedom to hold and express opinions without either interference of any sort or the fear of it. This not only affects the fundamental rights and freedoms of the victims of such restrictions but also the rights of other members of the society who will be forced to suffer in silence even as the public affairs are run in a way that does not serve their best interests. This further eventually affects the enjoyment of other rights such as the right to quality and attainable health, education, freedom of assembly and the right to picket.

6. Conclusion

The recent acts against the right to freedom of expression as have been witnessed in the recent past have continued to infringe on the constitutional rights of the Kenyan people. The government continues to limit this right extra constitutionally, and in a manner that serves no legitimate purpose in an open and democratic society. The standards and the means that have been applied by the government fall short of the constitutional, regional and international standards. Such acts include enforced disappearance, internet shutdown, abduction and killing of protesters and crowd mobilisers, and threats against government critics. These acts are disguised as protectionist, seeking to safeguard public order and security while in the real sense, they have ulterior motives. Such acts have the end goal of silencing government critics, stifling dissent and making more and more people afraid of airing their concerns on governance matters. The high-handedness of government in managing public affairs and restricting the exercise of freedom of expression is against the Constitution and international human rights law and has no place in an open and democratic society. This is akin to the reawakening of a sleeping freedom of expression monster, a monster that died with the Moi regime and was buried by the Kenyan people when they adopted the 2010 Constitution and its attendant rights and freedoms.

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[102] *Speiser v Randall*, 357 U.S. 513 (1957).
[103] For a more in-depth analysis of the struggle for the right to freedom of expression, see CM Ngugi, 'Free expression and authority in contest: The evolution of freedom of expression in Kenya' (Thesis, 2008) <http://erepository.uonbi.ac.ke/handle/11295/39106> (accessed 14 February 2025).

Suspended declarations of invalidity: A critique of the Supreme Court's pronouncements in the Finance Act 2023 decision

By Ronald Odhiambo Bwana

Abstract

Recent adjudication has witnessed a major change in judicial attitude toward the suspended declaration of unconstitutionality. Kenyan courts have, in certain cases, welcomed the remedy where findings of invalidity were made. The suspended declaration of unconstitutionality is a remedial device that the courts use to reverse the effects of findings of unconstitutionality thereby validating invalid laws to enable the legislature to correct the constitutionally infirm provisions. The courts act pragmatically under the guise of a self-invented power to deem the law different from what it is. The Supreme Court of Kenya in The Cabinet Secretary for the National Treasury & 4 Others v Okiya Omtatah Okoiti & 52 Others; Gautam Bhatia (amicus curiae) was expected to bring about clarity on the basis and circumstances upon which the remedy could be issued. However, the Supreme Court in search of a more pragmatic approach to constitutional decision-making drifted off from the core principles of the constitution and got it wrong by neglecting to interpret the supremacy clause vis a vis the suspended declaration, plunging the country into a state of judicial heresy. This article runs against the judicial tide by criticising how the Supreme Court dealt with the question of suspended declaration of unconstitutionality in the Finance Act 2023 decision.

The Supreme Court of Kenya is the highest judicial authority in the country. It was established under Article 163 of the Constitution of Kenya (2010) and serves as the final appellate court.

I. Introduction

Kenyan Courts routinely perform strong-form judicial reviews of laws for constitutionality. Judicial review is the practice of the courts subjecting legislation to scrutiny for consistency with the Constitution.[1] Once a determination of

[1]Amitpal C Singh, 'Declarations of Invalidity and the Metaphysics of Judicial Review' (2025) 58 UBC Law Review.

unconstitutionality is made, the law is invalid to the extent of the inconsistency. The law is, as it is often said, struck down rendering it null and void across the country.[2] This approach differs from that of the United Kingdom. In the United Kingdom where weak-form judicial review is practiced, the courts can only make a declaration that legislation is incompatible with the Human Rights Act 1998 but such a declaration has no impact on the validity or effect of the legislation and places no obligation on Parliament to change the law.[3] This practice flows from the doctrine of parliamentary sovereignty in the British constitutional order i.e., the idea that Parliament can enact or repeal any law as it deems fit.[4]

The legal basis for the strong form judicial review in Kenya is the supremacy clause in Article 2 of the 2010 Constitution. The Constitution's supremacy clause transposes its normativity (the Constitution's ambition to shape the legal order and its institutions) to its 'all-powerfulness' (the Constitution's aim to expand its power to solve any legal and political conflict and to reach any social behaviour of legal significance) by establishing a hierarchical primacy within the sources of law. Put simply, constitutional supremacy entails that the Constitution trumps any other norm in the legal system in case of open conflict.[5] So, Article 2 forms the legal basis on which Kenyan courts rely to strike down laws, acts, or omissions that are inconsistent with the Constitution. Article 2 is therefore relevant in any discussion on suspended declarations of invalidity. Where Article 2 excludes suspensions of unconstitutionality declarations, their legal basis will have to be found elsewhere.

Ronald Dworkin was an influential American legal philosopher known for his work on law, morality, and political philosophy.

II. Constitutional dialogue

In the realm of rights protection tension is alive as to which branch of government ought to have the last word. To the first school, courts are the proper guardians of constitutional rights. To this school, courts are best suited to check the excesses of the political majority, particularly the legislature. Dworkin, a leading proponent of this school makes a distinction between the functions of the courts and the legislature through the principle-policy dichotomy, where principle is the 'requirement of justice or fairness or some other dimension of morality' whereas policy is 'a kind of standard that sets out a goal to be reached i.e., an improvement in some economic, political or social feature of the community'. For Dworkin, judges are rightly suited to protect rights in a democracy given their competence to deal

[2]Brian Bird, 'The Judicial Notwithstanding Clause: Suspended Declarations of Invalidity' (2019) 42 Manitoba Law Journal 1, 30.
[3]Section 4, Human Rights Act 1998.
[4]Odhiambo JD Ochiel, 'Transformation of Judicial Review in Kenya under the 2010 Constitution' (LLM Thesis, University of Nairobi 2016), 23.
[5]Graziella Romeo, 'The Conceptualization of Constitutional Supremacy: Global Discourse and Legal Tradition' (2020) 21 German Law Journal, 905.


Aileen Kavanagh

with matters of principle. In that regard, the insulation of judges from the demands of majority politics allows them to stand firm against the incoming tide of majoritarian prejudice and political self-dealing, thus rescuing rights "from the battleground of politics".[6]

The second school holds that the legislature ought to have the last word in protecting rights. It posits that since there is disagreement of what rights entail in a particular case then it is only the legislature that is capable of defining what those rights are. Jeremy Waldron maintains that the people should trust the legislature given that it is a supremely dignified, diverse, and deliberative forum that can protect rights against the oligarchic offensive of an ermined elite. Sigalet, Webber and Dixon, argue that the legislatures are able to secure human rights through modes of protection that courts cannot provide by way of judicial review such as acting deliberately in response to reasons to change the law.[7]

The third school occupies the middle ground. This school of thought rejects the court/legislature dichotomy arguing that protecting rights is a collaborative enterprise between all three branches of government, where each branch has a distinct but complementary role to play whilst working together with the other branches in constitutional partnership. The collaborative vision of constitutional guardianship, as offered by Aileen Kavanagh, holds that rights protection 'is neither the solitary domain of a Herculean super-judge nor the dignified pronouncements of an enlightened legislature' but a 'complex, dynamic, and collaborative enterprise, where each branch of government plays a valuable role whilst treating the other branches with comity and respect'.[8] Kavanagh points out that once we accept that rights protection needs both legislation and adjudication then the next task would be 'to work out how these institutions act, interact and counteract in a complex, collaborative scheme. She thus urges a move 'beyond Manicheanism' or rather the binaries of 'heroes versus villains' and 'good versus evil' and explore the 'many shades of grey' such as dialogue between the branches of government.[9]

The dialogue metaphor is often used to describe various symbolic aspects of constitutional interactions between the judicial and legislative branches of government concerning rights.[10] For Hogg and Bushell, dialogue occurs when the legislature amends or repeals an

[6]Kavanagh, *The Collaborative Constitution* (Cambridge University Press 2024) 33.
[7]Geoffrey Sigalet, Grégoire Webber and Rosalind Dixon, 'The 'What' and 'Why' of Constitutional Dialogue' in *Constitutional Dialogue: Rights, Democracy, Institutions* (Sigalet, Webber and Dixon eds) (Cambridge University Press, 2019), 3.
[8]Kavanagh, *The Collaborative Constitution*,1.
[9]Kavanagh, *The Collaborative Constitution*, 2.
[10]Geoffrey Sigalet, Grégoire Webber and Rosalind Dixon, 'The 'What' and 'Why' of Constitutional Dialogue' in *Constitutional Dialogue: Rights, Democracy, Institutions* (Sigalet, Webber and Dixon eds) (Cambridge University Press, 2019), 1.

unconstitutional statute.[11] To Schauer, dialogue is a model of constitutional design whereby the decisions of constitutional courts are subject to further legislative action and are non-final.[12] Tushnet, on the other hand, offers a nuanced account of how dialogue occurs. He contends that dialogue may occur when 'the Constitution imposes an affirmative duty on the legislature to enact legislation on a certain topic, and the legislature simply fails to do anything at all (unconstitutionality by omission).'[13] In that case, the court identifies the legislature's failure and initiates dialogue with the legislature by telling it that it should take some action.[14]

Constitutional dialogue is appealed to provide an escape route from the Manichean narrative since "each branch of government initiates and reacts to each other – as if they were in conversation or dialogue, through their Acts, judgments and policies".[15] Accordingly, dialogue presents itself as a technique of 'decoupling' constitutional rights review 'from judicial supremacy by empowering legislatures to have the last word'. The emerging constitutional model has been variously described as 'the new Commonwealth model', the 'parliamentary model', the 'hybrid model', the 'dialogue model', or 'weak-form review'.[16] Kavanagh contends that by ensuring that judicial decisions were 'expressly open to legislative revision', the new model combined judicial oversight with legislative override.[17] Even so, the legislature seems to have won out in the dialogue model since it has been assigned the last word on constitutional guardianship but only to the extent that the legislature replies. Thus, instead of providing an escape route the dialogue model does nothing more than take us back to the Manichean narrative.

Constitutional dialogue is a fairly new concept in Kenya. Granted, the Constitution of Kenya separates power from the different branches of government. The executive is granted the power to implement laws while the power to make laws is trusted by the legislature. The judiciary, on the other hand, is vested with the power of adjudication. The Constitution of Kenya embraces both the Manichean narrative and Kavanagh's collaborative thesis in light of Kenya's constitutional history.[18] In terms of constitutional guardianship i.e., protecting the Constitution against mediate or immediate violation, it posits a hegemony of the judiciary over the legislature and the executive given the immense powers the Courts have in checking the excesses of the other branches of government towards the protection of fundamental rights and freedoms. The collaborative vision adopts a different position from Kavanagh by placing an obligation on every person to respect, uphold, and defend it.[19]

III. Suspended declaration of invalidity

Kenyan courts have in recent times been peddling a narrative that the Constitution gives room for dialogue between the branches of government, specifically

[11]Peter W Hogg and Allison A Bushell, 'The Charter dialogue between courts and legislatures (or perhaps the Charter of Rights isn't such a bad thing after all)' (1997) 35 Osgoode Hall Law Journal 75, 82
[12]Frederick Schauer, 'Dialogue and Its Discontents' in *Constitutional Dialogue: Rights, Democracy, Institutions* (Sigalet, Webber, and Dixon eds) (Cambridge University Press, 2019), 433.
[13]Mark Tushnet, 'Dialogue and Constitutional Duty' (2012) Harvard Public Law Working Paper No. 12-10, 2, Available at SSRN: https://ssrn.com/abstract=2026555.
[14]Tushnet, 'Dialogue and Constitutional Duty', 3.
[15]Mathew Palmer, 'Constitutional Dialogue and the Rule of Law' Key Note Address to Constitutional Dialogue Conference Faculty of Law, Hong Kong University 9 December 2016.
[16]Aileen Kavanagh, *The Collaborative Constitution*, 58.
[17]Ibid, 59.
[18]Ronald Odhiambo Bwana, 'A Perspective on Suspended Declarations of Unconstitutionality' (2024).
[19]Article 3(1), Constitution of Kenya 2010.

Manitoba is a province in central Canada. The Manitoba Language Reference (also known as Reference re Manitoba Language Rights, is a landmark case decided by the Supreme Court of Canada. The case addressed the validity of unilingual English laws in Manitoba and reaffirmed the constitutional requirement for bilingual legislation in the province.

the legislature and the courts in light of rights violations without offering a lucid explanation. This dialogue has principally taken the form of the suspended declaration of unconstitutionality.[20] By this remedy, the Courts delay the effects of a declaration of unconstitutionality for a defined period to ostensibly allow the legislature to amend the law to make it constitutional thus giving temporary validity to the otherwise unconstitutional enactment. The suspended declaration draws its roots from the Canadian case of *Manitoba Language Reference*.[21] In Manitoba, the Supreme Court of Canada struck down Manitoba province's laws that were enacted only in the English Language whereas the Canadian Charter mandated the laws to be both in English and French. The effect of the declaration was that Manitoba province was to operate without any law. To avoid "anarchy" and a "legal vacuum" the Court suspended the effect of its judgment thus temporarily giving life to the unconstitutional laws to give Manitoba time to re-enact its unilingual laws in French.[22] The suspension was, therefore, justified on the grounds of the rule of law to avert a constitutional crisis.

According to Brian Bird, the suspended declaration of unconstitutionality is one way through which the courts and legislature interact to avoid the effects of an immediate declaration of unconstitutionality. He

[20]Article 2(1), Constitution of Kenya 2010.
[21]*Re Manitoba Language Rights* [1985] 1 SCR 721.
[22]ibid, 767.

contends that to be legitimate, dialogue between the courts and the legislature must have legal grounding.[23] In a tepid decision, the Supreme Court in search of a more pragmatic approach to constitutional decision-making drifted off from the core principles of the constitution and got it wrong by neglecting to interpret the supremacy clause vis a vis the suspended declaration, plunging the country into a state of judicial heresy. The main argument is that the Supreme Court failed to seize the moment and interpret the Constitution. Had the Court interpreted the Constitution, it would have found that the courts have no power to deem the law to be different than it is. Put simply, constitutional invalidation cannot be remedied by the courts as they have no power to add to, subtract from, vary, or amend constitutionally infirm statutes. This piece calls the attention of the Court to the interpretive questions and asks it to boldly express its 'voice' by seriously thinking about the Constitution.

IV. Erroneous findings on Article 23 of the Constitution

The Supreme Court found that Article 23 forms the legal basis for the suspended declaration of invalidity since it 'provides for the various reliefs available for violations of the Bill of Rights.' According to the Court, the word 'includes', as used in Article 23(3) read with Article 259(4)(b), means that the list is not exhaustive.[24] While the Supreme Court's finding sounds correct, it has several problems. The Court was wrong in its interpretation of Article 23 as the framework for suspended declarations. First, although Article 23(3) grants courts remedial discretion for rights violations, it does not empower the courts to fashion remedies for laws that violate the Constitution.[25] In other words, whereas Article 2(4) outlines the consequences for laws that violate the Constitution, Article 23 stipulates the remedies for unconstitutional acts but not for unconstitutional laws. Consequently, Article 23 does not empower Kenyan courts to issue suspended declarations.

Secondly, Article 23 is often raised by litigants to obtain redress for their suffering on account of laws, actions, or omissions that violate their rights or freedoms under the Constitution. In other words, litigants expect the declaration of invalidity to cure the harm they have suffered but not aggravate it.[26] Therefore, once a court finds that a law denies, infringes, or threatens a right or fundamental freedom and thereby issues a declaration of invalidity, it is not available to it to suspend such declaration as the suspension would outrightly infringe the successful claimant's rights since he/she may turn out to have a right but no remedy with practical impact hence beating the purpose of the declaration of invalidity.[27] This piece concurs that the word 'includes' means that the list of remedies is not exhaustive. Still, Article 23 is not as long as a judge's foot. Put simply, it does not encompass every remedy that comes to the mind of a judge but only those capable of advancing the purposes, values, and principles of the Constitution.[28]

Thirdly, the court failed to define 'appropriate relief' as used in Article 23(3). In vague terms, Article 23(3) gives very little guidance on what standards should guide a court's choice of remedy. It only

[23]Bird, 'The Judicial Notwithstanding Clause', 32.
[24]*The Cabinet Secretary for the National Treasury & 4 Others v Okiya Omtatah Okoiti & 52 Others; Gautam Bhatia (amicus curiae)*, para 235.
[25]See Ronald Odhiambo Bwana, 'A Perspective on Suspended Declarations of Unconstitutionality' (2024) 105 The Platform, 66; Bird, 'The Judicial Notwithstanding Clause', 35.
[26]Carolyn Mouland, 'Remedying the Remedy: Bedford's Suspended Declaration of Invalidity' 41 *Manitoba Law Journal* 4, 284.
[27]Robert Leckey, 'The Harms of Remedial Discretion' *International Journal of Constitutional Law*, 11.
[28]Article 259, Constitution of Kenya.

says that any relief granted in enforcing the Bill of Rights must be 'appropriate'. In *Fose v Minister of Safety and Security*,[29] the South African Constitutional Court held that 'appropriate relief' means 'relief that is required to protect and enforce the Constitution' and that appropriateness, requires "suitability" which is measured by the extent to which a particular form of relief vindicates the Constitution and acts as a deterrent against further violations of rights enshrined in chapter 3 (Bill of Rights).' Accordingly, appropriate relief 'demands a victim-centered approach to remedies'[30] to vindicate the rights violated and to prevent or deter any future infringements.[31] This was reiterated in *Saskatchewan Human Rights Commission v Kodellas* in the following words; Appropriateness connotes efficaciousness and suitability from the standpoint of the violation itself — a remedy 'to fit the offence' as it were. It suggests a remedy that, from the perspective of the person whose right was violated, will effectively redress the grievance brought about by the violation.[32] The Supreme Court in essence took account of what was 'just and equitable' but not what was 'appropriate' in the circumstances thus failing to give the Kenyan taxpayer an appropriate relief.

V. Failing to interpret Article 2 of the Constitution

Article 2 of the Constitution proclaims its supremacy in the sense that it binds all persons and all State organs at both levels of government, and any law that is inconsistent with it is void to the extent of the inconsistency. In its 137-page judgment, the Supreme Court overlooked this hallowed constitutional provision in a judgment that was expected to be Kenya's *Manitoba* if not *Schachter*. The Supreme Court is most often accused of jumping the interpretation stage to the application as if the interpretive question is settled.[33] In the Finance Act judgment, the Supreme Court latched on Article 23 without engaging Article 2 of the Constitution to determine whether the supremacy clause allows or excludes suspended declarations.

The Constitution's supremacy clause establishes a hierarchical primacy within the sources of law. It entails that the constitution trumps any other norm in the legal system in case of open conflict and/or conditions the interpretation of other norms that show some sort of inconsistency with constitutional imperatives.[34] Had the Court engaged Article 2 it would have perhaps arrived at the conclusion that it has no temporal element and excludes suspended declarations. A plain reading of Article 2(4) infers an immediate declaration of invalidity of any law found to be inconsistent with the Constitution.[35] The wording of Article 2(4) draws inspiration from the Blackstonian declaratory theory which holds that laws inconsistent with the Constitution are invalid and thus inoperable.[36] Accordingly, a court's declaration of unconstitutionality is only an announcement of what Article 2(4) has already accomplished through its authority such that a declaration in terms of Article 23(3)(d) does nothing more than

[29]1997 (3) SA 786, para 19.
[30]Stu Woolman and Michael Bishop, *Constitutional Law of South Africa*, 9-56.
[31]*Gitobu Imanyara & 2 Others v Attorney General Civil Appeal No 98 of 2014* [2016] eKLR.
[32](1989) 60 DLR [Bayda CJ].
[33]Ian Mwiti Mathenge, 'A critique of the Supreme Court's pronouncements on international law and the right to housing in Kenya in Mitu-Bell Welfare Society' (2022) 6 *Kabarak Journal of Law and Ethics*, 2.
[34]Graziella Romeo, 'The Conceptualization of Constitutional Supremacy: Global Discourse and Legal Tradition' (2020) 21 German Law Journal, 905.
[35]Ronald Odhiambo Bwana, 'A Perspective on Suspended Declarations of Unconstitutionality' (2024) 105 The Platform, 66.
[36]Geoffrey Sigalet, 'Legislated Rights as Trumps: Why the Notwithstanding Clause Overrides Judicial Review' (2024) 61Osgoode Hall Law Journal 1, 78.

recognize what has always been the law's legal status.[37]

The supremacy clause therefore confers no discretion on judges as to the moment at which a declaration of unconstitutionality will take effect. In any event, the suspended declaration of unconstitutionality conflicts with Article 2(4) as it purports to introduce a temporal element.[38] The only discretion in Article 2(4) relates to the retroactive or prospective effect of the nullity.[39] It follows that if a court intends to save a statutory enactment from the operation of Article 2(4) it may resort to other reliefs such as reading down so as not to reach unconstitutionality.[40] Therefore, once a court declares a statute invalid, it is not open to it to reconstruct or repair the unconstitutional enactment to bring it into compliance with the Constitution since that is the exclusive job of the legislature.[41] The power to reconstruct or repair statutes could have been given to the courts by the drafters but it was not.

The Court of Appeal (Maraga, M'inoti & Murgor, JJ.A.) in *Suleiman Said Shabhal v Independent Electoral & Boundaries Commission & 3 others*,[42] the Court of Appeal rejected the suspended declaration. It held that a statute that is blatantly violative of the Constitution cannot form the foundation of valid legal claims in light of Article 2(4). Thus, "the idea that statutory enactments contrary to the Constitution can claim even fleeting validity should not be countenanced, let alone entertained" since "holding otherwise would be contributing

Suleiman Said Shabhal

to the erosion of the supremacy and pre-eminence of the Constitution in the hierarchy of legal norms".[43] Although not binding on the Supreme Court, the court should have, at the very least, been persuaded by the appellate court's decision in *Suleiman Said Shabhal* to interrogate the repercussions of the suspended declaration on Article 2.

Curiously, the Supreme Court relied on its decision in *Suleiman Said Shabhal vs. Independent Electoral and Boundaries Commission & 3 Others*[44] to support the suspended declaration. The apex court quoted its Suleiman Said Shabhal decision out of context. It is trite that a case is only an authority for what it decides and not what logically flows from it.[45] The ratio

[37]Peltomaa, *Understanding Unconstitutionality*; Paul Daly, Jeremy Opolsky, Jake Babad, and Julie Lowenstein, 'The Effect of Declarations of Unconstitutionality in Canada' (2021) CanLIIDocs 2420, 8.
[38]Bird, 'The Judicial Notwithstanding Clause', 33.
[39]*Suleiman Said Shabhal v Independent Electoral and Boundaries Commission & 3 Others* SC Petition No. 21 of 2014, [2014] eKLR.
[40]Bird, 'The Judicial Notwithstanding Clause', 28; *Schachter v Canada* [1992] 2 SCR 679.
[41]Arthur Peltomaa, *Understanding Unconstitutionality: How a Country Lost its Way* (Teja Press, 2018) 2.
[42]Civil Appeal No. 42 of 2013, (2014) eKLR.
[43]ibid, [8].
[44]SC Petition No. 21 of 2014, [2014] eKLR.
[45]*The German School Society & Another v Ohany & Another* (Civil Appeal 325 & 342 0f 2018(Consolidated)) 2023 KECA 894 (KLR) (24th July 2023) (Judgment)

South African Supreme court

of the Shabhal case is that a court has discretion as to the time span effect re the nullification of statute given that nullity may operate prospectively or retrospectively. Reference to the suspended declaration in Shabhal was made *obiter*.

VI. Misunderstanding Canadian and South African Supremacy Clauses

Brian Bird warned that suspensions of invalidity 'can threaten the rule of law if they are misunderstood.'[46] On the other hand, Arthur Peltomaa cautioned that if not confined to the rule of law, pragmatism can become a very unruly horse given that "once you get astride it you never know where it will carry you. The Supreme Court in making out its case its case for the suspended declaration relied on a long line of persuasive authority from Canada and South Africa. It, however, failed to distinguish Kenya's context of the supremacy clause from the Canadian and South African perspectives.

i. Canada

Section 52(1) of the Constitution Act, 1982 proclaims the supremacy of the Canadian Constitution in the following words; "The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect." Arthur Peltomaa contends that it is the operation of section 52(1) but not court declarations that invalidate laws. For Peltomaa, the role of the courts in actions challenging the validity of laws is to identify the inconsistency between a statute and the Constitution. Once inconsistency is established 'the Constitution, as the supreme law, must be given overriding effect, and the statute, as the subordinate law, must be disregarded by the court and given no force or effect.'

Fundamentally, the court exercises no discretion and grants no remedy but simply figures out what the law is and applies that law to the facts of the case.[47] According

[46]Bird, 'The Judicial Notwithstanding Clause.'

to Peltomaa, the Canadian constitutional supremacy clause is self-executing thus a court declaration of invalidity is just but a metaphor for the actual process which involves the Constitution requiring the court to resolve conflicts between the Constitution and other laws in favour of the Constitution.[48] To Daly et al, the supremacy clause operates automatically and does not need steps to be taken to establish invalidity. For them, a 'court's role—as a neutral arbiter and guardian of the constitution—is to recognize the unconstitutionality, but they do not create the unconstitutionality or the subsequent absence of force and effect.'[49]

In *Nova Scotia (Workers' Compensation Board) v Martin*, the Supreme Court of Canada (Gonthier J) held that "the invalidity of a legislative provision inconsistent with the Charter does not arise from the fact of its being declared unconstitutional by a court, but from the operation of section 52(1)."[50] Similarly, McLachlin CJ in *R v Ferguson*, held that section 52(1) confers no discretion on judges on how to apply it, stating that: "The other remedy section, section 52(1) of the Constitution Act, 1982, confers no discretion on judges. It simply provides that laws that are inconsistent with the Charter are of no force and effect to the extent of the inconsistency…When a litigant claims that a law violates the Charter, and a court rules or "declares" that it does, the effect of section 52(1) is to render the law null and void. It is common to describe this as the court "striking down" the law. When a court "strikes down" a law, the law has failed by operation of section 52 of the Constitution Act, 1982."[51] Daly et al, maintain that since section 52 cannot speak for itself, adjudication is required.[52] However, in *R v Lloyd*,[53] McLachlin CJ transposed the power to strike down laws from section 52 to the court. She stated that a law "remains in full force or effect absent a formal declaration of invalidity by a court of inherent jurisdiction."[54] Under this description, the judiciary is seen as a gatekeeper rather than a servant or partner of the Constitution.[55]

According to Brian Bird, the Canadian constitutional supremacy clause excludes the suspensions of invalidity.[56] Bird's view is buttressed by Grant Hoole who contends that a plain reading of section 52(1) implies an immediate invalidation of any law found to be *ultra vires* the Constitution.[57] Immediate invalidation was therefore the practice in Canada before the suspended declaration of invalidity made its debut in 1985 via *Manitoba Language Reference*.[58] In *Manitoba* the Canadian Supreme Court suspended the nullity of Manitoba province's laws that were enacted only in English on the basis that the Canadian Constitution would not 'suffer a province without laws' thus it gave temporary validity to Manitoba's unconstitutional laws. The suspension of invalidity was justified on account of the rule of law.[59]

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[47]Peltomaa, *Understanding Unconstitutionality*, 3.
[48]Peltomaa, *Understanding Unconstitutionality*, 3.
[49]Daly et al, 'The Effect of Declarations of Unconstitutionality in Canada', 7.
[50][2003] 2 SCR 504, para 28.
[51](2008) 6 SCC 6, para 35.
[52]Daly et al, 'The Effect of Declarations of Unconstitutionality in Canada', 9.
[53](2016) SCC 13.
[54]Ibid, para 19.
[55]Daly et al, 'The Effect of Declarations of Unconstitutionality in Canada', 10.
[56]Bird, 'The Judicial Notwithstanding Clause', 32.
[57]Grant Hoole, 'Proportionality as a Remedial Principle: A Framework for Suspended Declarations of Invalidity' (2011) 49 *Alberta Law Review* 1, 110-111.
[58]Bruce Ryder, 'Suspending the Charter' (2003) 21 *Supreme Court Law Review* (2d), 267. See also *R v Big M Drug Mart Limited* (1985) 1 SCR 295, [353].
[59]Bird, 'The Judicial Notwithstanding Clause', 27.

The period following *Manitoba* saw an expanded use of the remedy.[60] Grant Hoole, for instance, maintains that suspensions of invalidity are no longer reserved for instances of emergency but are used liberally by the courts with the result that constitutional rights have at times been suspended without a just basis.[61] Riccardo Serafin, on the other hand, argues that the suspended declaration of invalidity has become a 'default remedy in Canadian constitutional litigation'.[62] In S*chachter v Canada*,[63] s 52(1) was construed by the majority as granting Canadian courts "flexibility in determining what course of action to take" after discovering unconstitutionality. Noting the misgivings of the suspended declaration, Lamer CJ insisted that the remedy should only be invoked where there are good pragmatic reasons grounded in a balancing of interests in the transition to a new legal regime. The court thus circumscribed circumstances where the remedy would be appropriate i.e., preserve the rule of law; avoid dangers to the public; or not deprive deserving persons of the benefits of an under-inclusive law.[64] However, Lamer CJ did not intend the guidelines to stand as hard and fast rules.[65]

Be that as it may, section 33 of the Canadian Charter mitigates the supremacy clause by expressly permitting legislatures, but not courts, to give life to laws that violate certain Charter rights and freedoms through the notwithstanding clause.[66] The notwithstanding clause empowers the legislatures to ignore a Charter decree thus reasserting the doctrine of Parliamentary Supremacy. To Hogg and Bushell, the notwithstanding clause gives the Canadian legislature 'room to advance its objectives, while at the same time respecting the requirements of the Charter as articulated by the courts'. This view is bolstered by Sigalet, Webber, and Dixon who maintain that the notwithstanding clause 'empowers a legislature to challenge a constitutional conclusion by a court without the need to have recourse to the constitution's amendment formula and, so, without changing the text of the constitution.'[67]

ii. South Africa

Section 2 of the South African Constitution proclaims its supremacy in the following words; 'This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.' The supremacy clause implies that if any non-constitutional norm collides with a constitutional norm the constitutional norm is to be given overriding effect.[68] Therefore, South African courts are under the obligation to 'declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency.'[69] According to Michael Bishop, section 172(1) (a) of the South African Constitution is couched in mandatory terms and thus confers no discretion on courts. To Bishop, a 'declaration of invalidity is a mandatory result of a finding of constitutional

[60]See *Dixon v British Columbia* (AG) [1989] 59 DLR; R v Swain [1991] 1 SCR 933; *Schachter v Canada* [1992] 2 SCR 679.
[61]Hoole, 'Proportionality as a Remedial Principle'.
[62]Riccardo Serafin, 'Suspended Declarations of Invalidity: A Comparative Perspective' (2024), 5; Bird, 'The Judicial Notwithstanding Clause', 29.
[63]S*chachter v Canada* [1992] 2 SCR 716.
[64]Ibid, 719.
[65]Hoole, 'Proportionality as a Remedial Principle', 132.
[66]Bird, 'The Judicial Notwithstanding Clause', 26.
[67]Sigalet, Webber and Dixon, 'The 'What' and 'Why' of Constitutional Dialogue', 4.
[68]Frank I Michelman, 'The Rule of Law, Legality and the Supremacy of the Constitution' in Stuart Woolman and Michael Bishop (eds) *Constitutional Law of South Africa* (2nd edn, Juta 2013) 11-35.
[69]Section 172(1) (a), Constitution of South Africa.

inconsistency and flows automatically from that finding.[70] Suspended declarations of invalidity are therefore the default remedy in South Africa following findings of inconsistency. By the declaration of invalidity, 'the Court does not appear to be making law but puts the ball back in the legislature's court.'[71] However, section 172(1)(b) (ii) allows the courts to delay the coming into effect of their declarations of invalidity 'for any period and on any conditions, to allow the competent authority to correct the defect.'[72] Suspended declarations of invalidity are thus expressly sanctioned by the South African Constitution.

