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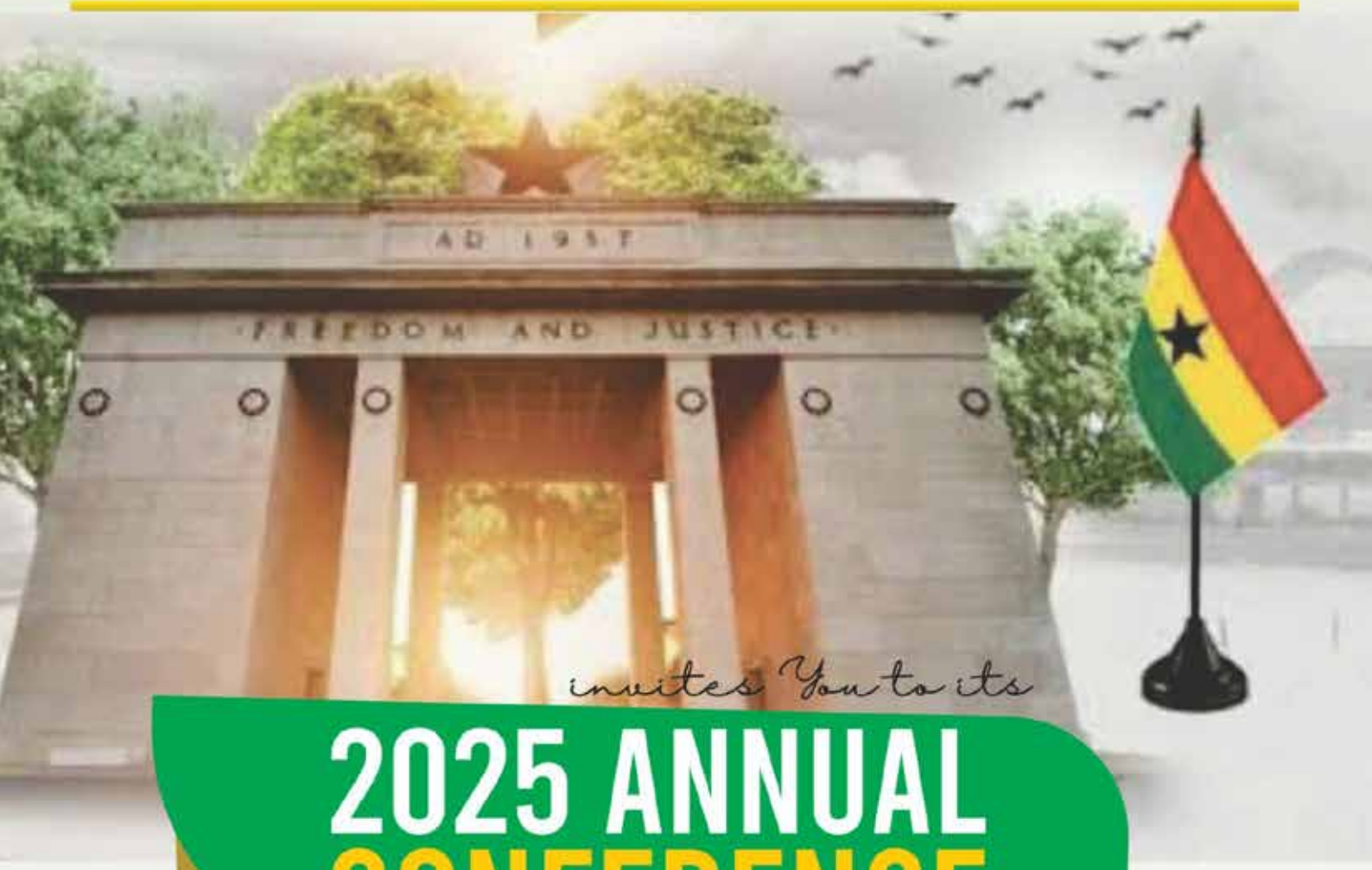

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EDITORIAL

Government by gunfire: Ruto's war on dissent

Kenya's youth have recently emerged as pivotal agents of political and social change, especially evident in the 2024–2025 Gen Z-led protests against government policies. These protests are part of a growing wave of digital-era youth activism and signal a fundamental shift in how civic engagement unfolds in Kenya.

Youth in Kenya are being taught a brutal civics lesson: speak up and risk a bullet. This is not misfortune at the margins. It is the governing logic of a presidency that treats dissent as an enemy operation and outsources its suppression to police and proxies. The evidence is not abstract. It is counted in bodies, hospital beds, and televised orders. In 2024, Kenya's national rights commission recorded 39 people killed and 361 injured during the finance bill protests. Those figures were not disputed by the state; they were posted by it. The message landing on Nairobi's streets since then is simple and chilling. Protest, and the state will make an example of you.

Put names to the arithmetic. In June 2024, 29 year old Rex Kanyike Masai was shot during a demonstration against punitive taxes. One year later, court proceedings are still piecing together which officer pulled the trigger, but the arc is clear enough: a young Kenyan lies dead because lethal force became routine crowd control. The inquest has already exposed irregularities in the handling and movement of police weapons. That is how impunity looks on paper. On the street it looks like blood on the tarmac and a family left to bury a son.

Fast forward to June 25, 2025, the first anniversary of the parliament storming.

Rex Kanyike Masai stands as a symbol of the risks Kenyan youth face when exercising constitutional rights. His death—and the unresolved justice surrounding it—raises urgent questions about state violence, citizen protection, and the health of constitutional rule in Kenya. Accountability requires not just investigation but action.

By nightfall, rights monitors and wire services agreed on one thing: a new round of deaths, most at police hands. Depending on the source, the toll that day ranged from eight to nineteen to sixteen, with hundreds more injured. Two weeks later, Kenya's own commission reported at least 31 deaths linked to the subsequent Saba Saba actions. The exact number matters less than the direction of travel. The state met the country's youngest citizens with rifles and batons, then argued over the body count.

The president's podium did not moderate the violence. It ratified it. On July 9, President William Ruto said looters and arsonists should be shot in the leg. That is not a slip. It is an operating instruction dressed up as toughness, heard by field commanders as permission. When a head of state narrates incapacitation by gunfire as the default answer to disorder, the transition from order to carnage is not a bug. It is the plan.

The death of Albert Ojwang has become a powerful symbol of Kenya's ongoing struggle with police brutality and state repression. It has deepened public resolve—especially among youth—to demand constitutional accountability, institutional reform, and protection of civic rights.

Worse, the government's security playbook now mingles police with paid muscle. Reporting from Nairobi has traced the presence of hired goons working alongside or in the shadow of police to beat and scatter crowds. This hybrid repression blurs accountability and deepens fear because citizens cannot tell where the state ends and criminal violence begins. The point is precisely that they should not. It keeps people at home. It curdles hope. It warns a generation that the price of voice is pain.

Consider Albert Ojwang, the teacher and blogger who died after police custody. After public outrage, authorities moved to charge officers. Activists immediately called it scapegoating. They have lived this cycle: deny, delay, sacrifice a constable, save the chain of command. Meanwhile, the protests grow younger, poorer, angrier. The government calls that chaos. It is accountability in formation, and it is being met with death.

This is the Ruto record: a fortress state built on the bodies of its children and defended with euphemisms. History will file it not under reform but brutality with a smile.

Serial Killer President? Ruto's Doomsday Reign, Youth Slaughter, and the Capitulation of Kenya's Courts and Parliament

By Miracle Okoth Mudeyi

President William Ruto

Abstract

The Constitution of Kenya 2010 pledged life, dignity, and peaceful protest. Fifteen years later, the promise lies beside the bodies of young people shot on Nairobi's streets. Since President William Ruto took office in 2022, he has presided over what amounts to a state-run killing spree. At press briefings he instructs officers to "shoot the legs," a euphemism that often delivers fatal torso wounds. Cabinet Secretary Kipchumba Murkomen echoes the call, urging police to "open fire." Under Ruto's command, crowd control has become an execution ritual. Officers fire live rounds, at chest height, raid homes before dawn to seize perceived protest organisers, and simply ignore habeas corpus orders. Station commanders accumulate contempt citations, three, sometimes four, without arrest or sanction. Magistrates deepen the harm by setting cash bail far above the statutory fines for minor assembly offences, effectively criminalizing poverty. Medical examiners detail crushed limbs and ligature scars on detainees who reappear weeks after abduction, proving torture with clinical precision. All these is against youthful protestors whose only weapon of retaliation is a harmless mobile phone camera.[1]

Parliament no longer checks this violence; it amplifies it. Several members of the parliament have stood on rally stages and repeated Ruto's call for open execution of "rioters." Two draft Bills tabled in 2024 sought to amend the Public Order Act by outlawing all gatherings without a police permit and raising penalty fines to millions of shillings, a direct strike at the constitutional right to assemble. When police gunfire turns deadly, the House approves emergency security budgets within days and shelves motions for independent inquiries. Members who march with citizens are stripped of committee seats or their security is quickly withdrawn. High

[1]Otieno Godfred Ohndyl, 'Social Media Is the New Front of Shaping Public Opinion in Developing World: Case of July 2024 Gen Z Protests in Kenya' (2025) 4 International Journal of Geopolitics and Governance 83.

Court judges issue stern declarations, yet without custodial power commanders ignore them, and the rule of law stops at the station gate. This piece argues that Ruto himself is the hinge on which the machinery of repression turns. His public directives, executive budgets, and political whip-lines create an inverted rule of law where rights are suspended by presidential fiat, police act with guaranteed impunity, courts speak without enforcement, and Parliament bankrolls the carnage. Until that personal chain of command is broken, youthful dissent in Kenya will remain a wager with death.

Introduction

The Constitution of Kenya emerged from the blood-stained ruins of the 2007–08 post-election violence and promised a definitive rupture with authoritarianism.[2] The Constitution was born of carnage and compromise.[3] It opened with an exhortation- *"EXERCISING our sovereign and inalienable right to determine the form of governance of our country"*—and then entrenched life (Article 26), dignity (Article 28), freedom from violence (Article 29) and, crucially, the right to assemble peaceably and unarmed (Article 37). The Bill of Rights entrenched the right to life[4] and, with almost lyrical fervour, proclaimed that every Kenyan may assemble, demonstrate, picket and petition "peaceably and unarmed." Yet between March 2023 and July 2025 police and paramilitary units fired live ammunition at demonstrations in Nairobi, Nyeri, Rongai and many other towns in Kenya, leaving 233 dead, 1076 injured and 91 officially recorded 'missing'. Every independent body, the Kenya National Commission on Human Rights (KNCHR), the Independent Policing Oversight Authority (IPOA), the Law Society of Kenya (LSK), Amnesty International, has pleaded for accountability. None has been heeded. This paper makes a stark claim: Kenya is witnessing a systemic inversion of the rule of law in which the constitutional guardians, Parliament and the courts, have become executors or apologists for presidentially directed violence.

The bloody post-election clashes of 2007-08, 1,133 deaths, half a million displaced, had revealed the moral bankruptcy of what Kenyans ruefully called *"the paper Republic"*: a web of polished statutes masking an entrenched, personalised state.[5] In the referendum of August 2010,[6] the electorate answered that crisis with uncharacteristic unanimity, approving a charter that rearranged the architecture of power and, crucially, enshrined an expansive Bill of Rights.[7] Life, dignity, bodily integrity and the liberty to assemble "peaceably and unarmed" were hoisted above ordinary politicking, ring-fenced from the vagaries of partisan majorities.[8] The promise was less that the new dispensation would be perfect than that it would never again permit the

[2]Elizabeth A O'Loughlin, 'Kenya's Constitution in a Global Context' (2017) 15 International Journal of Constitutional Law 839. Also see; Beth Elise Whitaker and Jason Giersch, 'Voting on a Constitution: Implications for Democracy in Kenya' (2009) 27 Journal of Contemporary African Studies 1.
[3]Eric Kramon and Daniel N Posner, 'Kenya's New Constitution' (2011) 22 Journal of Democracy 89.
[4]John Osogo Ambani and Morris Kiwinda Mbondenyi, 'A New Era in Human Rights Promotion and Protection in Kenya? An Analysis of the Salient Features of the 2010 Constitution's Bill of Rights' [2015] SSRN Electronic Journal.
[5]Andrew M Linke, 'Post-Election Violence in Kenya: Leadership Legacies, Demography and Motivations' (2020) 10 Territory, Politics, Governance 1.
[6]United Nations, 'Kenya: UN Welcomes Successful End of Referendum on Constitution' (*UN News6* August 2010) <https://news.un.org/en/story/2010/08/347072> accessed 14 July 2025.
[7]Edward Ontita, 'Governance and Social Protection: A Case of the Constitution Kenya 2010 as an Instrument for Social Protection' (2018) 6 Public Policy And Administration Review.
[8]John Mukuna and Melvin LM Mbao, '"We the People:" on Popular Participation and the Making of the 2010 Constitution of Kenya' [2014] Mediterranean Journal of Social Sciences.
[9]See John Mukum Mbaku, 'Kenyan Protesters Have Taken to the Streets in Their Thousands – What the Law Says about Their Rights' (*The Conversation*24 June 2024) <https://theconversation.com/kenyan-protesters-have-taken-to-the-streets-in-their-thousands-what-the-law-says-about-their-rights-233072> accessed 11 July 2025.

casual weaponisation of state violence against citizens whose only sin was dissent.[9]

Empirical Anatomy: Killings, Disappearances, Torture – The Charge against President William Ruto

The spike in repression is no statistical fluke. It tracks, instead, an identifiable chain of command and a discernible pattern of law-making. In July 2023, as the first cost-of-living demonstrations gathered momentum, the then Interior Cabinet Secretary Kithure Kindiki stood before cameras and announced that *"illegal assemblies will be neutralised with all means necessary."*[10] Four days later the Cabinet Secretary for Roads, Kipchumba Murkomen, urged officers to *"open fire"* on anyone breaching police cordons around critical infrastructure. Both statements were televised; neither was disavowed by State House. Live ammunition was indeed discharged, first in Kisumu in July 2023, where sixteen people were killed,[11] and then in Nairobi on 3 April, when an unarmed third-year university student was fatally shot through the eye while recording events on his phone.[12]

The law in Kenya does not require a signed kill order to pin liability on a superior; knowledge can be inferred from circumstances.[13] President Ruto's public pronouncements supply those circumstances.

Between June 25th 2024 and 10th July 2025, young protesters were met with the full force of Kenya's brutal police. A video surfaced of hawker Boniface Kariuki being shot in the head, leaving viewers trembling in disbelief. The streets were littered with

Cabinet Secretary for Roads, Kipchumba Murkomen

the lifeless bodies of youth, their blood spilling onto the tarmac, merging with the asphalt in a horrifying display of violence. Mothers screamed in anguish, their cries raw and unrelenting, while fathers desperately held their children close, as if trying to protect them from the terror unfolding around them. In just three weeks of protests, young lives were violently taken, and others were left wounded, their bodies bearing the marks of a relentless, uncaring state.

On 9 July 2025, the day after police killed thirty-one protesters, Ruto congratulated officers for "textbook restraint" and reiterated that they should "disable at the knee joint so they cannot run". He issued no disciplinary directives despite IPOA's tally of fatalities. Under the

[10]Apofeed, 'Kenya: Officials Threaten Protesters with Violence' (*African Business*18 July 2023) <https://african.business/2023/07/apo-newsfeed/kenya-officials-threaten-protesters-with-violence> accessed 25 July 2025.
[11]Angeline Ochieng, 'Police Brutality: Death Toll in Kisumu Anti-Government Protests Reaches 16' (*Daily Nation*29 July 2023) <https://nation.africa/kenya/counties/kisumu/police-brutality-death-toll-in-kisumu-anti-government-protests-reaches-16-4320366> accessed 28 June 2025.
[12]Nyagoah Tut Pur, '"Unchecked Injustice"' (*Human Rights Watch* 25 November 2024) <https://www.hrw.org/report/2024/11/25/unchecked-injustice/kenyas-suppression-2023-anti-government-protests> accessed 25 June 2025.
[13]See generally the application of this doctrine in the High Court decision in *Kenya Human Rights Commission & 8 others v Nchebere; Law Society of Kenya & 2 others (Interested Parties) [2024] KEHC 16607 (KLR)*

On June 17, 2025, Boniface Kariuki, a 22-year-old face-mask hawker, was walking away during protests in Nairobi's CBD when he was shot at point-blank range in the head by a police officer in riot gear

Rome Statute, domesticated by Kenya's International Crimes Act 2009, a superior is criminally liable when he knew or, owing to the circumstances, should have known that subordinates were committing crimes and failed to prevent them. Ruto chairs the National Security Council and personally presided over Cabinet sessions that approved expanded crowd-control budgets. Cabinet colleagues echoed his shoot-to-disable mantra on television and in Parliament. The absence of corrective measures, combined with forward-looking procurement and repeated redeployment of the same lethal units, satisfies the "should have known" standard and underscores a policy of repression rather than episodic indiscipline. Critics sometimes object that applying international-criminal concepts to domestic protest policing is melodramatic. Yet the legal threshold is not whether protests are messy or even violent in parts; it is whether the state response is widespread or systematic and directed at a civilian population. Kenya's casualty numbers, geographic spread, and twenty-four-month duration meet that test. Moreover, the victims are overwhelmingly young and poor, a demographic that does not threaten state survival in any military sense. The objective appears to be deterrence through terror, not restoration of order. Repression has already boomeranged politically.

Each killing becomes a viral hashtag that recruits fresh protesters. The deaths of blogger Albert Ojwang, and hawker Boniface Kariuki, among others this year produced peaks in TikTok and X engagement, translating into larger crowds within days. Kenya's demographic pyramid sharpens the risk. Two thirds of citizens are under thirty-five and spend a median of three hours per day online. Heavy-handed policing has closed electoral and parliamentary channels for grievance, leaving the street as default forum. Without accountability the state will remain locked in an escalating contest with its own future workforce. Until all three arms of government are forced back

inside constitutional guardrails, Kenya will drift farther from the 2010 promise that every citizen may "assemble, demonstrate, picket and petition" without risking a bullet through the heart.

Ruto cannot wash his hands of these deaths. Human rights monitors attribute at least 31 killings to police during the 2023 protests, with no successful prosecutions by late 2024.[14] KNCHR confirmed 39 protest deaths by 1 July 2024, then publicly revised the tally to 50 by mid-July. In 2025, sixteen people were killed on 25 June, and Saba Saba two weeks later left 31 more dead. Faced with this surge, the President praised police and told them to "shoot in the legs" to incapacitate protesters, a directive reported the day after 31 people were killed.[15] The numbers, the spread across counties, the two year duration, and the President's own words satisfy the "should have known" inference. On this record, responsibility fixes at the apex. History will remember William Ruto as a killer president unless accountability breaks the chain.

Ruto's kill record

Rights bodies and major newsrooms have traced a clear pattern of lethal force against protesters during President William Ruto's tenure. In 2023, Amnesty International and Human Rights Watch reported at least 31 people killed during the March to July demonstrations, with no successful prosecutions by late 2024. In 2024, the Kenya National Commission on Human Rights confirmed 39 deaths linked to the Finance Bill protests by 1 July, then updated the figure to 50 by mid July as hospital and mortuary records were reconciled. In 2025, the 25 June anniversary protests left about 16 people dead nationwide, and Saba Saba on 7 July rose to roughly 31 deaths within twenty four hours. A civil society joint statement issued on 11 July placed confirmed deaths at at least 38 across more than twenty counties, with verification still ongoing.

The ledger is anchored by names and dates. In 2024, widely reported victims include Rex Kanyike Masai, shot on 20 June in Nairobi; Evans Kiratu, who died after being struck by a launcher canister around 22 June; Eric Shieni and David Chege, both killed near Parliament on 25 June; Abdi Kadir, 24, who succumbed on 16 July after a June shooting; and 12 year old Kennedy Onyango, shot in Ongata Rongai. In 2025, the roll of the dead includes 12 year old Bridget Njoki, killed by a bullet that entered her family's sitting room in Githunguri, Kiambu, and Joseph Kagiri, 24, later buried in Ndeiya after being shot during Saba Saba operations around the Ngong–Embulbul–Kiserian corridor. These names stand for dozens more recorded in Nairobi, Kiambu, Kajiado, Nakuru, Bungoma, Mombasa, Eldoret, Narok, and Kisumu.

Accountability has lagged behind the body count. Amnesty and Human Rights Watch recorded no successful prosecutions for the 2023 killings by late 2024. KNCHR's 2024 and 2025 updates point to ongoing verification rather than closure. Command responsibility principles in the International Crimes Act of 2009 make superiors criminally liable where they knew or, given the circumstances, should have known of crimes by subordinates and failed to prevent them. Ruto chairs the National Security Council, his Cabinet approved expanded crowd control budgets, and senior officials publicly urged force. Taken together, the casualty numbers, the geographic spread,

[14]Nyagoah Tut Pur, '"Unchecked Injustice"' (*Human Rights Watch*25 November 2024) <https://www.hrw.org/report/2024/11/25/unchecked-injustice/kenyas-suppression-2023-anti-government-protests> accessed 22 July 2025.
[15]Reuters Staff, 'Kenya's President Orders Police to Shoot Violent Protesters in the Leg' *Reuters* (9 July 2025) <https://www.reuters.com/world/africa/kenyas-president-orders-police-shoot-violent-protesters-leg-2025-07-09/> accessed 27 July 2025.

PHOTO BY LUIS TATO / AFP

A protester walks past a burning barricade made of tyres during clashes with Kenya police officers at Saba Saba Day demonstrations in Nairobi on July 7, 2025.

and the duration support the inference of a policy choice rather than episodic excess.

Chamber of carnage: Kenya's parliament signs the death warrants of its own citizens

The National Assembly was designed to be the people's sentry. Article 95 of the Constitution tasks it with representing the citizenry, legislating, and, crucially, overseeing every other State organ, including the security sector. In practice, the Thirteenth Parliament has inverted that mandate. Instead of interrogating executive violence, it has funded, rationalized, and legally fortified the worst crackdown on civic dissent since the Moi era.