Had the Supreme Court distinguished Kenya's context of the supremacy clause from the Canadian and South African perspectives it would have perhaps concluded that suspensions are excluded by the Kenyan constitution. In Kenya, invalidity arises by operation of Article 2(4) with the courts' role being to identify inconsistency between the norms of the Constitution and the infringing norm hence issuing a remedy of invalidity where the law is not justified under Article 24. In other words, once a court finds that a law is inconsistent with the Constitution it must interrogate whether the inconsistency is cured by Article 24. Where the inconsistency cannot be cured by Article 24 the infringing law must be invalidated immediately.

VII. Conclusion

The suspended declaration, even though it offers a pragmatic approach to governance is not countenanced by the Constitution of Kenya. The Constitution in Article 23(3) demands an appropriate relief for rights violations. Appropriate relief means a


Supreme Court of Canada

remedy that is required to protect and enforce the Constitution and its suitability is measured by the extent to which the relief vindicates the Constitution and acts as a deterrent against further violations of rights enshrined. The suspended declaration therefore is not an appropriate relief in Kenya since it introduces a temporal element to the supremacy clause, denies successful litigants of remedies of practical impact, and unjustifiably limits rights and fundamental freedoms against the spirit of the Constitution which demands an interpretation that most favours the enforcement of right or fundamental freedom. The Supreme Court therefore got it wrong by giving the suspended declaration overriding effect against Article 2 of the Constitution.

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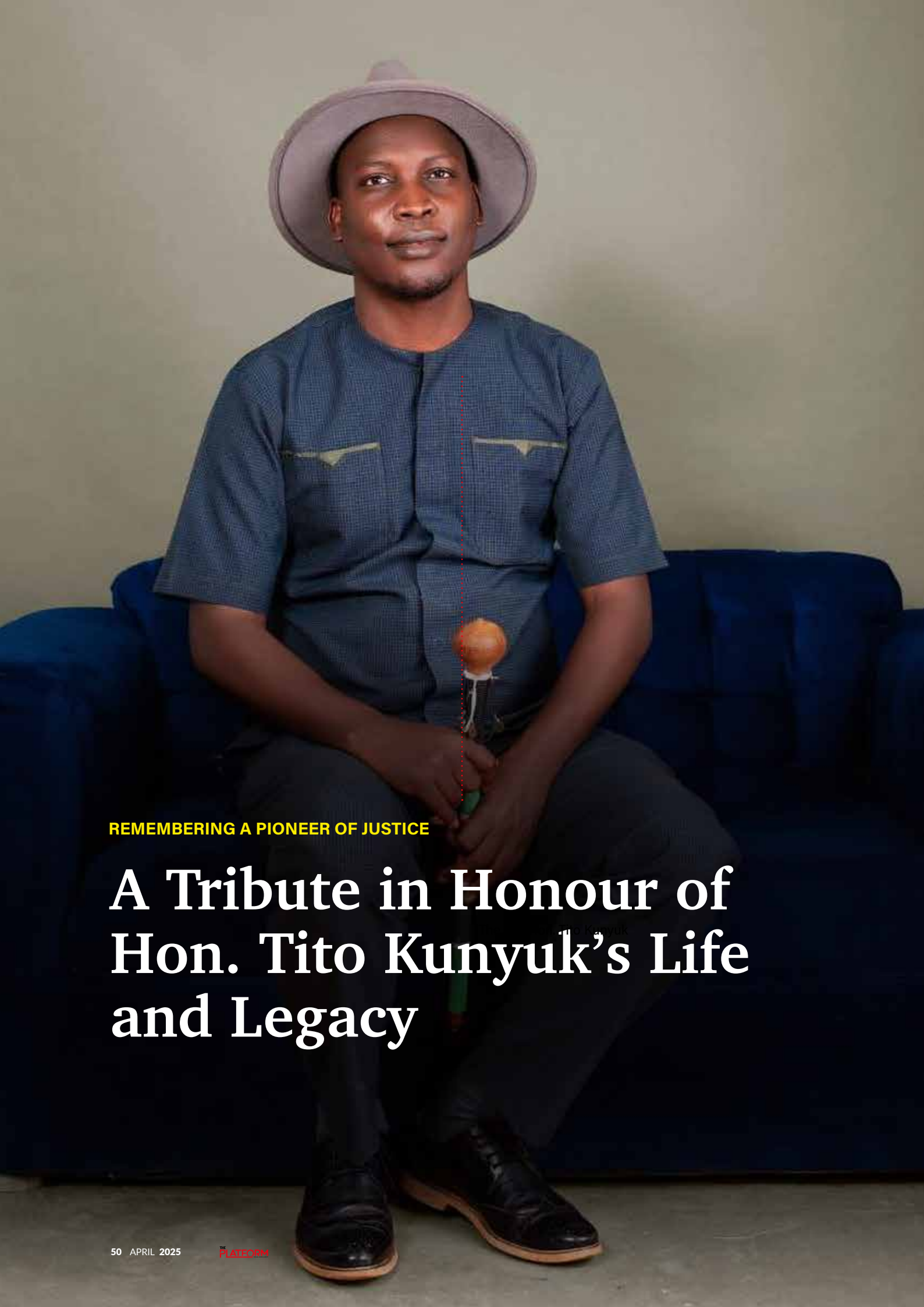
[70]Michael Bishop, 'Remedies' in Stuart Woolman and Michael Bishop (eds) *Constitutional Law of South Africa* (2nd edn, Juta 2013), 9-96.
[71]Stu Woolman and Michael Bishop, Constitutional Law of South Africa, 9-97; *Larbi-Odam & Others v Member of the Executive Council for Education (North-West Province) & Another* 1998 (1) SA 745 (CC).
[72]*Executive Council, Western Cape Legislature & Others v President, Republic of South Africa & Others* 1995 (4) SA 877 (CC).



REMEMBERING A PIONEER OF JUSTICE

A Tribute in Honour of Hon. Tito Kunyuk's Life and Legacy

By Salem Lorot

Introduction

On 31st December, 2024, Hon. Tito Kunyuk passed away at 43, the last day of the year that sadly bore the finality of his departure. I knew Kunyuk, or Book Tiger, as I used to call him. He was the Principal Kadhi at the Nakuru Law Courts, having risen through the ranks in the Kenyan Judiciary from a Resident Kadhi in 2013 and working in Kajiado, Isiolo and Kakuma, Kisumu Law Courts.

Prior to his stint at the Judiciary, he had worked as Da'wa (Islamic Liaison) Officer for Africa Muslims Agency in Kakuma, Turkana County.

In reflecting on Kunyuk's life, here are four things that I learnt from him.

1. **Be passionate about what you do**
   I am a christian and Kunyuk was a muslim. Both of us studied law but Kunyuk's specialization was on Sharia Law. It was hardly surprising since he studied Bachelor of Arts Degree in Sharia at International University of Africa, Khartoum, Sudan, in Collaboration with Thika College for Sharia and Islamic Studies, Thika, Kenya (now Umma University). He passed it with a distinction.

   There were his routine responsibilities as a Kadhi for example determination of disputes touching on personal status, marriage, divorce and succession among Muslim families and solemnizing and registering Muslim Marriages. But it didn't stop there. He continuously made his personal mission to master Sharia Law. He bought books on the subject, read them, and wrote articles on important questions on his area of expertise.

   Kunyuk's notable peer-reviewed publication is 'The Law of Evidence applicable in the Kadhis Courts of Kenya: A study of two decisions by Kadhi Abduljabar, Kadhis court Nairobi at UpperHill' in Topan F et al (eds) Governance and Islam in East Africa: Muslims and the State in Kenya and Tanzania (2024) published by Edinburgh University Press.

   The other is 'The need for a substantive fatwa institution in countering violent extremism in Kenya' in Green MC, Gunn TJ & Hill M(eds) Religion, Law and Security in Africa (2018) published by African Sun Media.

2. **Books are our compasses in this complex world**

   I had told you that I used to fondly call Kunyuk "Book Tiger", of course preferring that title to "book worm" for obvious reasons. It was for a good reason. Kunyuk had built an impressive personal maktaba (library) on carefully selected Islamic scholarly writings, law, poetry, and literature. I don't know of any other person who bought and read Wole Soyinka's books than Tito. I suspect that Kagumo Teachers' Training College where he studied English, History and Physical Education played a big role. His love for literature was evident and I used to joke with him that he had a high "shelf-esteem" while referring to his book shelf stacked with neat rows of his specialist, rare to find books. Book Tiger would trawl the internet, turn it upside down to locate that rare book somewhere in someone's basement in the US, and buy it—often at a hefty price— and ship it to Kenya including the shipping costs. He didn't say it but his mantra could have been that there is no knowledge that is too costly. It was evident that he believed that books are compasses with which we navigate this complex world. Whatever

we might have learnt last year might be obsolete this year.

3. **It is not late to go back to school for that additional diploma or master's degree or doctorate**

Kunyuk used to tell me he really needed to go back to school for his master's degree. When one is young, it an easy thing to do. But when you have a job and a family and a thousand other things, then it all about sacrifices. I was therefore thrilled when Kunyuk completed his Master of Laws in Human Rights Protection at the University of the Western Cape. I was saddened that he could not attend his graduation due to his health condition at the time but I was really proud of his milestone.

4. **We need to share our knowledge with the world**

Kunyuk believed in sharing his knowledge with communities around him and the world. He did this through the articles he wrote, interviews he gave, and conferences he attended. In 2017, he presented a paper at ICRC Workshop on International Humanitarian Law and Islam on Protection of Cultural Property during Hostilities under Islamic Law. In the same year, he presented another paper, 'I am Right, you are Dead': The need for a substantive fatwa institution in countering violent extremism in Kenya' at the Fifth Annual Law and Religion Conference at the International University of Rabat, Morocco.

A year later, he presented another paper, 'Moving the Centre: An Appraisal of the Law of Evidence Applicable in the Kadhis Courts of Kenya' at the conference titled 'Governance and Islam in East Africa: Muslims and the State' held at Aga Khan University, Nairobi.

It is not my intention to enumerate all the papers Kunyuk delivered in his life but to suggest that we could intentionally write and share our knowledge and experiences through conference papers, peer-reviewed articles, media interviews, and blog articles. Most of the times we tend to underestimate the immense knowledge we possess in our different spheres of specialization. We need to do this more and more.

Adios, Book Tiger

Book Tiger, I celebrate you for being an outlier, for realising early enough that bibliophiles don't live one life. Tucked in pages of a tome would be different lives and experiences: sitting in a chapter might be two or three lifetimes. I celebrate you for being a decent human being and full of quiet purpose, for being a public servant and spending time and resources to be a better public servant, for being true to your conscience when things weren't going well.

Here's one final quote:

"The best moments in reading are when you come across something–a thought, a feeling, a way of looking at things–which you had thought special and particular to you. Now here it is, set down by someone else, a person you have never met, someone even who is long dead. And it is as if a hand has come out and taken yours."

– Alan Bennett, The History Boys

Salem Lorot is a Legislative Drafter and an Advocate of the High Court of Kenya.

CELEBRATING A LIFE OF IMPACT

A Tribute to Hon. AbdilAziz Tito Kunyuk, an Extraordinary Jurist of Islamic Law

By Tioko Emmanuel Ekiru

1. Introduction

In the early hours of December 31, 2024, when the world was eagerly anticipating to usher in a New Year, 2025; with an inspiring hope and optimism, I lost a man I truly consider a mentor, a true friend, elder brother, a colleague, a guide, a perfect gentleman and a confidant. That is, Hon. AbdilAziz Tito Kunyuk. Hon. Kunyuk lost his battle for life following a prolonged ailment that he fought with sheer determination and endurance while in the ICU at St. Luke Hospital in Uasin Gishu County, Eldoret. His untimely passing left a deep void that words can scarcely describe not only to his family members, relatives and friends but also to the members of the legal profession of which he was a member. Hon. Kunyuk departed too soon, having so much left to achieve and many more lives to touch in this fragile world.

Rightly so, Hon. Kunyuk was one of those rare human combinations – intellectually gifted and a brilliant jurist with a deep sense of humour, humility and a love of humanity. His modest way of life made him a cordially admirable friend to all those who got to know him in the legal cycles and beyond.

The late Hon. AbdilAziz Tito Kunyuk.

He embodied disarming and charming qualities that inspired everyone.

His kindness was boundless, while his irresistible and bright smile was ever-present in all circumstances.

Hon. Kunyuk was equally a self-made individual. His love and passion for books appears to have been cemented in his DNA. He had built for himself an impeccable brand of a library with beautiful collections of Islamic law, African literature (decoloniality studies), poetry, legal philosophy, history and jurisprudence of the Kadhis' Courts in Kenya, politics, music, and contemporary governance scholarly writing, including literary of Turkana Community. Given his strong passion for books, one of his longtime friends

Salem Lorot dubbed him as 'books tiger', thus depicting Hon. Kunyuk's legendary curiosity for books.

Most importantly, and perhaps, one of the Hon.Kunyuk's most cherished legacies was his extraordinary depth, intellectual tradition and deep understanding of Islamic law, particularly the area of Islamic family law that saw him being widely respected and admired in equal measures by members of the legal profession such as judicial officers, judges, law students, legal practitioners, and many others for his immense contribution to Islamic family law.[1] Hon. Kunyuk significant contributions to the Muslim law can be evidently traced in his Master of Laws (LLM)Mini-Thesis at the University of the Western Cape, where he wrote a Mini-Thesis titled 'Muslim Family Law and Judicial Protection of Women's Rights in Kenya: An Assessment.'

Hon. Kunyuk's mini-dissertation scholarship generally advances the arguments on how the Kadhis' courts in Kenya can align Muslim family law with constitutional ethos grounded on gender justice as a central pillar for an egalitarian society. The Mini-Thesis also emphasized on how Kadhis' courts can serve as critical vehicles for justice, particularly in navigating the tension between upholding Islamic traditions and adhering the constitutional principles and values as primarily provided in Article 10 of the 2010 Constitution of Kenya.[2`] As a Principal Kadhi, Hon. Kunyuk was deeply involved in adjudicating cases related to Muslim Family Law, specifically in personal status matters related to marriage, divorce, and inheritance thus upholding fairness and justice all the time.

In addition to the foregoing, Hon. Kunyuk similarly translated the Quran into Turkana language so as to endear his community to draw near to the Almighty God (Allah, the ultimate creator, provider and the sustainer of all mankind).[3] Although I came to know him in person in 2016, when I was in my second year of studies at Moi University School of Law. Hon. Kunyuk and I were like conjoined twins. Whenever we would meet, we would leave everything else and soak ourselves into the conversations revolving around new knowledge in law, politics and our future aspirations.

Hon. Kunyuk was ahead of his time. He used to inspire and motivate me a lot. He was a person who would cheer you up even in trivial things. Given the fact that we came from the same community with a brand of marginalization being the core identity of our origin, I drew a lot of inspiration from Hon. Kunyuk. He taught me that it is possible for one from an underprivileged background to defy the barriers of marginalization and exclusion to rise and be ready to engage in serious intellectual wrestling matches with counterparts' peers drawn from well-to-do backgrounds. In this piece,

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See Hon. Tito Kunyuk conversations with the elephant platform where he underscored that Kadhi court has been part of Kenya's legal architecture, but it tends to be misunderstood by Muslims and non-Muslims, and thus controversies. According to him, a more nuanced understanding of the court is supposed to be explored to prevent arguments that would generate controversies, including the place of female Kadhis' in the Kenyan legal system. Available at https://www.theelephant.info/videos/2022/04/04/the-kadhis-court/ accessed on (17 March 2025).

[2]In accordance with Article 170(5) of the Constitution, Kadhis' courts play a crucial role in the application of Muslim family law in Kenya, specifically in personal status matters related to marriage, divorce and inheritance.

[3]Muslim believes Allah's attributes are reflected in His 99 names, such as "The Most Merciful" (Ar-Rahma) and "The Compassionate" (Ar-Rahim), which guide believers in understanding His nature and fostering a personal connection through prayer and worship.

I seek to paint albeit a non-exhaustive account of Hon. Kunyuk's biography by identifying, detailing and discussing some of the salient attributes of his life from childhood until the time he was summoned to return to His Maker.

2. Tito Kunyuk's background and context: From childhood to Principal Kadhi

Hon. Kunyuk was born on 2nd October 1981 at Lapur village in Turkana County to his parents Kunyuk Longoria and Takanyang Lopie (now deceased). He attended Lodwar High School for his "O" level of studies. He subsequently enrolled at Kagumo Teacher's Training College to study English, History and Physical Education. From 2002 to 2005, he studied at the International University of Africa, now called (Umma University) a constituent college of Sudan, in collaboration with Thika College to pursue a Bachelor of Arts in Sharia studies and Islamic Law. From 2013 to 2016, Hon. Kunyuk, joined Mount Kenya University to undertake a degree in Bachelor of Laws (LL. B), where he successfully graduated in the same university with Honours.

In 2022, at the tailed end of COVID-19 and despite laborious engagements in his workstation, Hon. Kunyuk, opted to enhance his academic credentials. He enrolled at the University of the Western Cape, South Africa for a Master of Laws in Human Rights protection. He graduated in absentia due to his health situation.

Careerwise, Hon. Kunyuk commenced his career with the Kenyan Judiciary in 2013 when he was appointed as a Resident Kadhi and got posted to the Kajiado Law Courts.
He later arose through his career ranks, and serving with unwavering commitment. He served at various stations including Isiolo, Kakuma, Kisumu and Nakuru Law Courts. At the time of his sudden demise, Hon. Kunyuk was serving as Principal Kadhi at Nakuru Law Courts.

3. Hon. Kunyuk as a Family Man

Hon. Kunyuk was married to Jamila Natoo and Salma Jamal. He was blessed with five children, namely Mahmoud Lopwarin, Jaffa Lopiana, Andalucia Nagilae, Salahudin Imoni and Rumi Takanyang. As a devoted partner and head of the family, Hon. Kunyuk's home was a sanctuary of joy, tranquillity and laughter because of his storytelling nature and the love for music and sports. In addition, Hon. Tito was known for his nurturing character and the commitment to instill values of mutual respect, integrity, love and compassion to every member of his family. Even though gone too soon, Hon. Kunyuk's legacy as a family man will continue to live in the hearts of his loved one.

4. Hon. Kunyuk a Devoted Scholar, and a Researcher

As I mentioned earlier, Hon. Kunyuk, had irresistible passion for books as exemplified with his research interest drawn particularly in the areas of Islamic family law, the history and the jurisprudence of the Kadhis' Courts in Kenya, African literature, poetry, legal theory, politics, music, and contemporary governance, including cultural and literary heritage of the Turkana community. Some of his top-notch publications, include 'The Law of Evidence applicable in the Kadhis Courts of Kenya: A study of two decisions by Kadhi Abduljabar, Kadhis court Nairobi at UpperHill' in Topan F et al (eds) Governance and Islam in East Africa: Muslims and the State in Kenya and Tanzania (2024) published

by Edinburgh University Press.' The other that follows is: 'The need for a substantive fatwa institution in countering violent extremism in Kenya' in Green MC, Gunn TJ & Hill M(eds) Religion, Law and Security in Africa (2018) published by African Sun Media.'

Besides the peer reviewed publications , Hon. Kunyuk ,has written extensively on other commentaries such as, 'Defining Religious Authority among Muslims, Friday Bulletin, Issue No. 592; History of the Kadhis Court in the Kenyan Legal System, New Dawn, Issue No. 132; Child Marriage in Islamic Law: A Survey of Source-texts, New Dawn Issue No. 133; Appointment, Role and Status of Kadhis in Kenya, New Dawn, Issue No. 134;Umar's Epistle to Abu Musa Al-Ash'ari on Judicial Theory and Practice, New Dawn Issue No.135;Legal Reasoning in the Kadhis Courts, New Dawn, Issue No. 136; Adab-al-Qadhi as religio-legal code of ethics for Kadhis, New Dawn, Issue No. 138; and Enforcement of Consolatory Gift, Mataa' upon Divorce in Our Kadhis Courts, NEP Journal (On line) 24th February 2017.

Hon. Kunyuk's research scholarship has been vital in providing valuable insight in the application of the Islamic family law in contemporary Kenyan legal landscape and thus enriching the interplay between Islamic law and the constitutional muster.

Beyond research scholarship, Hon. Kunyuk was not a bystander voice in the history of the world. His love for knowledge and curiosity for new ideas drove him to traverse different parts of the African continent and beyond to present papers in various conferences. Through such fora, Hon. Kunyuk was able to interact with and exchange ideas with a diverse range of scholars, international experts, politicians, human rights activists, policy makers and judges. Some of the papers he presented in various conferences include a paper he presented at ICRC Workshop on International Humanitarian Law and Islam in 2017, titled,' Protection of Cultural Property During Hostilities under Islamic Law.' Subsequently, and in the same year, he presented a paper with a compelling theme in the international conference titled, 'I am Right, you are Dead': The need for a substantive fatwa institution in countering violent extremism in Kenya' at the Fifth Annual Law and Religion Conference at the International University of Rabat, Morocco.

In 2018, Hon. Kunyuk with his sheer brilliance nature staged another paper, 'Moving the Centre: An Appraisal of the Law of Evidence Applicable in the Kadhis Courts of Kenya' at the conference titled 'Governance and Islam in East Africa: Muslims and the State' held at Aga Khan University, Nairobi.' Recently in May 2024, and on what seem to be his closing submissions on the face of earth, Hon. Kunyuk attended 11th Annual conference of the African consortium for Law and Religion Studies hosted hosted ina Falls, in Harare, Zimbabwe to present a paper.

5. Hon.Kunyuk, a Man of the People and a Legacy of Integrity in Serving the Kenyan Judiciary

Hon. Kunyuk's brand of identity was his pen of integrity, diligence, humanness, fairness, equality, rule of law and unwavering commitment to social justice. As a jurist, a consummate intellectual and a law scholar. Hon. Kunyuk recognized that law must not be an abstract concept confined to the courtrooms but rather be seen as a powerful instrument to serving the peoples' general welfare or public good. In the Kadhis' courts, Hon. Kunyuk played an instrumental role to enhance

the functional character of the court in the administration of justice. This is evidently seen from various dockets he served while in the court. For example, Hon. Kunyuk was appointed to be one of the stakeholders representing Kadhis' in the Curriculum Development in the Kenya Judicial Academy[4]. Similarly, he served as a Member of the Steering Committee for the finalization of the Kadhis courts Rules of Procedure and Practice 2020 and the production of the Kadhis Courts Bench Book, and finally he served as a Member of the Committee that developed the Judicial Training and Development Policy 2018.

The Chief Justice, Hon. Justice Martha Koome, while eulogizing Hon. Kunyuk, described him as a diligent and professional judicial officer in all his judicial duties. In addition to this, Hon. Kunyuk had an exceptional legal mind. His ability to dissect and analyze complex statutes and documents written in Arabic was meticulous and nuanced in approach. Furthermore, his work as a judicial officer in handling questions related to Muslim law to personal related matters on issues such as marriage, divorce and inheritance in the Kadhi courts would be immortalized for across generations.

Most crucially then, what set Hon. Kunyuk apart was his pro-people's character. Throughout his judicial career, Hon. Kunyuk maintained deep connections with everyone regardless of their station in life, including the common people in the street and the villages. Hon. Kunyuk had also deep connection with professional bodies from his Turkana Community, namely Turkana Lawyers Association(Turlaw) and Turkana west Professional Association, the platforms he used together with his colleagues to champion for charitable programs ,including mentorship programs. His passing on was a huge blow that was felt widely in different parts of the country.

6. Final reflection

Hon. Kunyuk will be remembered as an extraordinary jurist with a deep commitment to pursuing goals, humanness, fairness, equality, rule of law and undivided commitment to social justice. His sum-total dedication as an expert in Islamic family law, among other disciplines, exemplifies his life legacy aimed at using the law as a powerful tool for social change and protection.

As we grieve his untimely loss, let us also honour him by embracing the qualities that defined his life including his diligence, his professionalism and his unwavering commitment to social justice in pushing the boundaries of legal thought while remaining rooted meticulously in fairness and equality.

My brother, Hon. Kunyuk, May Allah SWT raises you and fly you first class (as you loved to say) with ease to the highest heaven. May He enable us all to embrace deeply in our hearts and minds your profound values that was symbolically shaped by noble ideals of justice.

Travel well brother and know you are and will be greatly missed.

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[4]I accessed the forementioned information from Hon.Tito Kunyuk's curriculum vitae which is under the custody of his family.

Assessing the impact of the Finance Act 2023 on Foreign Direct Investment in Kenya

By Jeff Kang'e Manga

Abstract

The Finance Act 2023 introduced numerous fiscal policies and tax reforms which have had a direct impact on the attractiveness of Kenya as a potential investment area. Foreign Direct Investment is credited as being a crucial tool in enhancing economic development especially in developing countries. It is therefore important for developing countries to create an environment that encourages investment in said regions. This is especially so for Kenya as it is a leading economic hub in East Africa and therefore its ability to attract Foreign Direct Investment is crucial. The purpose of this study is therefore to investigate whether the provisions of the Finance Act 2023 including the changes and amendments on tax incentives and other tax regulations encourage or discourage foreign direct investment in Kenya. The Study also aims to conduct a comparative analysis between Kenya and other countries on the tax policies and regulations in the regions and how the policies have impacted foreign direct investment. The research incorporated doctrinal research methodology including the examination of the current Foreign Direct Investment trends. The research will also investigate Kenya's Foreign Direct Investment trends before and after the introduction of the Finance Act 2023. The Research will be beneficial to potential investors as it will provide valuable information on whether Kenya provides a conducive environment on investment. It will also enable policy makers find out whether present policies attract investment and if not how to adequately amend them and finally it will assist academicians find valuable information on this field.

The Finance Act, 2023 is a significant piece of legislation in Kenya that introduces various amendments to tax laws and financial regulations. Assented to by the President on June 26, 2023, and gazetted on June 27, 2023, the Act aims to generate additional revenue to support the government's KES 3.6 trillion budget.

Key Words: Assessing, Impact, Finance Act, Foreign Direct Investment, Kenya

Introduction of the study

The economy of a country is crucial for its growth and subsistence, in fact some claim that an economy makes a country. Further it has been stated that a country's present

The Finance Act, 2023, introduced significant tax reforms and regulatory changes in Kenya, affecting various sectors of the economy, including Foreign Direct Investment (FDI). While the government aimed to increase revenue, some provisions of the Act have raised concerns among investors, potentially affecting Kenya's attractiveness as an investment destination.

economic conditions decide its future.[1] There are numerous ways in which a country can improve its economy including; imports and exports, trade, inflation and Foreign Direct Investment.[2] Foreign Direct Investment is defined by the International Monetary Fund as investment made to secure long-term interest by the investor in enterprises that operates in another country. Foreign Direct Investment has numerous advantages especially for developing countries as it aids developing countries acquire external finances from more affluent countries. Further, it ensures advancement of technology in the country, provides a greater access to the foreign market and ensures the government of said countries acquire foreign exchange.[3] This means that developing countries should aim to create environments that encourage foreign direct investment in the region. This is especially so for Kenya as the country prides itself as being the major economic hub in East Africa. There are various ways in which a country can encourage Foreign direct investments including: creation of tax policies that are favourable to foreign investors such as tax reliefs and tax havens. In Kenya specifically, the Finance Act 2023 introduced a range of fiscal policies, tax incentives and other regulatory measures that will no doubt have a significant impact to foreign investment in the region and as such is critical to the economic future of the country. This research therefore aims to investigate whether the introductions, amendments and general changes brought about by the Finance act 2023 attract or deter foreign

[1]Nawaz, M. A., Azam, A., & Bhatti, M. A. (2019). (*Natural Resources Depletion and Economic Growth: Evidence from ASEAN Countries. Pakistan Journal of Economic Studies*, 2(2), 37-54.)
[2]Muhammad, Liu and Seemab (*(PDF) impact of taxation on Foreign Direct Investment: Empirical evidence from Pakistan)* https://www.researchgate.net/publication/353030309_Impact_of_Taxation_on_Foreign_Direct_Investment_Empirical_Evidence_from_Pakistan accessed 11 December 2024
[3]Ibid

investment in Kenya. The Study will also compare the trend of foreign direct investment before and after the introduction of foreign direct investment in the region in an attempt to determine the effect of the Finance Act in Foreign Investment. The Study will finally provide necessary recommendations on how to improve the policies in an attempt to make Kenya a leading destination for investment in Africa.

Overview of Foreign Direct Investment in Kenya

Foreign direct investment in Kenya can be traced back to the 1970s where there was a steady growth of FDI and Kenya served as a gateway for foreign investors who sought to penetrate the Southern and East African Markets. The cause for growth of FDI was due to higher level of growth and development in Kenya at the time, better infrastructure and comparatively speaking the policies in Kenya were more favourable to Foreign Direct Investment as compared to other neighbouring countries that had closed trade regimes.[4] Key Sectors in Kenya that attracted most Foreign Direct Investment include; Manufacturing sector due to the raw materials present in the country, agriculture sector as Kenya and Africa as a whole is known for its agricultural prowess and the technology sector. However, FDI growth began to decline at the period between 1981-1990. This was due to inconsistent economic policies and structural reforms that became quite unfavourable to FDI, poor infrastructures and public services and finally corruption in governance. It is estimated that Kenya's FDI flows dropped below those of Tanzania and Uganda making Kenya the worst in East Africa. Attempts were made by the new government of 2024 to fix the problem. Some of the projects suggested to improve FDI in Kenya included enactment of social and economic policy reforms to encourage investment in Kenya. An example of reforms included the economic recovery strategy of 2003 which was aimed at stimulating private investment in Kenya.[5]

However, despite the attempts made by the Kenyan government to create a more favorable climate for Foreign Direct Investment through policy initiates, Kenya FDI inflows has been relatively low in the region. Especially, at the beginning of the end of the last decade and the beginning of the new decade, Kenya's Foreign Direct Investment prospect has been negatively affected by the Covid 19 Pandemic as the world shut down, political unrests and public demonstrations especially recently as citizens have demonstrated against the economic policies of the current regime making Kenya a highly undesirable investment area and high levels of public sector corruption.[6] According to UNCTAD's Investment Report 2022, Kenya's inbound foreign direct investment flow declined annually from $1.1 billion (Ks150.36 billion) in 2019 to $717 million in 2020 to $448 million in 2021, following a downward trend that began in 2010. During the same three-year period, the number of greenfield investments also decreased by about 60%, from 95 in 2019 to 39 in 2021.[7] This drop in foreign investment transactions defies a pattern observed in other parts of East Africa, where average FDI inflows rose by 35% to $8.2 billion between 2019 and 2021.[8]

It is well documented of the benefits of Foreign Direct Investment in developing

[4]Purity Wanjugu Mahugu, '*Factors Driving Foreign Direct Investment Inflows in Kenya*,' (Uonbi Repository 2023)
[5]Ibid
[6]Elizabeth Cooke, ' *The FDI LandScape in Kenya in 2023*,' (Investment Monitor 2023)
[7]UNCTAD World Investment Report 2023.
[8]Ibid

The banking and insurance industries have seen increased foreign direct investment, with multinational companies expanding their footprint.

countries especially Kenya. Various Studies have showcased the benefit of FDIs to such countries and have listed them to include technological spillovers from the developed countries where the investors come from to the developing countries, facilitates the development of human capital as it results in creation of employment opportunities for the locals found in the developing countries which also improves standard of living of the people, enhances the integration of global trade, contributes to the creation of a more competitive business environment, and advances company growth as multinational companies benefit from FDI as a means of expanding their footprints into international markets.[9] Higher economic growth is the outcome of all of these, making it an essential instrument for reducing poverty in underdeveloped nations. Recent findings from firm surveys conducted in Kenya, Tanzania, and Uganda indicate that foreign direct investment (FDI) has significant benefits for both the host economies and the employees of foreign-owned businesses. Further and specifically to Kenya, Foreign Direct Investment is crucial in the achievement of Kenya's larger economic strategies including Vision 2030, EAC integration and it enhances Kenya's ability to be a key player in African Continental Free Trade Area (AfCFTA).