The Assembly, Demonstration, Picketing and Petition Bill 2024

If the budget paid for repression, the Bill sought to clothe it in legality. Clause 7(2) introduces a mandatory 72-hour notification rule, criminalizing failure with a one year custodial sentence. Clause 11 forbids "any apparel or device that obscures facial identification", a clause broad enough to criminalise surgical masks and motorcycle helmets. Clause 12 imposes joint-and-several civil liability on organisers for "any injury or damage, irrespective of causation". Each clause collides head-on with Article 37 of the Constitution , the ICCPR, and the ACHPR Guidelines on Assembly, which reject strict liability and insist that restrictions be demonstrably necessary and proportionate.

Why this matters constitutionally

The Assembly's capitulation erodes two constitutional guard-rails. First, the power of the purse was intended as a lever to discipline the executive. By rubber-stamping military style outlays, Parliament forfeits that leverage and normalises lethal crowd control as routine expenditure. Second,

robust deliberative procedure is central to Kenya's concept of public participation. Rushed votes, gagged minority voices, and the sidelining of committee scrutiny hollow out that deliberative promise.

Judiciary on the Back-Foot: Formalism over Freedom

The Supreme Court's Original Sin

The judiciary, once lionised for its 2017 annulment of a presidential election, has likewise drifted into self-protective minimalism. In *Hussein Khalid v Attorney General* (2019) eKLR[16] the Supreme Court upheld colonial offences of "riot" and "breach of peace," managing to cite the Constitution's limitation clause without actually applying its proportionality test.[17] That decision, rarely invoked during the Kenyatta years, has become the default prosecutorial tool against the post-2022 protest movement: by mid-2025 some 783 demonstrators had been arraigned on the very counts validated in Khalid. It is worthy to note that Supreme Court declined to stop the prosecution of persons who were arrested, detained and charged after participating in demonstrations.

The petitioners in *Hussein Khalid v Attorney General* asked whether prosecuting them for "riot," "unlawful assembly," and "offensive conduct" after the Occupy Parliament protest could stand with the Bill of Rights. They attacked Penal Code sections 78(1)–(2) and 94(1), and the courts assessed the Public Order Act's Part III provisions, namely sections 32, 33 and 36. The Supreme Court affirmed the Court of Appeal, declined to halt the prosecutions, and upheld the impugned provisions. It did so by treating "breach of the peace" as adequately defined through precedent and by pushing most objections to the trial stage, warning that "blanket" facial attacks on the statutes are overreaching. It further endorsed limits on assembly where there is a clear, present or imminent danger to public order and cast the right as protectable only when peaceable and unarmed. The result is a process heavy deference that avoids robust facial review under Article 24, leans on case law to cure vagueness, and leaves colonial public order offences intact. That reasoning privileges deference over rights and casts a chilling criminal shadow over peaceful protest.

The doctrinal consequences of *Hussein Khalid* are profound. Every protest-related charge sheet filed since March 2023 cites the very offences the Supreme Court refused to strike. Police arrest first and sort the facts later, knowing that the most powerful bench in the Republic has blessed their legal arsenal. The decision therefore operates as a permission slip for repression, not merely an isolated misstep.

Habeas corpus in the High Court: from great writ to procedural cul-de-sac

When enforced disappearances surged after the June 2024 parliamentary shootings, public-interest lawyers resurrected habeas corpus. The writ, once a sharp tool for liberating detainees, has dulled under High-Court stewardship. After the June 2024 shootings, public interest lawyers reached for habeas corpus. In *Law Society of Kenya v Inspector General*,[18] the High Court first showed resolve. It convicted the then Acting Inspector General for contempt, imposed six months' imprisonment, and suspended the sentence for seven days so that he could purge the contempt by complying with habeas corpus orders for three Kenyans

[16]Khalid & 16 others v Attorney General & 2 others [2019] KESC 93 (KLR

[17]Walter Ochieng, 'The role of domestic courts in curbing democratic regression through the protection of freedom of assembly and right to demonstrate: A case study of judicial approaches in Kenya and South Africa' in Laura-Stella Enonchong and others (eds), *Democracy in Africa: Regression and Resilience* (Juta 2022) 38–55.

[18]Law Society of Kenya & 3 others v Inspector General of Police & 4 others (Petition E436 of 2024) [2024] KEHC 10995 (KLR).

who had not been produced. The Court framed this as a coercive measure, not a punitive one. Then came the turn. The contemnor appeared, offered an apology, and the Court credited his contrition as genuine, declaring that his conduct had restored the dignity of the Court and the due administration of justice. Leaning on "purging" doctrine and its inherent power to pardon, the Court set aside both conviction and sentence, and noted that the three Kenyans had been found. The message was unmistakable. Contempt that had drawn a custodial sentence was washed away by an apology the Court deemed sincere, with accountability yielding to contrition in a case that began with enforced disappearance allegations.

The quiet complicity of the Magistrates' Courts

Unfortunately, the magistracy has not been a neutral referee; it has become the favoured midfield through which the executive advances its game against the Constitution and the people. Courts have entertained incitement-to-violence charges against a protester whose only offence was chanting "Ruto must go," a slogan plainly protected as political speech. They have rejected state requests for custodial detention yet then imposed cash bail of KSh 300 000 on the very same defendants, a figure thirty times the statutory ceiling and far beyond the reach of boda-boda riders and students who make up the bulk of the protest movement. In the most egregious instance, a magistrate assessed a protest organiser at a bond of KSh 10 million with no cash option, effectively jailing him pre-trial even though the Public Order Act caps punishment at six months or a fine of KSh 10 000.[19] Such orders are routinely justified as necessary to ensure attendance or prevent further unrest, but the true effect is to supply President Ruto with what Moi once extracted from the Nyayo House torture chambers: silence born of fear. A charge sheet heavy with exaggerated counts, a weekend arrest that guarantees at least two nights in remand, and ruinous bail terms together achieve what batons and waterboarding once did, only now with the veneer of legality. Even when these cases are eventually dismissed the damage has been done, dissent has been chilled and the judiciary has licensed the suppression. In short, what should be the last bulwark against executive overreach has, by inertia or quiet collusion, become the courtroom analogue of the rubber bullet and the tear-gas canister.

Against this backdrop, the events of 25 June 2024 and 7 July 2025 stand out less as aberrations than as the logical crescendo of an unbroken chain. On the first date, tens of thousands marched on Parliament to protest a Finance Bill that would have slapped eco-levies on everything from second-hand clothes to mobile-money transfers.[20] Snipers on the roof of Continental House felled twenty-three people in under ninety minutes.[21] President Ruto withdrew the Bill the next day—a tactical retreat—while simultaneously authorising what Interior Ministry memos called "targeted arrests." In reality, forty-three activists disappeared that week alone, many resurfacing with water-boarding injuries; eighteen were never seen again.[22]

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[19]Joshua Nyawa, 'Criminal Lawfare and Judicial Complicity: Ruto's New Authoritarian Toolkit' (*Wordpress.com* 13 July 2025) <https://joshuamalidzonyawa.wordpress.com/2025/07/13/criminal-lawfare-and-judicial-complicity-rutos-new-authoritarian-toolkit/> accessed 14 July 2025.

[20]Communications ACLED, 'Anti-Tax Demonstrations Spread Nationwide and Highlight Kenya's Structural Challenges - July 2024' (*ACLED*19 July 2024) <https://acleddata.com/2024/07/19/anti-tax-demonstrations-spread-nationwide-and-highlight-kenyas-structural-challenges-july-2024/> accessed 14 June 2025.

[21]Human Rights Watch, 'Kenya: Security Forces Abducted, Killed Protesters' (*Human Rights Watch*6 November 2024) <https://www.hrw.org/news/2024/11/06/kenya-security-forces-abducted-killed-protesters> accessed 14 July 2025.

[22]Bertram Hill, 'Kenya Parliament Protests: BBC Identifies the Security Forces Who Shot at Anti-Tax Protesters' *The British Broadcasting Corporation* (28 April 2025) <https://www.bbc.com/news/articles/c8jexr9yv0do> accessed 14 July 2025.

Exactly a year later on 25th June 2025, youth collectives marked the massacre's anniversary with the rallying call for seeking justice for the state sanctioned murders against the young people. Amnesty confirmed sixteen new fatalities; police acknowledged over five hundred arrests.[23] Eleven days on, Kenya commemorated Saba Saba, the historic day in 1990 when citizens first cracked the one-party edifice. This time the commemoration turned into a referendum on Ruto's rule: KNCHR documented thirty-one deaths and over a hundred gun-shot injuries in twenty-four hours.[24] At dawn on 9 July the President appeared on national television and congratulated police for their "valor," wording that might have come from a military after-action report. He then offered an instruction that history will repeat long after the minute-books of his administration fade: *"Shoot the legs."*[25]

"Ruto's Reign" has become a phrase loaded with meaning — for many Kenyans, it encapsulates a time marked by economic hardship, state repression, and rising youth defiance. Here's a breakdown of the phrase as it's currently understood by critics, activists, and especially Kenya's Gen Z generation.

Conclusion

Kenya's future now turns on a moral hinge. For three years the State has answered economic despair with gunfire, and each volley has boomeranged, deepening the rage that fuels the next march. Constitutions do not die in a single coup; they bleed out through everyday cowardice: a budget rubber-stamped, a bench that sidesteps proportionality, a shrug at an open grave. Yet the same institutions that enabled this spiral hold the tools to reverse it. Parliament can starve impunity of funds, courts can slam the proportionality gate on lethal policing, IPOA can press a single case to conviction and shatter the myth of untouchable uniforms. The moment demands intestinal fortitude, not reform by press release. History's ledger is brutal with collaborators, generous with dissenters who refused to keep silent. If Kenya's leaders choose expediency again, the republic will calcify into a serial-killer state, one bullet at a time. If they choose constitutional courage, the names etched on morgue tags, Rex Maasai, Nyambura Wanjiku, dozens more, may yet become the martyrs who forced a nation to honour its own charter. On that choice, made in the next budget vote, the next High Court ruling, rests nothing less than the right of every Kenyan youth to walk a street where protest is not a death sentence.

Miracle Okoth Mudeyi is a lawyer and an editor at this publication.

[23]Al Jazeera, 'Sixteen Killed, Hundreds Injured, in Anti-government Kenyan Protests' (*Al Jazeera*25 June 2025) <https://www.aljazeera.com/news/2025/6/25/thousands-rally-in-kenya-to-mark-anniversary-of-antitax-demonstrations> accessed 14 July 2025.
[24]Daniel Mule, 'Update on the Saba Saba 2025 Demonstrations' (*Kenya National Commission on Human Rights* 8 July 2025) <https://www.knchr.org/Articles/ArtMID/2432/ArticleID/1232/Update-on-the-Saba-Saba-2025-Demonstrations> accessed 14 July 2025.
[25]Wycliffe Muia, 'Kenya's Saba Saba Protests: President William Ruto Orders Police to Shoot Rioters Targeting Businesses in the Legs' *The British Broadcasting Corporation* (9 July 2025) <https://www.bbc.com/news/articles/c9dgv5e6447o> accessed 14 July 2025.

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REPUBLIC OF KENYA

JUDICIARY

STATEMENT ON RESPECT FOR COURT ORDERS AND THE RULE OF LAW

My attention has been drawn to the deeply regrettable events that transpired today during the ongoing Kenya National Drama Festival in Nakuru, involving students from Butere Girls High School.

It is particularly disturbing that these events occurred against the backdrop of clear and binding court orders issued by the High Court sitting in Kisii, in *Anifa Mango v Principal, Butere Girls High School & 3 Others, Petition No. E006 of 2025*. In that decision, delivered on 3rd April 2025, the High Court directed the school administration and the organisers of the Kenya National Drama Festivals to facilitate and ensure that 50 students of Butere Girls High School participate in and perform their play titled *'Echoes of War'* at the national drama festival.

What transpired today raises grave concerns about the extent to which those orders of the High Court were respected and complied with. It is a foundational principle of our constitutional democracy that all persons and institutions — including State organs, State officers, and public officials — are bound by and must obey court orders. Defiance of court orders not only undermines the authority of the courts but also poses a serious threat to the rule of law, which is the bedrock of our society.

Even more troubling are reports of the use of force and violence against school-going children in the course of these events. Such actions raise serious constitutional questions about respect for the dignity, rights, and welfare of children, who enjoy special protection under the Constitution, the Children Act, and international human rights instruments.

I wish to make it clear to all state organs, state officers and public officers that respect for court orders is not optional. It is a constitutional imperative that safeguards our collective commitment to the rule of law, and constitutionalism. Any deviation from this path erodes public confidence in our institutions and poses a danger to our democracy.

I therefore condemn today's events as they deviate from path of the rule of law and constitutional duty to protect the rights of all — especially our children — in every sphere of public and private life.

Hon. Justice Martha K. Koome, EGH
Chief Justice and President of the Supreme Court of Kenya

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THE COURT'S IRON WALLS

When the Judiciary Builds Walls, Not Bridges

When the Kenyan judiciary builds walls instead of bridges, it loses its constitutional soul and moral authority. The Constitution of Kenya (2010) envisioned a judiciary that would transform society, not entrench privilege. Whether in failing to address police brutality, being slow in ruling on electoral justice, or ignoring the plight of marginalized communities, the judiciary can—intentionally or not—alienate itself from the people.

By Gitobu Imanyara

In the face of a rising tide of citizen unrest, Kenya's judiciary is retreating. Not into reflection and reform, but into defensiveness and detachment. Public criticism of punitive bail terms has been met not with introspection, but indignation. Judicial officers whose decisions have life-altering consequences are behaving as if they are beyond reproach. This is dangerous. Because when courts stop listening, citizens stop believing. And when legitimacy crumbles, justice becomes a shell of itself.

There is a growing sense across the country that bail and bond decisions are no longer anchored in fairness, precedent, or proportionality. They appear arbitrary, inconsistent, and at times deliberately punitive, especially when applied to protesters, activists, and dissenters. And as more Kenyans are slapped with exaggerated bail conditions for merely exercising their constitutional right to demonstrate, a fundamental question must be asked: whose judiciary is this?

The Judicial Service Commission (JSC) and senior judges must understand one thing clearly: the judiciary is not a sacred shrine. It is not a temple immune to scrutiny. It is not a deity before whom citizens must kneel in

When young Kenyans are punished for exercising constitutional rights, while the corrupt walk free, the judiciary sends a clear message: Justice is not neutral. In such moments, it doesn't just build a wall—it becomes one.

silence. It is a public institution, funded by the people, empowered by the Constitution, and accountable to both.

When the public protests bail decisions that make no sense, like demanding Ksh 500,000 for a protester or denying bond to a student arrested during a demonstration, it is not an attack on the judiciary. It is feedback. It is civic engagement. It is democracy at work.
To label this feedback "unwarranted" is to misunderstand the moment and misdiagnose the problem. The people are not enemies of the judiciary. They are its clients. And right now, the clients are dissatisfied.

Justice, at its core, must be seen to be done. But when two similar cases receive wildly different bail terms or when protest-related charges are met with conditions harsher than those given to corruption suspects, something is clearly wrong. Kenyans are not blind. They can see the inconsistency. They can feel the bias. And they are right to be outraged.

Consider recent events: peaceful Gen Z protesters charged with "unlawful assembly" are handed bail terms equivalent to hardened criminals. Students arrested with nothing but placards and slogans are treated as national threats. Meanwhile, politicians accused of inciting violence, stealing public funds, or undermining institutions continue to walk free on cashless bonds and endless adjournments. This contradiction is glaring. It undermines the moral authority of the judiciary. It creates the perception, whether real or not, that the courts are being weaponised against dissent, and that certain judges are only too willing to play along.

The Return of Judicial Subservience? The conduct of some judicial officers, such as those in Thika Law Courts, has rekindled

The 2017 Supreme Court ruling was a historic high point in Kenya's democratic journey. It showed that courts can build bridges to democracy—not just walls to protect power. In the words of Maraga, it reminded Kenya and the world that the Constitution is supreme, not the president.

dark memories. Many Kenyans still remember the Bernard Chunga era when the judiciary was little more than an appendage of the Executive, serving power rather than justice. We were promised that era was behind us. The 2010 Constitution sought to create an independent, accountable, and responsive judiciary. And for a time, it worked. The Maraga Court's nullification of the 2017 presidential election was a proud moment for judicial independence. But now, it feels like the gains are being reversed. The same old tricks are back: use the police to harass citizens, charge them with vague offenses, and rely on select judges to impose unreasonable bail terms that serve as de facto punishment.

It is a strategy of silencing through the backdoor. And if the judiciary continues to play along, it will not survive the storm of public anger that is coming.

JSC Must Lead, Not Defend. The Judicial Service Commission must abandon its defensive posture. This is not the time for press statements rejecting criticism or condemning social media outrage. It is time for engagement. For soul-searching. For bold corrective action.

Why is there no uniform framework for setting bail across courts? Why are some magistrates imposing punitive terms for minor offenses? Why is there no disciplinary action against judicial officers who clearly abuse their discretion?

These are not rhetorical questions. They are urgent matters that demand action. If JSC does not address them now, it risks losing the confidence of a generation that already feels betrayed by every other institution in the country.

Build Bridges, Not Walls. If the judiciary wants to regain its footing, it must stop building walls of legalese and arrogance. It must build bridges with the people. That means standardising bail guidelines, retraining judicial officers on proportionality and discretion, and affirming in word and deed that protest is not a crime. It also means listening really listening to the concerns of young Kenyans who are increasingly vocal, organised, and unwilling to be silenced. This generation does not want special treatment. It wants fairness. It wants equal justice under the law. Is that too much to ask? The judiciary now stands at a crossroads. It can choose the path of humility, openness, and reform, or it can choose defensiveness, denial, and decline. It can decide to serve the Constitution or bend to the will of the Executive. It can be a guardian of justice or a tool of suppression.

But it cannot be both.

Because when courts become instruments of fear instead of protectors of freedom, when bail becomes punishment, and when criticism is met with contempt, then the people will have no choice but to protest even louder. And that protest, like justice, will not be denied.

Gitobu Imanyara is the Chair Editorial Board and CEO at this publication.

Criminal lawfare and judicial complicity: Ruto's new authoritarian toolkit

By Joshua Malidzo Nyawa

Introduction

Silently, Kenya is witnessing a return to repression, this time round, the batons, teargas and live bullets are backed up by legal briefs and a veneer of constitutionalism. The repression is not only led by the executive arm but also wears a new face, one of legal respectability, or let us just call it for what it is, a judicially sanctioned repression. Today's repression comes dressed in judicial robes and judicial vestments. Whereas Moi openly tortured, detained or abducted his critics most of the time without trial or charged them under Sedition laws, where they were automatically denied bail, Ruto has picked a more sophisticated, more insidious option, clocked in the legal process. Ruto picks criminal lawfare in his authoritarian toolkit and presents his opponents in court. Criminal lawfare is the deployment of the criminal justice system as a weapon to silence dissent. Criminal lawfare falls within the larger scheme of Autocratic Legalism or hybrid Authoritarianism or Abusive constitutionalism, which refer to the use of the law to subvert democracy, to do away with checks and balances, to fight the opposition, to silence any critic and to silence the media.

Ruto's insidious option started with the

Repression in Kenya is both a historical legacy and a current reality. It is practiced through state violence, legal manipulation, digital surveillance, and silencing of dissenting voices. But repression is also met with courageous resistance—especially by youth, women, lawyers, journalists, and community organizers determined to uphold the promise of the 2010 Constitution.

co-optation of the prosecutorial and investigative arms of the criminal justice system (the office of the director of prosecution and the national police service arm), which were meant to be independent. As such, the two institutions, or Siamese twins, have been militarised and are readily deployed to perform the president's desires. These Siamese twins readily arrest critics for laughable charges and apply in court to detain them as they commence investigations or use their favourite terms, national security and public order.

Unfortunately, and regrettably, in all this, the judiciary cannot be said to be an innocent

A Nairobi-based software developer and civic tech activist, Rose Njeri created Civic Email, a digital platform enabling Kenyans to send objections on the Finance Bill, 2025, with a single click. The tool gained swift popularity—especially among youth—for facilitating direct engagement with the legislative process.

bystander. It has indirectly collaborated with the Siamese twins in their iniquitous conduct and allowed them to become 'unruly horses or rapid dogs on the loose'. It is a tragedy that an institution tasked with being the guardian of the Constitution and meant to check the executive's overreach appears increasingly comfortable in playing along. Whether by design, a pro-government attitude of the individual magistrates, inertia, fear or genuine errors, the judiciary has accorded Ruto enough legroom to play around and accorded him an opportunity to win matches against the Constitution and the people. For example, how do you explain a court tolerating a charge of incitement to violence against a protester who chanted *Ruto must go*? How do you explain a court dismissing a state's application to detain arrested persons and proceeding to impose a cash bail of Ksh 300,000? Or that of a protester slapped with a bond of Ksh 10M without an option of bail? Although the court might dismiss the charges at the end of the trial, Ruto would have achieved his objective and instilled fear in any dissident. Although Nyayo torture chambers no longer exist, Ruto achieves his objectives and this time round, with the judicial imprimatur. So what Moi achieved through the Nyayo torture chambers, Ruto achieves in the courts. He hauls critics with exaggerated charges into court to suppress opposition, stifle protest, and maintain control. Therefore, it is the same script with a new cast.

Ruto and Criminal lawfare: From cybercrimes to terrorism offences

Ruto's first two years in office have been marked with significant opposition, especially from the young generation, mostly from his unkept promises. Despite riding on the wave of economic changes, reducing the public debt, creating employment opportunities and stopping the misuse of the criminal justice system, he reneged on these promises. He has taken out more loans and oversaw massive looting and public display of misuse of resources. In 2024, he introduced one of the most draconian finance bills to increase taxes. Kenyans protested against this move both online and offline, and he reluctantly withdrew the bill. However, Ruto has since resorted to criminal lawfare to silence dissents and one of his favourite tools is The Computer Misuse and Cybercrimes Act, 2018.