Foreign direct investment is generally crucial for the alleviation of poverty in developing countries like Kenya. Further, Foreign Direct Investment results in improvement of infrastructure in the developing countries as the governments of said countries will be vigilant in ensuring the infrastructure in their countries are well developed so as to attract investors and moreover the capital raised from said investors will facilitate the improvements of said infrastructure.

[9]Elizabeth Cooke, ' *The FDI LandScape in Kenya in 2023*,' (Investment Monitor 2023)

Kenya's industrial sector continues to draw significant foreign investment, bolstered by government incentives and a growing consumer market.

It is therefore crucial that developing countries like Kenya present a climate favourable to foreign Direct Investment majorly by the creation and amendment of economic policies that encourage foreign direct investment. One way in which Kenya has done so is the formulation and implementation of the Finance Act 2023 which presents various policies that are aimed to change the economic landscape of the country and affect investment in the region. These policies include changes in taxation of foreign entities, new regulations for foreign corporations and tax avoidance regulations. This research therefore aims to investigate the various provisions of the Finance Act 2023 and their potential impact on Foreign Direct investment in Kenya.

Analysis of the Provisions of the Finance Act 2023 and their Impact on Foreign Direct Investment in Kenya

The main objective of the Finance Act 2023, as highlighted in its preamble, is to amend various tax and duty laws, targeting all persons who accrue or derive income from Kenya.[10] Since Kenya operates under a source-based income taxation model, these amendments affect both residents and non-residents, including foreign investors who wish to invest in the country. As Foreign Direct Investment (FDI) remains a major source of income for Kenya, the structure of the country's taxation laws plays a crucial role in either attracting or deterring investment. Generally, taxation laws that

[10]Finance Act 2023, Preamble.

impose high taxes on non-residents can discourage foreign investment, while lower taxes or incentives can attract it. This section will examine the specific provisions of the Finance Act 2023 and assess their potential impact on FDI in Kenya. The Provisions include;

a) Changes on Investment Allowance

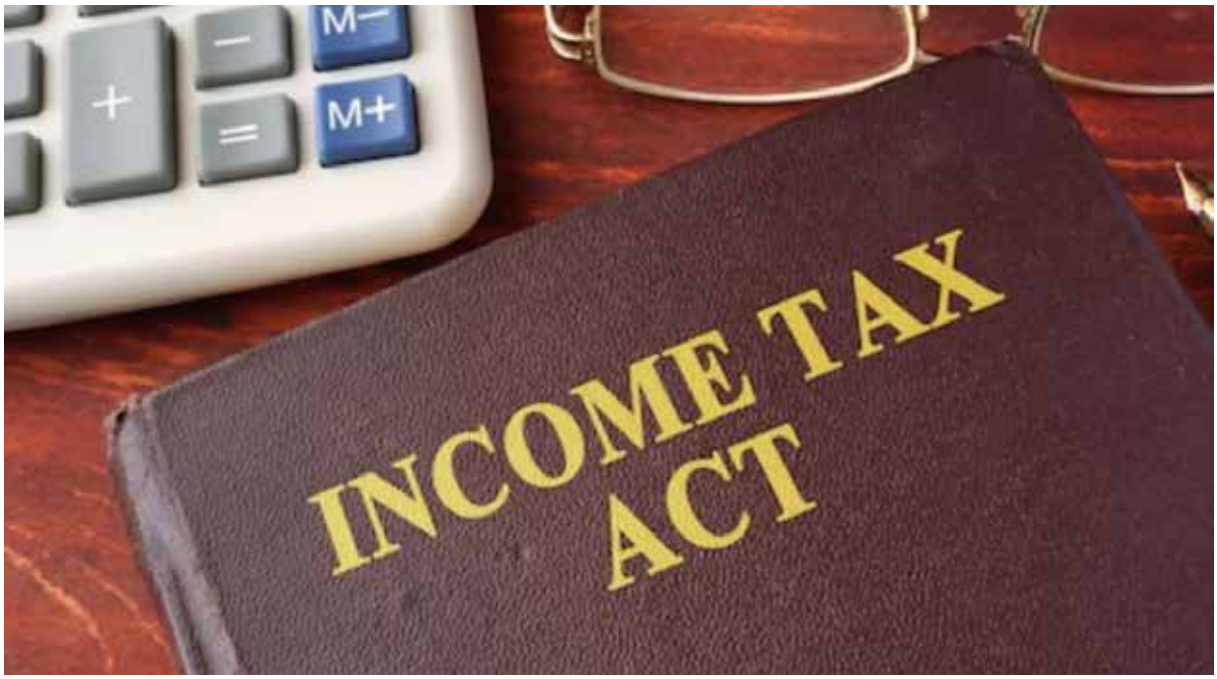
Section 25 of the Finance Act 2023 amends the Second Schedule of the Income Tax Act and introduces a 10% straight line Investment allowance for industrial buildings and docks.[11] The Act goes further on to redefine the term 'industrial building' to include a building with the following purposes; transport, as a bridge, inland water navigation and electricity or hydraulic power undertaking.[12] The Act also defines the term 'docks' to include a container, terminal berth, harbour, wharf, pier, jetty, storage yard or other works in or at which vessels load or unload merch but excludes a pier or jetty used for recreation.[13] The introduction of these amendments is a welcomed change as if implemented as highlighted it has the potential to boost foreign direct investment especially in the blue economy which relates to investment in marine related infrastructure like port facilities and fishing equipment.[14] This amendment also has the potential to promote sustainable development and attract reasonable investment. The Blue economy is often closely related to environmental and marine conservation. Introducing the allowances can encourage ecofriendly foreign investors which will in turn enable Kenya get closer to achieving its environmentally sustainable goals. This is beneficial to Kenya as it gives it a competitive advantage within the East Africa Region and it also improves the

An investment allowance is a financial incentive governments or tax authorities provide to businesses and individuals to encourage capital investments in machinery, equipment, infrastructure, or other qualifying assets. It typically comes as a tax deduction or tax credit to reduce taxable income.

Business Environment in Kenya. The Act under the Aforementioned Section goes further to broaden the definition of Telecommunication equipment under the Second Schedule of the Income Tax Act to include civil works deemed as part of the telecommunication equipment or civil works contributing to the use of the telecommunication equipment. This is a welcome change as it encourages investors in the telecommunication sector.

Jacques Morisset and Neda Pirnia discussed the advantages of policies that include tax allowances for foreign investment. They point out that the investment tax allowances are appropriately targeted at the desired activity because a company can only benefit from lower corporate taxes if it makes capital investments. Additionally, the allowances encourage businesses to plan for investments with a long-term perspective. Additionally, the allowance encourages new investment rather than providing owners of existing capital with a windfall gain, as does

[11]Section 25 Finance Act 2023.
[12]Ibid.
[13]Ibid.
[14]Dr. Benjamin Musau, *'Analysis of the Kenya Finance Act 2023.'* (B.M Musau& Co. Advocates 2023)



The Income Tax Act (Cap. 470) serves as the cornerstone of Kenya's taxation system, outlining the legal framework for income tax assessment, collection, and enforcement. Regular amendments ensure its alignment with the country's fiscal policies and economic objectives.

a cut in corporate tax rates, and it produces less revenue leakage than a tax holiday because it targets current capital spending. Additionally, it can be made refundable, which would enable the government to split the risks and expenses of the investment with the foreign business owner.[15] In conclusion, it is a welcomed approach adopted by the drafters of the Finance Act 2023 to introduce the tax allowances as they clearly have a positive effect on Foreign Direct Investment which in turn enables the economy of Kenya be entitled to the benefits of Foreign Direct Investment discussed above.

b) Income Tax Rate for a Permanent Establishment

The Finance Act 2023 amends the Income Tax Act in relation to Corporate Income tax of non-resident persons. It reduces the percentage deducted to the Corporate Income tax on non-residents form 37.5% as was highlighted in the Income Tax Act to 30%.[16] The Correlation between the reduction of corporate Income tax and the increment of Foreign direct investment flow was highlighted by Adi and Widyono who after conducting an empirical study of 29 Asian countries found that there is an indirect relationship between Corporate Income Tax and Foreign Direct Investment in that as Corporate Income Tax decreases, foreign direct investment increases. In fact, from their study it was noted that Foreign Direct Investment inflows increase by an estimated 4.38% due to a 1% Corporate Tax rate reduction.[17] This would mean from their analysis a reduction of the Corporate Tax Rate of 7.5 % by the Finance Act of 2023 should Lead to an estimated 32.85 %

[15]Jacques Morisset & Neda Pirnia, '*How Tax Policy and Incentives affect FDI*,' (World Bank)
[16]Kenya Revenue Authority, ' *Highlights Of The Finance Act 2023*,' https://www.kra.go.ke/popular-links/key-highlights-of-the-finance-act-2023 accessed on 11th December 2024
[17]Adi Lesamana & Widyono Soetjipto, '*The Effect Of Corporate Tax Policy On Foreign Direct Investment: Empirical Evidence From Asian Countries,' (Bulletin of Monetary Economics and Banking, Vol. 25 No. 4, 2022), pp. 647 - 672*

increase in Foreign Direct Investment in flow in Kenya. Erica also notes that increment in the rates of corporate income tax is most harmful to economic growth in the United States as the workers bear a portion of the burden.

She notes that reducing the corporate income tax will benefit workers as new investments boost productivity and lead to wage growth. Scott Hodge also notes that most industrialized and developed nations have adopted the reduction of corporate income tax rates in an attempt to attract investment and facilitate economic growth. He further notes that slicing corporate tax rates leads to increased investment, productivity gains, and consequently increased economic growth, output, and raises the standard of living of the citizens and residents of the particular nation. From the above assessments, it is evident that Corporate Income Tax and foreign direct investments are akin to water and oil in that they do not mix.[18] It can be concluded that for a country to boost its FDI inflows it is imperative that it seeks to reduce its rates of corporate income Tax especially for Non-residents. This is exactly the position that has been adopted by the Finance Act of 2023 which has reduced the Corporate Income Tax rate which, as evidence shows, has the potential to make Kenya quite enticing as an investment option and thus making the Foreign Direct Investment inflow of Kenya increase. This is a beneficial move as the resultant effect will be economic growth in Kenya.

c) Introduction of Tax Exemptions

Section 24 (c) of the Finance Act of 2023 amends the First Schedule of the Income Tax Act by adding on incomes accrued or derived form Kenya that are exempt

A tax exemption is a legal provision that allows certain individuals, organizations, or types of income to be excluded from taxation. Governments use exemptions to promote economic growth, support social causes, or incentivize specific sectors.

from taxation. Activities that Income that attract the tax exemptions highlighted in the Finance Act 2023 include; Royalties paid to a non-resident person by a company undertaking the manufacture of human vaccines and Interest paid to a resident person or nonresident person by a company undertaking the manufacture of human vaccines.[19] Kenya's Finance Act 2023 tax exemptions can serve as a powerful inducement to draw foreign direct investment into the production and manufacturing of vaccinations for humans. By lowering production costs, providing tax breaks, and encouraging the expansion of the pharmaceutical industry, Kenya is establishing itself as a competitive location for both domestic and foreign vaccine manufacturers. In the long run, this may result in more international investments, the creation of jobs in Kenya, technology transfer, and a more robust domestic pharmaceutical sector as the investment will encourage infrastructural development of vaccine manufacturing stations. It also encourages further research and

[18]Scott Hodge, *'How Lowering Corporate Tax Rates Encourages Economic Growth,'* (Tax Foundation 2018)
[19]Section 24 (c) Finance Act 2023.

Repatriated income refers to profits, dividends, royalties, interest, or other earnings that a non-resident entity or individual transfers out of Kenya to their home country. The taxation of such income is governed by Kenya's Income Tax Act (Cap. 470) and various Double Taxation Agreements

development in the vaccine arena and the pharmaceutical industry at large in Kenya.[20]

d) Taxation of Repatriated Income for Non-Residents

Section 6 of the Finance Act of 2023 amends the Income Tax Act by inserting a provision 7B which provides summarily that a non – resident person who carries on business in Kenya and has a Permanent Establishment in Kenya shall required under the Act to pay tax on the repatriated income for that year on income. Frank defines repatriated income as proceeds earned and transferred by multinational entities conducting business in foreign jurisdictions (Kenya) to their home country.[21] A definition of repatriated income an also be derived from the Finance Act of 2023 as movement in net assets plus the net profit calculated in accordance with generally accepted accounting principles after deducting the tax payable on the chargeable income. For the purposes of the repatriated income, net assets shall not include the revaluation of assets. The calculation of repatriated income is also provided in the finance Act and is as follows:[22]

Computation of Repatriated income;
R=A1+(P-T)-A2

Where:
R= Repatriated Income
A1= net assets at the beginning of the year
P= net profit for the year of income
T=tax payable on the chargeable income
A2 = net assets at the end of the year

Though it is also important to note that the corporation tax, as discussed earlier, for non-resident persons with permanent establishments was reduce from 37.5% to 30%. Generally, taxation of repatriated income of non-residents acts as a deterrence to investors from investing in the region as they would prefer regions where they can get maximum returns. Further it can prompt double taxation if no double taxation treaties exist between the host and home state. Therefore, more often

[20]Dr. Benjamin Musau, '*Analysis of the Kenya Finance Act 2023*.' (B.M Musau& Co. Advocates 2023)
[21]Frank Maina, '*Taxation of Repatriated Income*,' (Ronalds 2023)
[22]Section 6 Finance Act 2023

than not taxation on repatriated income negatively affects Foreign Direct Investment. However, these effects can be mitigated and attract foreign investments if the Country offers incentives, like Kenya which reduced corporation tax, which may attract foreign investment.

Regional Comparative Analysis with other EAC Countries

One of the key benefits of modifying tax policies and regulations to encourage Foreign Direct Investment (FDI) is gaining a competitive advantage over other countries, particularly neighbouring ones. Since Kenya is considered a pivotal economic player in the East African Community (EAC), it is imperative to compare its tax and fiscal policies with those of other EAC countries, specifically Tanzania and Uganda, to evaluate its competitive standing in attracting FDI.

a) Tanzania

Tanzania's Finance Act 2023 was enacted on June 6, 2023, and came into operation on July 1, 2023, around the same time as Kenya's Finance Act 2023.[23] Key highlights of the Tanzanian Finance Act include the following:

• **Income Tax Act Amendments:** The Act excludes from taxation a change in underlying ownership resulting from the allotment of new membership interest in a resident entity. This means capital investments through new share issuance are exempt from taxation, encouraging investment.[24]

• **Non-resident Income Tax:** Income tax is excluded on payments made to non-resident persons for electronic services provided by individuals conducting business in Tanzania. Additionally, the time for non-resident persons to file tax returns has been extended to the twentieth day of the month following the taxable period.[25]

• **Tax Exemptions:** Exemptions include:
  - o Gains derived from internal restructuring of mining companies under agreements with the government.
  - o Income earned by the National Health Insurance Fund from fixed deposits, treasury bonds, bills, or dividends.[26]

• **Export Tax Amendments:** Export Processing Zone (EPZ) investors involved in the export of meat are exempt from export tax on raw hides and skins.

• **Special Incentives:**[27]
  - o A reduced Corporate Income Tax (CIT) rate of 20% (from 30%) for new manufacturers of pharmaceuticals or leather products for the first five years of operation.
  - o Newly listed companies on the Dar es Salaam Stock Exchange (DSE) benefit from a reduced CIT rate of 25% (from 30%) for the first three years, provided at least 30% of shares are publicly listed.
  - o A 10% CIT rate for the first five years for new assemblers of vehicles, tractors, and fishing boats.

b) Comparison with Kenya

• **Corporate Income Tax (CIT)**:
Both Kenya and Tanzania's Finance Acts 2023 set the CIT rate at 30%. However, Kenya was at a competitive disadvantage before 2023 due to its previous 37.5% CIT

[23]Fabiola SSebuyoya, Kelvin Mosha, Mohammedzameen Nazali, '*Tanzania Finance Act 2023: Highlights*,' (Bowmans Publishers 2023)
[24]Ibid
[25]EY Global, '*Tanzania Finance Act 2023 analysis*,' (EY GLOBAL 2023)
[26]Rishit Shah, Mirumbe Mseti, ' *Tanzania; Corporte – Tax Credits & Incenitves*,' (PWC 2024)
[27]Ibid

Withholding Tax (WHT) is a tax deducted at the source on specified payments made to residents and non-residents in Kenya. It ensures tax collection at the point of income generation. The tax is deducted by the payer and remitted to the Kenya Revenue Authority

rate for non-residents. By aligning its CIT rate with Tanzania, Kenya has levelled the playing field.

• **Withholding Tax (WHT):**
Kenya's Finance Act 2023 offers a ten-year WHT exemption for royalties, interest, management fees, professional fees, training fees, consultancy fees, and agency or contractual fees paid by Special Economic Zone (SEZ) developers, operators, or enterprises to non-residents. After this period, non-residents are subject to a 20% WHT rate on royalties.

In Tanzania, the maximum WHT rate is capped at 15%, making its regime more attractive for foreign investors in this respect.

• **Sector-Specific Incentives:**
Tanzania provides a reduced CIT rate for new pharmaceutical and leather manufacturers (20% for five years), newly listed companies (25% for three years), and new assemblers of vehicles and related equipment (10% for five years).

In contrast, Kenya offers a 100% investment deduction on building and machinery costs for manufacturers and a 150% deduction for investments exceeding KES 200 million outside Nairobi. While Kenya's approach incentivizes capital investment, Tanzania's sector-specific reduced CIT rates may be more immediately attractive to new investors in targeted industries.

• **Export Processing Zones (EPZs) and Special Economic Zones (SEZs):**
Both countries offer competitive tax regimes in SEZs and EPZs. Kenya's CIT rates range from 10% to 15% in these zones, similar to Tanzania's.

• **Tax Incentives for Newly Listed Companies:**
Tanzania's preferential CIT rate for newly listed companies on the DSE is a notable advantage, as Kenya does not currently offer similar incentives. This could deter investors seeking public listing benefits.

Conclusion

While Kenya's Finance Act 2023 makes strides in improving the country's FDI attractiveness, particularly through CIT rate reductions and investment deductions, Tanzania's Finance Act 2023 provides more targeted sectoral incentives and favorable WHT rates. Kenya can enhance its competitive advantage by addressing gaps such as preferential rates for newly listed companies and adopting sector-specific CIT reductions. This would position Kenya more favourably within the EAC region as a leading investment destination.

Uganda

According to a report by John R. Musinguzi, Uganda's Foreign Direct Investment inflows increased by 48.3% from USD 320.25 million in 2022 to USD 474.07 million in 2023. This growth is attributed to Uganda's friendly investment policy framework, including tax incentives designed to

attract investors.[28] The Key highlights of the tax policies attracting investors are as highlighted below:

- **Withholding Tax (WHT):**
  - WHT is charged at a rate of 15% on nonresident persons deriving income from dividends, rent, natural resource payments, interest, royalties, and management fees, which aligns with Kenya's WHT rates.[29]

- **Corporate Income Tax (CIT):** [30]
  - Similar to Kenya and Tanzania, CIT for branches of foreign companies in Uganda is set at 30%.

- **Capital Gains Tax (CGT):** [31]
  - Gains from the sale of non-depreciable assets, such as shares in a private firm, are taxed as regular business income at a rate of 30% for both residents and non-residents.

- **Value Added Tax (VAT):**
  - VAT in Uganda is charged at a standard rate of 18% on taxable supplies of goods and services and specific imports. Certain supplies, such as unprocessed agricultural products, financial services, and insurance services (including health, microinsurance, reinsurance, and life insurance), are zero-rated. Comparatively, Kenya's VAT rate stands at 16%.

- **Fiscal Incentives under Uganda's Free Zone Scheme:** [32]
  - Exemption from taxes and customs on all imported inputs used in Export Processing Zones (EPZs) for production purposes (e.g., raw materials, plant, and machinery).
  - Exemption from all taxes, levies, and rates on exports from Free Zones.
  - A 10-year tax break for Free Zone Developers with a minimum investment capital of USD 50 million.
  - A 10-year tax break for Operators in Free Zones with a minimum investment capital of USD 10 million (foreigners) or USD 2 million (EAC nationals).
  - Exemption from taxation on plant and machinery used in Free Zones for five years and one day after disposal.

These measures highlight Uganda's commitment to fostering a competitive investment climate, particularly in Free Zones, where incentives are designed to reduce operational costs and enhance profitability for investors.

Comparison with Kenya

- **Corporate Income Tax (CIT):**
  - Both Kenya and Uganda maintain a CIT rate of 30%, aligning with Tanzania's rate and creating parity across the region.

- **Withholding Tax (WHT):**
  - Uganda's 15% WHT rate matches that of Kenya and is slightly more competitive than Tanzania's maximum WHT rate of 15% on royalties and other payments.

- **Value Added Tax (VAT):**
  - Uganda's 18% VAT rate is higher than Kenya's 16%, potentially making Kenya more attractive for investors prioritizing lower consumption taxes.

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[28] John R. Musingizi, '*A Guide on Tax Incentives/Exemptions available to the Investors in Uganda*.' (Uganda Revenue Authority 2023) Pg. 4
[29] Investment Guide, '*Uganda Standard Incentives for Investors*,' https://www.eac.int/investment-climate-and-incentives/investment-incentives/243-sector/investment-promotion-private-sector-development/investment-guide/2478-uganda-standard-incentives-for-investors accessed on 11th December 2024
[30] Ibid
[31] Ibid
[32] Ibid

The Finance Act 2023, enacted on June 26, 2023, introduced significant tax reforms in Kenya aimed at increasing government revenue. These changes have elicited varied reactions from the business community and foreign investors, impacting the country's foreign direct investment (FDI) landscape.

- **Free Zone Incentives:**
  - Uganda offers significant fiscal incentives within Free Zones, including a 10-year tax holiday for developers and operators with substantial investments. Kenya's SEZ and EPZ incentives focus on reduced CIT rates (10% to 15%) and investment deductions rather than long-term tax holidays, which may make Uganda more appealing for large-scale developers.

- **Sector-Specific Incentives:**
  - While Uganda's incentives are broader and target Free Zone activities, Kenya's policies provide substantial deductions for manufacturers investing heavily in machinery and infrastructure.

Conclusion

Uganda's robust FDI growth and comprehensive tax incentives, particularly in Free Zones, showcase its competitive edge within the EAC. While Kenya's Finance Act 2023 aligns with regional standards in CIT and WHT rates, it can enhance its appeal by adopting broader tax holidays and expanding sector-specific incentives. This would position Kenya as a stronger competitor in the EAC region, driving more substantial foreign investment inflows.

Empirical Analysis of Foreign Direct Investment Inflows After Enactment of the Finance Act 2023

A statistical analysis by Macrotrends highlights the trends in Kenya's Foreign Direct Investment (FDI) inflows from 2020 to 2023:

- **2020:** FDI inflows amounted to USD 0.43 billion, reflecting a 9.29% decline from 2019.
- **2021:** FDI increased slightly to USD 0.46 billion, an 8.69% rise from 2020.
- **2022:** FDI dropped to USD 0.39 billion, marking a 15.06% decline from the previous year.
- **2023:** Following the enactment of the Finance Act 2023, FDI surged to USD 1.50 billion, a remarkable 282.22% increase from 2022.[33]

This data underscores a consistent decline in FDI inflows over recent years until the

[33]Macrotrends, *'Kenya Foreign Direct Investment 1970 – 2024'*, < https://www.macrotrends.net/global-metrics/countries/ken/kenya/foreign-direct-investment> accessed on 11th December 2024

passage of the Finance Act 2023, which reversed the trend with a significant boost in 2023. This sharp increase suggests a positive correlation between the new fiscal policies and investor confidence in Kenya. However, the data also indicates that there is room for further improvement to sustain and enhance this momentum.

Conclusion

The Finance Act 2023 is a critical step toward improving Kenya's ability to attract foreign direct investment. Kenya's competitive position in the area has been boosted by the decrease of corporate tax rates, the implementation of investment allowances, and targeted tax exemptions. These efforts have already resulted in a large increase in FDI inflows. To preserve and build on this achievement, Kenya must address long-standing issues such as political instability, corruption, and a lack of sector-specific incentives.

Recommendations

Expand Sector-Specific Tax Incentives: To diversify FDI sources and encourage sustainable growth, introduce specific tax cuts for developing industries such as renewable energy, technology, and manufacturing.
Improve Free Zone Policies: Provide longer-term tax breaks and exemptions within Free Zones to entice large investments and compete with Uganda's strong incentives.

Enhance Political Stability and Governance: Strengthen anti-corruption measures and maintain consistent law enforcement to create a more predictable and investor-friendly climate.

Leverage Regional Integration: Align policies with East African Community (EAC) norms and encourage cross-border investment to boost Kenya's appeal as a regional hub.

Promote Infrastructure Development: Prioritize infrastructure expenditures, such as transportation and electricity, to support large-scale projects and make doing business easier for international investors.

Bibliography

Books

Adi A and Widyono A, 'Corporate Tax Rate Reduction and Its Impact on FDI Inflows: Evidence from Asia' (2019) Journal of Economic Policy 45(3).

Hodge S, 'Global Trends in Corporate Income Tax Reduction' (2020) Tax Foundation.

Macrotrends, 'Kenya Foreign Direct Investment Inflows Data' (2023) https://www.macrotrends.net/ accessed 1 December 2023.

Morisset J and Pirnia N, 'Tax Incentives: Using Investment Tax Allowances to Promote FDI' (World Bank 2019).

United Nations Economic Commission for Africa, 'African Continental Free Trade Area: Enhancing Regional Integration and FDI' (2021).

Reports

UNCTAD, 'Investment Report 2022: Global FDI Trends and Regional Analysis' (2022).

Legislations

Finance Act 2023 (Kenya).

Finance Act 2023 (Tanzania).

Uganda Revenue Authority, 'Guide on Tax Incentives/Exemptions Available to the Ugandan Investors' (2019).

Definition of "Opposition" within the Context of the Constitution of Kenya, 2010

By Ouma Kizito Ajuong'

The National Dialogue Committee (NADCO) Report recommends for inter alia the amendment of the Constitution to establish the Office of Official Opposition. The establishment and entrenchment of the Office of the Leader of the Official Opposition in the Constitution is proposed in recognition of the value and legitimacy of opposition parties as part of Kenya's political system. This is described as the person who is the leader of the largest party or coalition of political parties that garnered the greatest number of votes in the immediately preceding presidential elections. The person may further be designated by a coalition agreement as discussed by the runners-up of a presidential election. The NADCO Report further states that the leader of the Official opposition is proposed to have two deputies with their benefits charged to the Consolidated Fund. If these constitutional amendments are to be adopted, Parliament has the role of enacting legislation to operationalize these laws. The NADCO Report enumerates the functions of the leader of official opposition to include; representing the interest of the opposition, providing alternatives to the government in terms of policies; providing awareness in understanding the role of opposition in a democratic state, participating in state ceremonial functions and international parliamentary events among others. This proposal from the NADCO report must be discussed with three issues in mind. While the Constitution of Kenya, 2010 is built on the foundation of a Presidential system of governance; Kenya was colonized by the British who have a pure parliamentary system hence the word "opposition". This is to say, the need for an official leader of the opposition is a hungover of the colonial Constitution and the past regimes. A lot of people still believe that opposition to government can only come from arrangements in politics. The other issue that needs consideration when looking at the proposal to create the Office of Official leader of opposition is the politics.

There are a lot of persons who feel that the pure presidential system prescribed in the Constitution of Kenya, 2010 is rather exclusive. The presidential system is a system that supports a structure of a winner-takes-all. The persons who runs for president and becomes a runner up under the Constitution of Kenya, 2010 is always left in the cold. As they are left in the cold; their constituencies also always feel excluded. For there to be political inclusion therefore, there may be need to include the leaders of the largest party or coalition in parliament. This is with the mind that Kenya is often ethicized politically. When a leader is excluded, their communities are often seen to be excluded.

The other issue is the role of the opposition; as stated before, because of the hangover of the colonial constitution; there is always a feeling that opposition to government can

only take place through the Westminster style of checks and balances. Why else would the Parliament of Kenya amend the standing orders to allow Cabinet Secretaries answer questions in the House? Anyway, is there "Opposition" contextualized within the letter and the spirit of the Constitution 2010? While the Constitution of Kenya does not use the word "opposition" the constitution is structured with the philosophy of "decentralized presidency" and a system of checks and balances both vertically and horizontally, thus, opposition. I am arguing that the supreme law in Kenya has an already in-built institutionalized opposition or oversight to executive power and all the other powers. The law has in essence replaced the word opposition with the word oversight.

The people of Kenya are meant to be opposition to government. This is because all sovereign authority belongs to the people. They therefore have a right to critique and provide oversight to the government. In Kenya today, citizens may petition all the branches of government and seek answers to any questions they have. The Constitution of Kenya through Article 119 read together with the Petition to Parliament (Procedures) Act gives every person the power to petition Parliament to consider any matter within its authority. Citizens in Kenya also have a constitutional right to peaceably and unarmed, to assemble, to demonstrate, to picket, and to present petitions to public authorities. They also play a major role in participation through public participation sessions. The other role of opposition through the Constitution of Kenya, 2010 is the place and space of the civil society. As much the civil society is seen by many as just a barking dog; they still play a very important role and are often the face of the impoverished.

The people of Kenya are meant to be opposition to government. This is because all sovereign authority belongs to the people.

Parliament through the architecture of the Constitution of Kenya is the pivot of opposition. The work ascribed to the leader of the official opposition in the NADCO Report are all functions of parliament. As much as parliament will always have two sides; it has an oversight function through the different committees. Parliament has the right to perform all the functions that are prescribed to the hypothetical leader of the official opposition. The other layer of Opposition to government are established independent offices such as the Commission of Administration of Justice (Ombudsman), Office of the Auditor General, Office of the Controller of Budget along with a number of independent constitutional commissions. The offices have the function of providing oversight and checks and balances in the body government.