The Act is a vaguely drafted legislation, leaving judges and prosecutors to determine its contours. The citizens are left in the dark as to what the law demands, and it allows prosecutors to make it up, knowing that the offences are subject to the enforcers' interpretation. Take, for example, the offences of false publication, publication of false information, child pornography, cyber harassment, cybersquatting, and Wrongful distribution of obscene or intimate images. The use of this Act against dissents has been on the rise since the Finance Act protests.

Rose Njeri, a software developer and digital activist, was arrested, and the state wanted to charge her with the offence of 'Unauthorised interference with a Computer system'. Njeri created a tool to simplify

The Ruto administration's misuse of anti-terrorism laws to tame civil protests represents a dangerous departure from constitutional governance. It is a form of legal authoritarianism—cloaking repression in the language of national security. Instead of treating protestors as terrorists, the government should address the legitimate grievances that fuel protest: corruption, economic injustice, lack of youth representation, and impunity.

the process of submitting comments to parliament on a bill following a call for comments from parliament. The tool was just to aid the constitutional requirement of the public participation exercise. It was therefore laughable as to why the state chose to arrest her instead of commending her. Her case is, however, not isolated. The Act has been deployed to silence dissent on social media. It is used by the state to carry out subtle but effective repression through arrests, intimidation, and legally ambiguous enforcement. (see here, here, here, and here).

Moving from the cybercrime offences, Ruto has deployed anti-terrorism laws to tame civil protests. Today, every demonstrator has been labelled by the president as a terrorist and has recently added that they should be shot and later prosecuted. Those who were not shot during the recent protests were quickly arraigned in the Kahawa Law Courts, a specialised criminal court dealing with terrorism related offences. Before this, the anti-terrorism law was rarely invoked and was only used against the Al-Shabaab. However, to use it against protesters is the highest level of desperation from the state. However, the intent is clear: not to obtain a conviction but to silence dissent and deter any protest.

Although hiding under the guise of enforcing the law against those who caused mayhem and burnt down establishments such as the Kikuyu law courts, the purpose is easy to discern. The arrest and charging of the 36 protesters, including a member of parliament from the opposition, with terrorism related offences screams more of crushing dissent than enforcing the law. It is meant to instil fear in Kenyans and ensure no further protests. The mere act of charging protesters with offences that attract 30 years' imprisonment has a chilling effect on the protesters, and in this, Ruto has found a new weapon.

William Ruto's government is not rejecting the law. It's doing something more dangerous: repurposing it. This is not rule of law—it's the rule by law, where repression is washed, perfumed, and stamped by the court system.

Judiciary's complicity and *kudisprudence*

The judiciary is supposed to be the guardian of the Constitution and check the excesses of the executive. However, sometimes, the judiciary becomes the executive's most reliable ally in oppressing Kenyans. The cooptation of the judiciary might be due to several factors, including the willful subservience of the executive. As Mwangi noted in the Black Bar, the magistrates and judges can twist the law to support the government, effectively reducing the judiciary to an ineffective guard of the people's fundamental liberties.

Today, the judiciary, especially the Magistracy, has tolerated and enabled the Siamese twins and Ruto in their quest to crash dissents. To illustrate the complicity, I pick two examples. One is through the use of miscellaneous criminal applications. The accepted logic has been that the police investigate offences and gather evidence before arresting people. Today, the role has been reversed, and the police arrest first before investigating.

Since the Constitution requires arrested persons to be presented in Court within 24 hours, the Siamese twins present them in court but not with a charge sheet. Instead, they bring the arrested persons under miscellaneous applications seeking to detain them for several days, the least being 14 days. In their affidavits, they claim that investigations are ongoing or deploy the scaremongering argument, the national security argument. While adopting a complete hands-off approach, the majority of the magistrates allow these requests and accept the deeply flawed affidavits, and Kenyans are held in custody for even 21 days as the police investigate, like Cop Shakur.

Courts must be wary of deploying undefined national security or public safety terms to limit constitutional rights. A Constitution cannot be allowed to be bent so easily. National security or public safety cannot become a blank cheque for the state to overdraw. The caution by Senior counsel Pherozee Nowrojee in Practising an Honourable Profession (2024) must ring true; *it is now not for politicians, judges, magistrates, policemen and prosecutors in peacetime to bend the Constitution in the name of the "security of the nation"*. The mere invocation of national security or public safety cannot limit human rights. There must be more to this beyond the laundering and selling of fear. (See, for instance, the Court's holdings in Sudi and Joseph Thiongo for the position that our Constitution no longer allows the sacrificing of rights to secure peace and security).

The second example of the judiciary's complicity is in bail and bond. Even when the magistrates find no compelling reasons

to deny bail or find that the miscellaneous applications are of no basis, the magistrates proceed to indirectly render the right to bail otiose by setting the bail amounts too high for an ordinary Kenyan. Take, for instance, the earlier example of an unemployed Kenyan protesting the state of the economy being slapped with a Ksh 50,000/300,000 bail. Or the example of primary school teachers who were slapped with a bond of Ksh 2M or a bail of Ksh 1M. Such Kenyans end up languishing in those remands or police cells until the completion of the cases. But this practice has a name: *kudisprudence*. It is the jurisprudence where people with low incomes do not enjoy constitutional rights. Although the Constitution provides the right to bail, it has been rendered meaningless since only the Haves can enjoy it.

But more worrying, the *kudisprudence* violates their right to liberty and bail and aids Ruto in his criminal lawfare journey. An example is necessary here. On 28 June 2024, Kenyans on X reacted to the cry for help from the Defenders Coalition. The coalition informed Kenyans of the punitive bail terms for 122 accused persons, including children. The 122 accused persons were arrested during the anti-finance bill protests on 24 June 2024 and were charged with breaking into the office of a member of parliament. The Magistrate handling the case slapped the Accused persons with a bail of Ksh 100,000. The cry for help forced the High Court judge to sit on Sunday morning to review these punitive bail terms, especially for the school-going children who were still in remand.

Another example is the Magistrate handling the anti-terrorism cases against the 37 protestors, who slapped them with a cash bail of 300,000. They are still in police cells and remand as they cannot afford the set amount. Therefore, despite having the right in the Constitution (the right to bail), the magistracy has denied the poor and have-nots this right. The magistracy has ensured that the right can only be enjoyed by the rich. As such, the jurisprudence emanating from the magistracy is kudisprudence. Although kudisprudence on its own is worrying, it is devastating when kudisprudence aids an authoritarian in his quest to silence dissents.

Although Ruto wields the law against dissent, not all robes bend to his will. Some magistrates have remained steadfast and upheld the Constitution. These magistrates, such as Hon Dolphina Alego, Ekhubi, and Hon Onsarigo, remind us of Justice Schofield, who, despite being in difficult authoritarian times, enforced the Constitution against the police as he sought to find out the whereabouts of Stephen Mbaraka Karanja. History records that Justice Schofield told off the then-Chief Justice Miller, who the President sent to inform him to lay off the case. History also reminds us of the defiant judge Patrick O'Connor, who stood up to the executive's chief justice Miller and was later summarily dismissed from the judiciary.

Conclusion

Ruto's regime is using the law to launder repression, and the courts are handing him the soap. The courts are not resisting the abuse but are facilitating it by either rubber-stamping detentions or setting unaffordable bail terms. Time is ripe for the judiciary to have a moment of introspection and ask itself the tricky question: will it serve as a bulwark against the erosion of rights, or as a bureaucratic accomplice to authoritarianism? Unfortunately, the judiciary does not have much time, as it is slowly transitioning from the common person's last hope to the common person's lost hope. But before this happens, the judiciary can reverse course!

Joshua Malidzo Nyawa is a Litigation Counsel at Katiba Institute.

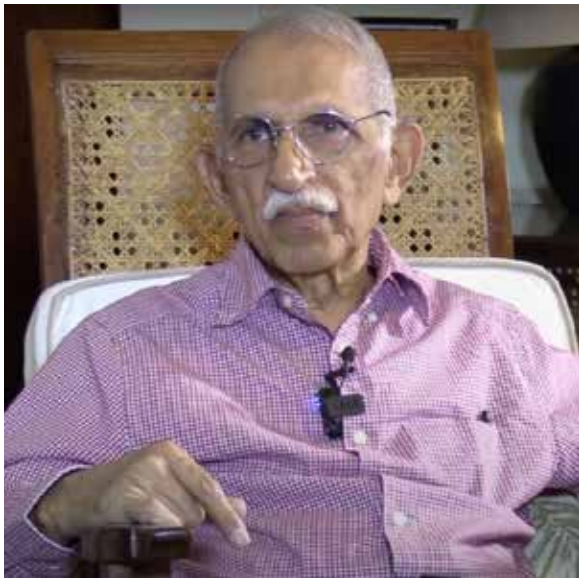
End the era and errors of extrajudicial executions and enforced disappearances: A befitting Legacy to Pheroze Nowrojee SC

By Beverline Anyango Ongaro

'Justice must flow like torrents of water."[1]

I. Introduction and Background

It is indisputable that senior counsel (SC) Pheroze Nowrojee was a legal polyglot because his legal practice was diverse: yet executed meticulously with the understanding and unpinning that the law is a tool to liberate. His footprints and fingerprints remain indelible in the quest for the enjoyment of human rights by all people. A cursory glance at collection of articles in my library including one captioned *'Human Rights Defenders Challenge Government over Extra-judicial Killings'* of the New Dawn Magazine dated March 15-April 1, 2010, is a poignant reminder of his consistency and candor in demanding accountability for extra-judicial executions (EJEs) and enforced disappearances (EDs). In the previous year, in 2009, I was a peer to John Paul (GPO) Oulu at the Political Leadership Development Programme under the Youth Agenda Association wherein as youth leaders, we were being trained to be transformative leaders. The sharp sad



The Late Pheroze Nowrojee

contradiction is that on 5 March 2009, GPO Oulu was summarily executed alongside a fellow human rights defender Oscar Kingara allegedly for information on prevalent EJEs they had shared with the then Special Rapporteur on Extrajudicial, Summary of Arbitrary Execution (SUMEX), Prof. Philip Alston.[2]

On 27 August 2010, Kenya promulgated the Constitution of Kenya following a successful referendum and enacted an array of laws whose effective implementation would have been a vanguard in protecting all persons from EJEs and EDs. The

[1]Amos 5:24, New English Translation Bible.
[2]https://www.omct.org/en/resources/urgent-interventions/assassination-of-messrs-oscar-kamau-kingara-and-john-paul-oulu [Accessed on 19 July 2025].

laws include notably the Prevention of Torture Act Chapter 88 Laws of Kenya, the Persons Deprived of Liberty Act Chapter 90A Laws of Kenya, the National Police Service Act Chapter 84 Laws of Kenya, National Coroners Service Act 84 Laws of Kenya, the Prevention of Terrorism Act Laws of Kenya Chapter 59 B, the Victim Protection Act Chapters 79A Laws of Kenya and the Witness Protection Act Chapter 79 Laws of Kenya. Under this 'new' constitutional dispensation, institutions were established with the mandate to protect, respect, promote, fulfil human rights and fundamental freedoms enshrined within the Constitution, legislations and by virtue of Article 2(5) of the Constitution the treaties that Kenya is a State Party to. These institutions are the National Police Service (NPS)[3] and the Internal Affairs Unit[4] as its internal oversight mechanisms, the National Police Service Commission (NPSC),[5] the Office of Director of Public Prosecutions (ODPP),[6] the Victim Protection Board,[7] the Witness Protection Agency,[8] the Judiciary,[9] the Kenya National Commission on Human Right (KNCHR),[10] and the Independent Policing Oversight Authority (IPOA).[11] These body of domestic laws augmented the regional and international laws binding upon Kenya on the protection of all persons from EJEs and EDs.[12]

II. Worrying trends of EJEs and EDs

Albeit these robust laws, sadly and shockingly, worrying trends of EJEs and EDs continued to be witnessed at the time of SC Pheroze's demise; and in an amplified fashion at the time of his memorial on 10 July 2025 following recurrences of human rights violations during 25 June 2025 commemorative Gen Z protests and on Saba Saba protests of 7 July 2025. KNCHR established a joint situation room with IPOA for a coordinated approach in monitoring, documenting and investigating human rights violations in the context of these protests during which they issued statements raising concerns on EJEs and EDs incidents.[13] Equally, the Law Society of Kenya (LSK), civil society organisations (CSO), and their coalitions notably under the auspices of the Missing Voices Coalition (MVC) and the Police Reforms Working Group (PRWG) coordinated in monitoring, documentation and providing legal aid and ancillary required assistance to victims of human rights violations including EJEs and EDs during these protests to facilitate access to adequate and timely remedies.[14]

III. Human rights impact of EJEs and EDs

The aforementioned documented incidents of EDs by KNCHR, LSK and CSO coalitions had the consistent patterns of persons arrested, detained or abducted against their will or otherwise deprived of their liberty by police officers or private individuals acting on behalf of, or with the support, direct or indirect, consent or acquiescence of the government, followed by a refusal to disclose the fate or whereabouts of

[3]Article 243 of the Constitution of Kenya 2010.
[4]Section 87 of the National Police Service Chapter 84 Laws of Kenya.
[5]National Police Service Commission Chapter 85 Laws of Kenya.
[6]Article 157 of the Constitution of Kenya and the Office of Director of Public Prosecutions Act No. 2 of 2013.
[7]Section 31 of the Victim Protection Act.
[8]Section 3A of the Witness Protection Act.
[9]Article 159 of Constitution of Kenya 2010.
[10]Article 248 of Constitution of Kenya 2010, Section 3 of the Kenya National Commission on Human Rights Chapter 71 Laws of Kenya and Article 59 Constitution of Kenya.
[11]Section 3 of the Independent Policing Oversight Authority Chapter 86 Laws of Kenya.
[12]https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=90&Lang=EN [Accessed on 19 July 2025].
[13]Kenya National Commission on Human Rights, *KNCHR Update on the Saba Saba 2025 Demonstrations*, 8 July 2025.
[14]Police Reforms Working Group, *Joint Statement on the Aftermath of the Saba Saba Demonstrations and Ngong Investigative Findings* 15 July 2025.

Extra-judicial executions in Kenya are a persistent and deeply troubling human rights issue—where state agents, especially police and security forces, are implicated in killing individuals without lawful judicial process. Despite constitutional protections, these killings are often carried out with impunity, particularly targeting marginalized groups, suspected criminals, and political dissenters.

the persons concerned or a refusal to acknowledge the deprivation of their liberty. Equally, the ongoing constitutional petitions for habeas corpus filed by LSK[15] and CSOs does not only reveal these patterns but also the gravity and flagrant violations of human rights. These are violations of human rights guarantees on the protection on non-derogable rights to life, fair trial and not to be subjected to torture; the right to human dignity; the right to liberty and security of the person; the right to information; right to freedoms of opinion and expression, association and assembly, and movement; right to truth that is individual and collective; the right to recognition as a person before the law; right to education; right to family life; the right effective remedy and rights of vulnerable person as children, women, persons with disabilities and elderly.

These recent incidents of EJEs and EDs amplified the already existing patterns to these human rights violations. In *Kituo Cha Sheria and Haki Africa and 1 Other vs. Cabinet Secretary Interior and Coordination of National Government and Other High Court Petition No. 194 of 2022*, the petition poignantly reveals these patterns of EJEs and EDs; and the severity of the violations due to absence of effective immediate remedy of prompt, impartial and effective investigations. The petition faulted the Kenyan State for falling to enact law that criminalises EDs. Equally, the Senate's Standing Committee on Justice, Legal Affairs and Human Rights in its *Report on the Inquiry into Extra-Judicial Killings and Extra-Enforced Disappearances* recommended for Kenya to ratify the United Nations (UN) Convention for the Protection of All Persons from Enforced Disappearances[16] and to establish Multi-agency Committee to address EJEs and EDs.[17]

At international level, these worrying patterns of EJEs and EDs has drawn recommendations to Kenya by the United Nations Human Rights Council during 2025 Universal Periodic Review (UPR). The UPR recommendations are descriptive on the specific measures to be undertaken as they urged Kenya to establish a legal framework to prevent and criminalise EJEs and EDs by security forces; amend the Penal Code to criminalize against EJEs and EDs by police; establish an effective independent accountability mechanism to investigate and prosecute EJEs and EDs by security forces; fully implement the National Coroner Service Act, 2017 and the Prevention of Torture Act, 2017; and ratify UN Convention for the Protection of All Persons from EDs.[18] Providentially, these UPR recommendations resound and underscore

[15]For example, *Rony Kiplagat and Steve Kavingo and 5 Others vs. Kenya National Commission on Human Rights and the International Commission of Jurist(Kenyan Section) and 15 Others*, High Court Constitutional Petition Number 714 of 2024.
[16]Adopted by General Assembly it its Resolution 61/177 on 20 December 2006 and Kenya become a signatory on 6 February 2007.
[17]Recommendation 8, *Report on the Inquiry into Extra-Judicial Killings and Extra-Enforced Disappearances*, Senate's Standing Committee on Justice, Legal Affairs and Human Right, page 36.
[18]Human Rights Council , *Report of the Working Group on the Universal Periodic Review Kenya*, A/HRC/60/10, 68 Session 8 September-3 October 2025.

Legal practitioners are not just defenders in courtrooms—they are front-line actors in the struggle against state violence. Through litigation, advocacy, education, and reform efforts, they play a crucial role in protecting life, demanding accountability, and safeguarding the rule of law.

Kenya's pledge during 75 Commemoration of the Universal Declaration on Human Rights on 11 December 2023,[19] and nascent measures taken so far that include the establishment of Multi-Agency Committee on the Legislative, Policy and Institutional Framework for the Protection of Persons from Extra Judicial Killings and Enforced Disappearances in Kenya (MAC) by the Office of the Attorney General in 2023 as had been recommended by the Senate. In 2024, MAC engaged with SUMEX and the Working Group on Involuntary and Enforced Disappearances (WGIED) to facilitate its effort in establishing a legal framework criminalising EJEs and EDS.

IV. Beyond fee note, what is the role of legal practitioners in prevention and accountability of EJEs and EDs?

Kenya is a signatory to the UN Convention for the Protection of All Persons from EDs. Although it has not ratified it, the import of *High Court Petition E194 of 2022* is that it is applicable in Kenya. In any event given the jus cogens nature of EJEs and EDs they constitute non-derogable rights that cannot be derogated from under any circumstances. While the obligation to prevent EJEs and EDs primarily vests in the government, legal practitioners regardless of their areas of practice ought to not only be deeply concerned by but have a corresponding sense of obligation to take steps towards protection of all persons from EJEs and EDs. It is because these human rights violations undermine the Kenya's constitutional and national values committed to respect for the rule of law, human rights and fundamental freedoms; and these systematic violations of EJEs and EDs are of the nature of crime against humanity. SC Pheroze, challenged lawyers, *'Advocates and politics are close all over the world. They varyingly share the fields of the Rule of Law and democratic practices. We have to practice democracy through politics and manage the State by politics which reflects the Rule of Law. The defence of democracy and the Rule of Law becomes part*

[19] https://x.com/OHCHRKENYA/status/1780561319306936603 [Accessed 19 July 2025].

of practice of a lawyer.[20] So far commendably, legal practitioners across their diverse years of experience have on pro-bono basis filed constitutional cases seeking adequate remedies for EJEs and EDs cases including Habeas Corpus.[21] However, there is much more that legal practitioners can do that is discussed hereinbelow.

1. Legislative reforms

LSK has been instrumental in steering law reforms in Kenya. It has been by virtue of its membership serving within institutions with distinct mandate in legal reforms and reviews, namely the Office of the Attorney General, the Kenya Law Reforms Commission, National Assembly, the Senate, and Executive Arm of government either as Cabinet Secretaries or advisors. In addition to these, LSK membership serve in taskforces and committees conferred to undertake policy and legislative formulation and reforms. The LSK by virtue of Section 4 of the Law Society of Kenya have provided advisory services during legislative processes. The scope of legal practitioners participating in legislative reforms has widened through an increasingly good practice of law firms and legal consultancy submitting memoranda to the Parliament and County Assemblies. Cumulatively, legal practitioners have wider platforms, as aforementioned, to steer and influence legislative reforms for sound laws to address EJEs and EDs.