As if that is not enough, the doctrine of separation of power is deeply entrenched in the supreme law. This is also meant to provide a system of checks and balances and oversight as judiciary often corrects and advises the Executive as well as Parliament only for the hiccups of disobedience of court orders.

Do the People of Kenya therefore need more opposition? Well, Constitutions are often generic however creation of the Office of the Official opposition leader may only serve to fix the politics but as far as checks and balances are concern; the Constitution of Kenya, 2010 provides for enough opposition and a balanced system of governance. As a footnote however if the pure presidential system is not fit for purpose for the people of Kenya; there may be need to change the structure of government to a parliamentary system or maybe a hybrid system but who is to say a hybrid system is the best? Does the governance structure of Kenya need more offices or less?

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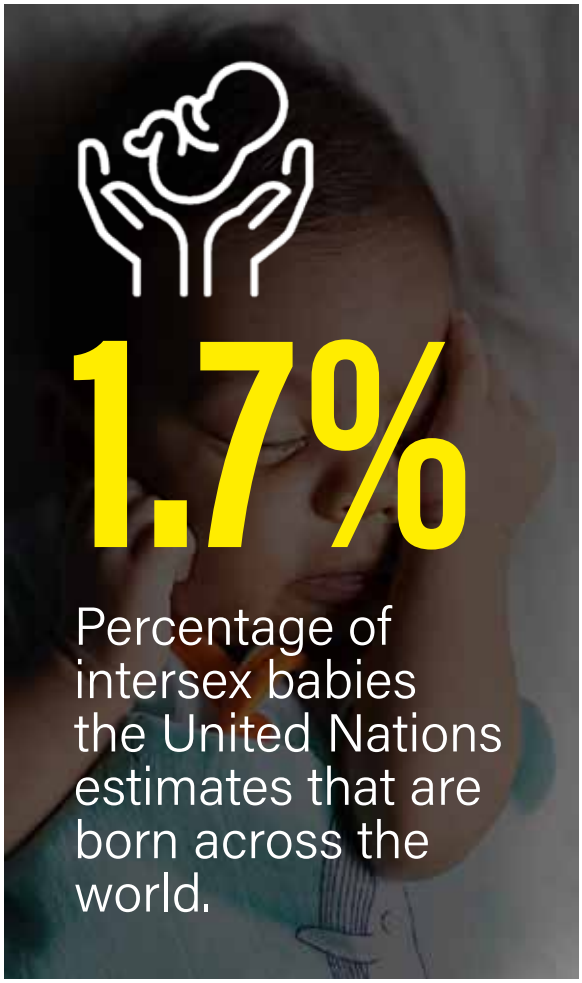
The long Overdue fight for intersex recognition in Kenya

By Florence Nyambura Kimiri

Abstract

In a world where sex is confined to the male or female categories, intersex people in Kenya have long struggled for visibility and recognition. Born with sex characteristics that defy conventional definitions of male and female, intersex individuals face systemic discrimination and exclusion. Yet it is on this background that Kenya has emerged as a trailblazer in Africa by taking bold steps towards intersex rights, from the historic inclusion of intersex in the national census to the legal recognition of intersex as a sex in the sex marker in registration documents. This paper argues that the recognition of intersex as a sex in birth registration is just but a step towards the protection of their rights. It advocates for the adoption of the Intersex Persons Bill 2024 to further secure their rights to recognition and identity as intersex instead of the compulsory need to choose to be either male or female.

The paper is divided into five parts; the first part is the introductory part, which defines intersex persons and historical recognition. The second part highlights the challenges faced by intersex persons, from non-recognition to forced medical interventions.



The third part analyses case laws in Kenya that have shaped the recognition of intersex persons. Fourthly, the paper analyses the current domestic framework governing and promoting intersex persons' rights in Kenya. Lastly, the paper examines the Intersex Persons Bill 2024 and advocates for its enactment to further safeguard the rights of intersex persons.

1. Introduction

An Intersex is a person who is conceived and born with a biological sex characteristic that cannot be exclusively categorized in the common binary of female or male due to their inherent and mixed anatomical, hormonal, gonadal (ovaries and testes) or chromosomal (X and Y) patterns, which could be apparent before, at birth, in childhood, puberty or adulthood. [1]The intersex condition affects the biological sex of a person and is medically referred to as Disorders of Sex Development (DSD).[2]

The United Nations estimates that 1.7% of babies born across the world are intersex.[3] In Kenya, the 2019 census reported 1524 intersex persons in the country.[4] Despite this, the existence of intersex persons was ignored in law and policy, leading to discrimination, stigma and violation of human rights.[5]

Throughout history, intersex persons have faced myriad problems in society occasioned by the binary categorization of male and female.[6] Initially, they were referred to as "hermaphrodites", which implies a person born the person is fully male and fully female.[7] The term intersex replaced hermaphrodites in the 20th century.[8] With the development of modern medicine, intersex children were subjected to unnecessary genitalia surgery to conform to either male or female.

In Kenya, intersex is perceived with negativity, with many communities believing that intersex persons are unclean or possessed by evil spirits.[9] Furthermore, the association of intersex people with the LGBTQ community escalates the level of stigma they experienced by intersex people.[10] This exposed them to stigma, abuse, torture and discrimination.[11]

In recent years, however, Kenya has made great strides in the recognition and protection of intersex individuals. Various legislation, such as the Persons Deprived of Liberty Act, was amended to recognise intersex people. The Children Act of 2022 also recognised the need to protect intersex children in Kenya. But the biggest accomplishment is the final recognition of intersex as a sex. Legal Notice No. 153 of 2024 included intersex in the sex maker in birth and death registrations.[12]

This paper analyses the legal and policy framework that governs the rights of intersex people. It argues that, in addition to recognition, the Intersex Persons Bill needs to be adopted to implement adequate measures to protect intersex people.

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[1]Report of the Taskforce on Policy, Legal, Institutional And Administrative Reforms Regarding The Intersex Persons In Kenya Abridged Version' (2018) <https://www.knchr.org/Portals/0/INTERSEX%20TASKFORCE%20FREPORT-Abridged%20Version.pdf> (accessed 20 February 2025).

[2]Ibid

[3]Ibid

[4]'VOLUME I: POPULATION by COUNTY and SUB-COUNTY Counting Our People for Sustainable Development and Devolution of Services REPUBLIC of KENYA' (2019) <https://housingfinanceafrica.org/app/uploads/VOLUME-I-KPHC-2019.pdf>. (accessed 20 February 2025)

[5]Ibid (n 1)

[6]Lori Kelly, 'Thinking beyond the Binary: The History of Intersex People in the United States' (The Trail8 November 2018) <https://trail.pugetsound.edu/?p=15774>.(accessed 21 February 2025)

[7]Ibid

[8]Ibid

[9]New Dawn for Intersex Persons in Kenya: An Evaluation of the Intersex Persons Bill, 2023 < https://new.kenyalaw.org/akn/ke/doc/journal/2025-01-31/new-dawn-for-intersex-persons-in-kenya-an-evaluation-of-the-intersex-persons-bill-2023/eng@2025-01-31/source.pdf> (accessed on 21 February 2025)

[10]Ibid

[11]Ibid

[12]Legal Notice No. 153 of 2024 <https://kenyalaw.org/kl/fileadmin/pdfdownloads/LegalNotices/2024/LN153_2024.pdf>

Intersex people are often ostracized by families and communities due to misconceptions and societal pressure to conform to binary gender norms. In some cultures, intersex births are seen as a "curse" or "bad omen," leading to abandonment, secrecy, or even infanticide.

2. Challenges faced by intersex people

Some of the challenges faced by intersex are non-recognition, stigma, and discrimination.

2.1. Non-recognition

Article 6 of the Universal Declaration of Human Rights, 1948, provides that everyone has the right to be recognised everywhere as a person before the law.[13] The Births and Deaths Registration Act did not acknowledge intersex people until February this year when the Birth and Deaths Registration Rules were amended to include intersex as a sex in the registration documents recently. This meant that they could not get registration certificates. In Baby As case, a question mark (?) was put on the sex marker of her birth registration certificate.[14] Those who get documented end up with misgendered and end up with identity documents that are inconsistent with their sex reality.[15]

2.2. Stigma and discrimination

Intersex children and adults are stigmatised and face various human rights abuses due to the perception of their bodies as different.[16] These violations include breaches of their rights to health and bodily integrity, freedom from torture and mistreatment, as well as their right to equality and protection from discrimination.[17]

Intersex persons endure a lifetime of stigma and discrimination due to the perception that being intersex is unnatural and

[13]United Nations, 'Universal Declaration of Human Rights' (United Nations10 December 1948) <https://www.un.org/en/about-us/universal-declaration-of-human-rights>. (accessed on 20/02/2024)
[14]Baby 'A' (Suing through the Mother E A) & another v Attorney General & 6 others [2014] eKLR.
[15]Mary Wambui Njogu, 'Non-Recognition of Intersex Persons and Its Impact on Their Human Rights: The Case of Kenya.' [2023] Uonbi.ac.ke <https://erepository.uonbi.ac.ke/handle/11295/164822>. (accessed 24/2/2025)
[16]interACT Team, 'New UN Intersex Fact Sheet' (interACT: Advocates for Intersex Youth7 September 2015) <https://interactadvocates.org/new-un-intersex-fact-sheet/>.
[17]Ibid

abnormal.[18] This leads to challenges in completing their education and accessing healthcare or employment.[19] The Star covered a story by Simon, who was born intersex and narrated how the community frowned upon him when he was growing up.[20] After his parents' death, he was maltreated, violated and chased away by his relatives, who told him he was a curse to the society.[21]

2.3. Unnecessary and coercive medical intervention

Surgical modification of intersex person's genitalia to reassign them to the binary male or female classification.[22] This "modification" amounts to intersex genital mutilation (IGM).[23]

Article 23(1)(f) of the Children Act states that an intersex child should not be subjected to organ change or removal except with the advice of a medical geneticist. This is followed by Article 23(2), which makes it a criminal offence to contravene the provisions of section 23(1), and such a person commits an offence and, if convicted will be liable to imprisonment for a term of "not less than three years or to a fine of not less than five hundred thousand shillings, or both".

Intersex persons have existed without legal recognition. They face a lot of stigma and discrimination from society. The perception is that intersex is a disease, curse or bad omen and, therefore, frowned upon.[24] Furthermore, they are subjected to unnecessary medical intervention that mutilates their bodies. The Intersex Persons Bill seeks to reduce this by prohibiting

In Kenya, several landmark court cases have significantly influenced the legal recognition and rights of intersex individuals. These cases highlighted the systemic challenges intersex individuals face in Kenya, particularly concerning legal recognition and documentation. In response, the government has initiated measures to address these issues, including the proposal of the Intersex Persons Bill, 2023, which aims to provide a comprehensive legal framework for the recognition and protection of intersex persons.

intersex genital mutilation and educating the public on the plight of the intersex.

3. Case laws that have shaped the legal recognition of intersex people

This part will evaluate how the courts in Kenya have contributed to the recognition of intersex people.

3.1. R.M v Attorney General & 4 others [2010] eKLR

This was the first case that addressed the issue of legal recognition of intersex persons. The petitioner, R M, was born with both male and female genitalia but was given a male name by his parents. Due to his ambiguous gender, he was unable to acquire a birth certificate and, subsequently,

[18]Ibid (n 9)
[19]Ibid
[20]'Understanding the Plight of Intersex' (The Star2021) <https://www.the-star.co.ke/news/2021-12-24-understanding-the-plight-of-intersex> accessed 27 February 2025.
[21]Ibid
[22]Ibid (n 15)
[23]Ibid
[24]Ibid (n 9)

Many intersex individuals undergo non-consensual medical interventions (such as surgeries and hormone treatments) aimed at "normalizing" their bodies. These procedures can lead to physical and psychological harm, including loss of sexual sensation, infertility, and trauma.

a national identity card or any travel documents. He was charged with an offence of robbery with violence. While in remand awaiting trial, it was discovered that he had both male and female genitalia, a condition that a doctor confirmed.

Despite this, he was committed to Kamiti Maximum Prison for male death row convicts. Due to his intersex condition, the petitioner was abused, molested and exposed to inhuman treatment while in prison. He petitioned the court because his right to dignity and his fundamental rights against inhuman treatment, discrimination on grounds of sex, and rights to freedom of association, freedom of movement, right to fair hearing and protection under the law were violated. The petitioner argued that the failure of the legal framework to recognise intersex persons resulted in the infringement of the above fundamental rights.

The court held that the petitioner failed on the claim that the legal framework did not recognise and, therefore, discriminated against intersex persons. It was the court's opinion that the law sufficiently protected the petitioner as an intersex and did not suffer discrimination. He succeeded in the claim that prison officials treated him in a manner that was cruel and degrading, and he was awarded damages for violation of the right to dignity.

The court took a conservative approach when determining the case. It was not persuaded that there is a definite number of intersex persons in Kenya to form a class or body of persons in respect of whose interest the petitioner can bring a representative suit. In its opinion, “an intersex person falls within one of the two categories of male and female gender included in the term sex. To introduce intersex as a third category of gender would be a fallacy.”

This court influenced the Persons Deprived of Liberty Act amendment, which was amended to define an intersex person albeit narrowly. A provision was added that intersex persons deprived of liberty should be accommodated separately from male or female prisoners.

3.2. Baby A (Suing through the Mother E A) & another v Attorney General 6 others 2014

In this case, Baby A was born intersex. A question mark '(?)' was inserted for the column indicating the child's sex, and the child had not been issued with a birth certificate. The Petitioners claimed that the entry of a question mark on the child's medical and treatment notes violated the child's rights to legal recognition, human dignity and the right of the child not to be subjected to inhuman and degrading treatment.

The court was guided by the ***R.M V Attorney General & 4 others [2010] eKLR*** and found that the petitioner did not produce enough evidence to prove discrimination suffered by baby "A and, therefore, intersex persons. However, the court noted that there was a lack of legal or policy framework on intersex persons and urged parliament to make one. The court also ordered the collection of data on the number of intersex persons in Kenya.

The court still employed the conservative approach in defining the term sex. It, however, called on the Attorney General to collect and keep data on intersex persons. This judgement prompted the Attorney General to form a task force to analyse the status of intersex people in Kenya.

4. Legal and policy framework on intersex persons in Kenya

4.1. The Constitution of Kenya, 2010

The Constitution does not specifically refer to intersex persons. Article 19 (3)(a) states that the rights provided in the Bill of Rights are inherent in every individual and are not given by the state. Article 28 states, "Every person has inherent dignity and the right to have that dignity respected and protected." The right to human dignity is the foundation of other rights. In the case of in *Republic of Kenya v. Kenya National Examinations Council and Another*, the court stated as follows:

"Human dignity is that intangible element that makes a human being complete. It goes to the heart of human identity. Every human has a value. Human dignity can be violated through humiliation, degradation or dehumanization. Each individual has inherent dignity which our Constitution protects. Human dignity is the cornerstone of the other human rights enshrined in the Constitution."[25]

Article 27(4) bars discrimination directly or indirectly based on different aspects, including sex. The Bill of Rights consistently grants rights to every person and individual, and it is clear that rights are not granted to male or female persons but to everyone in general.[26]

4.2.Children Act 2022 [27]

This Act defines an intersex child and protects this vulnerable group of children, in contrast with the 2001 Children Act, which did not provide anything on intersex

[25][2014] eKLR, JR Case No. 147 of 2013
[26]Grace Mwende Ndichu, 'The Plight of Intersex Persons' (*Strathmore.edu*2020) <https://su-plus.strathmore.edu/items/27a62e66-d53e-432d-8da0-76d872fe0c67> accessed 26 February 2025.
[27]Chapter 141, Laws of Kenya

children. It defines an intersex child as "a child with a congenital condition in which the biological sex characteristics cannot be exclusively categorized in the common binary of female or male due to inherent and mixed anatomical, hormonal, gonadal or chromosomal patterns, which could be apparent before, at birth, in childhood, puberty or adulthood."[28]

It provides that every child has the right to be registered in the Registrar of Births immediately after birth.[29] Furthermore, the Principal Registrar is mandated to take measures to ensure correct documentation and registration of intersex children at birth.[30]

The Act provides that intersex children have the right to be treated with dignity and to be accorded with appropriate medical treatment, special care and education.[31] Furthermore, they are considered a special category needing social protection services.[32]

The act also protects intersex children from being subjected to organ change or removal except with the advice of a medical geneticist. In relation to children in conflict with the law, male, female and intersex children deprived of liberty are to be accommodated in separate facilities.[33]

An intersex child who has been or is likely to be subjected to intersex genital mutilation, discriminatory treatment or abuse is considered a child in need of care and protection.[34]

4.3. The Persons Deprived of Liberty Act 2014[35]

The Persons Deprived of Liberty Act was the first legislation in Kenya to recognize intersex persons.[36] The Act defines an intersex as a person certified by a competent medical practitioner to have both male and female reproductive organs. This definition has, however, been criticized for been too narrow and failing to recognize the various variations of the intersex condition.[37]

Whereas persons deprived of liberty can be subjected to reasonable search, an intersex person has the right to decide the sex of the person by whom they should be searched.[38] Additionally, intersex persons deprived of liberty are to be held separately from other persons.[39]

4.4. The Births and Deaths Registration (Amendment) Rules 2024

Section 29 (d) of the Births and Deaths Registration Act gives the Cabinet secretary the power to make rules on matters registration and documentation of intersex persons.[40] Legal Notice 153 of 2024 amended the Births and Deaths Registration Rules to include intersex as a sex during birth certificate.[41] This inclusion culminates

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[28]Ibid section 2
[29]Ibid section 7 (2)
[30]Ibid section 7(3)
[31]Ibid section 21
[32]Ibid
[33]Ibid Section 26 (3)
[34]Ibid section 144
[35]Chapter 90 A, Laws of Kenya
[36]The National Council On The Administration Of Justice, 'The National Council On The Administration Of Justice Report On The Status Of Intersex Persons In The Criminal Justice System In Kenya' https://www.knchr.org/Portals/0/REPORT-ON-INTERSEX-PERSONS%203_1.pdf (accessed 25 February 2025)
[37]Ibid
[38]Ibid (n 9) section 10 (3)
[39]Ibid section 12 (3) (e)
[40]Births and Deaths Registration Act Cap. 149, Laws of Kenya
[41]'Births and Deaths Registration (Amendment) Rules, 2024' (*Kenyalaw.org*2024) <https://new.kenyalaw.org/akn/ke/act/ln/2024/153/eng@2024-10-11> accessed 13 February 2025.

Kenya has undertaken significant legal reforms to recognize and protect the rights of intersex individuals. This proposed legislation aims to provide comprehensive recognition and safeguarding of intersex persons' human rights in Kenya. It addresses various aspects, including the prohibition of harmful practices targeting intersex individuals and the realization of their rights.

the long fight to the recognition of intersex persons. With the provision in a birth certificate, means that intersex children will not be forced into choosing the binary male or female sex. They have a choice to be intersex and remain intersex.

This provision will ease the acquisition of birth certificates and the right to be recognized and registered. This momentous provision has been applauded as an effort towards equality and actualising article 27 of the Constitution, which prohibits discrimination on any grounds.

Despite this provision, there is a need to provide a legislative framework to provide the rights of intersex people in detail. Parliament should pass the Intersex Persons Bill of 2024 to provide further provision to intersex in Kenya.

4.5. The Report of the Taskforce on Policy, Legal, Institutional and Administrative Reforms Regarding Intersex Persons in Kenya

The Attorney General formed the Taskforce on Policy, Legal, Institutional and Administrative Reforms regarding Intersex Persons in Kenya in 2017.[42] The Taskforce was mandated to compile comprehensive data regarding the number, distribution, and challenges of Intersex people and to analyse the policy, legal, medical, administrative, and institutional frameworks governing structures and systems regarding them.[43]

According to the report, the estimated number of intersex persons in Kenya is 779,414 with a large population of these persons in Nairobi County (75874).[44] The task force found that only 10 % of adult

[42]Ibid (n 1)
[43]Ibid
[44]Ibid

In February 2025, Kenya amended this Act to officially recognize intersex persons in birth registrations. This allows for the inclusion of an 'intersex' category alongside 'male' and 'female' in birth certificates, ensuring accurate legal documentation from birth.

intersex sampled had attained a tertiary education. Additionally, many intersex people were found to have dropped out of school due to negative peer pressure and societal stereotyping.[45]

The task force recommended a broad definition of intersex persons, which has since been adopted by the Children Act of 2022. The recommendations of the task force have been considered. In 2019, Kenya became the first African country to collect data on intersex persons.[46] The recommendation to introduce an Intersex (I) marker in all official documents that require identification of sex has since been implemented.

The report also recommends the Ministry of Health provide for intersex persons' care and facilitate their access to the highest attainable standard of health. It also calls for regulation of all surgical and hormonal interventions for children about their intersex status. This recommendation is present in the Intersex Persons Bill of 2024.

5. The Intersex Persons Bill 2024

The Bill seeks to recognise, protect, and safeguard intersex persons' rights in Kenya, including equalising opportunities, affirmative action, and non-discrimination.[47] The Bill defines intersex as well as providing for their documentation.

5.1. Objectives of the Bill

The objectives are to provide a framework for the recognition of intersex persons, as well as the protection, fulfilment, and promotion of their rights.[48] The Bill seeks to consolidate a legal piece to facilitate the enjoyment of human rights and the inclusion of intersex persons in all aspects of society. The Bill recognizes intersex persons as a marginalized group that has been discriminated against and calls for inclusion in all areas of life.

5.2. Registration of intersex

Section 5 of the Bill allows an intersex person to apply to the Registrar of Births and Deaths to amend the sex marker from male to intersex or female to intersex. Section 6 provides that an intersex person can apply to the Registrar to have the Registrar correct any particulars in the national identity card.

This section will allow intersex persons to identify as intersex as opposed to being forced to select the binary male or female categorization. Enactment of this Bill post the Births and Deaths Registration (Amendment Rules) 2024, will facilitate the amendment of intersex person's registration documents from the forced categorization to just intersex.

[45]Ibid
[46]Ibid (n 11)
[47]Intersex Persons Bill 2024 <https://www.knchr.org/Portals/0/Intersex%20Persons%20Bill%2C%20January%202024%20.pdf>
[48]Ibid Section 3

5.3. Rights of intersex persons

Section 8 of the Bill prohibits any harmful practice and makes it an offence to do so. This aligns with the UN Special Rapporteur's recommendations that State Parties be obligated to abolish laws that allow corrective surgeries and related therapies on intersex persons without their free and informed consent.[49]

On the right to education, learning institutions are prohibited from denying admission to an intersex person to any course or study for their being intersex.[50] The Bill seeks to remove the barriers faced by intersex persons when seeking education by providing that the Cabinet Secretary for Education should ensure that intersex persons are fully integrated into learning institutions and access the appropriate need and support when studying.[51]

On matters of health, an intersex person has the right to the highest attainable standard of health, including the right not to be subjected to intrusive and involuntary medical testing or treatments.[52] The Bill further provides that an intersex person who is required to prove their sex shall obtain a medical report in the prescribed form from a medical practitioner, which contains the name and age of the intersex person and the intersex condition or variation of the person.[53] This ensures a standardized and respectful process for recognising intersex conditions and ensures that intersex individuals are treated with dignity.

5.4. The National Council for Intersex Persons

Part IV of the Bill establishes a National Council for Intersex Persons. The council's mandate includes developing measures to ensure registration of intersex people, establishing a database of all intersex people in Kenya, formulating measures to prevent discrimination against intersex people, and carrying out public education on the rights of intersex people, among other things.[54] The council will ensure policy measures are put in place to further protect the rights of intersex persons.The Intersex Bill fully recognises intersex persons. It gives them a sense of identity by allowing them to identify as intersex. From the above cases, the courts noted the lack of legal framework and hesitated to imply their rights. However, with the enactment of the Bill, courts will have a statute to rely on when enforcing the rights of intersex people.

6. Conclusion

The recognition of intersex as a sex in registration documents is a great step in their recognition. However, intersex persons are doomed to face similar challenges if no legal measures are put in place. This paper has analysed the historical recognition of intersex persons by the Kenyan courts. It has also analysed the current legal framework for intersex persons in Kenya.

Ultimately, the paper calls for adoption of the Intersex Persons Bill of 2024 to further secure the rights of intersex persons and allow the amendment of their sex to intersex.

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[49]United Nations (UN), Special Rapporteur on Torture (2013), Report of the Special Rapporteur on torture and other cruel, inhuman, or degrading treatment or punishment, Juan E. Méndez, Human Rights Council, Twenty-second session, Report No. A/HRC/22/53, 1 February 2013
[50]Intersex Bill 2024, Section 9
[51]Ibid
[52]Ibid section 10
[53]Ibid section 11
[54]Ibid , Section 26 (1)

Bibliography

1. Constitution of Kenya, 2010Births and Deaths Registration Act, CAP 149

2. Children Act No 29 of 2022

3. Births and Deaths Registration (Amendment) Rules, 2024.The Report of the Taskforce on Policy, Legal, Institutional and Administrative Reforms Regarding Intersex Persons in Kenya.

4. The National Council on the Administration Of Justice Report on The Status Of Intersex Persons In The Criminal Justice System In Kenya <https://www.knchr.org/Portals/0/REPORT-ON-INTERSEX-PERSONS%203_1.pdf>

7. Kelly L, 'Thinking beyond the Binary: The History of Intersex People in the United States' (The Trail8 November 2018) <https://trail.pugetsound.edu/?p=15774>

8. Ndichu GM, 'The Plight of Intersex Persons' (Strathmore.edu2020) <https://su-plus.strathmore.edu/items/27a62e66-d53e-432d-8da0-76d872fe0c67> accessed 26 February 2025

9. Njogu MW, 'Non-Recognition of Intersex Persons and Its Impact on Their Human Rights: The Case of Kenya.' [2023] Uonbi.ac.ke <https://erepository.uonbi.ac.ke/handle/11295/164822>

10. 'Report Of The Taskforce On Policy, Legal, Institutional And Administrative Reforms Regarding The Intersex Persons In Kenya Abridged Version' (2018) <https://www.knchr.org/Portals/0/INTERSEX%20TASKFORCE%20FREPORT-Abridged%20Version.pdf> accessed 26 February 2025

11. Team interACT, 'New UN Intersex Fact Sheet' (interACT: Advocates for Intersex Youth7 September 2015) <https://interactadvocates.org/new-un-intersex-fact-sheet/>

12. The National Council on the Administration of Justice, 'The National Council on the Administration of Justice Report on The Status Of Intersex Persons In The Criminal Justice System In Kenya' <https://www.knchr.org/Portals/0/REPORT-ON-INTERSEX-PERSONS%203_1.pdf>

13. United Nations, 'Universal Declaration of Human Rights' (United Nations10 December 1948) <https://www.un.org/en/about-us/universal-declaration-of-human-rights>

14. 'VOLUME I: POPULATION by COUNTY and SUB-COUNTY Counting Our People for Sustainable Development and Devolution of Services REPUBLIC of KENYA' (2019) <https://housingfinanceafrica.org/app/uploads/VOLUME-I-KPHC-2019.pdf>

LABELS ERADICATING NEGATIVE ETHNICITY

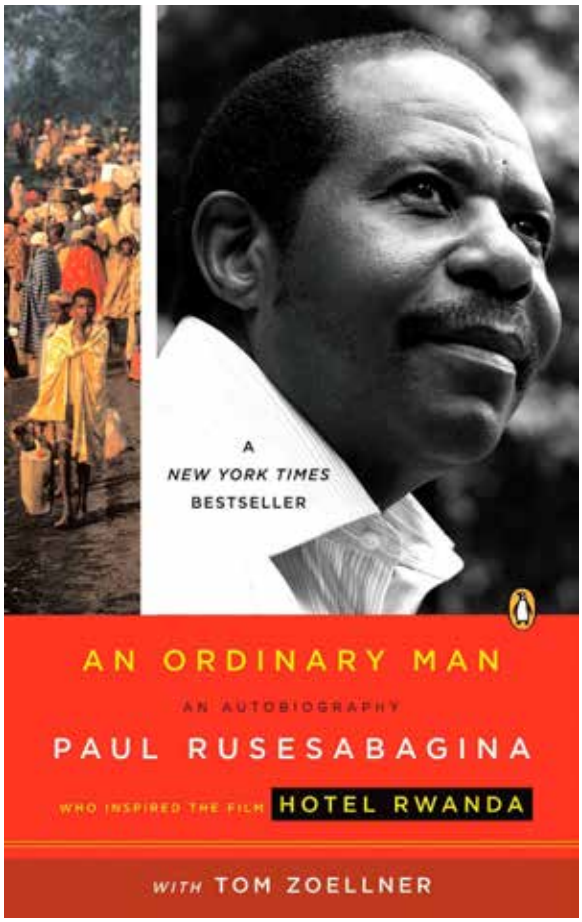
Stripes of Tribe: Towards Eradicating Negative Ethnicity in Kenya

Ethnicity remains a dominant factor in Kenyan politics, influencing elections, governance, and public resource allocation. While the 2010 Constitution and devolution have helped promote inclusivity, challenges like ethnic favoritism and electoral violence persist. For sustainable democracy, Kenya must move toward issue-based politics rather than ethnic mobilization.

By Ouma Kizito Ajuong'

In 2017, I penned down an article, "*Ugly beauty: Ethnicity and Politics in Kenya*". The article ideally focused on the intrigues of ethnic mobilization and the centrality of tribe in Kenyan politics. While tribe remains a significant characteristic of Kenya's population makeup; the dichotomy of the good and bad of tribe needs to be well understood. Away from politics therefore, I seek to reflect on the effect of negative ethnicity and how we can deal with it. I must confess, I always thought of tribe and negative ethnicity as a phenomenon that only surfaces in politics, today as I write this, I now think that the stripes of tribe may emanate from politics and political talk but definitely goes beyond politics even as the "Gen-Z" say they are tribeless. What is the effect of negative ethnicity?

If I may start from the deep end. The 2007-08 Kenyan crisis described as a violent,



An Ordinary Man is a powerful memoir that reminds us of the importance of courage, diplomacy, and moral responsibility in the face of evil. It is a must-read for those interested in history, human rights, and the power of individual action.

political, economic and humanitarian post-election catastrophe is an example of what negative ethnicity can do. According to the Waki Report, *Commission of Inquiry into the Post-Election Violence*; over 1,200 Kenyans died, and over half a million people were displaced. There were also other effects such as disruption of transport, crop production, an increasing in the price of basic goods and a decrease in revenue. To bring the point home, I further refer to Paul Rusesagina's "*An Ordinary Man*" an autobiography that paints the horrendous Rwanda genocide picture. A tribal war between the Hutu and the Tutsi that led to the death of over half a million people. I am stressing the point that negative ethnicity often leads to loss of lives. Closer to this is the effect of political instability. Political instability simply means that government cannot run smoothly. Where negative ethnicity leads to tribal wars, it affects investor confidence, discourages foreign investment and hugely affects the economy.