With MAC under the Office of the Attorney General in place and the increasing acknowledgement by Parliament on the need for legislation addressing EJEs and EDs, what is the bare minimum standards that legal practitioners should advocate for in such a legislation? It would be instructive for legal practitioners to ensure policy and legislation as a bare minimum adopts human standards stipulated within the *Convention on the Protection of All Persons from EDs, Declaration on the Protection of All Persons from Enforced Disappearances,*[22] *Guidance on the Less-Lethal Weapons in Law Enforcement,*[23] *the African Commission on Human and Peoples' Rights Guidelines on the Protection of All Persons from Enforced Disappearances,*[24] *Code of Conduct for Law Enforcement Officials,*[25] *the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials,*[26] *the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power,*[27] *and the Standard Minimum Rules for the Treatment of Prisoners,*[28] *and the Guiding Principles for the Search for Disappeared Persons.*[29] In a nutshell the legislation should contain the following provisions as guardrail: -

i. Criminalising acts of EDs by State or public officers for organising, acquiescing or tolerating it as a crime without statute of limitation[30] to be tried in under judicial authority stipulated in Article 157 of the Constitution of Kenya to the exclusion

[20]Pheroze Nowrojee, *the Practising an Honorable Profession* (2024) pg 165.
[21]Pheroze Nowrojee, *The Legal Profession 1963-2013 All This Can Happen Again- Soon*, The Legal Profession and the New Constitutional Order in Kenya ed Yash and Jill Ghai pg. 36-39.
[22]Adopted December 1992 by General Assembly Resolution 47/133.
[23]United Nations Human Rights Guidance on Less-Lethal Weapons in Law Enforcement | OHCHR Published 1 June 2020
[24]Adopted 21 April -13 May 2022 on 71 Ordinary Session of the African Commission on Human and People's Rights.
[25]Adopted 17 December 179 by General Assembly Resolution 34/169.
[26]Adopted on 7 September 1990 by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba.
[27]Adopted 29 November 1985 by General Assembly Resolution 40/34.
[28]Adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977.
[29]Committee on Enforced Disappearances, CED/C/7 8 May 2019.
[30]Article 17 of Declaration on Protection of All Persons from EDs.

of court martials, and for prohibition of privileges and immunities. Persons alleged to have committed EDs ought to be suspended from official duties during investigations.[31]

ii. Strict prohibition of orders, instructions, authorisation or encouragement of EDs: no order or instruction of any public authority, civilian, military or other, may be invoked to justify an EJEs or EDs.[32] This is particularly critical given the recent public directives on 'shooting protestors'[33] and how police officers should conduct themselves in context of protests is in blatant and flagrant assault on constitutional and national legal frameworks guaranteeing human rights and obligations on NPS, State and public officers. The directives also infringe upon the universally accepted *Basic Principles on Use of Force and Firearms by Law Enforcement Officials* which is a guardrail on conscientious use of force and firearm as it stipulates adherence to principles of proportionality, necessity and legality on use of force in unlawful assemblies, and command responsibility;[34] and outlines the circumstances on use of force and firearm that expressly excludes in defence of property.[35] It would be instructive for the legal framework to stipulate that any person receiving orders or instructions for EJEs or ED to have the right and duty to refuse or not to obey it[36] no criminal or disciplinary action or reprisals for such refusal;[37] command responsibility for unlawful use of force and firearms;[38] and acts constituting EDs shall be considered a continuing offence as long as the perpetrators continue to conceal the fate and the whereabouts of persons who have disappeared and these facts remain unclarified.[39]

iii. The obligation to promptly, thoroughly, and impartially investigate complaints of alleged EDs or on *suo-moto* basis where there are no formal complaints but there are apparent patterns of EDs for as long as the fates of the victims of EDs remain unknown.[40]

iv. Allocation of adequate resources for investigations, prosecution and facilitate access to adequate remedies to the victims of EJEs and EDs.[41]

v. Conferment of the authority and power to summon witnesses, production of documents, conduct on-site visits, protection from reprisals or ill-treatment of witnesses, and legal practitioners involved in the investigations, and punitive effective sanctions for such reprisals or ill-treatment.[42]

vi. The means of determining the whereabouts and the state of health of persons deprived of their liberty;[43] the identification of the authority

[31]Article 16(1) Declaration on Protection of All Persons from EDs.
[32]Article 6 (1) of Declaration on Protection of All Persons from EDs , and Article 8 of the Code of Conduct of LEA.
[33]See for example, https://www.reuters.com/world/africa/kenyas-president-orders-police-shoot-violent-protesters-leg-2025-07-09/ [accessed on 21 July 2025].
[34]Articles 12, 13 and 14 of Basic Principles on Use of Force and Firearms by LEO; Articles 1, 2, and 3 Code of Conduct of LEA.
[35]Article 5 of Basic Principles on Use of Force and Firearms by LEO.
[36]Article 6 (1) of Declaration on Protection of All Persons from EDs ,and Article 25 and 26 of Basic Principles on Use of Force and Firearms by LEO.
[37]Article 25 on Basic Principles on Use of Force and Firearms by LEO.
[38]Article 25 of Basic Principles on Use of Force and Firearms by LEO.
[39]Article 17 of Declaration on Protection of All Persons from EDs.
[40]Article 13 (1) of Declaration on Protection of All Persons from EDs.
[41]Article 13(2) of Declaration on Protection of All Persons from EDs.
[42]Article 13 (2) (3) and (4) of Declaration on Protection of All Persons from EDs.
[43]Article of Code of Conduct of LEA.

ordering involved in the deprivation of liberty and such authority being required to prevent EDs under all circumstances,[44] prohibition of use of unlawful use of force and firearms;[45] and persons deprived of liberty to be held in only official recognised places and promptly arraigned in court.[46]

vii. During proceedings on EDs for KNCHR and IPOA based on and in line with their mandates to have access to all places where persons deprived of their liberty are being held and 'any places' where they have reasonable grounds to believe such persons may be found with or without prior notice to such places.[47] This provision is imperative noting the omnibus Security Law Amendments of the NPS (Amendment) Bill 2024 that seeks to impose a requirement for IPOA to issue notice of intention to inspect detention facilities.

viii. Accurate information on the detention of persons on their place of detention and transfers being made promptly available to the legal practitioners representing victims in proceedings on EDs.[48] In case of EJEs and the unlawful use of force, legal practitioners representing victims to have access to the independent process of investigations[49] and detailed report on death sent to be sent promptly to the competent authorities responsible for administrative review and judicial control[50] to facilitate pursuit of effective remedies for the victims as broadly defined under the Victims Protection Act.[51]

ix. Maintenance of update centralised and decentralised registers of persons deprived of their liberty and guarantees of KNCHR, IPOA and victims' advocates to access the registers during proceedings on enforced disappearances.

x. Release of persons deprived of their liberty in human dignity, anchored upon their security of physical integrity, and in a manner that verifies their release. This is critical given the increasing trends observable trends wherein EDs persons alleged having being released unprocedural after being deprived of their liberty making it difficult to establish the conditions of deprived liberty.

xi. Fortify the provision of Articles 49 and 51 on rights of arrested persons and to fair trial respectively, by stipulating a clear chain of command for of all law enforcement officials (LEOs) responsible for arrests, detentions, custody, transfers and imprisonment, and of LEOs authorised by law to use force and firearms by integrating human rights-based approaches best practices.[52]

xii. Mitigating circumstances for persons who, having participated in EDs and are instrumental in bringing the victims forward alive or in providing voluntarily information which would contribute to clarifying cases of EDs.[53]

xiii. Prohibition of explusion, return (refouler) or extradite a person

[44]Article 9 of Declaration on Protection of All Persons from EDs.
[45]Article 15 and 16 of Basic Principles on Use of Force and Firearms by LEO.
[46]Article 10 (1) of Declaration on Protection of All Persons from EDs.
[47]See generally, Standard Minimum Rules for the Treatment of Prisoners.
[48]Article 13 (2) of Declarations, see generally United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Persons Deprived of Their Liberty to Bring Proceedings Before a Court HRC/30/37.
[49]Article 21 of Basic Principles on Use of Force and Firearms by LEO.
[50]Article 22 of Basic Principles on Use of Force and Firearms by LEO .
[51]Section 2.
[52]Article 6 of Code of Conduct of LEA.
[53]Article 4 (2) of Declaration on Protection of All Persons from EDs.

Access to justice is the lifeline of human dignity. Without it, the promise of human rights remains hollow. It is not just about courts—it is about ensuring every person, regardless of status, can speak, seek help, be heard, and be protected.

to another State where there are substantial grounds to believe that such a persons would be in danger of EDs.[54]

2. Access to justice

Access to justice is central to enjoyment of human rights. It facilitates victims to access adequate remedies and abrogators of human rights violations to be held accountable. Wherein there is effective accountability mechanisms, it serves as an effective tool for prevention of human rights violations. Article 48 of the Constitution of Kenya 2010 guarantees the right to access justice; this right is elaborated in the Legal Aid Act No. 6 of 2016 Laws of Kenya, as read together with the Access to Information Act No. 31 of 2016 Laws of Kenya that asserts how access to justice can be claimed. Victims of EJEs and EDs have in fledging fashion exercised their rights to access justice through LSK, and CSOs but it is a miniscule number of victims due to absence of cogent legal framework on protection, penalising and punishing EJEs and EDs; and inaccessibility and low level of awareness on avenues of access to justice such as public inquiry by Parliament and High Court albeit their anaemic nature, which is compounded by threat of reprisals and intimidation to victims and in some instance legal practitioners. Notwithstanding these, it would be instructive for legal practitioners to glean from *the United Nations Basic Principles on the Role of Lawyers*[55] to facilitate efficient, effective and response mechanisms on the right of access to justice. These Basic Principles stipulate appropriate mechanism for the human rights violations' victims; fair disciplinary or criminal procedures with

[54]Article 8 of Declaration on Protection of All Persons from EDs.
[55]Adopted on 7 September 1990 by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba.

respect to human rights violations in context of police officers' chain of command;[56] and guarantees from disciplinary or criminal sanctions to police officers who refuse to carry orders on unlawful use of force or firearms or EDs and other human rights violations.[57] This would be in line with the Code of Conduct for Law Enforcement Officers that instructs law enforcement officials who comply with the provisions of the Code of Conduct to be accorded respect, support and the co-operation of the community and from the law enforcement agency and its profession;[58] and the equality of arms in court proceedings.[59]

Article 157 of the Constitution of Kenya 2010 establishes the Office of the Director of Public Prosecution (ODPP) and confers independent prosecutorial powers that is to be exercised with regard to public interest, in the interest of administration of justice and on the need to prevent and avoid abuse of the legal process. The prosecutorial powers and functions are further elaborated in the ODPP Act No. 2 of 2013 and the ODPP's guidelines, notably Plea Bargaining and Decision to Charge.[60] It is imperative for ODPP in conducting prosecution -led investigations and prosecution in EJE and EDs cases to do so in coherence with *the Minnesota Protocol on Investigations of Potentially Unlawful Deaths, the UN Convention on Protection of All Persons from EDs, the UN Declaration on Protection of All Persons from EDs, and the African Commission on Human and Peoples' Rights Guidelines on the Protection of All Persons from EDs.* It is because these human rights frameworks provide guidance on victim-centred prosecution and instances plea bargaining may be applied for persons who, having participated in EDs and are instrumental in bringing the victims forward alive or in providing voluntarily information which would contribute to clarifying cases of EDs,[61] but not granted amnesty.[62] These human rights frameworks stipulate that: suspects of ED and EJE ought to hold positions to influence investigations by means of pressure or acts of intimidation or reprisals;[63] continuing obligation for prosecution and command responsibility;[64] and cooperation among States in investigations and prosecution.[65] Cumulatively, frameworks these would be beneficial reference materials augmenting ODPP's guidelines. Additionally, legal practitioners participating as victims' advocates in EJE and EDs cases would enhance their meaningful effective participation by utilising these aforementioned four (4) human rights frameworks.

3. Advocacy for adequate remedy

Legal practitioners have been instrumental in advocating for adequate remedies for EJEs and EDs victims notwithstanding absence of a cogent policy and legal framework to address these gross human rights violations. Practitioners have done this through: -

- Public interest cases as E194 of 2022 to

[56]Article 8 of Code of Conduct of LEA.
[57]Article 25 of Basic Principles on Use of Force and Firearms by LEO .
[58]Article 8 of Code of Conduct of LEA.
[59]Principle 12 of the United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Persons Deprived of Their Liberty to Bring Proceedings Before a Court.
[60]https://odpp.go.ke/ [accessed on 19 July 2025]
[61]Article 4 (2) of Declaration on Protection of All Persons from EDs, and Guideline 4.1.6 Obligation to Punish of ACHPR Guidelines on Protection of All Persons from EDs.
[62]Guideline 4.1.5 Obligation to Prosecute African Union of ACHPR Guidelines on Protection of All Persons from EDs.
[63]Guideline 4.1.4 (iii) Obligations specific to the circumstance of the disappearance of ACHPR Guidelines on Protection of All Persons from EDs.
[64]Guideline 4.1.5 Obligation to Prosecute of ACHPR Guidelines on Protection of All Persons from EDs.
[65]Guideline 4.1.8 Obligation to Co-operate among State of ACHPR Guidelines on Protection of All Persons from EDs.

A human rights-based policy on enforced disappearances transforms silence into justice and fear into accountability. It sends a clear message: no person shall vanish without a trace, and no state agent is above the law.

compel the government to undertake effective and prompt investigations and prosecution; establish a register of ED and EJEs and ratify the United Nations Convention of the Protection of All Persons from EDs.

- Representing victims and making presentations to the Public Inquiry by the Senate Standing Committee Justice Legal Affairs and Human Rights.[66]
- Engaging the United Nations Special Procedures Mandate holders as WGIED and SUMEX; and submitting shadow reports the regional and international human rights treaty mechanisms such Human Rights Committee, Committee against Torture and the UPR.

It is indisputable that given the pervasive incidents of EJEs and EDs and its deep impact on the victims and the society at large, multi-pronged approaches are necessary in order to comprehensively address these human rights violations, and impunity ensuing. Apart from steering legal reforms, and access to justice, legal practitioners can undertake the following to facilitate adequate redress to EJEs and EDs victims: -

i. Designing, strengthen and implement a comprehensive human right based public policy on EDs

Such a public policy ought to stipulate how lawyers and their victims participate in conducting search of disappeared persons and their rights and protection of those rights; coordinated and complementarity of search to criminal investigations; search databases and DNA databanks; handling vulnerable groups who subject of search such as human rights defenders who have disappeared; and search protocols.[67] This would require strong cooperation between legal practitioners within NPS, IPOA and LSK.

[66]The Senate Standing Committee on Justice, Legal Affairs and Human Rights, *Report on the Inquiry into EJEs and EDs.*
[67]See generally, Committee on Enforced Disappearances, *United Nations Guiding Principles for the Search for Disappeared Persons*, 8 May 2019; Guideline 4.1.4 Obligation to Search and Investigate African Union ED Guidelines.

ii. Human rights standard setting through proper screening and training of law enforcement officers

NPS receives reinforcement from law enforcement officers deployed from the Kenya Forest Service, the Kenya Prison Service (KPS), the Kenya Wildlife Service, the National Youth Service (NYS) and the Kenya Defence Forces[68] Legal practitioners within these security agencies in coordination LSK, KNCHR and IPOA ought to facilitate integration of human rights among law enforcement officials by ensuring that all officials are selected through proper screening procedures, have appropriate moral, psychological and physical qualities for the effective exercise of their functions and receive continuous and thorough professional training; and they have continued fitness to perform these functions should be subject to periodic review[69]. It would be vital for professional training to be centred on human rights especially in the investigative process; integrate alternatives to the use of force and firearms and the peaceful settlement of conflicts; public order management that underscores understanding of crowd behaviour, and de-escalation methods such as persuasion, negotiation and mediation;[70] and provision of stress counselling to law enforcement officials involved in situations where force and firearms are used.[71] Fortunately, *the National Taskforce on Improvement of the Terms and Conditions of Service and Other Reforms for Members of NPS, KPS and NYS* (known as the Maraga Taskforce) recommended integration of human rights standards along aforementioned parameters with the security agencies. It would be vital for legal practitioners in hawked-eye fashion to follow-up on implementation of these recommendations.

The Cabinet Secretary for Ministry of Interior and National Coordination *issued Policy Directive No.1 of 2025 on Conditions As To the Use of Force and Firearms.*[72] The Policy Directive ought to be examined from the human rights lenses of the *Guidance on Less-Lethal Weapons in Law Enforcement and the Model Protocol on Law Enforcement Officers* to Promote and Protect Human Rights in the Context of Peaceful Protests[73] (2021), which provides guidance on the judicious use of less-lethal weapons and the circumstances they would be unlawful employed. This would be particularly important as NPS participated in the regional consultations in 2021 during the formulation of these *Model Protocol on Law Enforcement Officers* by the UN Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association.[74]

iii. Employ of expert witness, international and emerging jurisprudence, and technology

Legal practitioners can take up the challenge of integrating and deploying expert witnesses and technology in EJEs and EDs cases, which aid the Kenyan courts in 'formulating judge-made laws to address nuanced lacuna in EJEs and EDs' particularly on the right to recognition as a person before the law in the context of EDs. Such lacuna includes, 'what are the appropriate remedies for next of kin to *de facto* disappeared persons who are stuck in legal uncertainty created by the absence

[68]See for example, Kenya Gazette Notice 7861/ 2024.
[69]Article 18 of Basic Principles on Use of Force and Firearms by LEO.
[70]Article 20 and 21 of Basic Principles on Use of Force and Firearms by LEO.
[71]Article 21 of Basic Principles on Use of Force and Firearms by LEO .
[72]18 July 2025.
[73]Human Rights Council, A/HRC/55/60 21 January 2024.
[74]Document Viewer [accessed on 19 July 2025].

of the disappeared persons, with respect to management and disposal the property of disappeared persons, marital status of remaining spouse who are in perpetual limbo of undefined marriage, guardianship of minors, right to social funds? Can legal practitioners seek to obtain a declaration on presumption of death or declaration of absence or certificate of absence by reasons of forced disappearances? Perhaps legal practitioners can the test the waters to address the lacuna and legal certainty cause by EDs for which the WGIED *General Comment on the Right to Recognition As A Person Before the Law in the Context of Enforced Disappearances*,[75] are valuable compass, as well *the Minnesota Protocol on Investigations of Potentially Unlawful Deaths*, that provides guidance on use of technology and expert witnesses in EJEs cases.

iv. Legal education to upcoming legal practitioners

It would be imperative for legal practitioners administering legal education to devote time for students to not only acquire theoretical knowledge on prevention and protection of all persons from EJEs and EDs but to also mentor and coach students to equip them in providing legal aid to indigent communities through engagement with the community based organisations and the social justice centres to provide technical expertise to monitor incidents of EJEs and EDs and engage with the UN Special Procedures Mandate Holders.

Final Thoughts

Legal practitioners in diverse spheres, whether in public and private sectors have vast opportunities to apply their legal expertise for the protection of all people from EJEs and EDs. Human rights work does not only require putting in long hours of work, but it is inherently emotionally taxing. It is particularly true for legal practitioners as they often play the dual role of providing legal expertise and psychosocial support as clients expect advocates to actively listen, empathize and provide counsel to clients the victims' families on how to deal with the impacts of EJE and ED while pursuing adequate remedies. Although there is growing recognition and collaboration between legal practitioners and counsellor psychologists in cases of EJEs and EDs, this is often an exception rather than the rule given the disproportionate ratio that exists between these professions. Legal practitioners handling EJEs and EDs cases are prone to burn-out with dire psychological and physiological impacts. On account of increasing reported media incidents of EJEs and ED even legal practitioners not involved in these cases are prone to vicarious burn out from the communal trauma. It stands to reason in these circumstances for legal practitioners to heed to conclusions by Bryan Stevenson a renown human rights American lawyer, *'You can't effectively fight abusive power, poverty, inequality, illness, oppression or injustice and not be broken by it. We can embrace our humanity, which means embracing our broken nature and the compassion that remains our best hope for healing. There is no wholeness outsider of our reciprocal humanity.'*[76] Additionally, drawing from S.C Pheroze's advice, who diligently and selflessly fought against EJE and EDs, legal practitioners would immensely benefit from his advice that they should acquire and sharpen attributes of perseverance and rectitude.[77]

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[75]WGIED, General Comment on the Right to Recognition As A Person Before the Law in the Context of Enforced Disappearances.
[76]Bryan Stevenson, *Just Mercy A Story of Justice and Redemption* (2015) Pg 289-290.
[77]Pheroze Nowrojee, *the Practising an Honorable Profession (2024)* 19-38.

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5th Volume of the EALS Human Rights and Rule of Law Journal

Introduction

The East Africa Law Society (EALS) is inviting members to submit manuscripts for consideration for publication in the 5th volume of the EALS Human Rights and Rule of Law Journal.

This journal was created to deliver the Society's mandate of monitoring the state and progress of respect and promotion of human rights and Rule of Law in the East African region. In fulfilling this mandate, EALS also oversees the implementation of decisions of regional courts, conduct of public interest litigation initiatives, publishing Rule of Law reports, issuing public statements against abuses of human rights and Rule of Law, making policy and legal reform recommendations to the EAC and state governments and undertaking general advocacy on human rights and rule of law.

The Journal among others aims at providing critical contemporary analyses of the state and progress of respect for and promotion of human rights and Rule of Law in East Africa. It will thus be instrumental in improving understanding of region's state of human rights as well as Rule of Law concerns and developments which will in turn inform better and more effective Policy discourse and other actions for change.

Special Edition to Celebrate 25 Years of the East African Community

On 30th November 1999, the Treaty for the Establishment of the East African Community (EAC) was signed, and on 7th July 2000, it entered into force, officially launching the modern EAC. The year 2024 marked 25 years since the re-establishment of the EAC, making it a crucial moment to reflect on its progress, challenges, and future prospects.

The EAC was revived with the ambition of fostering regional integration, economic cooperation, and legal harmonization to support peace, stability, and development in East Africa. Since then, the bloc has expanded to include eight member states, launched key economic frameworks such as the Customs Union, Common Market, Monetary Union Protocol, and played a pivotal role in regional trade, governance, and dispute resolution.

Is it presidential immunity or impunity?

By Morgan Okoth

Abstract

Presidential immunity is a privilege enjoyed by the president of the Republic of Kenya. It is a doctrine that shields the president from both criminal and civil proceedings while in office, for the wrongs that result from actions that they do or omit to do in their capacity as president. This immunity is absolute as long as they are still in office. This has resulted in many of the Kenyan presidents abusing their executive powers and doing actions that contravene the constitution or other laws of the land. This paper aims to advocate for the limitation of this privilege such that the president can be sued and held accountable for violating the laws.

1.0 Introduction

Presidential immunity in Commonwealth countries in Africa was inherited from Britain. There are certain questions that those who drafted the constitution of Kenya ought to have asked themselves before inheriting this doctrine. What were the reasons for making the British Monarch, who was the head of state, immune to legal proceedings? Was Kenya in the same situation as Britain was when introducing this doctrine?

The British monarch (currently King Charles III) is protected by the doctrine of sovereign immunity, which means the monarch cannot be prosecuted or sued in civil or criminal court.

The three main reasons why the British government made the head of state immune to legal proceedings were the following; the King or Queen was believed to be incapable of committing a wrong, litigation against the monarch would undermine their attention to duty or authority of their office, and finally, the courts were Queen's or King's, resulting in Queen's Bench Division and King's Bench Division, making it impossible for the monarch to be taken to their courts.[1]

[1]Ben Sihanya "President and Deputy President in Kenya and Africa" Ben Sihanya Constitutional Democracy, Regulatory and Administrative Law in Kenya and Africa (CODRALKA) Vol. 1: Presidency, Premier, Legislature, Judiciary, Commissions, Devolution Bureaucracy and Administrative Justice in Kenya, Sihanya Mentoring and Prof. Ben Sihanya Advocates, Nairobi and Siaya 2020 56.