The other effect of negative ethnicity is that it affects national ethos. What are the national values and traditions that define Kenyans? I have come across the concept of national ethos in several documents including the Building Bridges Initiative (BBI) documents and the mandate of the National Cohesion and Integration Commission (NCIC). This means developing values and traditions that unite people rather than divide them. Negative ethnicity however negates this as it focuses on tribes and groups of people as opposed to a nation. It breeds the feeling of ethnocentrism. It further breaks away the concept of unity in diversity and encourages competition, distrust and suspicions among tribes. Negative ethnicity in essence breaks nations and the feelings of nationhood and things tend to fall apart. Other effects are the tribal and cultural differences that permeate the social stratum. I am talking about challenges that arise when dealing with issues such as inter-marriages. How do we, therefore, deal with negative ethnicity?

There is need to kill the politics of ethnicity and change it to issue-based politics. The Waki Report, *Post-Election Violence 2007-How Deep are the Roots?* traces the root causes of electoral violence and therein lies ethnic talks and ethnic mobilization. Tribe against tribe; people against a people. The thinking that a person who is not of the same tribe is an enemy. While it is true that different constituencies and different tribes have unique challenges and needs, there is need not be sort in exclusion of others. The foolish political talks of people from the mountains, valleys, rivers and lakes in Kenya need to come to an end for negative ethnicity to die down. The politician as an opinion shaper ought to be able to see the people of Kenya as one. This also need to be reflected in political parties. As long as

political parties are still personalized and ethic-based, negative ethnicity will still remain a scourge for the people of Kenya. Political parties are meant to be national in character. It is only fair that to abide by the letter and spirit of the Constitution of Kenya, 2010.

The other way to eradicate negative ethnicity is to look at our historical traditions and myths that different communities carry against others. As much as the Constitution of Kenya, 2010 encourages cultural heritage; there is a need to practice cultural tolerance. In other words, *live and let live*. As the people of Kenya practice their culture and speak their languages, there is a need to embrace those who are different and not discriminate. The National Cohesion and Integration Act primarily frowns upon ethnic discrimination broken down into the elements of ethnic discrimination, discrimination by way of victimization; comparison of persons of different ethnic groups, and harassment based on ethnicity. These break social integration and promote negative ethnicity yet mostly have remained in our statute books.

Negative ethnicity in Kenya may also be dealt with by embracing equality in wealth and resource sharing. I get very concerned when I see resources in Kenya are still divided based on the graces of those in power. If the national cake is not shared equally, then it follows that there are tribes and ethnic groups who will feel left out. Economic marginalization in Kenya, is a concept that is always attributed to the post-independence economic class and particularly, Sessional Paper No.10 of 1965 on African Socialism and its application to planning in Kenya. It can be argued that the strand still goes on despite the Constitution of Kenya, 2010. There is also need to teach and to encourage patriotism and national ethos as opposed to ethnic differences in schools with our children and in the government policies. Public awareness

Commissioner Rev. Dr. Samuel Kobia, is the Chairman, National Cohesion and Integration Commission. The National Cohesion and Integration Commission (NCIC) is a government agency in Kenya established under the National Cohesion and Integration Act, 2008. Its main role is to promote national unity, prevent ethnic discrimination, and combat hate speech.

and campaigns towards patriotism and enhancing national cohesion may also help in fighting negative ethnicity. As for the National Cohesion and Integration Commission (NCIC), there are questions as to whether this Commission is still relevant. I have always had my reservation with criminalization of hate or hate speech as this in essence does not help with cohesion of Kenyans, rather making hate an offense helps the politicians to propagate negative ethnicity.

There is much more that the Commission needs to do in building a cohesive environment. There may be need to restructure this Commission so as to look at issues such as equality and equity in appointments in government and all measures that promote cohesion and integration.

"May we dwell in unity peace and Liberty".

Ouma Kizito Ajuong' is an Advocate of the High Court of Kenya.

LISTENING TO UNHEARD STORIES

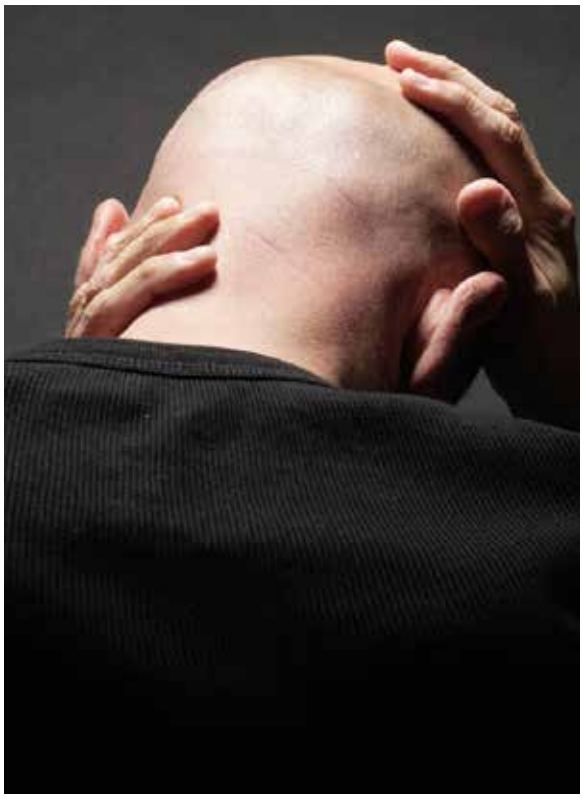
Breaking the silence: The crisis of sexual violence against men in today's society

By Ochieng Robbert Obura

By Derrick Kiptoo

Abstract

Sexual violence is a pervasive issue that affects individuals regardless of gender, yet male victims remain largely overlooked due to societal stigmas and entrenched notions of masculinity. While sexual violence is commonly associated with female victims, men also experience significant rates of assault, with approximately 27% of men reporting some form of sexual violence in their lifetime. The article identifies cultural norms and expectations of masculinity as key barriers to reporting, as men often fear being judged, ridiculed, or perceived as weak. Sexual violence against men occurs in various settings, including conflict zones, civilian life, and intimate relationships, with men in conflict zones particularly vulnerable to acts of sexual torture and exploitation. The psychological and emotional impacts on male survivors are profound, including PTSD, depression, and identity conflicts. Despite these challenges, support systems for male victims remain inadequate. The article calls for a shift in societal attitudes, advocating for increased awareness, open discussions, and the redefinition of masculinity to encourage men to seek help without shame. It also emphasizes the importance of education, empathy, and support services tailored to male survivors. By addressing these issues, the article aims to break the silence surrounding male sexual violence and foster a more inclusive understanding of its impact across all genders.



Sexual violence against men is a serious but often overlooked issue. While it is commonly associated with women, men also experience rape, assault, and other forms of sexual violence in various settings, including war zones, prisons, workplaces, and even within families. However, stigma, societal norms, and legal gaps make it difficult for male survivors to speak out and seek justice.

Introduction

Sexual violence is a major problem that affects people regardless of their gender, harming both men and women in different social, cultural, and economic situations. Although talks about sexual violence have mostly focused on women as victims, there is an increasing acknowledgement of the sexual violence men face, which is frequently ignored or minimized in typical discussions. Sexual violence includes any sexual act, attempts to obtain a sexual act, or actions to force or traffic individuals into sex, regardless of the existing relationship between the victim and the doer.[1] In defining sexual violence, the World Health Organization states that it can happen to anyone regardless of gender[2] but the reality is that the focus is mainly on women victims, with male victims often being overlooked.

Acts of sexual violence/assault on males has been defined as "any non-consensual sexual acts perpetrated against a man, 16 years or older, by a male or female."[3] The lack of reports on sexual violence among men is linked to cultural stigmas and society's expectations of masculinity, with men who are victims of sexual violence failing to report to the sense of shame the society has created.[4] Society often looks at men who are victims of sexual violence as having failed in their masculine responsibility to protect themselves.[5]

The system seems to be more protective towards female victims as compared to male ones, but as knowledge about sexual violence has continued to grow, so has the understanding of its various effects on men, who may go through similar trauma but usually confront extra challenges in finding support services.

Statistics done in the past have shown that about 27% of men have experienced some form of sexual assault in their lives.[6] Sexual assault has led to short- and long-term physical injury, fear, anxiety, despair, post-traumatic stress disorder (PTSD), low self-esteem, social difficulties, and suicide ideation.[7] The thinking of the society is that men are less likely to suffer mentally from sexual violence. Still, studies have shown that it has a toll on men's mental health as much as it does on women, with other instances of sexual violence having worse effects on men than on women.[8]

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[1]The World Health Organization, 'Sexual Violence', Sexual violence fact sheet <https://www.bing.com/ck/a?!&&p=3143ba6b73052cb27f823d64776d0873600e4c387a13dd73a1ee16160033cdbcJmltdHM9MTczOTc1MDQwMA&ptn=3&ver=2&hsh=4&fclid=1ab26c74-ddff-6a0d-27e3-7840dc246bbf&psq=definition+of+sexual+violence&u=a1aHR0cHM6Ly9hcHBzLndoby5pbnQvdmlvbGVuY2UtaW5mby9zZXh1YWwtdmlvbGVuY2Uv&ntb=1 > accessed on 17 February 2025

[2]Ibid

[3]John C. T., Jonathan K., 'Male Victims of Sexual Assault: A Literature Review', PubMed Central <https://www.bing.com/ck/a?!&&p=870ec16fc7e9cd0fa7f021cd60d9d0eabb27060e5216ed994ac55eacfef4f1a7JmltdHM9MTczOTgzNjgwMA&ptn=3&ver=2&hsh=4&fclid=1ab26c74-ddff-6a0d-27e3-7840dc246bbf&psq=+sexual+violence+against+men&u=a1aHR0cHM6Ly9wbWMubmNiaS5ubG0ubmloLmdvdi9hcnRpY2xlcy9QTUMxMDEzNTU1OC8&ntb=1> accessed 17 February 2025

[4]Heather Hlavka, 'Speaking of Stigma and the Silence of Shame: Young Men and Sexual Victimization', (2016) 20 Men and Masculinities P 482

[5]Ibid

[6]Basile K.C., Smith S.G., 'Sexual Violence Victimization of Women: Prevalence, Characteristics, and the Role of Public Health and Prevention' (2011) 5 Am. J. Lifestyle P 407–417

[7]Depraetere J., Vandeviver C., Beken T.V., Keygnaert I., 'Big Boys Don't Cry: A Critical Interpretive Synthesis of Male Sexual Victimization. Trauma Violence Abuse' (2020) 21 PMC P 991–1010

[8]Peterson Z.D., Voller E.K., Polusny M.A., Murdoch M., 'Prevalence and consequences of adult sexual assault of men: Review of empirical findings and state of the literature' (2011)

[9]United Nations High Commissioner for Refugees (UNHCR), 'Global trends: Forced displacement in 2020 <https://www.bing.com/ck/a?!&&p=2dc18ac152f16d5791826c0b677dc7a7aaf2b108e859fbedfb2e7dfc9238e927JmltdHM9MTczOTgzNjgwMA&ptn=3&ver=2&hsh=4&fclid=1ab26c74-ddff-6a0d-27e3-7840dc246bbf&psq=Forced+displacement+in+2020&u=a1aHR0cHM6Ly93d3cudW5oY3lub3JnL3N0YXRpc3RpY3MvdW5oY3JzdGF0cy82MGI2MzhlMzcvZ2xvYmFsLXRyZW5kcy1mb3JjZWQtZGlzcGxhY2VtZW50LTIwMjAuaHRtbA&ntb=1> accessed on 17 February 2025

Sexual violence in conflict zones is a widespread and devastating human rights violation. It is often used as a weapon of war to terrorize, dominate, and break communities. Women, men, and children are targeted by armed groups, security forces, and even peacekeepers. Despite international laws prohibiting such crimes, sexual violence in war continues in many regions.

Men experience sexual violence in various settings of life, and the next section looks at sexual violence in men in different settings.

Different settings for sexual violence against men

i. Sexual Violence in the Conflict Zone

In conflict zones, men are frequently targeted for physical violence, including torture, mutilation, and killing. Men are often subjected to extreme violence during armed conflicts, including being forced to witness the torture or killing of family members.[9] Sexual violence can also occur during conflict and can happen for several reasons as a war strategy, as a practice or is committed opportunistically.[10] Acts of sexual violence may be forced on victims by weapons bearers, or they might be abused at the hands of humanitarian workers or peacekeepers, or trafficked for sexual exploitation.[11] Sexual violence in the conflict zone is a tactical plan, it's not just rape but rape under orders and is one of the most neglected crimes.[12] Women are the most affected victims when it comes to sexual violence in conflict zones[13] but men are also victims of sexual violence in this setting the only difference being that it has not been given as much attention as women have.[14] Documentations of various conflict areas such as Afghanistan, Iraq and Somalia have revealed the occurrence of acts such as rape of men and boys, showing that there

[10]International Committee of the Red Cross, 'Five things you need to know about sexual violence in conflict zones', <https://www.bing.com/ck/a?!&&p=24180459e20536c212fed56ec029ed50db75c428dbf639f7b3f536c2abc4f0bdJmltdHM9MTczOTc1MDQwMA&ptn=3&ver=2&hsh=4&fclid=1ab26c74-ddff-6a0d-27e3-7840dc246bbf&psq=+sexual+violence+against+men+in+conflict+zones&u=a1aHR0cHM6Ly93d3cuaWNyYy5vcmcvZW4vZG9jdW1lbnQvZml2ZS10aGluZ3Mta25vdy1hYm91dC1zZXh1YWwtdmlvbGVuY2UtY29uZmxpY3Qtem9uZXM&ntb=1> accessed 17 February 2025

[11]Ibid

[12]Bharat H. D., Balraj K. S., 'Sexual Violence in Conflict Zones. A Challenge for International Law?' <Commentary18Feb2017.indd> accessed on 18 February 2025

[13]Regional Information Centre for Western Europe, 'Women and girls are disproportionately affected by conflict-related sexual violence' <Women and girls most affected by conflict-related sexual violence> accessed on 18 February 2025

[14]Office of the Special Representative of the Secretary-General for Children and Armed Conflict, 'Hidden Victims: Sexual Violence Against Boys and Men in Conflict', <Hidden Victims: Sexual Violence Against Boys and Men in Conflict – Office of the Special Representative of the Secretary-General for Children and Armed Conflict> accessed on 18 February 2025

might be more undisclosed cases happening around the world.[15] In Sri Lanka, more than a fifth of war prisoners exposed that they had undergone sexual assault in the hands of the captors or had been forced to rape each other as a form of entertainment for the opposing troops.[16] Other cases of sexual assault on men in conflict are in El Salvador, where 76 per cent of political prisoners in the 1980s reported having experienced sexual torture, and during the Bosnian war in the 1990s, almost 5,000 men held in detention camps outside Sarajevo were raped[17]. Another case is that of American soldiers who forced detainees in Abu Ghraib prison in Iraq to conduct group masturbation and homosexual acts.[18]

Acts of sexual violence are mainly enacted against men in the conflict zone, but they usually don't fit into the narrow fitting of rape and so end up being misclassified as acts of torture rather than sexual violence.[19] with certain victims also masking their experiences as torture rather than rape.[20] There is also a general misconception around the world that men are immune to sexual violence due to them being the stronger gender. So most people see them as the perpetrators rather than the victims.[21] This probably explains the fewer reported cases of sexual violence against men in times of conflict.

ii. Sexual violence in the civilian setting

Acts of sexual violence against men happen in the day-to-day life more than it seems with the social stigmatization being one if not the main factor leading to these cases not being reported. An anonymous victim of sexual assault once confessed that he had tried to open up to his friends about the situation and instead of being supportive to him, they laughed at him asking if was now gay.[22] In the civilian setting, such comments can lead to the male victims questioning their sexuality, contributing to the silence of the victims[23] especially in jurisdictions where same sex relationships are prohibited, the victims tend to keep quite to avoid being labelled as homosexuals.[24]

Victims in such a setting also find that most of the times they know the perpetrators of

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[15]Ibid

[16]Major Héloïse Goodley, 'Ignoring Male Victims of Sexual Violence in Conflict Is Short-sighted and Wrong', Chatham House <https://www.bing.com/ck/a?!&&p=e40aae85b2a6f2b61ae24bd280070fd18410979b186c5261848e2508a257635fJmltdHM9MTczOTgzNjgwMA&ptn=3&ver=2&hsh=4&fclid=1ab26c74-ddff-6a0d-27e3-7840dc246bbf&psq=+sexual+violence+against+men+in+the+society&u=a1aHR0cHM6Ly93d3cuY2hhdGhhbWhvdXNlLm9yZy8yMDE5LzAxL2lnbm9yaW5nLW1hbGUtdmljdGltcy1zZXh1YWwtdmlvbGVuY2UtY29uZmxpY3Qtc2hvcnQtc2lnaHRlZC1hbmQtd3Jvbmc&ntb=1> accessed on 18 February 2025

[17]Ibid

[18]Ibid

[19]Katherine Sawyer, 'Sexual Violence against Men in Civil Conflict' (2024) 77 Political Research Quarterly 3

[20]Major Héloïse Goodley, 'Ignoring Male Victims of Sexual Violence in Conflict Is Short-sighted and Wrong', Chatham House <https://www.bing.com/ck/a?!&&p=e40aae85b2a6f2b61ae24bd280070fd18410979b186c5261848e2508a257635fJmltdHM9MTczOTgzNjgwMA&ptn=3&ver=2&hsh=4&fclid=1ab26c74-ddff-6a0d-27e3-7840dc246bbf&psq=+sexual+violence+against+men+in+the+society&u=a1aHR0cHM6Ly93d3cuY2hhdGhhbWhvdXNlLm9yZy8yMDE5LzAxL2lnbm9yaW5nLW1hbGUtdmljdGltcy1zZXh1YWwtdmlvbGVuY2UtY29uZmxpY3Qtc2hvcnQtc2lnaHRlZC1hbmQtd3Jvbmc&ntb=1> accessed on 18 February 2025

[21]Ibid

[22]Louise de Toit, 'Sexual violence in South Africa: where are the male victims?' The Conversation <https://www.bing.com/ck/a?!&&p=bbf87fa7a229e1526fe9a0136990f0d64f844724f8540688b0de4daef3aadfc8JmltdHM9MTczOTgzNjgwMA&ptn=3&ver=2&hsh=4&fclid=1ab26c74-ddff-6a0d-27e3-7840dc246bbf&psq=+sexual+violence+against+men+in+the+society&u=a1aHR0cHM6Ly90aGVjb252ZXJzYXRpb24uY29tL3NleHVhbC12aW9sZW5jZS1pbi1zb3V0aC1hZnJpY2Etd2hlcmUtYXJlLXRoZS1tYWxlLXZpY3RpbXMtMTg2MTYx&ntb=1 > accessed 18 February 2025

[23]Rainn, 'Sexual Assault of Men and Boys' <https://www.bing.com/ck/a?!&&p=b20d7afd08f4334a4f4cbfecd95f454b56d51ff91317862b7cd3bc5c5a8d6482JmltdHM9MTczOTgzNjgwMA&ptn=3&ver=2&hsh=4&fclid=1ab26c74-ddff-6a0d-27e3-7840dc246bbf&psq=+sexual+violence+against+men+in+the+society&u=a1aHR0cHM6Ly9yYWlubi5vcmcvYXJ0aWNsZXMvc2V4dWFsLWFzc2F1bHQtbWVuLWFuZC1ib3Iz&ntb=1> accessed 18 February 2025 Major Héloïse Goodley, 'Ignoring Male Victims of Sexual Violence in Conflict Is Short-sighted and Wrong', Chatham House <https://www.bing.com/ck/a?!&&p=e40aae85b2a6f2b61ae24bd280070fd18410979b186c5261848e2508a257635fJmltdHM9MTczOTgzNjgwMA&ptn=3&ver=2&hsh=4&fclid=1ab26c74-ddff-6a0d-27e3-7840dc246bbf&psq=+sexual+violence+against+men+in+the+society&u=a1aHR0cHM6Ly93d3cuY2hhdGhhbWhvdXNlLm9yZy8yMDE5LzAxL2lnbm9yaW5nLW1hbGUtdmljdGltcy1zZXh1YWwtdmlvbGVuY2UtY29uZmxpY3Qtc2hvcnQtc2lnaHRlZC1hbmQtd3Jvbmc&ntb=1>-accessed on 18 February

Sexual violence in relationships occurs when one partner forces, coerces, or manipulates the other into unwanted sexual activity. It can happen in dating, cohabiting, or married relationships and affects people of all genders and sexual orientations. However, due to stigma, cultural beliefs, and legal gaps, many survivors struggle to speak out or seek help.

these acts. Studies show that over 90% of children and teen victims know exactly who abused them while for adults the percentage is at 80%.[25] Some cases of sexual violence against men may happen in social sittings such as bars where the perpetrator drugs the victim to take advantage of him. Both men and women can do this.

iii. Sexual violence in relationships

Sexual violence in relationship is less prevalent in heterosexual relationships than it is in homosexual ones.[26] The reason for this being that men are stronger than women and so being forced into sexual intercourse is less likely to happen.[27] However if more broader definitions of sexual violence are brought in such as men being coerced or pressured by their partners to engage in unwanted sexual acts and/or activities or unprotected sex through the use of threats, manipulation, pressuring, and false promises then more men in heterosexuals relationships can claim to have experienced sexual violence.[28] But generally, sexual violence in relationships tends to happen to men in gay relationships than those in straight ones.

Just like all forms of sexual violence in all other settings, sexual violence in relationships is more common for men that what people know and about 1 in 3 men have experienced sexual violence from their partners at some point in their lives with 56% of men experiencing it before the age of 25.[29]

iv. Sexual Violence within prisons

Sodomy, in the instance of incarceration, is the sexual activity that is compelled by fellow convicts or at times by correction officials.[30] In a number of them, they are the outcome of coercion or deception, while others are the outcome of outright

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[24]Major Héloïse Goodley, 'Ignoring Male Victims of Sexual Violence in Conflict Is Short-sighted and Wrong', Chatham House <https://www.bing.com/ck/a?!&&p=e40aae85b2a6f2b61ae24bd280070fd18410979b186c5261848e2508a257635fJmltdHM9MTczOTgzNjgwMA&ptn=3&ver=2&hsh=4&fclid=1ab26c74-ddff-6a0d-27e3-7840dc246bbf&psq=+sexual+violence+against+men+in+the+society&u=a1aHR0cHM6Ly93d3cuY2hhdGhhbWhvdXNlLm9yZy8yMDE5LzAxL2lnbm9yaW5nLW1hbGUtdmljdGltcy1zZXh1YWwtdmlvbGVuY2UtY29uZmxpY3Qtc2hvcnQtc2lnaHRlZC1hbmQtd3Jvbmc&ntb=1> accessed on 18 February 2025

[25]Ibid

[26]Kelly S. S., Sue O., Charlene V., 'What about the men? A Critical Review of Men's Experiences of Intimate Partner Violence', Sage Journals <https://www.bing.com/ck/a?!&&p=8bbf2d913838055c9fefb760c8cb35d92b042c64b407d2fb5721ffa3b2296d15JmltdHM9MTczOTkyMzIwMA&ptn=3&ver=2&hsh=4&fclid=1ab26c74-ddff-6a0d-27e3-7840dc246bbf&psq=+sexual+violence+against+men+in+relationships&u=a1aHR0cHM6Ly9qb3VybmFscy5zYWdlcHViLmNvbS9kb2kvMTAuMTE3Ny8xNTI0ODM4MDIxMTA0MzgyNw&ntb=1> accessed 18 February 2025

[27]Ibid

[28]Ibid

[29]CDC, 'Intimate Partner Violence, Sexual Violence, and Stalking Among Men' <https://www.bing.com/ck/a?!&&p=f3b6a985f7954e16435890b4d0411766f6654193de05d9d45675745ccb2f01bfJmltdHM9MTczOTkyMzIwMA&ptn=3&ver=2&hsh=4&fclid=1ab26c74-ddff-6a0d-27e3-7840dc246bbf&psq=+sexual+violence+against+men+in+relationships&u=a1aHR0cHM6Ly93d3cuY2RjLmdvdi9pbnRpbWF0ZS1wYXJ0bmVyLXZpb2xlbmNlL2Fib3V0L2ludGltYXRlLXBhcnRuZXItdmlvbGVuY2Utc2V4dWFsLXZpb2xlbmNlLWFuZC1zdGFsa2luZy1hbW9uZy1tZW4uaHRtbA&ntb=1> accessed 18 February 2025

[30]Eichert, David. "Disciplinary sodomy: Prison rape, police brutality, and the gendered politics of societal control in the American carceral system." *Cornell L. Rev.* 105 (2019): 1775.

aggression.[31] It is a sexually motivated assault that is driven by the exercise of power rather than desire with the perpetrators using the activity to exercise their mastery, to exercise control, or to intimidate others. In many institutions, sexual assault that includes sodomy can also be connected to the social hierarchies that develop within them. Inmates can target others they feel are vulnerable[32], like new arrivals to the institution, less physically strong individuals, or minorities. Groups of inmates or gangs occasionally practice sodomy as a means of initiation, punishment, or asserting control. In crowded and poorly managed institutions, the inadequate surveillance and ineffective measures to stop the abuse raise the potential for this kind of maltreatment to occur.[33]

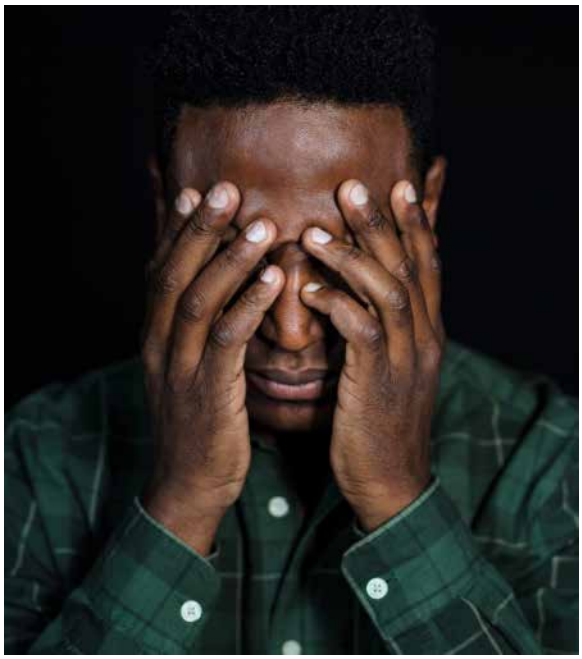
The physical aftermath of sodomy and sexual assault is immediate and severe. Victims are likely to develop bodily injury, sexually transmitted diseases (STIs), and chronic medical complications[34]. The psychological effect is no less severe. Victims are likely to develop trauma that is evidenced by depression, post-traumatic stress disorder (PTSD), and intense shame. The trauma can linger well into the time the survivor is no longer incarcerated, disrupting a survivor's reintegration into society and with healthy relationships.[35] The social stigma surrounding sexual violence in prisons exacerbates the suffering of survivors[36]. Many male victims, in particular, are reluctant to report assaults due to fears of retaliation, humiliation, or being labeled as weak. This silence not only perpetuates the cycle of violence but also discourages meaningful reform within the prison system.[37]

Often raped, castrated, or sexually tortured as a form of power and humiliation. Many do not report the abuse due to stigma and fear.

So, why don't more men step up and say something? A significant reason has to do with ingrained ideologies of masculinity:

i. Strength vs. Vulnerability: Boys are taught from a very young age to suppress their feelings and "toughen up." Being a victim means being weak.[38]
ii. Fear of Being Judged: They're often afraid of being laughed at or judged. Some of the questions, such as "Why didn't you

[31]Leo, R. A. (1992). From coercion to deception: The changing nature of police interrogation in America. *Crime, Law and Social Change*, 18, 35-59.
[32]Robinson, R. K. (2011). Masculinity as prison: Sexual identity, race, and incarceration. *Calif. L. Rev.*, 99, 1309.
[33]Nagi, Saad Z. *Child maltreatment in the United States: A challenge to social institutions*. Columbia University Press, 1977.
[34]Geist, Richard F. "Sexually related trauma." *Emergency Medicine Clinics of North America* 6.3 (1988): 439-466.
[35]Simpson, Nicole B. *Life after sexual trauma and incarceration: a restorative model for wholeness for women who suffered sexual violence*. Diss. Boston University, 2020.
[36]Heney, Jan, and Connie M. Kristiansen. "An analysis of the impact of prison on women survivors of childhood sexual abuse." *Women & Therapy* 20.4 (1998): 29-44.
[37]Feierman, Jessica. "Creative Prison Lawyering: From Silence to Democracy." *Geo. J. on Poverty L. & Pol'y* 11 (2004): 249.
[38]Kia-Keating, Maryam, et al. "Containing and Resisting Masculinity: Narratives of Renegotiation Among Resilient Male Survivors of Childhood Sexual Abuse." *Psychology of Men & Masculinity* 6.3 (2005): 169.



Sexual violence has devastating and long-lasting effects on survivors, affecting their physical health, mental well-being, relationships, and social life. While every survivor's experience is unique, the trauma can impact their body, mind, emotions, and future.

fight back?" and judgments of sexuality, can silence men.[39]

iii. Lack of Resources: Fewer mechanisms of support exist for men, which denies them access to assistance.[40]

Effects of Sexual Violence

The effects of sexual violence on men are substantial:

- Mental Issues: Depression, anxiety, PTSD, and other mental illnesses are widespread.[41]
- Relationship Issues: There can be relationship difficulties, with trust being problematic.[42]
- Self-Identity Issues: Survivors may find themselves with identity and masculinity conflicts.[43]

Recognizing and addressing the problem

Men seem to be the forgotten gender of our day and age and there is need to address issues affecting men such as in this article. Addressing sexual violence against men requires a different strategy and some of the ways this can be done is through;

i. Encouraging Empathy: Recognizing that sexual violence happens across all genders fosters empathy. We Encourage Recovery: Survivors are more likely to be assisted when encouraged.
ii. Promote Open Discussion: Create environments where men can discuss their experiences without being judged.[44]
iii. Listening and being supportive: If they tell their experience, believe them and be supportive.[45]
iv. Spreading Awareness: Leverage your platforms-social media, group memberships, conversations-to call attention to the problem.[46]
v. Educate Everyone: Schools, workplaces, and communities should include male experiences in discussions about sexual violence[47]

[39]Clark, Annie E., and Andrea L. Pino. *We believe you: Survivors of campus sexual assault speak out*. Holt Paperbacks, 2016.
[40]Addis, Michael E., and James R. Mahalik. "Men, masculinity, and the contexts of help seeking." *American psychologist* 58.1 (2003): 5.
[41]Dworkin, Emily R. "Risk for mental disorders associated with sexual assault: A meta-analysis." *Trauma, Violence, & Abuse* 21.5 (2020): 1011-1028.
[42]Vitek, Kristen N., and Elizabeth A. Yeater. "The association between a history of sexual violence and romantic relationship functioning: A systematic review." *Trauma, Violence, & Abuse* 22.5 (2021): 1221-1232.
[43]Easton, Scott D., Danielle M. Leone-Sheehan, and Patrick J. O'Leary. ""I will never know the person who I could have become": Perceived changes in self-identity among adult survivors of clergy-perpetrated sexual abuse." *Journal of Interpersonal Violence* 34.6 (2019): 1139-1162.
[44]World Health Organization. *Preventing intimate partner and sexual violence against women: Taking action and generating evidence*. World Health Organization, 2010.
[45]Bodie, Graham D., Andrea J. Vickery, and Christopher C. Gearhart. "The nature of supportive listening, I: Exploring the relation between supportive listeners and supportive people." *International Journal of Listening* 27.1 (2013): 39-49.
[47]Eroglu, Derya Ipek. "Medium is the Message: Unraveling the Social Media Platforms' Effects on Communication and Opinions." (2023).

vi. Redefine Masculine Norms: Encourage a masculinity that embraces vulnerability and accepts needing assistance doesn't mean being weak.[48]
vii. Support Organizations: Volunteer for or donate to organizations with services for male survivors.
viii. Understanding Cultural Influences: In some cultures, the stigma may be even stronger, necessitating culturally sensitive approaches.[49]

Vulnerability isn't a flaw, but rather a human quality we share. Every survivor's voice has value, and every voice raised chips away at stigma. Some people've been able to share their experiences, helping towards breaking barriers:

Terry Crews: The actor and former athlete discussed his abuse, commenting on the fact that anyone can be victimized regardless of their stature and physique.[50]

Anthony Edwards: The ER actor spoke up on being molested when he was a boy, drawing attention to abuse in Hollywood.[51]

Their stories also inform us of the importance of visibility. Public statements of protest, for instance, lend weight to thousands' experiences and mobilize them towards action.

Breaking the stigma has advantages not only for survivors but also for society in general.

Conclusion

The rising cases of sexual violence against men highlight a critical yet often ignored crisis. Despite the alarming prevalence,

Sexual violence doesn't just harm individuals—it shatters lives, families, and communities. Healing is possible, but it requires support, justice, and social change. Ending stigma, ensuring legal protection, and creating safe spaces for survivors can help break the cycle of violence.

societal stigma and inadequate legal frameworks continue to silence male survivors. It is imperative to advocate for stronger sexual and reproductive health rights for men, ensuring they receive the same protections and support afforded to other victims of sexual violence. Creating awareness is not just necessary; it is urgent. Establishing organizations similar to FIDA, dedicated to male survivors, can provide legal aid, psychosocial support, and a safe space for men to speak up without fear of judgment. The conversation must also extend to sodomy, a brutal violation that remains underreported due to cultural taboos and legal loopholes. Addressing these issues head-on will break the chains of silence and foster a society where all victims, regardless of gender, receive justice, dignity, and healing.

Ochieng Robbert Obura and **Derrick Kiptoo** are law students at Kabarak University.

[48]Robertson, Neville, and Heather Oulton. "Sexual violence: Raising the conversations, a literature review." (2008).
May, Larry. *Masculinity & morality*. Cornell University Press, 1998.
[49]Pescosolido, Bernice A., et al. "Rethinking theoretical approaches to stigma: A framework integrating normative influences on stigma (FINIS)." *Social science & medicine* 67.3 (2008): 431-440.
[50]Ressler, Jayne S. "Anonymous Plaintiffs and Sexual Misconduct." *Seton Hall L. Rev*. 50 (2019): 955.
[51]Wasson, Sam. A splurch in the kisser: *The movies of Blake Edwards*. Wesleyan University Press, 2009.

Artificial Intelligence versus the human: Balancing efficiency and ethics in contract negotiations

By Esther Wasike

Introduction: Evolution of contract management and the rise of artificial intelligence

Contracts have been the bedrock of all legal relationships since time immemorial, evolving from oral to written contracts. Their management has also evolved, from quills to typewriters, physical storage to cloud and now to Artificial Intelligence (AI). A technological wave is breaking over the legal industry, with AI tools primed to fundamentally alter contract processes, from drafting to final negotiation.

For instance, on 11th December, 2024, Luminance, the provider of Legal-Grade AI, announced the launch of 'Lumi Go', an AI agent allowing customers to transform the way they negotiate contracts such as Non-Disclosure Agreements or Master Service Agreements and providing them with the ability to send draft agreements to a counterparty and have AI auto-negotiate on their behalf.

With 'Lumi Go,' users sending contracts can now offer their recipients a simplified experience within Microsoft Word, including an AI-powered contract review and a chatbot. As the counterparty marks up the contract, they receive instant feedback on whether proposed changes are likely to be accepted. The AI also drafts suggested alternative language, insertable with just a click of a button, thus providing a more agreeable option.

As AI advances, it is often compared to human intelligence. While AI excels at specific tasks, it still lacks the depth of human reasoning, emotions, and creativity.

This shift represents a transformation of the lawyer's role, empowering them to dedicate their expertise to complex legal issues and strategic decision-making, thus driving more effective and efficient legal outcomes. However, this technological advancement is not without its nuances and potential pitfalls. This article will explore the benefits and drawbacks of entrusting AI agents with the crucial task of contract negotiation.

The AI factor

The first allure of AI in this domain is rooted in its capacity to transcend human limitations. AI is capable of handling

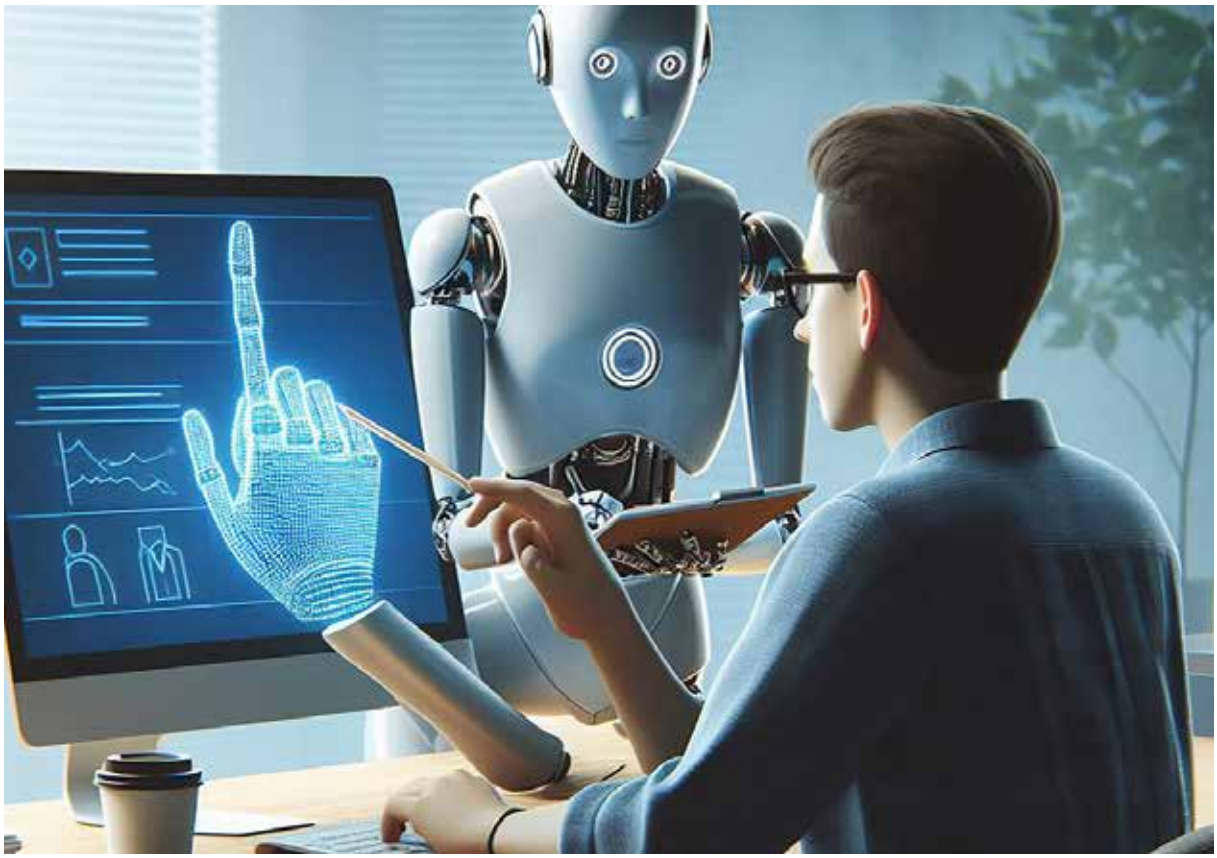
AI excels in speed, efficiency, and automation, but humans remain superior in creativity, emotions, and ethical reasoning. The future will be about collaboration, not competition.

huge volumes of data involved in even a moderately complex contract. A survey by McKinsey; *The state of AI: How organizations are rewiring to capture value, reported on 12th March* suggests that organizations leveraging AI for data analysis in commercial functions have seen an average 20% increase in efficiency in related processes. In contract negotiation, this translates to AI agents such as 'Lumi Go' efficiently filtering through and analyzing the data, previous contracts, and legal precedents.

PYMNTS.com has highlighted companies like *LawGeex* in its coverage of legal tech advancements. Such companies' underlying Artificial Intelligence demonstrates the power of rapid document analysis which can analyze thousands of documents in minutes, a task that would take human lawyers days. This speed not only accelerates deal closures but also reduces the costs associated with prolonged negotiations. For businesses engaging in numerous, relatively standardized contracts, such as supplier agreements, AI agents could automate a significant portion of the negotiation lifecycle, freeing human professionals to focus on high-stakes, strategically critical deals.

Furthermore, the promise of data-driven objectivity is a significant advantage. Human negotiators, despite their expertise, are susceptible to cognitive biases. 'The Anchoring bias', for instance, where the initial offer disproportionately influences the outcome, is a well-documented phenomenon in behavioral economics. With AI agents, programmed to operate based on predefined parameters and vast datasets, it becomes possible to mitigate these biases.

A study in the *Journal of Artificial Intelligence and Law* revealed that AI negotiation tools outperformed human negotiators by 5% in simulated tests. This advantage stemmed from the AI's ability to maintain optimal price points and resist emotional concessions. Essentially, AI's capacity to deliver unbiased, data-backed outcomes demonstrates a paradigm shift towards more rational and effective negotiation practices.



The rapid advancement of Artificial Intelligence (AI) has led to ongoing debates about how it compares to human intelligence. While AI can outperform humans in specific areas, it lacks key human traits like emotions, creativity, and general intelligence. Let's break down the key differences and future implications.

The accuracy and risk reduction offered by AI are also compelling. Contractual language is often precise and legally binding, leaving little room for error. AI agents, trained on legal language and specific organizational guidelines, can review and propose terms, reducing the likelihood of human oversights or the inclusion of unintended clauses. This is particularly relevant in ensuring compliance with complex regulatory requirements. While specific statistical reports on error reduction in AI-negotiated contracts are still emerging, the proven accuracy of AI in tasks like legal document review strongly suggests a similar potential in negotiation.

The need for human touch

Despite AI's efficiency in transformation contract drafting, the human element remains crucial, and this is where the limitations of current AI become apparent. Contract negotiation is not solely a logical exercise; it involves understanding the nuances of human interaction, building rapport, and adapting to the counterparty's motivations and unspoken needs. As a human negotiator might intuitively sense a point of flexibility or identify an underlying concern driving a counteroffer, current AI agents often lack this contextual awareness.

Tony Tiyou's article, *'Building Bridges: The Power of Relationships in Business,'* highlights the critical role of trust and human connection in business, areas where current AI falls short. While AI can analyze sentiment from text-based communications, it cannot fully grasp the subtle cues of body language or tone of voice that a human negotiator might pick up on during a face-to-face interaction.

The question of legal liability also casts a long shadow. If an AI agent, acting

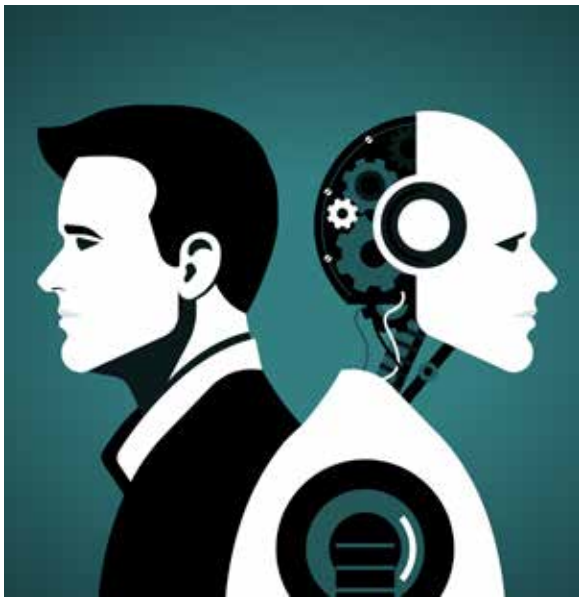
autonomously, negotiates a contract with detrimental terms or in violation of regulations, the lines of responsibility become blurred. A recent report by Ammar Zafar, on *Balancing the Scale: Navigating ethical and practical challenges of Artificial Intelligence in the Legal Profession* highlighted that over 60% of legal professionals express concerns about the lack of clear legal frameworks governing the actions of AI in legal contexts, including contract negotiation. While the principal would likely bear some responsibility, the extent of liability and the potential for holding the developers or deployers of the AI accountable are still moot.

Furthermore, the potential for manipulation is a real threat. If a sophisticated counterparty understands the algorithms and parameters governing an AI agent's negotiation strategy, they might be able to exploit these vulnerabilities. For instance, if an AI is programmed to prioritize speed of agreement, a skilled human negotiator might employ tactics to rush the AI into accepting less favorable terms. Ensuring the robustness and adaptability of AI negotiation algorithms against such strategic exploitation is a significant ongoing challenge.

Ethical considerations are also paramount. Should a party be obligated to disclose that they are being represented by an AI agent? The lack of transparency could erode trust and create an uneven playing field. The use of a highly sophisticated AI negotiator against a human without similar resources raises questions of fairness and access to effective representation.

Balancing the scales: A future of collaboration

Essentially, it is true that the rise of AI in contract negotiation has implications for the legal profession. While AI is unlikely to replace human lawyers entirely, it will undoubtedly transform certain aspects of their work. Lawyers will increasingly need to focus on strategic oversight of AI negotiation tools, handling complex negotiations, and advising on the legal and ethical implications of using AI in this domain.



The future is not about AI replacing humans, but rather AI working alongside humans to enhance productivity, creativity, and decision-making. This human-AI partnership will redefine industries, improve daily life, and unlock new opportunities.

In conclusion, the introduction of AI into contract negotiation signals a transformative shift, offering data-driven efficiency and potentially more favorable outcomes. Real-world examples demonstrate the growing capabilities of AI in analyzing and processing contract-related information. However, the inherent limitations of legal accountability, ethical considerations, and the enduring need for human ingenuity demand a balanced and thoughtful approach.

To successfully integrate AI, we must foster continuous dialogue, establish robust legal and ethical structures, and acknowledge that AI, despite its power, cannot replace the essential human elements of trust, understanding, and adaptability.

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Delimitation of marriage by cohabitation in Kenya: letting the law reflect social realities

By Cynthia Boundi Mayaka

By Timothy Mwichigi Kamau

By Paul Kauku

Marriage by cohabitation, also known as common-law marriage or presumptive marriage, refers to a situation where a couple lives together for an extended period and is considered legally married without a formal ceremony or registration. The recognition of such unions varies by country and legal system.

Abstract

Marriage laws in Kenya have evolved significantly over time. The changes through time reflect social, cultural, religious and legal shifts that have affected these laws through the years. Cohabitation or "come we stay" unions have existed in Kenya for a long time but the legislations have been generally vague on this issue. However, certain judicial decisions are beginning to shape the legal landscape in relation to cohabitation. This paper takes a historical journey into the advent of cohabitation as a social response to the limitations of statutory law. The paper then provides a review of the legal framework on marriage in Kenya highlighting the gaps in recognizing cohabitation. It shows that despite appreciation of the gaps and attempts to situate cohabitation through the courts, there is an urgent need to statutorily delimit the practice.

Introduction

Cohabitation has existed in Kenya for a long time. More pronounced following the advent of statutory marriages at the beginning of the 20th century. The Introduction of the East Africa Marriage Ordinance in 1902 decreeing registration of marriages can be regarded as a defacto introduction of cohabitation. Several years later in the case of *R v Amkeyo*[1], an unregistered

[1] [1917] 1 Cr. C.14

Kenya's marriage laws have evolved from customary traditions to colonial legal systems, and now to a modern legal framework. While the Marriage Act (2014) has unified marriage laws, debates on polygamy, inheritance, and LGBTQ+ rights continue to shape the legal landscape.

customary marriage was declared void. The legal framework enacted later on did not leave any room for cohabitation, though it introduced a hybrid system of marriage in African Christian Marriage and Divorce Act[2]. Marriage by cohabitation therefore became a rebuttable presumption. The Yawe case in 1976[3] set precedent in the subsequent years on presumption of marriage (marriage by cohabitation). Parties alleging marriage by cohabitation needed to provide proof of certain facts for the presumption of marriage to hold.

The attempt to review the laws on marriage in 1968[4] included a proposed amendment to the Evidence Act to make provision for the presumption of marriage after parties have lived together for a year or more. The succession laws law[5] further impliedly makes provision for presumption of marriage in succession matters.

The developments in recent years have acted as a pointer for the need to have a legal framework that provides for flexibility in a dynamic world.

Historical Nuances of Marriage Law In Kenya

Pre-colonial Era (Before 1895)

During this time, marriage was governed by Customary laws of the various ethnic communities in Kenya. Polygamy was widely practiced and accepted in different communities and the payment of dowry or bride price was a common theme across most communities. While divorce was generally frowned upon, family disputes and matters were handled by the elders.

It is worth noting that cohabitation was not a common practice in traditional Kenyan societies as marriages were generally arranged by or agreed between families and bride price was a condition to the marriage. Further, the communities practised other customary rites as part of marriage agreements between families.

Colonial Era (1895 – 1963)

The British, who colonised Kenya, introduced Christianity and new marriage laws to the Kenyan communities. The East Africa Marriage Ordinance[6] was enacted and it established a statutory marriage process. The key features of this Ordinance were: establishing a statutory marriage process; providing that natives married under the Ordinance were not subject to customary laws relating to marriage; and, Intestacy under English Law for the people who got

[2]Cap. 151, Laws of Kenya (1971)
[3]Hortensia Wanjiku Yawe v Public Trustee, Civil Appeal No. 13 of 1976, Court of Appeal for East Africa
[4]See Report of the Commission on Law of Marriage and Divorce at page 206.
[5]See Section 3 (5) of Law of Succession Act enacted in 1982
[6]Proclaimed in 1902

married under the Ordinance. The Natives Christian Marriage Ordinance[7] followed soon thereafter and the Natives Christian Marriage 1904 Ordinance was repealed by the African Christian Marriage and Divorce Act.

The African Christian Marriage and Divorce Act[8] streamlined the process of marriage registration, expanded regulations for Christian marriages and clarified divorce procedures. Further, it excluded Customary and Islamic marriages which were governed by separate legal frameworks.

It is worth noting that the African Christian Marriage and Divorce Act remained effective until Kenya's independence when various marriage laws were introduced to address different types of marriages. It is also notable that there were various changes to marriage laws including through amendment to statute and legal notices. Notably during the colonial era, customary marriages continued and cohabitation or "come we stay" unions were not recognised by the Courts.

Post-Independence Period (1963 – 2000s)

When the Marriage Act of 1971 came into force, it provided for civil marriages but did not unify Kenya's different marriage systems. Customary and Islamic marriages were recognised but there was no comprehensive legislative framework. During this period, the practice of cohabitation in urban areas increased due to economic and social changes as well as influence from the Western world. While cohabitation was becoming a norm in urban areas, women in cohabitation unions had no legal rights over property or spousal maintenance in the event of separation as the law did not recognise these unions. Hortensia Yawe case[9] was among the first attempts to create a framework within which cohabitation could find a legal footing.

Cohabitation as the default approach to marriage

In the ever-evolving landscape of matrimonial unions, the traditional route to marriage has undergone a transformation giving rise to realistic alternatives such as cohabitation, otherwise known as 'come we stay' in Kenya. This arrangement sees couples opting to live together without formalities but more often than not with blessings somewhat from their respective families or communities.

Typically, the genesis of cohabitation stems from a variety of circumstances, where a man or woman invites the other to share a dwelling hence the evocative term 'come we stay'. Observations demonstrate that these decisions are often spurred by the realities of life like premarital pregnancy, love at first sight, and in most cases, couples get involved when they are relatively still very young, and while still pursuing education and as such, tend to rely on parental support.

Suffice to say, the distinction between marriage and cohabitation is usually hazy since societal norms and practices blur the line between these two forms of union. This ambiguity reflects a complex interconnection of traditions, societal expectations, and individual choices. The ambiguity again has triggered deliberations in courtrooms and scholarly circles concerning the appropriate treatment and appreciation of cohabitation. Courts have struggled with the challenge of acknowledging cohabiting relationships and extending rights and obligations that are borne from the classic common law principle

[7]Proclaimed in 1904, repealed the 1902 Marriage Ordinance
[8]Enacted into law in 1931
[9]Civil Appeal No. 13 of 1976, Court of Appeal for East Africa

With British colonial rule ca While marriage by cohabitation is recognized in some legal systems, it does not always offer the same rights as formal marriage. Couples in long-term cohabitation should consider legal safeguards to protect their rights. me Western legal systems, which introduced formal marriage laws:

of presumption of marriage which operates under the assumption that individuals in a cohabiting relationship should be entertained to certain rights similar to those enjoyed by legally married couples.

To fully appreciate the evolution of cohabitation as a significant aspect of societal relationships in Kenya, it is important to look at documents such as *The 1968 report of the Commission on Law of Marriages and Divorce*[10]. This landmark report commissioned to evaluate existing laws concerning marriage and divorce, not only scrutinized the legal frameworks of the time but also proposed a blueprint for new, comprehensive laws applicable to all Kenyans. It is noteworthy that during an era when such matters were under intense scrutiny, the acknowledgement of cohabitation within the legal framework marked a significant milestone in the uptake of cohabitation within the social fabric of the Kenyan people.

The report delved into the intricacies of cohabitation addressing fundamental questions such as definition and the legal implications. One of the key recommendations was the establishment of a general presumption of marriage when individuals cohabit in a manner akin to that of spouses. The report further provided guidance on determining the duration necessary to qualify as cohabitation unions. Specifically, it suggested a benchmark of at least one year of cohabitation, under the circumstances where the couple has acquired the reputation of being husband and wife. This approach aimed at bridging the gap between traditional legal frameworks and the evolving dynamics of relationships within the society.

The embodiment of this presumption manifested in the case of Hortnesiah Wanjiku Yawe v Public Trustee[11]. The Court of Appeal for East Africa asserted that an extended period of cohabitation conducted

[10] https://www.jstor.org/stable/745741
[11] Civil Appeal 13 of 1976

in a manner akin to that of spouses may engender a presumption of marriage in favour of the party asserting it. The Court held that:

The presumption does not hinge on legal formalities of a particular marital system. Rather, it is a presumption grounded in the extensive cohabitation and societal acknowledgment of the parties as husband and wife.

Similarly, the case of *Kimber v Kimber*[12] serves as a notable illustration where the presiding judge demonstrated factors requisite for establishing cohabitation. Central to the criterion was the notion that a reasonable observer would perceive the individuals involved as residing together in a manner akin to a married couple. This entails sharing the same residence, engaging in daily life together, and fostering a sense of stability and permanence in the relationship. Furthermore, the court emphasized the significance of financial independence, a sexual relationship, and at times the presence of children as additional indicators of cohabitation.

With the enactment of the Marriage Act in 2014, cohabitation was notably absent among the recognized legal forms of marriage. The Act explicitly acknowledges Customary, Hindu, Islamic, Christian, and Civil Marriages, omitting cohabitation from its provisions. Section 2 of the Act however defines cohabitation as living in an arrangement where the unmarried couple resides together in a long-term relationship resembling marriage.

Subsequently, the case of *Joseph Gitau Githongo v Victoria Mwihaki*[13] shed light on the legal implications of cohabitation. The court expounded on the concept of presumption of marriage arising from the extended cohabitation of a man and woman without formalizing their union through a recognized form of marriage. In such cases, if the woman finds herself abandoned or widowed by her partner, the law, contingent upon sufficient evidence accords the status of 'wife'. This recognition enables her to seek maintenance or a portion of her deceased partner's estate. So unlike marriage which is governed by specific laws aimed at safeguarding the individuals involved, cohabitation does not provide such assurances. It represents a quasi-marital state, a legal classification distinct from marriage but often yielding similar consequences.

While cohabitation presumes marriage and the practice is widely practiced, presumption in law signifies the court's gravitation towards a particular issue in the absence of contradicting evidence. For instance, presumption of innocence denotes the court's position that the accused is considered innocent until proven guilty. All the same, presumption doesn't in its very nature denote innocence. Similarly, presumption of marriage does not automatically imply marriage. Pursuant to Article 119 of the Evidence Act, courts are empowered to infer the likelihood of certain facts based on common courses of natural events or public behaviour. Conversely, presumption of marriage doesn't establish a marital union, rather, it allows the individual invoking it to assert certain claims, especially during succession.

Initial attempts to address cohabitation were made in 2007 through the Marriage Bill which proposed that if a man and woman capable of marrying openly lived together for a minimum of two years in circumstances where they were perceived as husband and wife there would be a rebuttable presumption of marriage. In

[12][2000] 1 FLR
[13][2014] eKLR


Justice Alfred Mabeya

2012 a second proposal emerged under the initiative titled '*A change to marriage laws*.' This proposal approved by the cabinet at the time aimed at recognizing 'come we stay' arrangements lasting over six months as legal marriages. The proposed legislations would have empowered chiefs to formalize such unions and register them as marriages. Proponents argued that this approach would provide legal recognition to couples who may lack the means to undergo traditional or civil marriages.

In 2015, Justice Mabeya provided clarification on the legal status of couples claiming marriage through long-term cohabitation under the 2014 law[14]. He noted that the law did not recognize marriage by long cohabitation. However, he highlighted that this omission did not invalidate relationships where couples had lived together as spouses for extended periods often resulting in children. Mabeya emphasized that despite the absence of legal recognition, such relationships still held significance and warranted consideration under the law[15]. Justice William Musyoka firmed this principle in a 2015 ruling stating that when a marriage fails to adhere to the formalities in the Marriage Act or customary law, it may be validated through presumption of cohabitation.

Premised on the above, the reality is that, majority of couples commence marriage through cohabitation arrangements hence the several attempts to code the same into statute. The only drawback is the non-issuance of a certificate: the more reasons courts have made several attempts to define cohabitation including the Supreme Court. Cohabitation is therefore a social reality whether coded in statutes or not and the crux lies in the intention of the individuals to live as a married couple.

Legal framework governing marriage in Kenya

Introduction

This chapter provides an overview of the legal framework governing marriage in Kenya. It provides an insight into the process leading to the particular provisions. It analyses provisions of the Constitution of Kenya 2010, the Marriage Act 2014, subsidiary regulations developed post-2014 and select case law.

The Constitution

Kenya adopted a new Constitution in 2010, with a generally progressive bill of rights.[16] The adoption of the new Constitution triggered an extensive review of existing legislation to streamline the law with new standards and to give effect to new

[14]Marriage Act of 2014
[15]Karanja v. Karanja [2015] eKLR
[16]See Chapter 4 of the Constitution

The Marriage Act, 2014 was enacted to consolidate and modernize Kenya's marriage laws, ensuring clarity and uniformity across different types of marriages. It recognizes five forms of marriage, establishes registration requirements, and outlines rights and responsibilities for spouses.

constitutional provisions. The Marriage Act, enacted in May 2014, is one such legislation.

First, the Constitution recognises the family as the core unit of society[17] and provides in this regard that the "family is the natural and fundamental unit of society and the necessary basis of social order, and shall enjoy the recognition and protection of the State. It further establishes the equality of all parties in marriage, stating that "parties to a marriage are entitled to equal rights at the time of the marriage, during the marriage and at the dissolution of the marriage. The Constitution further recognises marriages concluded under any tradition or system of tradition, religious, personal, or family law so long as such systems are consistent with the Constitution.

The Marriage Act 2014

The Marriage Act of 2014 sought to harmonise marriage systems in Kenya under one legal framework. It includes provisions for objections to marriage, registration of marriage as well as matrimonial property rights. For marriages to be recognised they must comply with its provisions to be legally recognised as valid marriages in Kenya.

According to the Act, for a marriage to be recognised in Kenya, it has to be one of five kinds: Christian, civil, customary, Hindu, or Islamic. While Christian, civil, and Hindu marriages are monogamous in nature, customary and Islamic marriages are presumed to be potentially polygamous. The Marriage Act reiterates the equality of

[17]Article 45 of the Constitution

Some countries recognize common-law marriage or cohabitation as equivalent to a formal marriage. Kenyan courts have recognized marriage through prolonged cohabitation under customary law.

all parties to a marriage in tandem with the Constitution. The Act provides in this regard that, parties to a marriage have equal rights and obligations at the time of marriage, during the marriage, and at the dissolution of marriage. The Marriage Act further sets the minimum age of marriage to eighteen, thereby outlawing child marriage.

It is worth noting that while the Marriage Act of 2014 does not make substantive provisions on cohabitation as a form/ type of marriage, it allows for the possibility of a presumption of marriage based on long-term cohabitation.

The Act under section 2[18] defines cohabitation to mean "*to live in an arrangement in which an unmarried couple lives together in a long-term relationship that resembles a marriage*." The act does not make any substantive provisions on cohabitation. In an analysis of parliamentary proceedings,[19] some members held the view that presumption of marriage could arise after cohabiting for three years. Other members held the view that the period should be shorter. All in all, cohabitation did not get substantive provisions beyond the definition.

Subsidiary legislation on marriage

All the five subsidiary legislations (The Marriage (Matrimonial Proceedings) Rules, The Marriage (Muslim Marriage) Rules, The Marriage (Hindu Marriage) Rules, The Marriage (Customary Marriage) Rules and The Marriage (General) Rules make no provision for cohabitation. It is therefore argued that the subsidiary legislation ignores cohabitation in the pre and post-marriage act legal regime.

Case law on cohabitation

The Courts have made various pronouncements affecting marriage on issues such as the division of property upon divorce and the rights of cohabiting partners. The Courts have made rulings on cohabitation as a form of marriage under the presumption of marriage doctrine. The below case demonstrates the Courts' interpretation(s) of cohabitation as a form of marriage:

Mary Njoki vs. John Kinyanjui (1986)[20] – The Court held that if a couple cohabited and had children, it could give rise to a presumption of marriage and the Court would presume that a marriage existed.

[18]Section 2 of the Marriage Act, 2014
[19]See National Assembly Hansard dated 18th February 2014, afternoon session.
[20]Mary Njoki v John Kinyanjui Mutheru & 3 Others, (Mary Njoki) [1985] eKLR

In *Mary Wanjiku Githatu v Esther Wanjiru Kiarie [2010] eKLR*[21] Bosire JA held as follows:

"The existence or otherwise of a marriage is a question of fact. Likewise, whether a marriage can be presumed is a question of fact. It is not dependent on any system of law except where by reason of a written law it is excluded. For instance, a marriage cannot be presumed in favour of any party in a relationship in which one of them is married under statute. However, in circumstances where parties can marry, a marriage may be presumed if the facts and circumstances show the parties by along cohabitation or other circumstances evinced an intention of living together as husband and wife."

M W G vs. Attorney General & Others (2017) – The Court held that a woman who had lived with a man for many years had a right to a share of the property and in this regard, cohabitation was recognised as a basis for matrimonial property rights.