In Kenya, the rationale for this privilege is that it allows the president to execute their constitutional mandates without the fear of prosecution, prevents distractions that would arise from court attendances for testimonies or cross-examination and shields the dignity of the president and the office.[2]

2.0 Abuse of Presidential Immunity in Kenya and the world

Presidential immunity is a privilege enjoyed by most heads of state in the world.

2.1 Kenya

Almost all Kenyan presidents have abused power, but none have ever been prosecuted while in office, mainly because they are shielded by presidential immunity. Most of them have been associated with corruption cases throughout their tenures. These instances are seen as benefiting their interests but not the citizens.

2.1.1 President Daniel Arap Moi

During President Moi's Era, one of the greatest gold scandals in Africa occurred, the Goldenberg Scandal. This involved a fictitious company called Goldenberg International Limited, whose owner, Mr. Pattni, pretended to be exporting gold, something he never did. By then, it was a policy that a person would be compensated 35% of the value of their gold export. Kenya barely had a large gold that could be exported.

The Bosire Inquiry established what everyone knew but could not prove, because the Attorney General, Amos Wako, had

Former President Daniel Arap Moi

developed feet of clay. The commission concluded that it involved the highest levels of President Moi's government officials and that President Moi had personally authorised two Goldenberg-related payments.[3] This suggests that the fraud could not have occurred without the involvement of President Moi and Mr. Saitoti, the then Vice President.[4] The names of President Moi, both of his sons, Philip K. Moi and Gideon Moi, appeared in the list of people who benefited from the scandal.[5]

The 2005 Bosire Commission of Inquiry into the scandal concluded that up to Kshs158.3 billion of Goldenberg money was transacted with 487 companies and individuals.[6]

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[2]Attorney-General & 2 others v Ndii & 79 others; Dixon & 7 others (Amicus Curiae) [2022] KESC 8 (KLR)
[3]https://www.theelephant.info/analysis/2019/09/05/tales-of-state-capture-goldenberg-anglo-leasing-and-eurobond/ Accessed on 4th July 2025
[4]Roman Grynberg and Fusa Singogo "An Autonomy of Grand Fraud: The Goldenberg Scandal and IMF/ World Bank" Public Policy and Administration Research 2023 28
[5]Ibid. See footnote 4
[6]The Hon. Mr. Justice S.E.E. Bosire J.A. "Goldenberg Affair" Judicial Commission of Inquiry 2005


Former President Uhuru Kenyatta

2.1.2 President Uhuru Muigai Kenyatta

One of the most popular abuses of office by President Uhuru occurred in 2022 when he refused to appoint six judges to the Court of Appeal and the Environmental and Lands Court. The six had been nominated by the Judicial Service Commission.[7] After filing a petition seeking compensation, Kshs126 million of the taxpayers' money was used to compensate them.[8]

"An order for compensation is hereby issued awarding each petitioner general damages of Kshs 15,000,000 against the respondent for violation of the petitioners' constitutional rights and fundamental freedoms. An order of compensation is hereby issued awarding each petitioner exemplary damages of Kshs. 5,000,000 against the respondent for abuse of state power resulting in the violation of the petitioners' constitutional rights and fundamental freedoms. The petitioners shall have interest on 4 and 5 above at court rates from the date of this judgment until payment in full. Costs of the Petition to the petitioners".[9]

2.1.3 President William Ruto

There is a recent instance where President Ruto disobeyed a court order barring him from appointing the commissioners and the chairperson of the Independent Electoral and Boundaries Commission.[10] The order was issued after a private citizen filed a petition in the High Court. The court issued a conservatory order preventing the gazettement or appointment of the commissioners and the chairperson.[11] This clearly shows that he was not ready to abide by the law; he wanted to operate in his own way.

In January 2024, President Ruto publicly hinted that his Kenya Kwanza government would not follow court orders in matters such as the Universal Health Coverage and the introduction of the Housing Levy.[12] In his opinion, these injunctions were meant to derail his government rather than ensure the constitutionality of his executive actions.[13] There was an argument that the president's defiance of the law would incite the public against obedience to the law; if the

[7] https://www.standardmedia.co.ke/national/article/2001414750/heartbreak-for-six-judges-as-uhuru-rejects-their-appointment Accessed on 4th July 2025
[8] https://nation.africa/kenya/news/uhuru-rejection-of-six-judges-costs-taxpayers-sh126-million--4788678#story Accessed on 4th July 2025
[9] Muchelule & 5 others v Attorney General; Judicial Service Commission (Interested Party) [2024] KEHC 12116 (KLR)
[10] https://www.citizen.digital/news/ruto-disregards-court-order-again-in-appointment-of-iebc-commissioners-n364467 Accessed on 4th July 2025
[11] Omondi & another v Attorney General & 2 others; Ethekon & 6 others (Interested Parties) [2025] KEHC 7463 (KLR)
[12] https://www.standardmedia.co.ke/politics/article/2001488263/ruto-declares-he-will-defy-court-orders-on-kenya-kwanza-projects Accessed on 4th July 2025
[13] https://nation.africa/kenya/news/politics/president-ruto-no-courts-of-law-will-stand-in-my-way--4480668 Accessed on 4th July 2025

president does not comply with court orders, who are we to be obedient?[14]

2.2 The United States of America

The situation for the United States can be considered to be different. This is because there has never been a president who directly abused office; most of their proceedings involved personal matters.

2.2.1 President Richard Milhous Nixon

The former president had fired Fitzgerald for the alleged testimony that brought shame to the Pentagon. In his testimony, he disclosed cost overruns and inefficiencies in the military aircraft. He believed that the president fired him in retaliation for his testimony.[15]

2.2.2 President William Jefferson Clinton (Bill Clinton)

President Clinton had engaged in sexual harassment before becoming the president. While in office as the President of the United States, the victim filed an action against him.[16]

2.2.3 President Donald J. Trump

An investigation was being carried out regarding President Trump's business dealings, including possible campaign misconduct. The District Attorney issued a grand jury subpoena to Trump's firm seeking his business records. Trump refused to comply.[17]

President Trump was also accused of falsifying business records to conceal

US President Donald J. Trump

payments for an adult film star and unlawful activity from the voters, before and after the elections.

3.0 The Legal Framework

Presidential immunity is an inalienable privilege that is protected by the constitutions of various countries, which are the supreme laws in most cases, for example, in Kenya.[18]

3.1 Kenya

3.1.1 The Constitution of Kenya 1969

Article 14 of the Constitution of Kenya 1969 provided that no criminal or civil proceeding shall be instituted against the president while in office.[19]

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[14] https://www.standardmedia.co.ke/health/michael-ndonye/article/2001488341/ruto-will-be-the-loser-if-he-defies-court-orders-on-the-housing-levy Accessed on 4th July 2025
[15] https://caselaw.findlaw.com/court/us-supreme-court/457/731.html Accessed on 4th July 2025
[16] https://supreme.findlaw.com/supreme-court-insights/clinton-v--jones-case-summary.html Accessed on 4th July 2025
[17] https://caselaw.findlaw.com/court/us-supreme-court/19-635.html Accessed on 4th July 2025
[18] Constitution of Kenya 2010 Article 2 (1)
[19] Article 14 (1) & (2) Constitution of Kenya 1969

This provision did not explicitly shed light on certain areas by failing to answer some questions, for example, whether the president could be sued for crimes committed under international treaties.

3.1.2 The Constitution of Kenya 2010

Article 143 of the Constitution of Kenya 2010 provides that neither criminal nor civil proceedings can be instituted against the president while in office.[20] The provision that follows is an improvement of the one in the previous constitution, as it explicitly states that this immunity does not extend to crimes committed under international treaties that have been ratified by Kenya.[21]

3.2 The United States of America

There is no direct provision for presidential immunity in the Constitution of the United States, but still, the president enjoys this privilege.[22] It has been explicitly elaborated and emphasised by precedents that the author will expound on in the other sections.

4.0 Case laws

4.1 Kenyan Case Laws

4.1.1 Republic v Chief Justice of Kenya & 5 others [2005] KEHC 31 (KLR)

One of the issues for determination was whether the courts could use judicial review to check the actions of the president. The court entirely relied on Article 14 of the then-constitution, which provided absolute immunity for the president.[23] It included both criminal and civil wrongs that the president could commit. The court held that the doctrine of judicial review was statutory and could not override the provisions of the Constitution,[24] which was the supreme law.[25]

4.1.2 Julius Nyarotho v Attorney General & 3 others [2013] KEHC 4162 (KLR)

This is the case where the court departed from the previous ruling on judicial review. The court explained that even if the president is immune to legal proceedings under Article 143 of the constitution,[26] the Constitution is not helpless. Judicial review can be used to check the actions of the president. That the office of the president is a public trust, and therefore, whenever judicial review is instituted, it should be against the office, but not the person occupying the office. The legal representative of that office is the Attorney General; therefore, judicial review cannot be conducted against the president, but against the Attorney General.[27]

4.1.3 Katiba Institute v President of Republic of Kenya & 2 others; Judicial Service Commission & 3 others (Interested Parties) [2020] KEHC 9226 (KLR)

The court held that "a purposive, progressive, and holistic interpretation of the Constitution dictates that the President does not enjoy absolute immunity from intervention through judicial review or constitutional declarations for actions or omissions in the exercise of constitutional and statutory functions."[28]

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[20]Ibid. Art 143 (1) & (2)
[21]Ibid. Art 143 (4)
[22]https://constitution.findlaw.com/article2/article-ii-presidential-immunity-to-criminal-and-civil-suits.html Accessed on 4th July 2025
[23]Ibid. Article 14 (a) & (b)
[24]Republic v Chief Justice of Kenya & 5 others [2005] KEHC 31 (KLR)
[25]Ibid. Art 2 (1)
[26]Ibid. See footnote 20
[27]Julius Nyarotho v Attorney General & 3 others [2013] KEHC 4162 (KLR)
[28]Katiba Institute v President of Republic of Kenya & 2 others; Judicial Service Commission & 3 others (Interested Parties) [2020] KEHC 9226 (KLR)

The court further elaborated that the presidency is a creature of the constitution whose authority is derived from the people; the president must operate per the constitution because he is not above it. A strict interpretation of Article 143 would disparage the constitution and promote impunity. It reaffirmed that even though the acts of the president could be questioned, the right party to sue is the Attorney General; the president cannot be a party to a case.[29]

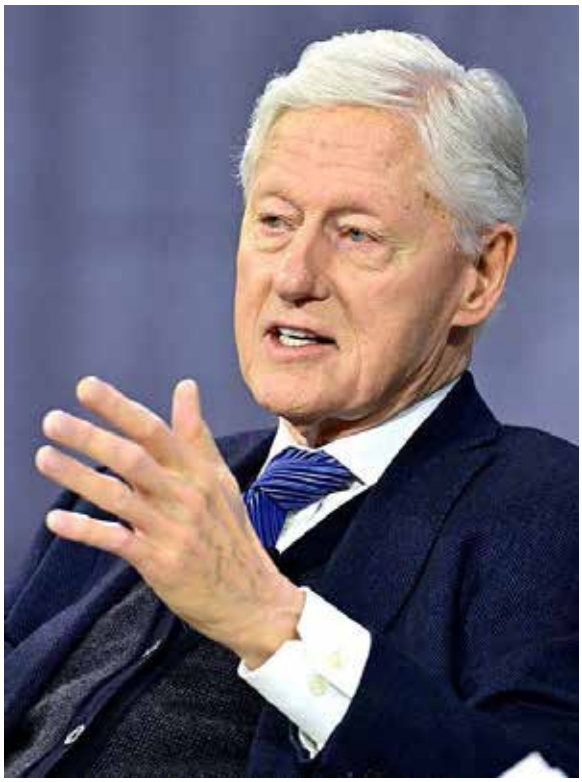
4.1.4 Attorney-General & 2 others v Ndii & 79 others; Dixon & 7 others (Amicus Curiae) [2022] KESC 8 (KLR)

The Supreme Court departed from the Court of Appeal and High Court's decisions and concluded that civil proceedings cannot be instituted against a sitting president in their name but through the Attorney General for wrongs that they may do while performing their official functions. After leaving office, they can be sued in person for actions that are deemed to grossly violate the constitution.[30]

4.2 American Case Laws

"There are ... incidental powers, belonging to the executive department, which are necessarily implied from the nature of the functions, which are confided to it. Among these, must necessarily be included the power to perform them ... The president cannot, therefore, be liable to arrest, imprisonment, or detention, while he is in the discharge of the duties of his office; and for this purpose, his person must be deemed, in civil cases at least, to possess an official inviolability."[31]

4.2.1 Nixon v. Fitzgerald, 457 U.S. 731 (1982)



Former US President Bill Clinton

In this case, the Supreme Court of the United States held that the president had absolute immunity for his official presidential actions. It emphasised the immunity for acts within the outer perimeter of the official acts of the president only.[32]

4.2.2 Clinton v. Jones, 520 U.S. 681 (1997)

In this case, the Supreme Court of the United States held that justice could not be delayed by waiting for the president to leave office to be sued. This was in relation to liabilities that occurred before assuming office. President Clinton was sued while in office for sexual harassment, an act that occurred before his presidency. The court held that the Constitution did not grant temporary immunity for unofficial acts.[33]

[29]Ibid. See footnote 28
[30]Attorney-General & 2 others v Ndii & 79 others; Dixon & 7 others (Amicus Curiae) [2022] KESC 8 (KLR)
[31]Mississippi v. Johnson, 71 U.S. (4 Wall.) 475, 501 (1867)
[32]Nixon v. Fitzgerald, 457 U.S. 731 (1982)
[33]Clinton v. Jones, 520 U.S. 681 (1997)

Chief Justice John Roberts

"The litigation of questions that relate entirely to the unofficial conduct of the individual who happens to be the President poses no perceptible risk of misallocation of either judicial power or executive power."[34]

4.2.3 Trump v. Vance, District Attorney of the County of New York, No. 19 635, 591 U.S. (2020)

In a judgment delivered by Chief Justice Roberts, the Supreme Court held that a sitting president does not have absolute immunity for actions that are not performed in their capacity as president. Eventually, it was concluded that a sitting president could be subject to criminal subpoenas for non-privileged personal records.[35]

4.2.4 Trump v. New York, 144 S. Ct. 2312 (2024)

In this case, President Trump was convicted of falsifying business records to conceal the payments to an adult film star and, unlawful activity with his voters. This shows that the president has no immunity for unofficial actions that occur before becoming the president. This was a historic case in the United States as President Trump became the first former president to be convicted of a criminal felony.[36]

5.0 Conclusion

I describe presidential immunity in Kenya as superfluous. It has given the president absolute immunity from both civil and criminal proceedings. The president can only be sued through the Attorney General. The objective of prosecuting a person should primarily be to hold them accountable and even punish them. How can someone be held accountable or punished for their wrongs, yet they cannot be sued directly? Even where the court rules that compensation should be made, the government still uses the taxpayers'

[34] https://supreme.findlaw.com/supreme-court-insights/clinton-v--jones-case-summary.html Accessed on 4th July 2025
[35] Trump v. Vance, District Attorney of the County of New York, No. 19 635, 591 U.S. (2020).
[36] https://constitution.findlaw.com/article2/article-ii-presidential-immunity-to-criminal-and-civil-suits.html#TrumpNY Accessed on 4th July 2025

money.[37] Does the president feel any form of punishment? There is no guarantee that a president will remain alive after leaving office. This means that they should be sued for acts that fall outside their official duties or those that are not related to the presidency while still in office, as seen in the American System. The doctrine of presidential immunity aimed to give them time to execute their mandates without fear and to shield the dignity of their office. Is there any need to give this protection even if it has lost its meaning or does not function as expected? Indeed, this immunity can only disparage the constitution and promote impunity.[38] Presidential immunity in Kenya is a double-edged sword; it is self-reliant, and immunity paves the way for impunity. Just because it was applicable in Britain and Kenya was colonised by Britain does not mean that it must be applicable in Kenya. It has lost its purpose. Is it presidential immunity or impunity?

6.0 Recommendations

6.1 Do away with the temporary immunity for actions before assuming office

Kenya should adopt this doctrine as applied in the United States. A sitting president can be sued without delay, without waiting for them to step out of office, for legal claims that fall outside their official duties.

Article 159 (2) of the Constitution of Kenya provides that, in exercising judicial authority, the courts and tribunals shall be guided by the following principles

(a) justice shall be done to all, irrespective of status;[39]
(b) justice shall not be delayed;[40]

This provision should be applied in prosecuting the president because justice delayed is justice denied.[41] He should not be favoured because of rank, he should be treated as a normal citizen. Different treatment might be considered as discrimination, which is discouraged by the constitution of Kenya.[42]

6.2 Establish an independent oversight tribunal

Apart from judicial review and impeachment, Kenya does not have any other mechanism for checking the presidential operations. Kenya should have a tribunal whose only duty is to oversight the president. This is because the legislature can always be influenced by the executive[43] based on political interests. This may render the impeachment of the president for gross violation of the Constitution useless.[44] Much reliance cannot be placed on the judiciary as the only hope. Judicial independence has been an issue of great concern in Kenya; the judiciary can be influenced by the executive.[45]

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[37]Ibid. See footnote 8
[38]ibid
[39]Constitution of Kenya 2010 Article 159 (2) (a)
[40]Constitution of Kenya 2010 Article 159 (2) (b)
[41]https://en.wikipedia.org/wiki/Justice_delayed_is_justice_denied Accessed on 4th July 2025
[42]Constitution of Kenya 2010 Article 15(1)(b) & 27
[43]https://nation.africa/kenya/news/politics/lame-duck-parliament-or-an-extension-of-the-executive--4575798#story Accessed on 4th July 2025
[44]Constitution of Kenya 2010 Article 145 (a), (b) & (c)
[45]https://citizen.digital/news/kenyas-judiciary-is-slowly-losing-its-independence-from-the-executive-icj-n329790?utm_source=chatgpt.com Accessed on 4th July 2025

The hidden struggles and silent battles of activism

By Munira Ali Omar

In May 2025, I remember sitting in a quiet room filled with powerful women leaders, activists and survivors at the first-ever Shangazi Network Summit organized by the formidable Maria Sarungi Tsehai. The gathering brought together women from Kenya, Tanzania and Uganda to speak, listen, network and build a living sisterhood rooted in a shared struggle. It was meant to be a space of safety and solidarity. What came next was beyond anything we had braced ourselves for. One story stood out, reminding me that activism's greatest sacrifices can also occur in silence. One of the most chilling moments was when Nana Mwafrika shared her story of how the Ugandan police escalated their use of force to an almost surreal level in their efforts to silence her.

In April 2019, Uganda was a country gripped by fear as Yoweri Museveni's regime had tightened its grip on power for decades and the political space was rapidly shrinking. Opposition voices were increasingly silenced through arrests, intimidation and violence. Bobi Wine, the charismatic opposition leader had been placed under house arrest heightening fears over the future of democracy. By 2019, Nana was no stranger to the streets. She had marched alongside opposition voices, called out police brutality and stood boldly for justice in public spaces. Her activism was vocal, visible and disruptive in the best sense of the word. However, the state doesn't just target you in public. Sometimes, the state's cruelty is not reserved for the streets, it waits for when you are alone and when no one is watching.

Bobi Wine is more than a political opponent of Museveni—he is a symbol of generational resilience against authoritarian rule. His music, public mobilization, and fight for election transparency continue to inspire a broader movement across Uganda and the region.

Into this tense atmosphere stepped Nana Mwafrika, a mother and a brave citizen. Though heavily pregnant and vulnerable, she chose to engage peacefully with the state's most feared institution, the police headquarters. As she was narrating her ordeal to us, you could hear her voice shaking. Her words came out between tears interrupted by long pauses as she fought to

steady herself. The wound was still fresh and unhealed. Beneath her grief, the anger still burned fiercely.

She made the bold decision to request a meeting with the Inspector General of Police but what followed was a brutal demonstration of state-sanctioned violence meant to crush dissent at its most intimate level. As she approached the gate to the police headquarters, a battalion of officers surrounded her and blocked her from accessing the public office. Without warning, they sprayed the inside of her car with a pepper spray and held her captive inside. In an attempt to forcefully pull her from the vehicle, the officers undressed her and began dragging her out. Despite her heavily pregnant state, they showed no regard for her well-being. Infact, one officer mocked her saying they would help her deliver her baby on the spot. The violence escalated further when another officer without any regard for the life she was carrying, stomped on Nana's pregnant belly. The trauma from the violent assault led to severe medical complications. Doctors later performed surgery to remove her unborn baby and ultimately had to remove her uterus due to the damage. Nana, the mother of five, would never be able to carry a child again.

Nana's assault did not happen amid a protest. She was alone, quietly seeking dialogue with the police. The attack exposes the hidden and personal risks activists face even when they are not part of visible demonstrations. It reveals how repression extends beyond public scenes of resistance into the private, behind-the-scenes moments of courage that often go unnoticed. This is the kind of violence that rarely makes headlines yet it defines the everyday struggles of human rights activists.

That same spirit of solidarity echoed again in May 2025 when activists Boniface Mwangi and Agather Atuhaire crossed into Tanzania not to protest publicly but to stand in silent solidarity with opposition leader

Nalongo Nana Mwafrika is more than a rights activist—she is a living testament to what it means to resist state violence with dignity. She refuses to be erased, silenced, or intimidated—even after bearing its worst consequences. Her story is a beacon for anyone fighting for justice under repression.

Tundu Lissu amid his treason charges. They went because they believed in the simple but radical idea of showing up for justice even when it is not safe. That act of just being there was deemed criminal and resulted in their abduction, detention and torture.

Their abduction sent shockwaves across East Africa's activist circles. For days, there was silence that many feared meant the worst. They had every reason to retreat, to heal in private, to let the moment pass unchallenged. When they re-emerged, scared and shaken, it wasn't just their physical wounds that spoke volumes but

Lissu's case is widely seen as a test of Tanzania's democratic credibility under President Samia Suluhu Hassan, who initially was praised for loosening political controls but now faces criticism for increasing repression. The treason charge—stemming from a call for electoral reform—demonstrates use of national security laws to suppress political dissent.

by their decision to remind us that truth-telling is an act of resistance. This act of truth-telling was for the public, the press and every activist who has ever wondered if the risk is worth it. That even in the darkest moments, we show up and when we speak, we speak not only for ourselves but for those still behind bars, still missing and still too afraid to name their pain.