Ngaah J, in *CWN v DK [2021] eKLR*[22] was of the view that;

"As far as presumption of marriage is concerned, it is a status of relationship that turns much on evidence as much as it is a presumption of law."

A note on Cohabitation and Property Rights

One cannot discuss cohabitation without touching on its effect on property rights. In this regard, the Matrimonial Property Act of 2013 provides that only legally married spouses can claim a share of matrimonial property. In *JOO vs. MBO (2018)*, the Court of Appeal established the principle of fairness and equity in dividing matrimonial property. The case clarified that the division of property should be based on each spouse's contribution, not on the idea of automatic equal sharing. Courts have, therefore, ruled, in various decisions, that cohabiting partners can claim property if they contributed financially or non-financially (e.g. through domestic support.). This is also seen in the case earlier highlighted of *Mary Nyambura Kangara alias Mary Nyambura Paul vs. Paul Ogari Mayaka (2021)*.

Comparative analysis on cohabitation in select jurisdictions

Different jurisdictions have diverse approaches to the concept of cohabitation. In some cohabitation is recognised and indeed protected as a form of marriage. Cohabitation has implications on property, succession law, children, domestic violence and general family welfare. In this part, an analysis of select commonwealth jurisdictions is undertaken.

Uganda

The Ugandan legal framework on marriage does not recognise cohabitation. However, a study[23] commissioned by the Uganda Law Reform Commission in 2020 found that the practice has been in existence for a remarkable period of time. The study sought to explore possibilities for a legal and institutional framework to govern cohabitation relationships. The study noted significant prevalence. It found an absence of a uniform definition of cohabitation amongst Ugandan communities. A majority of the respondents favoured regulation of the practice of cohabitation.

Cohabitation or presumption of marriage is not defined in the statutory framework for marriage in Uganda. An attempt to

[21]Mary Wanjiku Githatu v Esther Wanjiru Kiarie [2010] eKLR
[22]CWN v DK [2021] eKLR
[23]Uganda Law Reform Commission Study on Cohabitation in Uganda, September 2020

define cohabitation and advance the rights of parties within the legislation is yet to be finalised. Flowing from the study on cohabitation[24] the circumstances recognised as fitting the description of cohabitation include mutual consent of the parties, intimacy, period of living together, degree and nature of contribution and investments and public acknowledgement of the relationship.

The Law Reform Commission study identified cohabitation as a form of marriage, cohabitation as a precursor to marriage (trial marriage) and cohabitation as deviant behaviour (a form of protestation against interference with personal agency). Having found that cohabitation is widespread and has implications on the society, the study recommends recognition and regulation. The study underscores the need to protect parties in cohabitation relationships.

South Africa

In South Africa, cohabitation is referred to as common law marriage, living together or a domestic partnership. It is not recognized as a legal relationship. Parties in cohabiting relationships do not have the rights and duties enjoyed by legally married couples. However, some legislations recognise cohabitation and therefore place it on equal footing with marriage. Domestic Violence Act recognizes cohabiting partners to be in a domestic relationship[25]. The Medical Schemes Act recognises dependant to include a partner[26]. Certain elements of administration of Income Tax and Estate Duty Tax treat cohabitants as spouses. Spouse is defined to include a permanent same-sex or heterosexual relationship.

In the case of *Bwanya v Master of the High Court, Cape Town and Others (2021)*[27] the applicant sought a declaration against Section 1(1) of the Intestate Succession Act[28] and Section 2 of the Maintenance of Surviving Spouses Act[29]. Applicant argued that the sections are unconstitutional for failing to make provision for anyone who is not married to claim maintenance when a relationship is terminated by death. The court found in favour of the applicant and declared the sections unconstitutional. In the case of Section 2 of the Maintenance of Surviving Spouses Act, the court held that it is unconstitutional as it unfairly discriminated against unmarried couples by limiting its benefits only to married spouses.

Tanzania

In Tanzania, law on marriage is regulated under the Law of Marriage Act[30]. The law makes provision for two kinds of marriages. Monogamous or intended to be monogamous and those that are polygamous or potentially polygamous[31]. Although the act does not define cohabitation like the Kenyan law, it makes provision for presumption of marriage.
Section 160 (1) makes provision for presumption of marriage in the following terms:

i) Where it is proved that a man and woman have lived together for two years or more, in such circumstances as to have acquired the reputation of being husband and wife, there shall be a rebuttable presumption that they were duly married."
ii) When a man and a woman have lived together in circumstances which give

[24]ibid
[25]Section 1 of Domestic Violence Act No 116 of 1998
[26]Section 1 of Medical Schemes Act No 131 of 1998
[27]Case CCT 241/20
[28]No 89 of 1987 Laws of South Africa
[29]No 27 of 1990 Laws of South Africa
[30]Chapter 29 Laws of Tanzania
[31]Section 10 of the Law of Marriage Act

rise to a presumption provided for in subsection (1) and such presumption is rebutted in any court of competent jurisdiction, the woman shall be entitled to apply for maintenance for herself and for every child of the union on satisfying the court that she and the man did in fact live together as husband and wife for two years or more, and the court shall have jurisdiction to make an order or orders for maintenance and, upon application made therefor either by the woman or the man, to grant such other reliefs, including custody of children, as it has jurisdiction under this Act to make or grant upon or subsequent to the making of an order for the dissolution of a marriage or an order for separation, as the court may think fit, and the provisions of this Act which regulate and apply to proceedings for, and orders of, maintenance and other reliefs shall, in so far as they may be applicable, regulate and apply to proceedings for and orders of maintenance and other reliefs under this section."

In the case of *Anthony Isdory Ngondo vs Tundondeghe Nasoni Mwakifuna (2022)*[32] the High court analysed the provision and held that the provision intended to protect couples who would be unjustly denied their rights when the relationship is dissolved after a long cohabitation.

Ghana

In Ghana, cohabitation describes a relationship between people of different sexes who live together without getting married legally, formally in a religious ceremony or in any other traditional way.

George Acquaah (2023) observes that cohabitation, though not accepted in Ghanaian Culture is on the rise as observed.[33] It is driven by a number of serious legal and personal concerns. These include the view that marriage is a dangerous institution plagued with agony, frustration, violence, abuse, despair and death. Legal issues in marriage are a likelihood of ending up in divorce, financial complications and high bride price.

The Marriages Act of Ghana requires all marriages to be registered. However, this has not deterred Ghanaians from engaging in cohabitation as a form of marriage or avoiding marriage altogether.

Britain

Cohabitation in England is generally known as common law marriage. Some legal protection exists in several areas. Cohabitation gives no general legal status to a couple. The House of Commons reports[34] that by 2021 the number of cohabiting couples had increased to 3.6 million a significant growth from 1996. This covers both opposite-sex and same-sex couples.

Several laws make provisions for the protection of the interests and welfare of cohabiting couples. Children Act of 1989[35] which allows cohabiting couples to bear joint responsibility for children born from the relationships. The Family Law Act allows home sharers and former home sharers to apply non-molestation orders and orders regulating the occupation of the family home. The Rent Act[36] makes provision for the protection of tenancy

[32](Matrimonial Appeal 10 of 2020) 2022 TZHC 10987 (29 June 2022)
[33]Acquaah, George. (2023). An Examination of the Phenomenon of Cohabitation: A Case Study of the Fante Tribe of Ghana. E-Journal of Religious and Theological Studies. 472-481. 10.38159/erats.2023995.
[34]Catherine Fairbairn (2022) Research Briefing for the House of Commons Library, UK Parliament
[35]See Schedule 1 of the Children Act 1989
[36]Rent Act 1977

rights for cohabiting couples for purposes of succession. Cohabitants, like spouses, would succeed to a statutory tenancy. They are treated as married couples. Lastly, the Domestic Abuse Act[37] sets out statutory definition of domestic abuse which applies to people who are personally connected. The definition of personally connected includes present or previous intimate personal relationships.

Over time, the Law commission in its various reports has recommended reforms to protect eligible cohabitants who are economically vulnerable; preserve individual autonomy; maintain a distinction between cohabitation, marriage and civil partnership and provide certainty about who qualifies as a cohabitant. The Government on the other hand has continually held the view that law reform on cohabitation would only take place in the context of comprehensive family law.

India

In India cohabitation is seen as a living arrangement in which an unmarried couple lives together in a long-term relationship that resembles a marriage. Cohabiting couples are often referred to as "live-in relationships"

No particular law in India acknowledges "live-in relationships". This means there is no legal definition. There are no clear rights and obligations of such relationships. However, the Supreme Court of India has held in many decisions that presumption of marriage can arise subject to fulfilment of certain conditions.

In the case of Lata Singh v. State of Utah Pradesh[38] the court held that even though the concept of cohabitation is considered immoral in society's eyes, consenting adults of the opposite sex is not illegal in the eye of the law.

Some of the Indian laws that protect cohabiting parties include the Domestic Violence Act-it does not specify legal marriage registration but as a 'relationship in the nature of marriage'. Legal framework for protection of children recognizes children as legitimate regardless of whether they were born in 'live -in relationships. While live-in relationships are not governed by personal laws the Indian law and the Supreme court have been attempting to bring change in the legal framework to properly govern cohabitation.

Review of MNK v POM (2023)

The Supreme Court delivered a precedent setting decision on family law through the petition filed by MNK v POM[39] in January 2023. The petition laid down useful considerations on what constitutes a presumption of marriage by cohabitation. This review analyses the implication of the decision on whether long cohabitation should be deemed a marriage and mechanisms through which rights of cohabiting couples could be advanced in law. This review posits that the decision impliedly amended the marriage act by re-introducing presumption of marriage (cohabitation) as a form of marriage and setting the parameters. Lastly, the review points out the need for legal reform for family law in Kenya flowing from the judgment, social realities and comparative jurisprudence.

The petition sought several declarations. First, whether the common law doctrine of presumption of marriage is applicable in Kenya in light of Article 45, Section 3 of

[37]Part 1 of Domestic Abuse Act of 2021 UK Laws
[38]Lata Singh vs State Of U.P. & Another on July 7, 2006
[39]MNK v POM; Initiative for Strategic Litigation in Africa (ISLA) (Amicus Curiae) [2023] KESC 2 (KLR)

the Judicature Act and the comprehensive provisions of the Marriage Act No 4 of 2014. Second, the doctrine of presumption of marriage is no longer a concept which is beneficial to the institution of marriage, to the status of the parties and to the issue of their union. Thirdly, that the doctrine of presumption of marriage ought to be sparingly applied.

In its determination, the court in paragraph 35 recognized that cohabitation is a marriage though not recognized in law. Consequently, in paragraph 64 the court laid strict parameters within which a presumption of marriage can be made. In essence, the court affirmed that presumption of marriage (cohabitation) still exists. In paragraph 65 the court erroneously expressed the view that the doctrine of presumption of marriage is on its deathbed based on changes in matrimonial laws in Kenya.

It can be reasonably inferred that the SC impliedly amended the Marriage Act 2014 by re-introducing the presumption of marriage. Secondly, the decision created a transitional mechanism for marriages within the doctrine of presumption of marriage omitted in the legislation.

Although the decision proposes a framework that protects cohabitees[40] this review suggests that social realities and comparative jurisprudence should guide such a process.

Recommendations

This part outlines a few broad recommendations towards delimiting marriage by cohabitation. In light of the decision of the Supreme Court, there is a legitimate expectation that the state would review the marriage act and other relevant personal laws to protect cohabitees where presumption of marriage cannot be proven.

First, there is need to review the existing legislation (Marriage Act) to make substantive provision on cohabitation in broad terms beyond the definition provided in section 2 of the act.

Second, review of legislation to make provisions for situations where marriage by cohabitation falls short of the parameters set by the supreme court either due to lack of capacity or any other factor.

Thirdly, review of legislation to provide room for a minimum period of cohabitation. Tanzania's Law of Marriage Act would be an important persuasive reference.

Conclusion

This paper has demonstrated that marriage by cohabitation is a social reality that took root following urbanisation. It was largely informed by the coming together of people from different social backgrounds into the then emerging urban centres and a totally new social reality that was a departure from the traditional African system where marriage was accompanied by rites. While the individuals practising cohabitation would have preferred to pursue legal unions, the formalities and financial burdens associated with the same proved a barrier, and gradually, couples found themselves existing as husband and wife through cohabitations. Resultantly, the government through the 1968 Report of the Commission on Laws of Marriage and Divorce extensively discussed cohabitation having appreciated its existence in the first instance. Ultimately, and informed by social and political realities, the commission affirmed the existence of a general presumption of marriage during cohabitation. Ensuing laws including the Marriage Act of 2014 only defined cohabitation without providing

[40]See paragraph 66- 69 of the judgement

the necessary statutory backing. However, courts have pronounced themselves on the topic in the affirmative including the latest Supreme Court decision in the MNK. The long and the short of this is, cohabitation is a social reality, it's preferred owing to fewer formalities, and courts chated pathways to cushion against denial and violation of rights. The ball is therefore firmly in the court of parliament and other relevant agencies in making the necessary proposals and amendments to the existing legal framework to formalize cohabitation.

Bibliography

1. Acquaah, George. (2023). An Examination of the Phenomenon of Cohabitation: A Case Study of the Fante Tribe of Ghana. E-Journal of Religious and Theological Studies. 472-481. 10.38159/erats.2023995.
2. African Christian Marriage and Divorce Act 1931
3. Anthony Isdory Ngondo vs Tundondeghe Nasoni Mwakifuna (Matrimonial Appeal 10 of 2020) 2022 TZHC 10987 (29 June 2022)
4. Catherine Fairbairn (2022) Research Briefing for the House of Commons Library, UK Parliament
5. Chapter 29 Law of Marriage Act Laws of Tanzania
6. Constitution on Kenya 2010
7. CWN v DK [2021] eKLR
8. Domestic Violence Act No 116 of 1998 UK Laws
9. Domestic Abuse Act of 2021 Laws of UK
10. East Africa Marriage Ordinance 1902
11. Hortensia Wanjiku Yawe vs. Public Trustee (1976 Civil Appeal 13 of 1976
12. Joseph Gitau Githongo v Victoria Mwihaki [2014] eKLR
13. Kimber v Kimber [2000] 1 FLR
14. Lata Singh vs State Of U.P. & Another on July 7, 2006 Case CCT 241/20
15. Law of Succession Act enacted in 1982
16. Marriage Act, 2014
17. Mary Njoki v John Kinyanjui Mutheru & 3 Others, (Mary Njoki) [1985] eKLR
18. Mary Wanjiku Githatu v Esther Wanjiru Kiarie [2010] eKLR
19. Mary Nyambura Kangara alias Mary Nyambura Paul vs. Paul Ogari Mayaka (2023) eKLR; Petition No. 9 of 2021;
20. Medical Schemes Act No 131 of 1998 UK Laws
21. National Assembly Hansard dated 18th February 2014, afternoon session.
22. Natives Christian Marriage Ordinance 1904
23. No 89 of 1987 Laws of South Africa
24. No 27 of 1990 Laws of South Africa
25. Report of the Commission on Law of Marriage and Divorce at page 206.
26. Rent Act 1977 UK Laws
27. Schedule 1 of the Children Act 1989 UK Laws
28. Uganda Law Reform Commission Study on Cohabitation in Uganda, September 2020

The case for less regulation in robotics, AI, and quantum computing

As emerging technologies like robotics, artificial intelligence (AI), and quantum computing advance, governments worldwide are debating how to regulate them. While some argue for strict oversight to prevent risks, excessive regulation could stifle innovation, slow economic growth, and weaken global competitiveness.

By Ochola Job Omondi

Introduction

The 21st Century has ushered a technological renaissance, with robotics, artificial intelligence (AI), and quantum computing all poised to redefine the boundaries of human achievements. These fields have so far been used in streamlining industries such as car manufacturing, intelligent algorithms have been used to solve complex problems, and quantum machines are shattering computational limits. Governments world over are taking notice of these industries and different approaches are being used to harness and control these advancements. As nations grapple with how to govern them, the European Union's regulatory framework has been contended in this essay to offer a cautionary tale. With frameworks like the AI Act, the Machinery Regulation (Revised 2023), and initiatives such as the Quantum Flagship, the EU has prioritized safety, ethics, and control which are all laudable goals that in practice choke innovation. This essay contends that less regulation, rather than more, is the key to unleashing the

The General Data Protection Regulation (GDPR) is the European Union's landmark data privacy law, which came into effect on May 25, 2018. It is one of the strictest data protection laws in the world, designed to give individuals more control over their personal data and hold organizations accountable for data privacy and security.

full potential of robotics, AI, and quantum computing. The case for less regulation rests on a simple truth: these technologies flourish in freedom, where experimentation outpaces bureaucracy, and bold ideas need not wait for permission. The EU's experience illuminates the perils of overreach making a compelling argument for a lighter touch elsewhere.

The EU's regulatory landscape

The EU has embraced its role as a global pacesetter in tech governance, crafting regulations that prioritize ethics, safety, and accountability. The EU's General Data Protection Regulation (GDPR), enacted in 2018 exemplifies this ethos, the GDPR applies to organizations established in the EU that process personal data, regardless of where the data is processed, and to organizations outside the EU that target people in the EU. The GDPR imposes stringent data-handling requirements affecting AI development which is heavily reliant on vast datasets. Companies that do not comply with the GDPR face fines of upto £20 million or 4% of the company's annual global turnover for breaches.

The AI Act, effective from August 2024 builds on this foundation by introducing a risk-based framework that classifies AI systems into tiers banning some outright (e.g social scoring) and subjecting "high risk" applications like robotics in healthcare to rigorous pre-market scrutiny. Violators risk penalties as high as £35 million or 7% of annual revenue. Meanwhile, quantum computing though less encumbered today is shaped by the EU's Quantum Flagship a £1 Billion initiative launched in 2018 which aims to develop a quantum web, where all of Europe's quantum computers, simulators and sensors are interconnected already hints at future oversight. These measures reflect a noble ambition which is to safeguard the society from untested technologies, yet also reveal a fats flaw- overregulation that outpaces the same technologies it seeks to govern.

In 2024, the European Commission published the European Competitiveness Report by Mario Draghi (Draghi Report). In the report, Draghi calls for deregulation in the tech market by stating that "the EU's regulatory stance towards tech companies hampers innovation" as "…the EU has around 100 tech-focused laws and over 270 regulators active in the digital networks across member states". He calls for a review of the regulatory framework with over 60% of EU companies seeing the same as obstacle to investment. The upshots of the report is a warning that EU's regulatory burden jeopardizes its competitiveness against less constrained rivals like the United States and China.

Assessing the cost of EU's over regulation

The EU's regulatory approach has far-reaching consequences to the field of robotics, AI, and quantum computing, fields that thrive on agility and experimentation. In robotics, the integration of AI- think in autonomous delivery drones or surgical robots- triggers dual oversight under the AI Act and the Machinery Regulation (revised 2023). Compliance demands exhaustive risk assessments and certification which delay deployment and inflates costs. Such rules disproportionately burden small and medium enterprises (SMEs) which often lack resources to navigate the regulatory red-tape, ceding ground to larger and often non-European competitors.

AI development also faces similar hurdles. The GDPR's data restrictions hinder the creation of robust, data-hungry models a disadvantage that has been very evident when comparing Europe's output to that of US firms like Open AI and Grok, which birthed ChatGPT and GrokAI respectively in a more freer data ecosystem.

Quantum computing while still in its infancy, risks premature shackling. The EU's push for secure quantum communication through the Europe's Quantum Communication Infrastructure (EuroQCI) Project and standardized framework may end up locking researchers into rigid paths before the technology's full potential is understood. The "top-down" approach may stifle serendipity that drives quantum leaps unlike the US where quantum efforts like Googles Sycamore or IBM's Qiskit ecosystem flourish with minimal federal oversight.

Lessons from less regulated markets

History and geography alike affirm that innovation thrives in freedom. The US tech boom from the internet's rise in the 1990s to AI's dominance today is a true testament to the impact of a light regulatory approach. Companies like Tesla, which are pioneering autonomous driving, or Microsoft which pushes for Majora 1 operate in an environment where failures are used to learn lesson and not catching felony charges. Federal rules when they exist focus on outcomes such as safety standards and nit micromanaging processes and this fosters a culture of risk-taking.

China similarly offers a parallel lesson. Its AI, robotics and quantum sectors backed by billions in state funding prioritized speed over scrutiny producing results like Baidu's Ernie Bot and DeepSeek. While China may not be fully a model of liberty, their approach underscores the value of unhindered ambition.

The EU's counterexample is telling, its tech giants SAP aside are scarce and its start-up ecosystem lags, with venture capital inflow dwarfed by the US. This loss is others' gain, talent and ideas migrate to freer markets as seen in the exodus of AI researchers to Silicon Valley.

The perils of pre-emptive regulation

Advocates of the EU model argue that it pre-empts harm such as robotic malfunctions and AI bias. While these risks are real, pre-emptive regulations as a response

As AI, robotics, and quantum computing evolve, governments are pushing for tighter regulations to address risks like bias, automation concerns, and ethical dilemmas. While well-intended, excessive regulation could stifle innovation, slow economic growth, and weaken global competitiveness. A light-touch approach—where the market and industry self-regulate—would create a balance between safety and progress.

often overshoots. Blanket rules assume that regulators can foresee every pitfall, ignoring how technologies evolve unpredictably. Issues for example to do with robotics safety could be addressed through targeted liability laws and not blanket mandates that delay entire industries.

US and China by contrast regulate reactively -addressing harms as they arise- and thus allowing for innovation to sprint ahead. The EU's punitive fines and compliance costs deter not just bad actors but also bold thinkers in these fields, a lesson for nations crafting their own tech policies.

A Vision for less regulation in AI, robotics and quantum computing

Less regulation need not mean lawlessness. A balanced approach could feature outcome based rules that for example ban discriminatory AI outputs, voluntary ethics codes, and innovation sandboxed- spaces where robotics, AI, and quantum firms test ideas without upfront burden.

For robotics this might mean streamlining safety certifications and trusting the developers to prioritize user welfare. For AI, it could involve easing data restrictions for research, paired with post-deployment audits. For quantum computing, it suggests delaying standardization until the field matures, fostering global collaboration over insular control. Such an approach will ensures that risks are adequately addressed and at the same time progress in innovation is preserved.

Conclusion

Overregulation as Europe demonstrates can sap momentum, diverting resources and ceding leadership to less encumbered rivals. A lighter touch rooted in trust and adaptability offers a better path, one where autonomous robots save lives, AI solves mysteries, and quantum machines unlock new realities. The EU's caution need not dictate the world's course instead it should inspire a bold alternative. In the race to shape tomorrow, less regulation is not a gamble- it is the winning hand.

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Bibliography

Legislation

- Charter of Fundamental Rights of the European Union [2012] OJ C326/391
- Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C326/47
- Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States [2004] OJ L158/77
- Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems [2004] OJ L200/1

Cases

- Case 30/77 R v Bouchereau [1977] ECR 1999, EU:C:1977:172
- Case 67/74 *Bonsignore v Oberstadtdirektor der Stadt Köln* [1975] ECR 297, EU:C:1975:34
- Case C-100/01 *Olazabal v Ministre de l'Intérieur* [2002] ECR I-10981, EU:C:2002:485
- Case C-127/08 *Metock and Others v Minister for Justice, Equality and Law Reform* [2008] ECR I-6241, EU:C:2008:449
- Case C-140/12 *Brey v Land Baden-Württemberg* [2013] EU:C:2013:565
- Case C-67/14 *Jobcenter Berlin Neukölln v Alimanovic* EU:C:2015:597.
- Case C-145/09 *Tsakouridis v Bundesrepublik Deutschland* [2010] ECR I-11979, EU:C:2010:708
- Case C-184/99 *Grzelczyk v Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve* [2001] ECR I-6193, EU:C:2001:458
- Case C-200/02 *Zhu and Chen v Secretary of State for the Home Department* [2004] ECR I-9925, EU:C:2004:639
- Case C-292/89 *Antonissen v Council* [1991] ECR I-745, EU:C:1991:80
- Case C-299/14 *Garcia-Nieto and Others v Delegación del Gobierno en Navarra* [2016] EU:C:2016:114
- Case C-333/13 *Dano v Jobcenter Leipzig* [2014] ECR I-764, EU:C:2014:2358
- Case C-348/09 *PI v Oberösterreichische Landesregierung* [2012] EU:C:2012:300
- Case C-36/75 *Rutili v Ministre de l'Intérieur* [1975] ECR 1219, EU:C:1975:137.
- Case C-370/90 *Singh v Minister for the Home Department* [1992] ECR I-4265, EU:C:1992:296
- Case C-413/99 *Baumbast and R v Secretary of State for the Home Department* [2002] ECR I-7091, ECLI:EU:C:2002:493
- Case C-48/75 *Belgium v Royer* [1976] ECR 497, EU:C:1976:136
- Case C-502/01 *Gaumain-Cerri v Bundesanstalt für Arbeit* [2004] ECR I-6483, EU:C:2004:413
- Joined Cases 115/81 and 116/81 *Adoui and Cornuaille v Belgian State* [1982] ECR 1665, EU:C:1982:183
- Joined Cases C-482/01 and C-493/01 *Orfanopoulos and Oliveri v Land Baden-Württemberg* [2004] ECR I-5257, EU:C:2004:262

Journals

- Kramer D, 'Earning Social Citizenship in the European Union: Free Movement and Access to Social Assistance Benefits Reconstructed' (2016) 18 Cambridge Yearbook of European Legal Studies 270
- O'Brien C, 'Civis Capitalist Sum: Class as the New Guiding Principle of EU Free Movement Rights' (2016) 53 Common Market Law Review 937
- Shuibhne NN, 'Limits Rising, Duties Ascending: The Changing Legal Shape of Union Citizenship' (2015) 52 Common Market Law Review 889
- Spaventa E, 'Mice or Horses? British Citizens in the EU 27 after Brexit as "Former EU Citizens"' (2019) 44 European Law Review 589
- Spaventa E, 'Seeing the Wood despite the Trees? On the Scope of Union Citizenship and Its Constitutional Effects' (2008) 45 Common Market Law Review 13
- Thym D, 'The Elusive Limits of Solidarity: Residence Rights of and Social Benefits for Economically Inactive Union Citizens' (2015) 52 Common Market Law Review 17

Athol Fugard's bibliography in chronological order of first production and/or publication:

Klaas and the Devil (1956)
The Cell (play) (1957)
No-Good Friday (1958)
Nongogo (1959)
The Blood Knot (1961); later revised and entitled Blood Knot (1987)
Hello and Goodbye (1965)
The Coat (1966)
People Are Living There (1968)
The Last Bus (1969)
Boesman and Lena (1969)
Friday's Bread on Monday (1970)
Sizwe Banzi Is Dead (1972) (developed with John Kani, and Winston Ntshona in workshops)
The Island (1972) (developed with John Kani, and Winston Ntshona in workshops)
Statements After an Arrest Under the Immorality Act (1972)
Dimetos (1975)
Orestes (1978)
A Lesson from Aloes (1978)
The Drummer (1980)
"Master Harold"...and the Boys (1982)
The Road to Mecca (1984)
A Place with the Pigs: a personal parable (1987)
My Children! My Africa! (1989)
My Life (1992)
Playland (1993)
Valley Song (1996)
The Captain's Tiger: a memoir for the stage (1997)
Sorrows and Rejoicings (2001)
Exits and Entrances (2004)
Booitjie and the Oubaas (2006)
Victory (2007)
Coming Home (2009)
Have You Seen Us (2009)
The Train Driver (2010)
The Shadow of the Hummingbird (2014)
The Painted Rocks at Revolver Creek (2016)
Concerning the Life of Babyboy Kleintjies (2022) (co-written with Paula Fourie)

2. The Conundrum Regarding the Removal of Supreme Court Judges

The issue of judicial accountability has reached a critical juncture with multiple petitions filed with the Judicial Service Commission (JSC) seeking the removal of Chief Justice Martha Koome and six other Supreme Court judges. Prominent figures have accused the judges of gross misconduct and incompetence. The JSC began processing these petitions, requiring the judges to submit responses to the allegations. However, the judges challenged the JSC's authority, arguing that the Commission lacked the constitutional mandate to review decisions made by the Supreme Court. This has led to multiple legal actions and interim orders from the High Courts in Narok and Nairobi, effectively halting further action by the JSC until these legal challenges are resolved.

3. Accountability: The Other Side of Judicial Independence

Insisting on judicial independence does not absolve judicial officers from accountability. We must emphasize that no judge, including those serving on the Supreme Court, is above the law. When allegations of unprofessional conduct or impropriety arise, they must be addressed through established constitutional mechanisms that uphold due process and the rule of law.

However, we must equally guard against the politicization of accountability processes. When judicial accountability becomes weaponized for political aims, it threatens the very foundation of judicial independence. The line between legitimate scrutiny and politically motivated attacks can be thin, requiring vigilance from all stakeholders.

Judicial officers must perform their duties according to high ethical standards, with court proceedings remaining transparent and accessible. Decisions should be accompanied by reasoned judgments subject to established appeal procedures. Effective complaints systems and disciplinary mechanisms are essential—not to undermine the judiciary, but to strengthen it by ensuring public confidence in its integrity.

The critical question facing Kenya today is not whether judges should be accountable, but how to ensure accountability mechanisms serve their proper purpose without becoming tools for political interference. As allegations against Supreme Court judges proceed, we urge strict adherence to fair trial guarantees and procedural safeguards, ensuring that accountability reinforces rather than undermines judicial independence.

4. **Safeguarding electoral justice ahead of the 2027 General Election Recognizing of the critical and independent role of the Judiciary in Electoral Dispute Resolution**

As the court with exclusive jurisdiction over any dispute touching on the election of the president, its role in the electoral cycle—particularly in resolving electoral disputes—cannot be downplayed. Currently, there is a pending request for an advisory opinion from the IEBC seeking clarity on:

1. Whether the IEBC can conduct a review of names and boundaries of constituencies and wards when the timelines under Article 89(2) and 89(3) of the Constitution (as read with Section 26 of the County Governments Act) have lapsed.
2. Whether the Constitution allows for an extension of these timelines, and if so, under what circumstances such an extension is permissible.
3. Whether the IEBC can undertake a process of delimitation of constituencies and other electoral processes in the absence of commissioners or the requisite quorum of commissioners.

The Supreme Court's exclusive jurisdiction over presidential election disputes makes it essential that the entire bench remains intact to ensure a proper quorum. A complete bench is necessary for timely, impartial, and authoritative resolution of presidential electoral disputes. Without a full quorum, the Judiciary's capacity to provide effective oversight during the electoral cycle would be compromised, potentially destabilizing the electoral process and weakening a key check and balance that upholds the rule of law.

The Supreme Court plays a critical role in the electoral justice system. As the court with exclusive jurisdiction over presidential election disputes, its function in resolving electoral conflicts cannot be understated. It is our view that this is a matter that directly impacts the upcoming electoral preparations.

Conclusion

The ongoing legal battles—including the contested removal petitions against the Supreme Court judges and the pending advisory opinion from the IEBC—highlight the persistent challenges to judicial independence in Kenya. Despite reforms under the Judiciary Transformation Framework and the Sustaining Judiciary Transformation Agenda that have strengthened the Judiciary's credibility, recent corruption allegations and political conflicts have reignited public mistrust.

As the last bastion of defense for the rule of law in Kenya and a critical actor in electoral justice, the Judiciary must be fiercely protected. Equally important, accountability must remain integral, ensuring that judicial officers perform their duties ethically and transparently. The future of Kenya's democracy depends on a Judiciary that is both independent and accountable—a combination essential for restoring public confidence and upholding the Constitution.

Signed by

1. **Name: Sheila Masinde, Executive Director, Transparency International Kenya (TI-Kenya)**
   Sign:
2. **Name: Franklin Mukwanja, Executive Director, Center for Multiparty Democracy (CMD-Kenya)**
   Sign:
3. **Name: Mulle Musau, National Coordinator, Elections Observation Group (ELOG)**
   Sign:

TRANSPARENCY INTERNATIONAL KENYA

ELGIA

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COMMISSION

Centre for Multiparty Democracy

4. Name: Eric Mukoya, Executive Director, International Commission of Jurists (K)
   Sign:

5. Name: Davis Malombe Executive Director, Kenya Human Rights Commission (KHRC)
   Sign:

6. Name: Felix Odhiambo, Executive Director, Electoral Law and Governance Institute for Africa (ELGIA)
   Sign:

Kenya's decision to make maths optional in high school is a bad idea – what should happen instead

By Moses Ngware

Kenya's education ministry announced in March 2025 that mathematics would be an optional subject in senior secondary school, which begins in grade 10. Most students in this grade are aged 15 years. The education minister said the mathematics taught from grade 4 to grade 9 was sufficient for foundational "numeracy literacy".

The change, in January 2026, is part of a shift to a new education system styled as the competence based curriculum. The decision is not to scrap maths altogether but rather to make it optional. However, given the poor performance in this subject, it is expected there will be few takers.

Maths is a compulsory subject in the first 12 years of basic education in many African countries. This is the case in Mauritius, Nigeria and South Africa, which opted for a choice between maths and mathematical literacy for grades 10-12.

The older education system, known as 8-4-4, featured eight years of primary school and four each at high school and university. Under this, core maths, dubbed Alternative A, is compulsory for all school going children until the second year of high school (form 2). Most students in this grade are aged 16 years. In the final two years of high school, one has the option of switching to Alternative B, a simplified version of Alternative A introduced in 2009. Alternative B is similar to South Africa's mathematical literacy subject.

@222222The decision has triggered heated debates in the country, in favour and against.

As a researcher who has taught high school maths and researched maths teaching for

over 20 years, I have the view that making maths optional is not a good idea. This is because both individuals and society need maths, regardless of the career path they might choose.

It's been argued that the change applies to the last two senior years of high school, which was the case in the old system too. For the new curriculum, however, this should not have been a problem as it is competence-based. This implies that what matters is the specific skills and knowledge mastered by a student, and not the examination scores.

The Kenyan education department should establish the root causes of the low performance in maths, and fix them. Research shows that chief among these are resource allocation; weak teacher preparation and support for foundational numeracy instruction; a learning disability known as dyscalculia; and the behavioural performance of maths teachers.

Kenya's maths problem

In the 2022 Kenya Certificate of Secondary Education exams, graded between A (highest) and E (lowest), over half of the 881,416 candidates' maths scores fell in the lowest two grades, D and E. This improved only marginally in 2023. To put the performance in context, the pass rate in high school certificate maths examinations in Mauritius improved from 81.4% to 91.8% between 2019 and 2022.

There are a number of reasons for this dismal performance in Kenya:

Resource allocation: The better-resourced national schools can only admit a small number of students, leaving out over 70% who join low-resourced day schools. Resources for learning maths range from teachers to interactive teaching and learning materials inside the classroom. With the support of partners such as the Global Partnership for Education, the government aims to achieve a 1:1 textbook-per-student ratio goal. However, the flow of capitation grants to secondary schools has been wanting, jeopardising access to resources at the school level.

Teacher preparation: Teachers aren't well prepared to support learners in foundational numeracy (maths in early grades). Foundational numeracy skills are critical in creating strong building blocks for future learning and success in later grades.

Teacher behaviour: Classroom observation studies reveal that maths teachers favour boys. Furthermore, above average learners sit in the front closer to the chalkboard, and learners are denied positive reinforcement that would motivate them to learn maths. There are also negative attitudes about maths as a difficult subject, reinforcing the stereotype that it is only suitable for boys and "bright" children.

Dyscalculia: Worldwide, 3%-7% of the general population are affected by a disability known as dyscalculia. In Kenya, 6.4% among primary and secondary school children have the disability. It is a condition that affects a person's ability to understand numerical concepts. By implication, the number of the 962,512 Kenya Certificate of Secondary Education candidates of 2024 with this disability works out to between 28,000 and 68,000 candidates. But Kenya's education system doesn't support teachers in diagnosing learners with dyscalculia, or managing their disability.

Policy options

There are alternatives to making maths an optional subject in senior secondary school. The system needs to focus on the root causes of low performance, and then on how to fix them.

I suggest the following solutions.

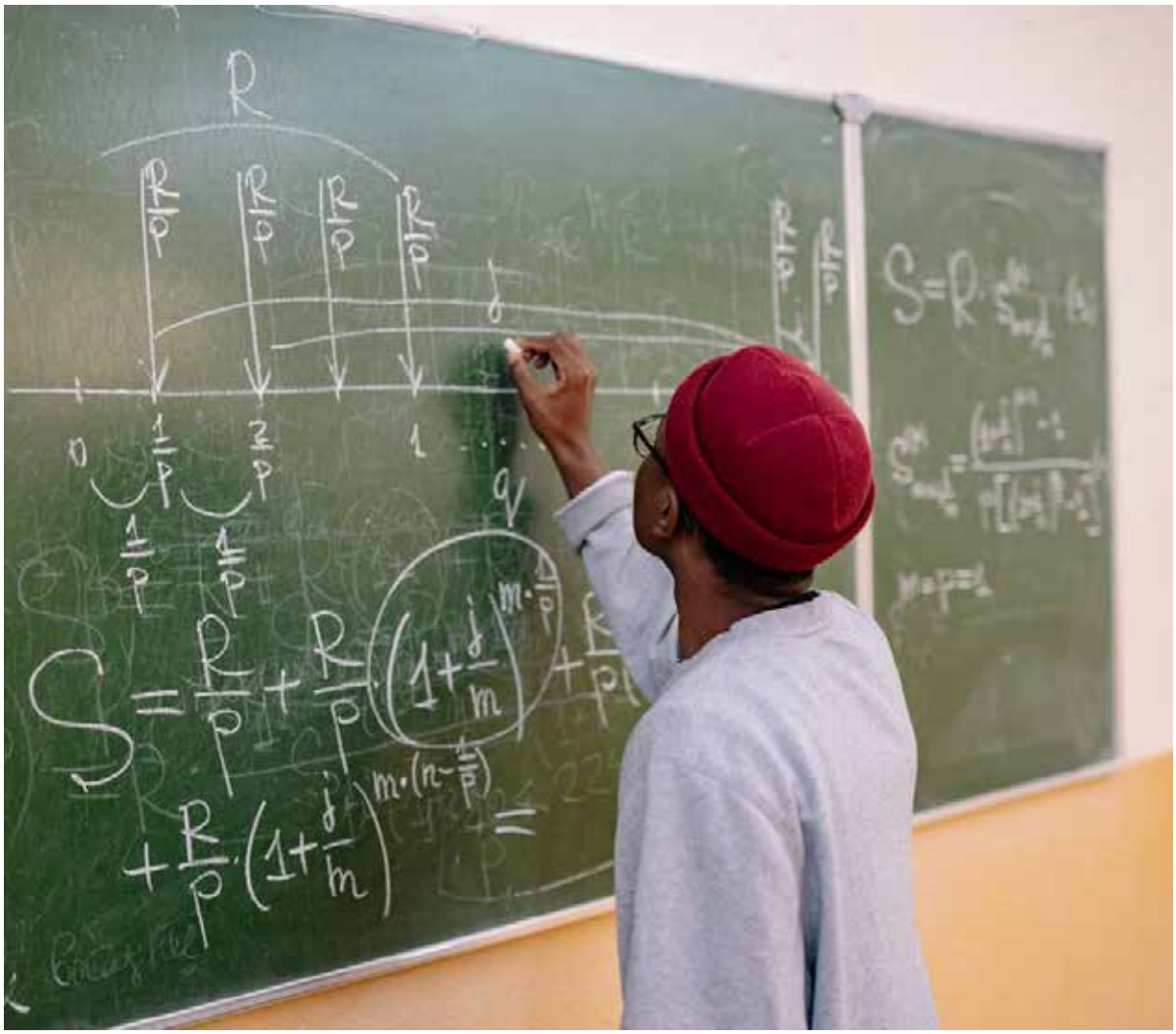


Photo by Yan Krukau via pexel.com

Maths is a compulsory subject in the first 12 years of basic education in many African countries.

- Avoid unnecessarily using achievement in maths to determine access to academic and training programmes. This way, one's career will not solely be determined by performance in maths.
- Keep a simpler maths alternative, or maths literacy, for senior secondary instead of making maths optional.
- Teachers should continue to develop their competence in maths, focusing on content knowledge as well as knowledge of how to teach numeracy.
- The general public should communicate effectively to eliminate negative stereotypes and unhelpful attitudes in society. The aim is to shift mindsets so that maths is perceived as part of life – making it necessary to support all children to succeed in maths.
- Help learners to overcome dyscalculia, using multisensory teaching approaches – a way of teaching that engages more than one sense at a time: sight, hearing, movement and touch.

This article was originally published by The Conversation at: https://theconversation.com/kenyas-decision-to-make-maths-optional-in-high-school-is-a-bad-idea-what-should-happen-instead-252965?utm_medium=article_native_share&utm_source=theconversation.com

Moses Ngware is a Senior Research Scientist, African Population and Health Research Center.

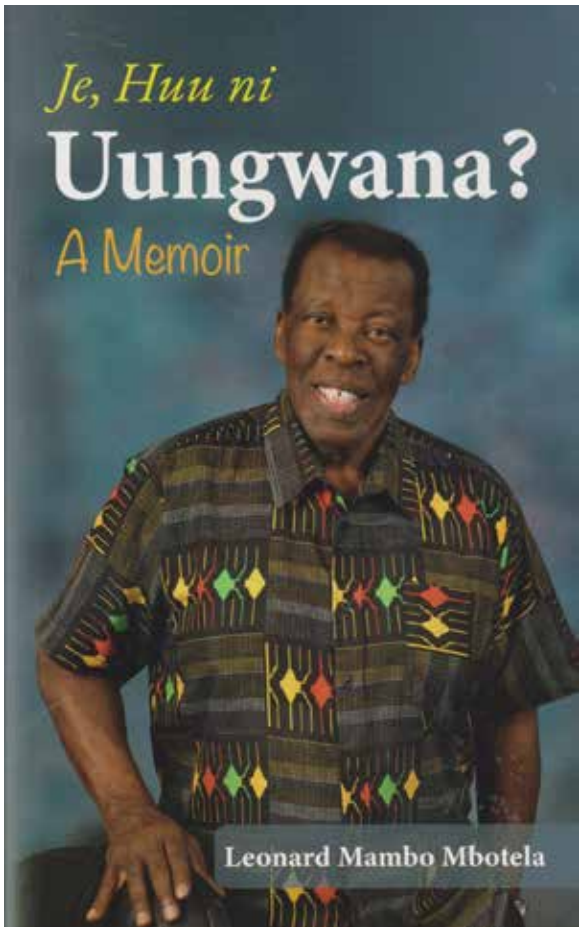
BOOK REVIEW

"Jee Huu ni Ungwana?" Leornard Mambo Mbotela - A legacy

By Janet Mburu

One thing that I find captivating about memoirs is that they bring out details that make one sigh in awe, and disbelief, as they get to understand the journey of the person in question. They also help one admire how a twist of fate can shape or change a person's destiny. For instance, Leornard mambo Mbotela's great grandfather was captured by slave traders in Malawi, and while enroute Europe, the ship carrying him was interjected by Anti-slavery team near Zanzibar and rerouted to Freretown in Mombasa. The would-be slaves were set free and given a place to live. That's how Mbotela senior got an education, and became part of the Freretown society. That is just part of the beautiful journey that Leornard Mambo Mbotela tells, in his book, Jee huu ni ungana, a memoir, of how he is a descendant of slave trade.

It is true, that if you do not tell your story in the right form, others will find the chance and tell it however they want. Leornard Mambo mbotela, in his book, Je Huu ni ungwana A memoir, walks us through the first account of his life and experience as a successful journalist who was caught up in the cross fire of an interesting political seen. He writes so well that we can vividly picture him held at gun point and being made to announce that Moi was no longer the president, something that was considered outrageous at the time. Still Leornard survived and lived to tell the tale, the one we are looking at today.



The man behind the voice

Growing up, many of us, including me, listened to a show called *Jee Huu ni Ungwana*? The unforgettable voice of Leonard Mambo Mbotela would float across the airwaves, offering insight, perspective, and a sense of belonging to an audience that had little more than their radios and televisions to stay connected with the world around them. It's a voice many of us felt in our souls and still do to date. Mbotela's voice was not just a source of entertainment, but a cultural institution for many of us, especially in the context of Kenya's political and social history.

But the life of Leonard Mambo Mbotela goes far beyond his radio and television career. He was a man who had a rich and intriguing past, one shaped by the turbulence of the 1982 coup attempt, a man whose career reached the heights of fame, yet always retained a humble aura. He was, and remains, an important figure in shaping Kenyan media and culture, a walking testament to perseverance, and, perhaps most significantly, an individual who helped define what it meant to be Kenyan in the post-colonial era, through journalism.

Leonard Mambo Mbotela's new book, Jee huu ni Ungwana, A memoir, released shortly before his passing, serves as both a personal memoir and a reflection on Kenyan politics. In it, he chronicles his experiences as a journalist, offering behind-the-scenes insights into some of Kenya's most pivotal moments—including the 1982 coup attempt, the shifting political landscape More so the Moi era, and the evolution of the country's media industry. More than just a retelling of events, the book is a deep exploration of the power of storytelling and the role of the media in shaping national consciousness. Mbotela does not shy away from discussing the political tensions he witnessed, the struggles of journalists to remain objective, and the challenges of reporting in an era of government control over the press. Through his sharp observations and rich storytelling, he leaves behind a treasure trove of knowledge—a final contribution to the country he loved so dearly.

Birth of the Program- Jee huu ni ungwana

I got the book and first delved in looking to understand what had inspired the show, Jee huu ni ungwana. Mbotela narrates how one afternoon a friend invited him to the Benefit Hotel in Nairobi to show him where the big men hang out. Being a lover of beautiful recreation places Umm. Botella took the chance and was not disappointed as he got to meet a lot of dignitaries, including the AG Sir Charles Njonjo. While there, he witnessed one patron who kept banging the table and demanding that a waiter serve him quickly. Though many people turned around in shock, he still kept shouting. Mbotela explains that he felt that it was unprofessional, after all, the message could be passed calmly. This insensitivity lingered in his mind for a long week after the incident, and he contemplated starting a show with this in mind.

He took the idea to the head of Swahili programs, Simeon Ndesanjo, who received it very well, asked for three episodes, and the show started. The Audience received it so well that it got extra Airtime, From the initial 15 minutes to 30, between 12.30 and 1.00 pm. Mbotela touched on every sensitive topic including discrimination at work, drunkenness, tribalism, queuing, and table manners, among others. Mbotela focused on building a social foundation in a nation that was driven by economic goals.

The coup d'etat

One of the most defining moments of Mbotela's life and career was the 1982 coup attempt, an event that shook Kenya to its core. Mbotela, in the first chapter of the book, dives straight into the narration of first-hand experience. He explains how he got caught up in the plot, while he had no idea what was going on. The coup was an attempt to overthrow then-President Daniel Arap Moi, orchestrated by a faction of the Kenyan military, largely driven by discontent over Moi's leadership and the perceived stagnation of Kenya's political and economic systems.

Mbotela walks us through his experience of the coup, whereby he was taken from home at 4:00 AM on Sunday,1st of August 1982 to go and announce that Moi was no longer the President of Kenya. First, he walks us through Saturday, the eve of the day, where after dropping her sister at the airport he just went home and stayed with family, unlike his normal trend of going out and

catching up with friends. Mbotela paints a picture of a happy family with kids playing all over the house, just another normal day. However, at 4:00 AM Sunday, Mbotela was rudely woken up by bangs on the bedroom window, and someone shouting “Mbotela, where are you? Come out”. For a moment, he thought it was burglars. Owe unto him, it was rebel soldiers. They had captured the staff driver and demanded that he drive them to Mbotela's house. When Mbotela stepped out, the lead soldier commanded him to dress up or get killed. Mbotela rushed back into the bedroom, dressed up quickly, and told the wife that some heavily armed soldiers had come to capture him and he was not sure that he would come back alive.

The wife was left in tears. Mbotela then stepped out and was bundled into a military Land Rover and such, sandwiched between armed soldiers. On arriving at the station Michaela explained that he was bullied from all corners. And told to announce that Ochuka was the new president of Kenya and Moy was no longer the president. It was a shock to him. Mbotela writes out the exact announcement he had to read over and over.

“Dear listeners, dear Kenyans, this is VOK. My name is Leonard Mambo Mbotela. You are informed that the government of Daniel Arap Moi has been overthrown. Yes, get it clear from me, the government of Daniel Arap Moi has been overthrown. He is no longer the president of Kenya. The military is now in charge of the country. The police are now civilians. All prisoners are now free. You are ordered to remain wherever you are until you get further instructions. I am here in the studio with the new president, Kenyan President Hezekiah Ochuka.”

All this was happening under gunpoint and Mbotela had to brave it. Ochuka also took the microphone and explained further why they had toppled Moi and promised that Kenya was going to be an amazing country. And as he warmed up to ascend the high position. Ochuka selected his favorite Lingala music and asked Mbotela to play on repeat. However, this was short-lived as at about 8 AM Some rebel soldiers went running into the studio and announced that they were being attacked by loyal soldiers. Mbotela explains how a pandemonium ensued as the rebels ran for cover while bullets flew through the window. Some soldiers fell over the tables while others scrambled for the exits, both doors and windows, in a bid to escape. Though Mbotela makes it sound funny he states that it's not a laughing matter, for within seconds he was left alone in the studio and very confused. He didn't know whether to run, whether to stay, whether to hide, but at least he switched off the radio. Eventually, he hid under the table because of The deafening gunshots splitting outside the window. After the gunshots had stopped an eerling silence ensued, a tall military officer walked into the studio and commanded that anyone who was hiding there to come out. Mbotela crawled out from under the table and came to a friendlier face to whom he introduced himself, stating that he was a broadcaster, not a soldier. After sniffing around this soldier told Mbotela, that he was lucky he would spare his life that day because he had always admired him and wished he would meet him.

Shortly after, Major General Mahmoud Mohammed, the deputy army commander walked into the studio visibly angry and looked at Mbotela accusingly asking him what he had announced and why. Before Mbotela could explain himself, he was ordered to retract the earlier announcement and inform the public that Moi was still the president of Kenya and that the coup had failed. Again. Mbotela was at it again. “Dear listeners, dear Kenyan, good morning. This is Mambo Mbotela again. I want to make it clear that the earlier announcement that President Daniel Arap Moi had been overdrawn was all lies. The truth is that Moi is still the President of Kenya, and you are advised to remain where you are but know

On August 1, 1982, a failed military coup against President Daniel arap Moi shook Kenya. The attempted coup, led by low-ranking officers of the Kenya Air Force, was quickly suppressed by loyal forces, marking a major shift in Kenya's political and military history.

that money is still the president. Kenya, everything is under control, and everything remains as it was. Those who attempt to withdraw him have been defeated. The angry General Mahmoud smiled. Mbotela Further walks us through the aftermath of the coup attempt, including the Dusk to dawn curfew That lasted a month.

Notably, Mbotela was directly affected by this dark chapter of Kenya's history, not only as the best journalist but also as a voice of reason and calm in the midst of chaos. It was on this very day, in the thick of the crisis, that Mbotela's resilience and professionalism came to the forefront.

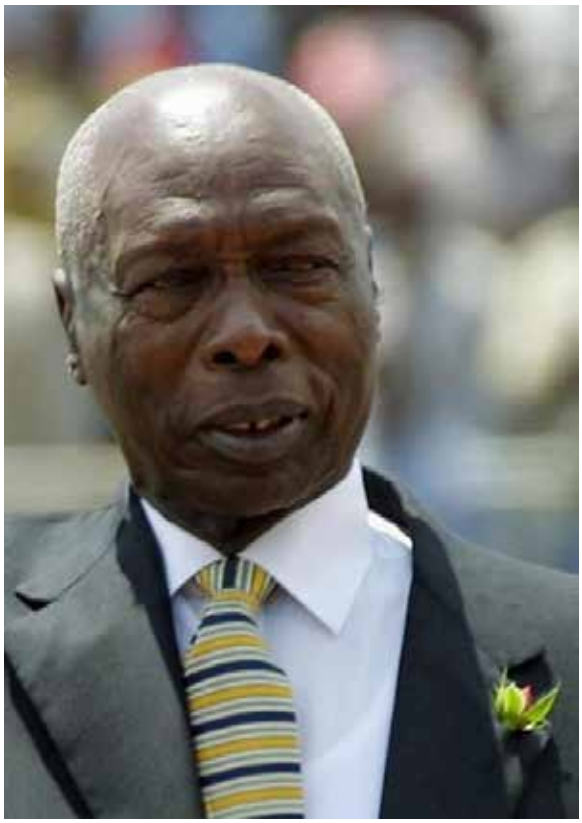
As news broke of the coup attempt, Mbotela was the first to broadcast on national radio, to announce the coup, and later bringing a sense of order and control when panic had the potential to take over. His ability to stay calm and collected, his authoritative yet soothing voice, helped reassure the Kenyan people during a time when they had no clear answers. For many listeners, Mbotela's words were a lifeline—one of the few ways they could hold on to any semblance of normalcy.

The impact of the coup

The 1982 coup attempt was a defining moment not just in Mbotela's career, but in Kenyan history. While he wasn't directly involved in the military operations or the political intricacies, his role as a broadcaster during the crisis solidified his place in the hearts of Kenyans. It highlighted his ability to wield the power of the airwaves not just as a tool for entertainment, but as an essential service for the well-being of the nation.

The coup attempt saw the Kenyan government tighten its control over the

The Late Charles Njonjo



The Late President Daniel Arap Moi

media. Censorship was imposed, and certain narratives were tightly regulated. However, for Mbotela, this period only strengthened his commitment to delivering unbiased, fact-based news to the public, even in the face of growing governmental oversight.

A bit about the former president Daniel Arap Moi and Sir Charles Njonjo

A majority of us, especially the younger generation have known Moi as a tough, whip-cracking President and more or less, a ruthless man. However, in this book, Mbotela takes the chance to show us Moi, who is a devoted Christian and a gentleman who goes out of his way to forgive Njonjo, who was part of the team that organized the coup d'état. When acting as a vice president Moi was among the friendliest leaders at the time, and Mbotela described him as composed, humble, forgiving, and non-combative. However, He underwent some hollowing mistreatments and belittlement from other leaders that made him glow bolder and stronger. Primarily he remained calm and behaved as if he was not aware of what was happening around him thus getting titles such as daftman, coward, and other undesirable adjectives from the then government henchman.

Mbotela explains how he heard of a story where an Assistant Commissioner of Police in charge of Rift Valley stopped Moi who had traveled to Uganda by road through Malaba for a conference in Kampala. Ordered that the motorcade be searched for contraband items, mainly guns. Instead of resisting, Moi quietly stepped out of his car, a merc Benz KNT 400and allowed the police officers to search the entire motorcade. Nothing illegal was found, but imagine the kind of hurt that Moi felt, seeing that someone was perceiving him as a potential threat. Mbotela explains how Moi became a cunning and shrewd president after the attempted coup d'etat, seeing that she was surrounded by enemies. Who wished to defeat him? He decided to protect his presidency by crook. And all unto you, if you crossed his path. The book, Jee huu ni ungwana gives you a deeper insight

into the true nature of Moi, his leadership, and Government, taking into account both the good and the bad.

Mbotela's Lineage and Early Life

Leonard Mambo Mbotela walks us through his unique childhood with intricate details such as he was a descendant of slavery, as his great-grandfather, had hailed from Yao land in central Malawi, having been captured by slave traders and put on a ship and route to Europe to be sold as a slave. The ship carrying Mbotela Senior was intercepted in Zanzibar by an anti-slavery team and redirected to Freetown in Mombasa where these slaves were set free, Thus Mbotela started living in Kenya, received an education, and was picked for his first major assignment by a Church Missionary Society to work as a porter accompanying Bishop James Hannington to Uganda. Mbotela narrates that his great-grandfather was one of the less than 10 porters who survived being murdered by the king of Buganda, Kabaka Mwanga. Mbotela senior married Halima Ida, and had one son, Juma. Juma was well learned and traveled, and later married Grace Esther, and was blessed with 11 children, the first one being James Mbotela, father to Leonard Mambo Mbotela.

Leonard was born on 29th May 1940 in Mombasa, and his roots were firmly planted in the fabric of Christian life. As a young boy, Mbotela witnessed a country transitioning from British colonial rule into independence. Kenya, as with many African nations, was in the midst of a seismic shift in terms of governance, national identity, and global standing. These formative years left an indelible mark on Mbotela, influencing both his career and personal philosophy later in life.

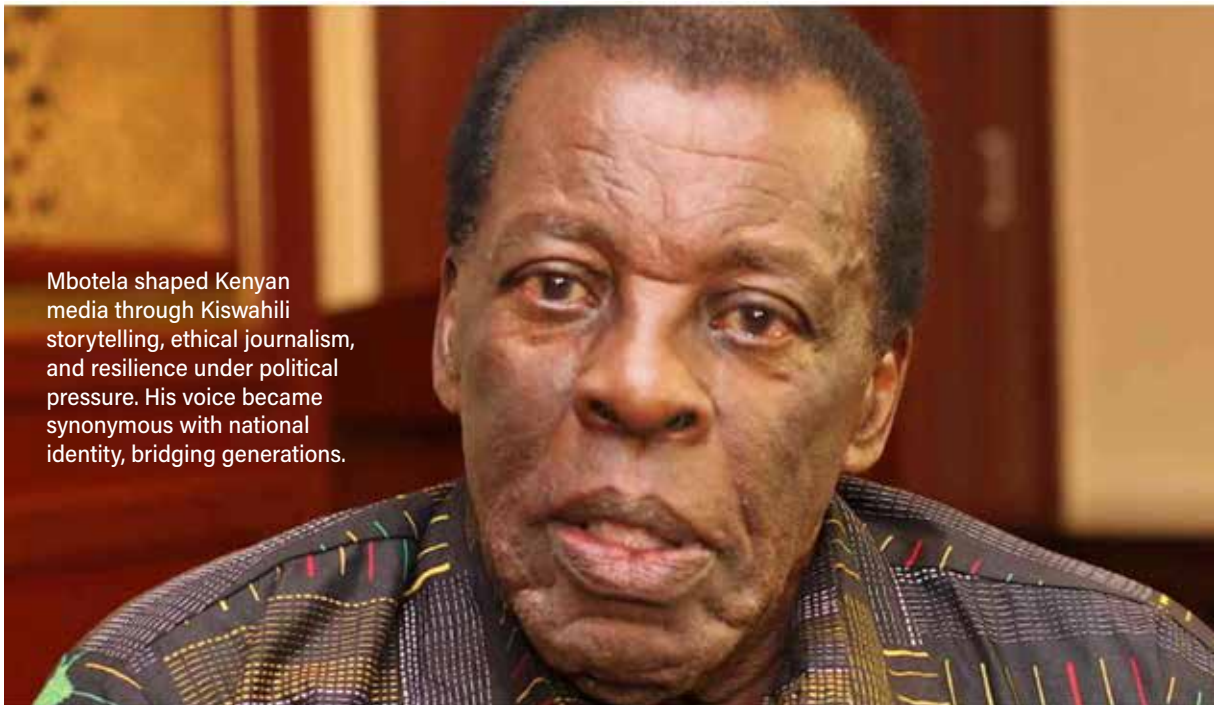
Coming from a family that valued education and hard work Mbotela's parents, like many of their generation, had an understanding of the importance of progress in both the educational and social spheres. Leonard was encouraged to excel and sought to learn about the world beyond the borders of his home village. A brilliant student, he would later attend some of the best schools in Kenya, which helped cultivate his talent for language and communication. Even in his school days, his friends and mentors often noticed his natural ability to command attention, a skill that would later help him become one of Kenya's most prominent broadcasters.

While his upbringing was deeply rooted in the values of respect, family, and community, there was also the realization that Kenya's young independence was a time of uncertainty. The country had only just shaken off the shackles of British colonial rule, and the challenges of building a stable, unified society were enormous.

The Voice of Mbotela

Beyond his role in times of crisis, Mbotela's contribution to Kenyan media was immense. His career spanned several decades, and during this time, he became the voice of an entire generation. As a host of shows, he was able to bridge gaps between different social classes, ethnic communities, and age groups. His show was not just a source of entertainment; it was a forum for discussing societal values, norms, and aspirations. It was a place where listeners could reflect on the meaning of respect, integrity, and responsibility in the context of a rapidly changing society.

His voice had a unique quality: it was authoritative, yet warm, and it carried weight, the sense of belonging that many Kenyans craved. Through his work on radio and television, Mbotela helped define the nature of public broadcasting in Kenya. He brought professionalism and a unique sense of purpose to the medium. It wasn't just about entertaining the masses, rather, about educating them, uplifting them, and offering them a space to reflect on their identities as Kenyans.



Mbotela shaped Kenyan media through Kiswahili storytelling, ethical journalism, and resilience under political pressure. His voice became synonymous with national identity, bridging generations.

Mbotela's professionalism was evident in his ability to pivot from entertainment to serious news coverage without losing the respect of his audience. Whether it was discussing the political landscape, social issues, or the achievements of Kenyan athletes, Mbotela's insight and perspective were unmatched. He was a constant presence in the lives of Kenyans—one who could always be relied upon to offer an honest, balanced, and fair view of the world.

Family and Personal Life

Behind the mic, Leonard Mambo Mbotela was a family man. He was a devoted husband and father, and his family played a central role in his life. Mbotela's wife, children, and extended family were always a source of pride and inspiration for him. Despite his fame and the demanding nature of his work, Mbotela always made time for his loved ones. His personal life, though often kept out of the public eye, reflected his values of humility, integrity, and service. His family was always supportive of his career, and they understood the sacrifices that came with his role in the public eye. Mbotela was a man who believed in the importance of family unity and shared values. In his book, Mbotela often speaks about how his family's encouragement had been pivotal to his success, noting how his wife and children were not just supporters, but true partners in his journey.

Conclusion

Leonard Mambo Mbotela's new book, offers readers an intimate look into his life, career, and the historical context that shaped his views. It's a poignant reflection on a life spent serving the people of Kenya through the power of media.

Leonard Mambo Mbotela's book is way more than you imagine, It is actually a tribute to the people who helped shape him, the country that gave him a platform, and the lessons he learned along the way. It's a testament to his enduring commitment to authenticity, truth, and social justice. Through his writing, Mbotela offers insights into the changes in Kenyan media, politics, and society over the years, offering readers a unique perspective on a transformative period in the country's history Including slavery, Christianity, and colonialism. I can confidently tell you, get the book, its value for money.

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