The power of showing up anyway….

These are just a few examples in a long history of repression targeting those who resist quietly in private rooms and away from cameras and crowds and the risks are just as real if not greater. This silent activism, this act of showing up to stand with fellow activists whether in Uganda, Tanzania or beyond in the first place is a backbone of social change. Without this solidarity, the loudest voices would have no foundation to stand on. It is this quiet courage, this commitment to stand by each other in moments of crisis that forms the foundation on which our collective efforts rely to grow and succeed.
Recognizing the value of this quiet resilience is important as it dispels the misconception that activism only occurs through loud protests and public demonstrations. By embracing and honoring these subtle forms of resistance, we affirm the sacrifices of countless activists whose risks remain unseen yet profoundly impact the future of democracy and human rights in East Africa.

The stories of Nana Mwafrika, Boniface Mwangi, Agather Atuhaire and countless others remind us that the battle for justice is not always fought on streets filled with crowds or captured by flashing cameras. It can take place through quiet risks and sacrifices that form the foundation of every movement working to dismantle oppression and build a just society. As readers, you are invited to recognize and honor this hidden courage, understanding that activism can happen in quiet moments, far from the public eye and when no one is watching.

Across East Africa, the civic spaces where citizens engage with governance, voice dissent and demand accountability are shrinking at an alarming pace. Governments are increasingly resorting to laws, intimidation and outright violence to silence critics and opposition voices. Yet, amid this closing civic space, solidarity remains the quiet force that keeps us together. Despite repression, fear, and fatigue, people should continue showing up to resist both quietly and boldly, in public and private spheres. Every gesture of defiance, no matter how small or unseen breaks down the foundations of oppression. And in that collective presence, no system, no matter how oppressive can fully extinguish the flame of justice so long as we keep showing up for each other, in every way we can.

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Thee scope and application of the doctrine of legitimate expectation inrenewal of fixed-term contracts of employment in Kenya: A review of case law

By Virginia Wangui Shaw

1. Introduction

The doctrine of legitimate expectation is a fundamental principle of natural justice that has its roots in public law, specifically the administrative legal realm. It is founded on two core principles of the law: fairness and reasonableness.[1] These principles come into play when an aggrieved party seeks the court's intervention to compel a public body to keep a promise or maintain a long-standing practice.[2]

As emphasized by the Supreme Court of Kenya (SCK), the doctrine of legitimate expectation is essential in promoting consistency and certainty in public administration.[3] S.A De Smith *et al.*, similarly argue that the doctrine's rationale lies in fostering certainty and predictability in the conduct of the state toward its citizens.[4]

The doctrine of legitimate expectation originated in the English courts and was particularly introduced by Lord Denning in ***Schmidt v. Secretary of State for Home Affairs [1969] 2 Ch 149***.[5] Since then, the doctrine has been widely adopted by the courts as part of common law, particularly as a remedy in judicial review cases.

While traditionally applied in the public law realm, the doctrine has also found application by the Kenyan Employment and Labour Relations Court (ELRC), particularly in cases involving the non-renewal of fixed-term contracts of employment. In such cases, employees often invoke the doctrine against their employers following the non-renewal of fixed-term contracts of employment.

This article begins by outlining the legal contexts in which legitimate expectations may arise, the applicable legal framework and the general threshold for advancing a claim based on legitimate expectation. This article thereafter narrows its focus to the application of legitimate expectation in employment claims, particularly renewal of fixed-term contracts of employment. In this regard, this article discusses how the Kenyan courts have interpreted and applied the doctrine of legitimate expectation in disputes relating to non-renewal of fixed-term contracts of employment.

[1]Communications Commission of Kenya & 5 others v. Royal Media Services Limited & 5 others [2014] KESC 53 (KLR). Paragraph 264.
[2]Ibid
[3]Fanikiwa Limited & 3 others v. Sirikwa Squatters Group & 17 others [2023] KESC 105 (KLR), para 87
[4]S.A De Smith et al., (1995) *"Judicial Review of Administrative Action"* 6th Edition, Sweet & Maxwell. Page 609
[5]Forsyth, C.F *"The Provenance and Protection of Legitimate Expectations"* [1988] C.L.J 238. The Cambridge Law Journal, Volume 47, Issue 2, July 1988, PP. 238.

The doctrine of legitimate expectation in Kenyan law—upheld by the Supreme Court—ensures that state authorities are held to their word. When public bodies make clear promises or follow consistent practices, individuals who rely on them are entitled to procedural fairness or substantive benefit unless overriding legal constraints apply.

Finally, this article undertakes a comparative analysis of how courts in other common law jurisdictions have approached the doctrine in similar contexts. This article concludes by advocating for the adoption of legislative guidelines to assist the courts in adjudicating the surging number of legitimate expectation claims touching on non-renewal of fixed-term contracts of employment.

2. Defining legitimate expectation

There is no universally accepted definition of the doctrine of legitimate expectation. Nonetheless, judicial pronouncements and authoritative legal texts have elucidated the circumstances under which such expectations may arise. According to *Halsbury's Laws of England*, a legitimate expectation may reasonably be inferred "*either from a representation or promise made by authority, including an implied representation, or from consistent past practice*."[6]

Similarly, S.A De Smith *et al*.,[7] contends that legitimate expectation arises in circumstances where *"a person responsible for taking a decision has induced in someone a reasonable expectation that he will receive or retain a benefit of advantage."*[8] This formulation emphasizes the reliance placed on the conduct or assurances of the entity that provokes the claim for legitimate expectation.

The Supreme Court of Kenya (SCK) has articulated a closely aligned position, holding that a legitimate expectation arises *"when a body, by representation or by past practice, has aroused an expectation that is within its power to fulfil."*[9] In this regard, the SCK opines that the doctrine of legitimate expectation imposes a duty on public bodies to *"act fairly and to honour reasonable expectation"* triggered by their own conduct.[10] Lord Bridge similarly characterized legitimate expectation as a *"duty of consultation arising from a legitimate expectation of consultation aroused either*

[6]Halsbury's Laws of England, 4th Edition, Volume 1 (1) page 151, paragraph 81.
[7]S.A De Smith et al., (1995) *"Judicial Review of Administrative Action"* 6th Edition, Sweet & Maxwell. Page 609
[8]*Ibid*
[9]Petition No. 14 of 2014 – Communications Commission of Kenya & 5 others v. Royal Media Services Limited & 5 others [2014]eKLR at paragraph 265
[10]Fanikiwa Limited & 3 others v. Sirikwa Squatters Group & 17 others [2023] KESC 105 (KLR), para 87

by a promise or by an established practice of consultation."[11]

From the foregoing decisions, it is clear that the common tenets upon which the doctrine of legitimate expectation is anchored include a promise, representation (express or implied) and consistent past practice by an administrative body. Indeed, the SCK has underscored that legitimate expectation must be based on a promise or an established practice by a public authority.[12] As relates to either an express or implied representation, the SCK emphasizes that an entity must have represented itself in a manner to arouse expectation of a fulfilment of a certain obligation.[13]

3. Legal framework

3.1 Constitutional provisions

The doctrine of legitimate expectation is not expressly captured in the Constitution; however, its application is usually anchored on Article 47 which provides that *"Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair."*[14]

In ***Communications Commission of Kenya & 5 Others v. Royal Media Services Limited & 5 Others***, Justice Rawal stated that the essence of the doctrine of legitimate expectation as anchored on article 47 of the Constitution is to impose a *"duty to act fairly."*[15] The Court further opined that the rationale for provisions of Article 47 of the Constitution of Kenya is to *"protect a party's legitimate claim of entitlement that is, procedural solidity and not a mere promise of consideration."*[16]

The SCK has emphasized that it is the court's responsibility to interrogate whether the said *"duty to act fairly"* was adhered to by the concerned administrative body.[17] In this regard, the Court opines that it is the duty of the court to provide remedy to an aggrieved party where fair procedural rules were violated.[18]

3.2 Statutory provisions

3.2.1 Fair Administrative Action Act

The Fair Administrative Action Act operationalises the provisions of the aforementioned Article 47 of the Constitution of Kenya. This Act provides an avenue for redress by way of judicial review for any person aggrieved by an administrative decision. The Act mandates the court/tribunal to review an administrative action if among other considerations, it *"violates the legitimate expectations of the person to whom it relates."*[19]

In ***Saire & Another v. Cabinet Secretary for Lands and Planning & Another***,[20] the Court overturned the revocation of three members of the Kajiado West Land Control Board whose contracts were revoked before completion of the contracted three years of service. The court noted that the Claimants had a legitimate expectation that they would continue serving in the absence of any

[11]Re Westminster City Council [1986] A.C. 668 at 692(Lord Bridge)
[12]Kenya Revenue Authority v. Export Trading Company Limited [2022] KESC 31 (KLR) para 54
[13]Communications Commission of Kenya & 5 others v. Royal Media Services Limited & 5 others (Petition 14, 14A, 14B & 14C of 2014 (Consolidated)) [2014] KESC 53 (KLR) (29 September 2014) (Judgment)
[14]Article 47(1) of the Constitution of Kenya
[15]Communications Commission of Kenya & 5 Others v. Royal Media Services Limited & 5 Others, paragraph 404
[16]*Ibid*
[17]Kenya Revenue Authority v. Export Trading Company Limited [2022] KESC 31 (KLR) ***para 46***
[18]*Ibid*
[19]Section 7(m) of the Fair Administrative Act
[20]KEELRC 894 (KLR)

lawful reason for revocation.[21] The court held that the premature revocation of the Claimants' appointment violated their right to fair administrative action.

4. Threshold for legitimate expectation claims

In order for an aggrieved party to successfully claim legitimate expectation, the following legal thresholds must be established:

4.1 Legitimacy

The SCK has emphasized that in adjudication of disputes touching on legitimate expectation, a court must look beyond the facts of a given case and the perceived existence of expectation in the Claimant's mind.[22] In this regard, the SCK underscores the need for a court to scrutinize the legitimacy of such expectations in a legal sense, with an objective view.[23]

In ***Communications Commission of Kenya & 5 others v. Royal Media Services Limited & 5 Others***, the SCK, although in a public law context, issued guidelines that dictate whether or not a given promise or representation gives rise to a legitimate expectation thus:

a. *There must be an express, clear and unambiguous promise given by a public authority;*
b. *The expectation itself must be reasonable;*
c. *The representation must be one which it was competent and lawful for the decision-maker to make; and*
d. *There cannot be a legitimate expectation against clear provisions of the law or the Constitution.*[24]

4.2 Locus standi

In addition to establishing the legitimacy of the claim, an aggrieved party seeking redress from court must establish that it has the legal capacity to invoke the principle of legitimate expectation.[25]

4.3 Reasonableness

The courts have held in many cases that only reasonable expectations that are triggered by administrative body's conduct will be considered legitimate by court.[26] This is in contrast with other illegitimate expectations, which the courts describe as *"which the individual has decided to entertain at his or her own risk."*[27] Accordingly, mere desires and/or wishes cannot translate to legitimate expectation. The test for reasonableness of the expectation is based on the reasonable man test and is determined on a case-by-case basis.

5. Burden and standard of proof in legitimate expectation claims

The burden of proof in invoking the doctrine of legitimate expectation always lies with the claimant.[28] In this regard, the courts in Kenya have emphasized that a claimant or any aggrieved person relying on legitimate expectation must convince the court on the basis of concrete evidence that the employer's conduct led him/her to believe in the renewal of the contract. Mere subjective expectations of contract renewal without the backing of persuasive evidence will be rejected by the courts.

[21]Saire & Another v. Cabinet Secretary for Lands and Planning & Another KEELRC 894 (KLR)
[22]Kenya Revenue Authority v. Export Trading Company Limited [2022] KESC 31 (KLR) – para 53
[23]*Ibid*
[24]Communications Commission of Kenya & 5 others v. Royal Media Services Limited & 5 others [2014] KESC 53 (KLR). Para 269
[25]*Ibid*, para 265
[26]Kenya Revenue Authority v. Export Trading Company Limited [2022] KESC 31 (KLR) Para 52
[27]Fanikiwa Limited & 3 others v. Sirikwa Squatters Group & 17 others [2023] KESC 105 (KLR) para 89
[28]Teresa Carlo Omondi v. Transparency International- Kenya [2017] KEELRC 1624 (KLR). Para. 91.

The standard of proof in this regard is the civil threshold; that is, the claimant must prove on a balance of probabilities that an employer's express or implied representation led the claimant to have a reasonable expectation that the contract would be renewed.

6. The place of legitimate expectation in renewal of fixed-term contracts of employment

6.1 General Rule of Fixed-Term Contracts of Employment

It is a trite principle of law that a fixed-term contract has a definite commencement date and an end date; therefore, such a contract terminates automatically at the end of the contract period. The Employment Act of Kenya does not define a fixed-term contract but acknowledges it as a type of employment contract.[30] The United Kingdom's ***Fixed-term Employees Regulations of 2002*** define a fixed-term contract of employment as:

"a contract of employment that…will terminate— (a) on the expiry of a specific term, (b) on the completion of a particular task, or (c) on the occurrence or non-occurrence of any other specific event …"[31]

This general rule on the automatic end of fixed-term contracts has been stated for the umpteenth time by the Court of Appeal of Kenya (CoA) in many appeals challenging non-renewal of a fixed-term contract of employment. The court emphasized this rule in ***Trocaire v Catherine Wambui Karuno***[32]

Fixed-term contracts are lawful and flexible, but they must not be used to disguise permanent employment or evade worker protections. Kenyan courts are increasingly willing to scrutinize them where exploitation is suspected.

and ***Registered Trustees of the Presbyterian Church of East Africa & another vs. Ruth Gathoni Ngotho- Kariuki.***[33] Lord Denning also echoed the same sentiments; asserting that parties in a fixed-term contract have no obligations towards each other beyond the contractual period.[34]

Regarding notice of non-renewal of a fixed-term contract of employment, an employer is not legally obliged to give notice of expiry of a contract since the contract period lapses by effluxion of time.[35] This position was emphasized by the CoA in ***Abdala & 9 others v Zhongmei & another.***[36]

Further, relating to the reason for non-renewal of a contract, the CoA emphasizes that the employer is not obliged to explain to the employee why the contract will not be extended or renewed.[37] The CoA underscores this legal principle in the following remarks: *"Once a fixed term*

[29] *Ibid*
[30] See Section 10(3)(c) of the Employment Act of Kenya.
[31] Section 1 of The Fixed-term Employees *(Prevention of Less Favourable Treatment)* Regulations 2002 of the United Kingdom.
[32] [2018] KECA 769 (KLR)
[33] [2017] eKLR
[34] British Broadcasting Corporation v. Ioannou [1975] 2 All ER 999
[35] See Abdala & 9 others v. Zhongmei & another (Civil Appeal 296 of 2019) [2025] KECA 26 (KLR) (17 January 2025) (Judgment)
[36] (Civil Appeal 296 of 2019) [2025] KECA 26 (KLR)
[37] Wambugi v. Board of Management Afya Yetu Initiative (Civil Appeal 180 of 2019) [2024] KECA 1557 (KLR) (25 October 2024) (Judgment)

contract is at an end, the employer has no obligation to justify termination on other grounds beyond the lapse of the fixed period."[38]

The CoA however, stresses that whereas an employer is not obliged to explain to the employee why the contract will not be extended or renewed, where there are particular provisions in a fixed-term contract requiring the employer to justify non-renewal, then the employer is obliged to give reasons for non-renewal of the fixed-term contract.[39]

6.2 Exceptions to the general rule: Grounds for legitimate expectation in fixed-term contracts

The general rule on non-renewal of fixed-term contracts notwithstanding, there are certain circumstances where an employer through representation may cause an employee to have a reasonable and justifiable expectation that his/her fixed-term contract will be extended. In ***John Ogutu Ragama v Bandari Sacco Limited***,[40] the court made the following remarks in this regard:

> *"…whereas the Employer has discretion in renewal of contracts, refusal to renew can be challenged where Employer's actions give rise to legitimate expectation there would be renewal; and secondly, where the decision not to renew is based on improper motive, or where there are countervailing circumstances. The Claimant would, assuming there was no valid contract, have a strong case based on the principle of legitimate expectation."*[41]

Indeed, the courts have over the years established some common grounds as exceptions to the general rule/basis for the application of legitimate expectation in the renewal of fixed-term contracts of employment. These include, but are not limited to:

6.2.1 Repeated renewals

Where an aggrieved party proves an employer's practice of consistent renewals, the court may hold that the employer created a reasonable expectation for renewal in the mind of the aggrieved party.[42] In ***Riley Falcon Security v. Lumbete***[43] the Court held that the employer's previous renewals of the Claimant's contract over a period of seven years in the absence of non-renewal notice had created a legitimate expectation of renewal on the part of the Claimant.

In ***Keen Kleeners Limited v. Kenya Plantation and Agricultural workers' Union***,[44] the Court of Appeal held:

> *"The long standing, uninterrupted and consistent practice of renewing or extending the grievants' contracts would have surely led the grievants to believe that their last contracts would be renewed, more so in the absence of any reasonable notice to the contrary given to them by the appellant."*[45]

6.2.2 Extended service

Where an employee has worked for an extended period of time under a fixed-term contract of employment beyond the initial

[38]Registered Trustees of the Presbyterian Church of East Africa & Presbyterian Foundation v. Ruth Gathoni Ngotho- Kariuki [2017] KECA 194 (KLR)
[39]Wambugi v. Board of Management Afya Yetu Initiative (Civil Appeal 180 of 2019) [2024] KECA 1557 (KLR) (25 October 2024) (Judgment)
[40][2017] KEELRC 1738 (KLR)
[41]John Ogutu Ragama v. Bandari Sacco Limited [2017] KEELRC 1738 (KLR)
[42]Teresa Carlo Omondi v. Transparency International- Kenya [2017] KEELRC 1624 (KLR). Para.91
[43][2024] KEELRC 1793 (KLR)
[44]Keen Kleeners Limited v. Kenya Plantation and Agricultural workers' Union [2021] KECA 352 (KLR). Paragraph 47.
[45]*Ibid*

An express promise to an employee is a clearly stated, unambiguous assurance given by an employer—or someone with authority—regarding a specific benefit, condition, or future action. This promise may be written or oral, and once made, can create legitimate expectations and sometimes binding legal obligations.

contractual period, the court may hold that there is a basis for legitimate expectation of renewal on the part of the employee.

In ***John Ogutu Ragama v Bandari Sacco Limited***, the Claimant had worked for almost one year after the expiry of the initial contract of employment. The Court held that working on an extended service after the duration of the contractual period created a strong case for legitimate expectation on the part of the claimant.[46]

6.2.3 Express promise

In circumstances where an employer gives an express promise to an employee on renewal of his/her fixed-term contract of employment, the court will find that the employer's express conduct created a legitimate expectation of renewal of the contract.[47] This includes contractual terms that guarantee renewal based on, for instance, satisfactory performance or availability of funds. Whenever such conditions for renewal are met, there is a valid basis to claim legitimate expectation for renewal. In ***John Nduba v Africa Medical and Research Foundation (AMREF Health Africa)***,[48] the court stated that where a contract of employment provides that it will be renewed subject to the fulfillment of some conditions, the employee has a legitimate expectation of renewal if he/she fulfills the renewal conditions.

6.2.4 Regular practice

In cases where a claimant proves that renewals of contracts are a regular practice by the employer company, the court will find that the practice creates a legitimate expectation of renewal in the mind of the claimant.[49] In ***John Nduba v Africa Medical***

[46]John Ogutu Ragama v. Bandari Sacco Limited [2017] KEELRC 1738 (KLR)
[47]Teresa Carlo Omondi v. Transparency International- Kenya [2017] KEELRC 1624 (KLR). Para.91
[48][2020] KEELRC 1685 (KLR) para 41
[49]Teresa Carlo Omondi v. Transparency International- Kenya [2017] KEELRC 1624 (KLR). Para.91

and Research Foundation[50] the Claimant had worked for 32 years with renewals of a two-year contract of employment as per the employer's manual. The Court held that in the absence of disciplinary issues, the Claimant had a legitimate expectation of future earnings.

6.2.5 Employer's conduct / representation

The courts have consistently held that where an employer expressly or impliedly represented herself/himself to the employee in a manner so as to lead the employee to expect a renewal of contract, the said representation amounts to a legitimate claim of expectation for contract renewal.[51] This may include failure by the employer to communicate non-renewal in cases where there have been previous renewals. In ***Kenya Broadcasting Corporation v. Siboko***,[52] the Court held that the employer's past conduct that led to renewal of the contract 16 times created a legitimate expectation for renewal.

6.3 Limitations on the application of legitimate expectation

The doctrine of legitimate expectation is applied on a case-by-case basis depending on the peculiar circumstances of a given case. Even where an aggrieved party has established a reasonable expectation, the court must scrutinize the legality of the said expectation. In this regard, the courts have held that the legitimate expectation cannot override the following:

6.3.1 Express provisions of the law

The doctrine of legitimate expectation cannot be invoked against clear provisions of the law, no matter the injuries the aggrieved party stands to suffer. This position has been emphasized by the courts in ***Republic v. Nairobi City County & Another ex parte Wainaina Kigathi Mungai***,[53] and ***Republic vs. Kenya Revenue Authority, ex parte Aberdare Freight Services Limited.***[54]

Legitimate expectations must be consistent with the law. Even if there was clear promise/representation, but the said expectation overrides statutory and constitutional provisions, the same cannot be protected by the law.[55] For instance, an employee cannot seek to enforce an illegal contract of employment even where there is a legitimate expectation of employment, as was the case in ***Ngetich & 3 others v. County Service Board Bomet & another.***[56]

In ***Fanikiwa Limited & 3 others v. Sirikwa Squatters Group & 17 others***[57] the Supreme Court made the following remarks in this regard:

> *"Legality dictates that an action can only be undertaken if it is authorized by the law. Therefore, a representation, promise, practice, conduct or an action outside the prescription of the law or undertaken by a person or entity without competent authority is illegal and cannot give rise to legitimate expectation."*[58]

6.3.2 Contractual obligations

In cases where the contract explicitly provides that the term of the contract will not be extended once the contract period has ended and the aggrieved party agrees

[50][2020] KEELRC 1685 (KLR) para 56
[51]*Ibid*, para 41
[52][2023] KEELRC 505 (KLR)
[53]High Court Judicial Review Misc. case No. 356 of 2013; [2014] eKLR Paragraph 33
[54][2004] 2 eKLR 530
[55]Communications Commission of Kenya & 5 others v. Royal Media Services Limited & 5 others (Petition 14, 14A, 14B & 14C of 2014 (Consolidated)) [2014] KESC 53 (KLR) (29 September 2014) (Judgment) – para 301
[56](Civil Appeal 20 of 2018) [2022] KECA 575 (KLR) (28 April 2022).
[57][2023] KESC 105 (KLR) para 99
[58]*Ibid*

to the terms, the courts will uphold the contractual terms and use them as a basis for justifying non-renewal of the contract by the employer. In this regard, the courts have emphasized that parties are bound by their contractual obligations.

This position was underscored by the Court of Appeal in ***Transparency International - Kenya v Teresa Omondi***, where the Court observed that the Claimant knowingly entered into a fixed-term contract that had no renewal guarantee.[59]

7. Comparative jurisprudence

Judicial precedents from other common law jurisdictions reveal common recognition and applicability of the doctrine of legitimate expectation but have varying guidelines and thresholds in determining employment disputes.

7.1 South Africa

7.1.1 Legal foundation

South African jurisprudence reveals a relatively liberal approach in its interpretation and application of the doctrine of legitimate expectation in employment disputes. The South African courts recognize and apply the doctrine of legitimate expectation primarily under the provisions of Promotion of Administrative Justice Act. Additionally, according to Section 186(1)(b) of the Labour Relations Act of South Africa, non-renewal of a fixed-term contract of employment where the employee had reasonable grounds for expectation of renewal is considered an unfair dismissal. In ***Zungu v. Premier of the Province of KwaZulu-Natal and Others***,[60]

Comparative jurisprudence is the study of differences and similarities between legal systems, doctrines, and philosophies across different countries. It helps scholars, judges, and legislators understand how legal ideas evolve, how they are interpreted in diverse contexts, and how they can inform domestic reform or constitutional interpretation.

the South African Constitutional Court held that the import of Section 186(1)(b) of the Labour Relations Act is to declare unfair dismissals in cases where an employer fails to renew a fixed-term contract where there is legitimate expectation for renewal on the part of the employee.

7.1.2 Legitimacy

Despite the liberal stance, the South African judges have been vocal in clarifying that the courts will not uphold blanket claims on all kinds of alleged expectations but only those that are truly legitimate. In the case of ***South African Veterinary Council v. Szymanski***,[61] the Court opined that the law protects only expectations that are legitimate. In ***SA Rugby Players Association & Others v. SA [Pty] Limited & Others]***,[62] the Court held that where a contract is clear that there will be no renewal, an aggrieved party must present cogent evidence to prove legitimate expectation of renewal.[63]

[59](Civil Appeal 81 of 2018) [2023] KECA 174 (KLR) (17 February 2023) (Judgment)
[60](2018) ZACC 1
[61]2003(4) S.A. 42 (SCA) at [paragraph 28]
[62][2008] 29 ILJ, 2218 [LAC
[63]*Ibid*

7.1.3 Repeated renewals

The South African courts commonly find in favour of the employee in cases where there have been repeated renewals by the employer. For instance, in ***South African Clothing and Textile Worker's Union and Another v CADEMA Industries (Pty) Ltd***,[64] the Court held that a legitimate expectation for renewal was created where an employee's contract was renewed multiple times within a period of four and a half years. This was the same holding in ***Yebe v. University of KwaZulu-Natal***[65] where the worker's contract had been renewed twenty times in slightly over four years of employment.

7.1.4 Employer's conduct and representations

The South African courts also consider the employer's conduct in deciding whether or not a claim for legitimate expectation is valid. In ***Mediterranean Woollen Mills (Pty) Ltd v. SA Clothing & Textile Workers Union***,[66] the Court opined that despite explicit provisions in a fixed-term contract that bar renewal, an employer's representation/conduct can override the intention and create a legitimate expectation for renewal.

7.1.5 Conversion to permanent contracts

Distinctively, unlike other common law jurisdictions like Canada, the South African courts opine that repeated renewals do not ipso facto convert a fixed-term contract into a permanent one. In ***Njikelana v. Kruger NO and Others***[67] the Court interpreted Section 186(1)(b) of the South African Labour Relations Act to the effect that repeated renewals perpetuate the fixed-term nature of the contract rather than altering its character to that of a permanent contract.

7.2 Canada

7.2.1 Legal foundation

Canadian courts recognize and apply the doctrine of legitimate expectation based on provisions of the Charter of Rights and Freedoms of Canada. Even though the provisions are primarily in the realm of administrative law, the Canadian courts have also applied the doctrine in some employment contexts. The Canadian courts have adopted a largely balanced approach in their application of the doctrine of legitimate expectation.

7.2.2 Contract clarity

Notably, the key factor in the interpretation of provisions of a fixed-term contract has been the clarity of the provisions of the fixed-term contract in question. In all cases where there is ambiguity as to the intention of parties in terms of contract renewal, the court holds in favour of the employee. Conversely, where the contract is very clear on non-renewal, the courts will not interfere with such a clear intention. In ***Flynn v. Shorcan Brokers Limited***,[68] the Ontario Court of Appeal rejected the Claimant's claim for legitimate expectation after the employer failed to renew a fixed-term contract of employment after four years of annual renewal. The Court stated that the contract's fixed-term intention was very clear and the employee was fully aware of that intention and further that the employer's conduct did not in any way create a legitimate expectation for renewal.

[64](C 277/05) [2008] ZALC 5
[65](2007) 28 ILJ 490 (CCMA)
[66]1998 (2) SA 1099 (SCA); [1998]6 BLLR 549 (A)
[67](2019) (JR1834/17) ZALCJHB 88 - SAFLII
[68]2006 ONCA

7.2.3 Repeated renewals

Outstandingly, the courts seem to discourage repeated renewals stretching for long indefinite periods. In such cases, the courts hold that repeated renewals override the explicit provisions of a fixed-term contract and automatically convert such contracts into permanent contracts of employment. In ***Ceccol v. Ontario Gymnastic Federation***,[69] for instance, the Ontario Court of Appeal upheld the employee's claim for legitimate expectation as the employee's contract was renewed annually for a period of 16 years. The court opined that where an employee's fixed-term contract had been renewed many times, it ceased to be a fixed-term contract but an indefinite regular contract of employment. This was further strengthened by what the court described as *"ambiguous renewal terms"*. The contract had provided for *"twelve months subject to renewal."* The Court stated that ambiguity should be interpreted in favour of the employee and thus found such a contract to be indefinite despite the contractual provisions indicating it was a fixed-term contract.

Additionally, in ***Atwater Badminton & Squash Club Inc. v. Morgan,***[70] the Quebec Court of Appeal held that the repeated renewals of the Claimant's fixed-term contract over seventeen years had created a legitimate expectation of not just renewal but indefinite/permanent employment.

7.2.4 Limited enforcement against government

Interestingly, the Canadian courts opine that legitimate expectations merely generate rights that guard against procedural unfairness but should not be considered as substantive entitlement by an aggrieved party, especially as against the government in administrative legal realms where the government enjoys statutory discretion in making decisions. This was the Supreme Court's holding in ***Mount Sinai Hospital Center v. Québec***.[71]

7.3 India

7.3.1 Legal foundation

Indian courts recognize and apply the doctrine of legitimate expectation by virtue of Article 14 of the Constitution of India, which provides for the right to equality. The Indian courts generally opine that the doctrine is an important component of fair administrative action. The Indian courts, however, adopt an overly cautious approach in the application of legitimate expectation in employment claims, where such claims are subjected to tight scrutiny.

7.3.2 Limited application in exceptional cases

Unlike many common law jurisdictions, which are liberal in their application of the legitimate expectation doctrine, the Indian courts are quite conservative in their application of the doctrine of legitimate expectation, only allowing such claims in exceptional cases in employment law. In ***J.P. Bansal v. State of Rajasthan***,[72] for instance, the court rejected the employee's claim for legitimate expectation of renewal based on past renewals. The court opined that the employee was fully aware that he had executed a fixed-term contract with no guarantee of renewal.

In ***National Buildings Construction Corporation v. Raghunathan***[73] the court held that an employee cannot claim

[69]2001 ONCA
[70]2014 QCCA
[71](2001 SCC 41)
[72](2003) 5 SCC 134
[73](1998) 7 SCC 66

Due Process in Cases of Alleged Misconduct refers to the fair and lawful procedures that must be followed when someone is accused of wrongdoing—whether in criminal law, employment, academia, or other settings. It ensures that the accused has the opportunity to know the charges, respond, and be judged fairly.

legitimate expectation of benefits where there is no express promise or past practice.

7.3.3 Due process in cases of alleged misconduct

The Indian courts have, however, maintained that in cases where an employer is on a fixed-term contract and is guilty of misconduct or any other reason justifying termination, the employee must be subjected to due process; otherwise, non-renewal of the contract based on the alleged misconduct will be construed as unfair termination, as the employee has a valid expectation of contract renewal in such cases in the absence of formal inquiry. In ***Swati Priyadarshini v. State of Madhya Pradesh & Others***,[74] the Supreme Court of India clarified that legitimate expectation is valid in cases where an employer refuses to renew a fixed-term contract based on a disciplinary issue that was not subjected to a formal inquiry about the culpability of the employee.

7.3.4 The Supremacy of public interest

Moreover, in India, public interest is a factor of consideration in addition to the common factors such as employer's representation, promise or past practice. In ***Punjab Communications Limited v. Union of India***,[75] the Supreme Court of India stated that even though an aggrieved party may have a valid claim of legitimate expectation based on the employer's express promise or past practice, public interest overrides such claims.

7.4 Australia

7.4.1 Legal foundation

The doctrine of legitimate expectation is not provided in any written law in Australia.

[74](2024) INSC 620
[75](1999) 4 SCC 727

The courts, however, recognize and apply the doctrine through established judicial precedents on the subject.

7.4.2 Limited application

Just like India, Australian courts have adopted a cautious approach towards the doctrine of legitimate expectation, especially in the renewal of fixed-term contracts of employment. The view of the Australian courts is that legitimate expectation is not enforceable as of right unless certain legal standards are fulfilled. Examples of the legal standards in this regard are express promise and contractual terms. In ***Tim Alouani-Roby v. National Rugby League (NRL) Limited***[76] the court rejected the Claimant's claim for legitimate expectation of contract renewal, terming the Claimant's expectation as a mere expectation devoid of any express binding promise or contractual provisions enabling renewal. The court stated that a mere expectation by the Claimant cannot supersede clear contractual terms.

7.4.3 Repeated renewals

Where the claim for legitimate expectation is merited, the courts will find in favour of the claimant for instance, in cases of repeated renewals over a long period of time. In ***Kavanagh & NTEU v. University of Melbourne***[77] the Fair Work Commission stated that consistent renewals of a fixed-term contract for a period of seventeen years constituted an indirect continuity of employment.

7.4.4 Limited enforcement outside administrative law

As aforementioned, the restrained approach by the Australian court springs from the courts' view that claims of legitimate expectation are not enforceable as of right but must be based on clear obligations under the law. This is particularly the position in cases outside the administrative law realm. In ***Re Minister for Immigration and Multicultural Affairs; Ex parte Lam***,[78] the High Court expressed reservations in the application of the principle of legitimate expectation outside the context of administrative law, particularly in employment disputes relating to the renewal of fixed-term contracts. The court observed that claims of legitimate expectation are not enforceable as of right but must be based on clear obligations under the law.

7.4.5 Express provisions override mere expectations

Notably, the Australian courts are a bit cautious in implying legitimate expectation in contracts where there are express provisions to the contrary. The courts are more likely to overrule a claimant's implied expectations and give meaning to express contractual terms. This was the High Court's holding in ***Commonwealth Bank of Australia v. Barker***.[79]

7.5 United Kingdom

7.5.1 Scope and legal foundation

In the United Kingdom, the doctrine of legitimate expectation applies predominantly in public law contexts where claimants seek redress against the decisions of public bodies. However, the courts have recognized and applied the doctrine in employment cases, although in limited contexts. The UK courts' decisions on legitimate expectation in employment disputes typically revolve

[76][2024] FCA 12
[77]P1374
[78](2003) HCA 6
[79][2014] HCA 32

Repeated Renewals of Fixed-Term Contracts raise important legal and ethical issues—especially around job security, disguised permanent employment, and fair labour practices.

around interpretation of the provisions of ***Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations 2002.***

7.5.2 Repeated renewals

Regarding repeated renewals of fixed-term contracts over a long period of time (more than four years), the courts give meaning to provisions of ***Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations 2002***, where such fixed-term contracts are converted into permanent contracts of employment unless there is a compelling legal justification given by an employer.

Where there is objective justification against converting a fixed-term contract into a permanent contract, the courts will hold in favour of the employer. For instance, in ***Duncombe v. Secretary of State for Children, Schools and Families***,[80] the court allowed continued use of fixed-term contracts of employment for teachers, having heard objective justification under the provisions of ***Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations 2002***. This was the finding in ***Lobo v. University College London Hospitals NHS Foundation Trust***[81] as well. In this case, the Employment Appeal Tribunal opined that the employer had satisfied the court as to why the claimant's fixed-term contract (a consultant), though renewed multiple times, could not be converted to a permanent contract.

In cases where there is no objective justification, the court will find in favour of an employee. This was the holding in ***Ford v. Warwickshire County Council***,[82] where the court held that a fixed-term contract that is renewed multiple times with breaks in between created continuous employment, thereby validating the employee's claim for unfair dismissal upon contract non-renewal.

7.5.3 Legitimacy

The UK courts, just like their common law counterparts, require the employee to provide evidence of an express promise or past practices by the employer in order to succeed in making a claim for legitimate expectation. In ***O'Neill v. Phillips***[83]the House of Lords stated that a claim of legitimate expectation must be devoid of

[80][2011] UKSC 14 & 36
[81][2024] EAT 91
[82][1983] 2 AC 71
[83][1999] UKHL 24

informal assurances. The Court opined that such claims must be grounded on express agreements capable of enforcement.

7.5.4 Enforcement against government

The UK courts have affirmed that an aggrieved party can successfully claim violation of legitimate expectation against public administration where the claim is legitimate. In ***Council of Civil Service Unions v. Minister for the Civil Service***,[84] while applying the doctrine of legitimate expectation in a public law context, the House of Lords opined that judicial review proceedings protect the legitimate expectation of the affected party against a public body in circumstances where a public body makes an express promise or the aggrieved party proves regular practice by the public body.

8. Conclusion

In light of the above analysis, it is clear thaat the significance of the doctrine of legitimate expectation cannot be gainsaid, particularly from the employee's perspective. Indeed, the doctrine plays a pivotal role in protecting employees against arbitrary non-renewal of fixed-term contracts.

However, a major challenge around its application stems from the lack of standardized legal guidelines, which would otherwise provide a consistent benchmark for judicial decision-making. Consequently, every judicial officer interprets and applies the doctrine based on their individual comprehension of the facts tabled before the court. This has led to inconsistencies in court practice around the application of the doctrine of legitimate expectation in the renewal of fixed-term contracts. This inconsistency has prompted several judges of the ELRC to call for legislative intervention concerning the issue of legitimate expectation on the renewal of fixed-term contracts of employment. In this regard, Justice James Rika, for instance, made the following remarks:

> *"There is no legislation in Kenya on the principle of legitimate expectation in renewal of fixed term contracts. In resolving disputes on the subject, the Court has to rely largely on decided cases. There are quite a number of decisions emerging on the subject, from our vibrant Employment & Labour Relations Court. In other jurisdictions, the concept has been clarified through legislation. Perhaps our Employment Act ought to be amended, to incorporate the concept of legitimate expectation of renewal of fixed term contracts, particularly because this has become a recurrent cause of employment disputes."*[85]

This article concludes by asserting that a standard legal and judicial approach to the doctrine of legitimate expectation in the renewal of fixed-term contracts would enhance certainty and predictability in courts' interpretation and application of the doctrine. This need arises from the surging number of legitimate expectation claims filed in the ELRC. As aforementioned, the absence of specific legislation on the doctrine will continue to contribute to inconsistencies in court decisions; even when the judges are presented with similar facts. The proposed legislation would provide a consistent framework for judges to reference when adjudicating legitimate expectation claims. Ultimately, this would foster greater consistency and reliability in judicial precedents concerning the doctrine.

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[84][1985] AC 374
[85]Teresa Carlo Omondi v. Transparency International- Kenya [2017] KEELRC 1624 (KLR)

Justice displaced: Rethinking the prosecutorial discretion on the place of trial in Kenya

By Agnes Nzioka

By Hosea Katila

Abstract

Behind the scenes of Kenya's criminal justice system lies a powerful but largely unchecked tool - ODPP's discretion in deciding the place of trial. Ever wondered why once you are arrested, you are taken to one police station and not the other? Arraigned in one court and not the other? The magic word behind it is jurisdiction, geographic jurisdiction to be particular. This is the power of a court to hear cases that arise within a defined area. The law provides for the place of trial for accused persons in Kenya. However, a close reading of the law reveals that an accused person may have more than one possible place of trial, leaving the ODPP at the discretion to choose where the accused will be tried. This article explores how this discretion may be and has been the subject of abuse in Kenya, at the expense of justice.

1.0 Introduction

The death of blogger and teacher Albert Ojwang in Police custody sparked an uproar in the country. It saw the Cabinet Secretary, Ministry of Interior and National Administration, the Inspector General of the

The Late Albert Ojwang

Kenya National Police Service, the Director of the Directorate of Criminal Investigations (DCI), and the head of the Independent Policing Oversight Authority (IPOA) being summoned to Parliament for questioning. When asked why the late Albert Ojwang was moved from Homabay to Nairobi, the Director of DCI claimed that it was for jurisdictional reasons, quoting section 71 of the Criminal Procedure Code.[1] While this article does not seek to substantiate the veracity of this claim, it dives into the murky waters of jurisdiction in Kenya's criminal justice system, with regard to the place of trial.

The article therefore seeks to examine how the jurisdiction of courts in Criminal Matters and place of trial is determined, show how the discretion exercised by the office of the

Director of Public Prosecutions (hereinafter ODPP) when deciding on the place of trial comes about, highlight how such discretion may be and has been the subject of abuse and shades light to the effect such abuse has on the access to and the administration of justice. The article concludes by asserting the need to put in place measures to curb the excesses of the ODPP in exercising its discretion in determining the place of trial.

2.0 Jurisdiction of courts in criminal matters and the place of trial

The Magistrate's Court Act[2] as read together with the Criminal Procedure Code (hereinafter CPC)[3] stipulates the Jurisdiction of courts in Criminal Matters and the place of trial for accused persons. On the ordinary place of inquiry and trial, the CPC provides that every offence shall ordinarily be tried by a court within the local limits of whose jurisdiction it was committed, or within the local limits of whose jurisdiction the accused was apprehended, is in custody on a charge for the offence, or has appeared in answer to a summons lawfully issued charging the offence.[4] This was the position in *Elsek Osman Erdinc v Republic [2021] eKLR*, where the Court held that the Director of Public Prosecution ought to have initiated and commenced the act of prosecution of the applicant before the Kilifi Senior Principal Magistrate Court, as the alleged crime of defilement took place in Kikambala, within Kilifi County.

However, it is worth noting that the local limits within which a crime was committed may not always be the local limits within which the accused person was apprehended or is in custody. For instance, an accused person may commit a crime in Kiambu but be apprehended in Machakos. Per the above section of the CPC, the accused person may be tried by either Kiambu or Machakos courts. This creates a discretion on the part of the prosecution on where to present the accused person for trial.

The CPC further provides that an offence may be tried by a court within the local limits of whose jurisdiction the consequence of the offence has ensued.[5] For example, if a theft occurs in Nairobi and the stolen goods are found in Kangundo, Section 72 allows the case to be tried in either Nairobi or Kangundo.The case of *David Kiagano Mbisi v Republic*,[6] made the import of section 72 of the Code clear in that, a person should be tried in a court which has the local geographical jurisdiction of the place where the act was done or consequences of the act were felt.

When it is uncertain in which of several local areas an offence was committed; or an offence is committed partly in one local area and partly in another; or an offence is a continuing one, and continues to be committed in more than one local areas; or an offence consists of several acts done in different local areas, it may be tried by a court having jurisdiction over any of those local areas.[7] Additionally, where an offence is committed while the offender is in the course of a journey or voyage, the accused may be tried by a court through or into the local limits of whose jurisdiction the offender, or the person against whom or the thing in respect of which the offence was committed, passed in the course of that journey or voyage.[8]

[1] https://youtu.be/KzxL-Zgt7r4?si=waCpOfiS858Pqjc4
[2] Magistrate's court Act No. 26 of 2015, s 6.
[3] Criminal Procedure Code, CAP 75.
[4] Ibid. s 7.
[5] Ibid s 72.
[6] *David Kiagano Mbisi v Republic* [2012] eKLR.
[7] Criminal Procedure Code, CAP 75, s.74.
[8] Ibid s. 75.

3.0 ODPP'S discretion

The above sections of the CPC provide multiple options on where an accused person may be tried. That is: an accused person may be tried by a court within the local limits of whose jurisdiction the crime was committed; alternatively, the accused person may be tried within the local limits of whose jurisdiction the accused was apprehended, or is in custody on a charge for the offence; again, an accused person may be tried by a court within the local limits of whose jurisdiction the consequence of the offence has ensued; further, where an offence is committed in several areas, the accused may be tried by a court having jurisdiction over any of those local areas and lastly, for offences committed while on a journey, the accused may be tried by a court having jurisdiction over any of the areas he passed in the course of his journey. This presents the ODPP with wide discretion to decide on which court to charge the accused person.

3.1 Abuse of discretion

The Constitution provides that the DPP does not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his or her powers or functions, should not be under the direction or control of any person or authority.[9] However, such powers should be exercised with due regard to the public interest, the interests of administration of justice and the need to avoid abuse of legal process.[10] Consequently, in determining the place of trial, the ODPP should do so with due regard to the public interest , the interests of administration of justice and the need to avoid abuse of the legal process. In practice, this has been far from the truth, with the discretion being abused as espoused below:

3.1.1 Forum shopping

"Forum shopping" refers to the act of handpicking a venue in which to try a case for purposes of gaining some unfair advantage or opportunity to throw the dice in one's favour.[11] Such an action would be a subversion of justice thus undermining the principle of equal protection of the law.[12] Forum shopping in this scenario may be two pronged, one is that the ODPP may decide to choose a venue that would be adverse to the accused person. This is at times done in the guise of good will on the part of the prosecution. For instance, in *David Kiagano Mbisi v Republic*,[13] the state had a senior Police Officer put on record the claim that he elected to charge the Applicant in Machakos instead of Kitui so as to "safeguard" the integrity of the Kitui Law Court. This is because, apparently, he believed the Applicant when he bragged openly that he was known within the judiciary at Kitui Law Courts and that the case would not be sustained. The court held that the State must not be allowed to forum-shop in criminal cases in the guise of "safeguarding" judicial integrity. The court observed that the overall impact was worse than the feared injury to the judiciary itself. Although the State's action was benign or well-intended, this was a case of the medicine being worse than the ailment.

On the other hand, forum shopping may take the direction of accusing the accused person of forum shopping whenever the accused makes an application to transfer the matter in an area that they are domiciled. Courts have generally declined to admit such applications by the accused person as

[9]The Constitution of Kenya (2010), art 157(10).
[10]Ibid, art 157(11).
[11]*Republic v Stephen Lelei & Fredrick Leliman* [2020] KEHC 3039 (KLR).
[12]*Stanley Muia Makau v Republic* [2020] KEHC 5755 (KLR).
[13](2012) eKLR.

in the case of *Nganga v Director of Public Prosecutions & 3 others*.[14] The threshold is high for any party to prove whenever it alleges forum shopping. While this is so to any party, the ODPP is shielded by article 157 of the constitution. The result of this is usually an unfair trial to the accused.

3.1.2 Undue regard to the law

The law encapsulates that if it appears that the dispensation of criminal justice is not possible, impartially, objectively and without any bias, at any place, the appropriate court may transfer the case to another court, where it feels that holding of fair and proper trial is conducive. Also, when it is shown that public confidence in the fairness of a trial would be seriously undermined, the court at its own motion or any of the parties may seek the transfer of a case. That power is contained in section 81 of the CPC.[15] While the law provides for a procedure under which a party including the DPP may transfer a case from one venue to another, it has not been well with ODPP heeding to this. This is not easily noticed until an aggrieved party makes an application to court. The DPP has often acted on their "discretion" to transfer matters from one venue to another. For example in the case of *Stanley Muia Makau v Republic* (Supra), the court directed the DPP to file the case within the rightful jurisdiction, which is at the Busia law courts, then seek a transfer under Section 81 of the *Criminal Procedure Code* on grounds that a fair and impartial trial could not be had in Busia due to the conflict of interest of the ODPP at Busia.

The tragedy is, most accused persons who go unrepresented, are unaware of the existence of laws guiding where they may be tried. This speaks to many who end up in prisons, stay long in prison cells before being arraigned in court for plea taking etcetera. While the constitutional provision on the power of the ODPP to charge, independently without any external interference, it is only the law, to which they are subjected to that could be streamlined to extinguish such errors. Furthermore, their 'constitutional shield' has made courts look at their excesses at a distance, leaving room for a lot of illegalities.

3.1.3 Abuse of court process

The unchecked exercise of this discretion has led to the abuse of the court process. For instance, there have been cases where the ODPP files two criminal cases affecting the same party in different court stations, frustrating the accused person. This was apparent in the case of *Republic v Chief Magistrate, Wang'uru & another; Kinywa & another*[16] where the DPP conceded that charges in the cases filed against the applicant at Nairobi Law Courts and Wang'uru Law Courts were similar. The Learned Judge observed that it was a clear case of abuse of process, if the DPP were to be allowed to proceed with two criminal cases against the same person for the same or similar offences before two different courts over the same subject matter. The court held that the obvious abuse of the Court process and resultant infringement of the rights of the applicants was vindicated.

3.1.4 Political interference

The decision to prosecute is primarily a question of public interest.[17] Arguments have it that what is in *public interest* is different from what is for *public*

[14] *Nganga v Director of Public Prosecutions & 3 others* [2025] KEHC 307 (KLR).
[15] *Jamock Kamakya Mbuvi v Republic* [2020] KEHC 1003 (KLR).
[16] *Republic v Chief Magistrate, Wang'uru & another; Kinywa & another (Interested Parties); Moh (Exparte Applicant)* [2025] KEHC 9846 (KLR).
[17] Cowdery, Nicholas. "Prosecution Appeals in New South Wales: New Rights, Roles and Challenges for the Court of Criminal Appeal and the DPP." Law in Context 26.1 (2008): 75-102.

interest.[18] Although the ODPP is said to be independent, the political interference with the exercise of prosecutorial powers is not new in Kenya. Prosecutors have varying degrees of independence from political direction and from the undesirable influence of politicians who appoint them, determine their working conditions and the resources that are provided to them, as well as determining their career progression.[19] Politically instigated charges may see the ODPP preferring to charge the accused person in one forum and not the other in order to not only frustrate the accused person but also get a favourable outcome in line with the political interest. This leads to wrong convictions, defeating justice, the very essence of the rule of law.

3.2 Effects to those affected by choice of jurisdiction

a. High costs/expenses

When a case is filed in a court that is not easily accessible to the accused person and witnesses, there are many incidental costs. Suppose the accused is out on bail or bond, it will definitely be costly commuting to that place, for example, commuting to Kajiado from Nairobi every time of mention or hearing. This was decried in *Elsek Osman Erdinc v Republic*,[20] where the case was filed at Shanzu law courts instead of Kilifi Law Courts around where the accused person and the witnesses were domiciled.

b. Infringement of right to fair trial

The right to fair trial hearing is one of the hallmarks of the constitution under the Bill of Rights. This right starts from the moment an accused person is arrested at the police station.[21] Once an arrested person

[18]Ibid.
[19]Colvin, Victoria, and Philip Stenning. *The Evolving Role of the Public Prosecutor*. Routledge, 2019.
[20]2021 eKLR.
[21]The constitution of Kenya (2010), art 49.

is presented before court and charged, the right to fair hearing is birthed to the (now) accused person. The constitution speaks to the right to fair trial as a non-derogative right.[22] The right includes being presented before a court as soon as reasonably possible, but not later than twenty four (24) hours or if the twenty four hours end outside the ordinary court hours, or on a day that is not an ordinary court day, the end of the next court day.[23] Preferring a charge against an accused person in a faraway court station may work against this right.

c. Accused under mercy of ODPP, not the law

The exercise of this discretion leaves the accused person at the mercy of the ODPP. This encourages acts such as corruption which may work for or against the accused person. This is tragic to the rule of law and the dispensation of justice.

3.3 Remedy to affected accused persons

In the case of the *Director of Public Prosecutions v. Justus Mwendwa Kathenge & 2 others*,[24] the Court of Appeal restated the principle that the powers of the DPP to prosecute are not absolute, and may be halted in cases of abuse of process. Although both powers of investigations and prosecution are to be exercised independently without direction or control from any person, this does not preclude the High Court as a constitutional court from terminating investigations and prosecution undertaken in breach of rights and fundamental freedoms, public interest or in abuse of the legal process.[25] However, courts are generally slow in interfering with the exercise of the ODPP's discretion.

When an accused person's right to a fair trial is violated, they are entitled to specific legal remedies—both substantive and procedural—to restore justice, prevent further harm, and uphold constitutional and international legal standards.

4.0 Conclusion

In conclusion, although leaving a wide discretion on the part of the ODPP to decide the place of trial was well intentioned for flexibility, convenience, and ensuring effective access to justice for all, the same has been abused, defeating the very purpose for which it was meant to achieve. This paper has highlighted some of the effects of the ODPP's excesses on the criminal justice system. Mechanisms should therefore be established within the law to curb these excesses. An independent prosecution system is no guarantee for an efficient criminal justice system where autonomy is not complemented with effective accountability.

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[22]Ibid, art 25.
[23]Ibid, art 47(1)(f).
[24]*Director of Public Prosecutions v. Justus Mwendwa Kathenge & 2 others* [2016] eKLR.
[25]*Republic v Chief Magistrate, Wang'uru & another; Kinywa & another (Interested Parties); Moh (Exparte Applicant)* [2025] KEHC 9846 (KLR).

Realizing the right to a clean environment: The legal struggle of Owino Uhuru residents

By Darryl Isabel

Abstract

The Owino Uhuru case marks a watershed moment in Kenya's environmental and constitutional jurisprudence. Residents of the Owino Uhuru settlement in Mombasa suffered prolonged exposure to toxic lead emissions from the Metal Refinery EPZ Limited smelter, leading to devastating health impacts and social harm. Despite clear constitutional guarantees under Article 42 on the right to a clean and healthy environment, state institutions failed to intervene, revealing deep accountability and enforcement gaps. This paper adopts a desk-based research methodology to critically examine the legal, constitutional, and institutional dimensions of the case. Drawing from the judicial decision, legal scholarship, media reports, and civil society documentation, it explores how public interest litigation was used to challenge state inaction and corporate impunity. The analysis focuses on the strategic use of constitutional rights, the role of civil society, and the responsiveness of courts to marginalized communities seeking redress. The findings show that while the 2020 High Court decision ordering compensation signaled a step toward environmental accountability, its delayed implementation and weak institutional follow-through reveal persistent barriers to effective remedy. The Owino Uhuru case highlights both the transformative potential and practical limitations of Kenya's Bill of Rights when confronted with complex environmental injustices. The paper concludes that the effective realization of constitutional rights depends not only on progressive judicial pronouncements but also on strong enforcement mechanisms and meaningful community participation. Additionally, it offers important lessons for strengthening environmental governance, advancing socio-economic rights, and deepening a culture of constitutional accountability in our evolving legal landscape.

Owino-Uhuru village in Mombasa. From 2007 to 2014, the Metal Refinery EPZ operated a lead-acid battery smelting plant adjacent to Owino-Uhuru village in Mombasa, exposing around 3,000 residents (about 450 households) to toxic lead pollution. Medical and environmental assessments confirmed serious health impacts—including neurological damage and at least 20 deaths—triggering a class-action constitutional petition in 2016 by the Centre for Justice Governance and Environmental Action (CJGEA) on behalf of the community.

1.0. Introduction

Owino Uhuru, a marginalized informal settlement in Mombasa, Kenya, has endured a severe environmental and public health crisis caused by lead contamination

from a nearby battery recycling smelter.[1] Established in 2007 by EPZ, the smelter emitted toxic lead particles into the air, soil, and water, resulting in widespread lead poisoning among the residents.[2] This contamination led to devastating health effects, including neurological damage, miscarriages, skin rashes, and child fatalities, with blood lead levels in some individuals far exceeding World Health Organization safety thresholds.[3] Clear evidence of harm was available, yet state agencies such as the National Environment Management Authority (NEMA) delayed effective intervention, revealing systemic failures in regulatory enforcement and corporate accountability.[4] Consequently, the affected community, supported by civil society organizations, pursued public interest litigation that culminated in a landmark 2020 High Court decision awarding compensation of approximately USD 12 million and ordering environmental remediation.[5]

This case raises fundamental constitutional concerns, particularly the right to a clean and healthy environment as enshrined in the 2010 Constitution.[6] Read together with Articles 22 and 70, these provisions reflect Kenya's broader commitment to transformative constitutionalism, which seeks to advance social justice, dignity, and equality through enforceable rights.[7] In contrast, the Owino Uhuru experience exposes a troubling disconnect between these constitutional promises and the actual performance of state institutions.[8] This is because, delayed responses and inadequate enforcement reveal weaknesses in environmental governance and access to justice.[9] Bridging this gap requires not only legal recognition of rights but also consistent institutional accountability to ensure that constitutional guarantees translate into real and timely protection for affected communities.

This paper argues that the Owino Uhuru case is a powerful illustration of the struggle to realize constitutional environmental rights and enforce state accountability in Kenya. It begins by outlining the constitutional and legal frameworks governing environmental protection, public interest litigation, and the obligations of regulatory agencies. The paper then presents a detailed case study of the lead contamination in Owino Uhuru, the resulting health impacts, institutional responses, and the community's legal journey. Subsequent sections analyze how the rule of law has functioned in this context, highlighting both judicial intervention and the persistent challenges of implementation. The paper further explores how this case contributes to transformative constitutionalism by demonstrating the role of the judiciary in enforcing rights and the influence of civic advocacy in shaping legal outcomes. The conclusion reflects on the lessons learned and the ongoing

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[1]Katy De La Motte, 'Kenyan Activist Wins Landmark Environmental Case over Lead Poisoning' *The Organization for World Peace*, (27 July 2020) <Kenyan Activist Wins Landmark Environmental Case Over Lead Poisoning – The Organization for World Peace> accessed 6 July 2025.

[2]Zoe Schlanger, 'A Kenyan Mother, Two Disappearing Indian Businessmen, and the Battery Factory that Poisoned a *Village' Quartz* (21 July 2022) <A Kenyan mother, two disappearing Indian businessmen, and the battery factory that poisoned a village> accessed 6 July 2025.

[3]Felix Horne, 'Landmark Decision in Kenya Lead Pollution Case' *Human Rights Watch* (22 July 2020) <Landmark Decision in Kenya Lead Pollution Case | Human Rights Watch> accessed 6 July 2020.

[4]ibid

[5]ibid

[6]Constitution of Kenya 2010, Art. 42.

[7]Freda Mugambi Githiru, 'Transformative Constitutionalism, Legal Culture and the Judiciary under the 2010 Constitution of Kenya' (LLD Thesis, University of Pretoria, 2015) 50-70.

[8]Export Processing Zone Authority & 10 others (Suing on their own behalf and on behalf of the residents of Owino-Uhuru Village) v Attorney General & 5 others [2024] KESC 75 (KLR)

[9]Kariuki Muigua, 'Revisiting the Role of Law in Environmental Governance in Kenya' (Kariuki Muigua and Company Advocates 2019) 2-4.

Kenya's 2010 Constitution provides one of the most progressive legal frameworks for environmental protection and sustainable development in Africa. The key provisions are found in Chapter Four (Bill of Rights) and Chapter Five (Land and Environment).

need to strengthen legal systems that serve vulnerable communities in the pursuit of environmental justice.

2.0. The Legal and Constitutional framework

The Constitution of Kenya, 2010 marked a transformative moment for environmental governance. It established environmental rights as justiciable and enforceable, placing the environment at the core of the national development and justice frameworks.[10] This section explores the legal architecture supporting environmental protection through three main pillars: constitutional provisions, statutory mandates of enforcement agencies such as the National Environment Management Authority, and the evolving role of the judiciary through public interest litigation.

2.1 Constitutional provisions protecting environmental rights

Article 42 of the Constitution enshrines the right to a clean and healthy environment, stating that every person has the right to have the environment protected for the benefit of present and future generations.[11] This provision is not merely aspirational; it provides a firm basis for litigation where environmental harm threatens community health, dignity, or livelihoods. Article 70 supplements this by giving any person the right to apply to court when these rights are threatened or violated.[12] The Constitution also includes Article 22, which widens legal standing by allowing individuals, groups, or civil society organizations to sue in the public interest or on behalf of others unable to do so.[13] These provisions reflect a deliberate shift towards participatory

[10]Joel Kimutai Bosek, 'Implementing Environmental Rights in Kenya's New Constitutional Order: Prospects and Potential Challenges' (2014) African Human Rights Journal, 490-491.
[11]Constitution of Kenya 2010, Art. 42.
[12]Constitution of Kenya 2010, Art. 70.
[13]Constitution of Kenya 2010, Art. 22.

environmental justice with a focus on access to remedies.[14] Their relevance to this paper lies in how they empowered the residents of Owino Uhuru to seek legal redress for environmental degradation and positioned the judiciary as a notable actor in enforcing constitutional environmental rights.

Moreover, Kenya is a signatory to several multilateral environmental agreements that shape its domestic environmental governance. These include the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, which Kenya ratified in 2000 to regulate toxic waste handling. Kenya is also party to the Stockholm Convention on Persistent Organic Pollutants, the Rotterdam Convention on hazardous chemicals, and the Convention on Biological Diversity.[15] These treaties, read together with Articles 2(5) and 2(6) of the Constitution, allow Kenyan courts to adopt international environmental law in local cases thereby strengthening local legal standards on environmental protection.[16] This includes the precautionary principle, which requires authorities to act to prevent environmental harm even without full scientific certainty, and the polluter pays principle, which holds that those responsible for environmental damage must bear the cost of remedying it.[17] Together, these principles promote a proactive and responsible approach to environmental protection, reinforcing both legal accountability and sustainable governance.

2.2 Statutory duties of NEMA and administrative gaps

The Environmental Management and Coordination Act (EMCA), enacted in 1999 and revised in 2015, is the principal environmental law in Kenya.[18] It established the National Environment Management Authority as the lead agency responsible for coordinating, monitoring, and enforcing environmental standards in the country.[19] Under Section 9, NEMA is mandated to issue environmental impact assessment licenses, monitor pollution, respond to hazards, and oversee compliance with both domestic and international environmental obligations.[20] Its central role was affirmed in the case of *Martin Osano Rabera and another v Municipal Council of Nakuru and others* where the court held that NEMA is not merely an investigator or prosecutor but the principal instrument for implementing all environmental policies.[21] Moreover, it must coordinate with other agencies to ensure sustainable resource management and provide technical support to improve environmental protection and public health in Kenya.[22]

Despite its broad statutory powers, NEMA has often fallen short in fulfilling its enforcement mandate.[23] In the Owino Uhuru case, residents reported prolonged exposure to lead emissions, backed by medical and environmental evidence, yet NEMA failed to intervene in time.[24] Although legally empowered to do so, the agency did not

[14]Peter Mwangi Muriithi, Blenda Nyahoro Wachira, 'Enhancing Public Participation for Effective Management and Protection of Environmental Resources in Kenya' (2021) Journal of Conflict Management and Sustainable Development 6(4), 129.
[15]Ministry of Environment, Water and Natural Resources, 'Kenya National Implementation Plan for the Stockholm Convention on Persistent Organic Pollutants' (2014–2019)
[16]Constitution of Kenya 2010, Art. 2(5), 2(6)
[17]Kariuki Muigua, 'Entrenching the Precautionary Principle in Kenya for Sustainability,' (Kariuki Muigua and Company Advocates, 2023) 1-9.
[18]Environmental Management and Coordination Act, 1999.
[19]ibid s 7.
[20]ibid s 9.
[21]Martin Osano Rabera & another v Municipal Council of Nakuru & 2 others [2018] eKLR, Petition No. 53 of 2012.
[22]ibid para 72.
[23]Kariuki Muigua, 'The Role of NEMA in Pollution Control in Kenya' *The Lawyer Africa* (9 October 2023) < The Role of NEMA in Pollution Control in Kenya – The Lawyer Africa > accessed 12 July 2025.
[24]Horne, 'Landmark Decision in Kenya Lead Pollution Case' (n 3).

Public Interest Litigation (PIL) refers to legal action initiated to protect or enforce rights affecting the public or a significant segment of it—often where victims are unable to act on their own. In Kenya, PIL has become a powerful constitutional tool for promoting social justice, environmental protection, and accountability.

shut down the offending smelter or take preventive action.[25] This reflects a wider trend of regulatory inaction, attributed to bureaucratic delays, limited capacity, and possible influence by industrial interests.[26] The reluctance of NEMA to act decisively, especially against economically powerful actors, undermines public trust and weakens environmental governance in the country.[27] Its failures in this case directly contributed to the violation of residents' constitutional right to a clean and healthy environment under Article 42, and exposed a marginalized community to avoidable harm.[28]

2.3 Judicial precedents and public interest litigation

In response to institutional failures, the judiciary has become a vital platform for advancing environmental justice in Kenya.[29] In the case of *Save Lamu and Others v National Environmental Management Authority and Another*, the High Court held that environmental licensing must include meaningful public participation and full disclosure of relevant information.[30] The court found that NEMA had issued licenses for a coal plant without involving the local community, thereby violating constitutional

[25]Munene Njoroge, 'Advancing Environmental Justice: The Supreme Court of Kenya holds State Agencies Accountable for Environmental Harm in Owino-Uhuru case' *The Oxford Human Rights Hub* 6 January 2024 < Advancing Environmental Justice: The Supreme Court of Kenya holds State Agencies Accountable for Environmental Harm in Owino-Uhuru case | OHRH > accessed 12 July 2025.
[26]ibid
[27]Horne, 'Landmark Decision in Kenya Lead Pollution Case' (n 3).
[28]ibid
[29]Office of the United Nations High Commissioner for Human Rights, 'Court Ruling in Kenya: A Milestone in Environmental Justice' (2020) < Court ruling in Kenya: A milestone in environmental justice> accessed 12 July 2025
[30]Save Lamu & 5 others v National Environmental Management Authority (NEMA) & another [2019] KENET 98 (KLR)

rights to a clean and healthy environment under Article 42 and the right to public participation under Article 10.[31] This ruling is significant to this study as it highlights the role of the judiciary in holding regulatory agencies accountable and enforcing constitutional and statutory environmental duties. Additionally, it asserts the importance of transparent, inclusive decision-making as a cornerstone of environmental governance and sustainable development in Kenya.

Another landmark decision is the case of *Rodgers Muema Nzioka and Others v Tiomin Kenya Ltd*, where the court granted an injunction to halt titanium mining operations due to the potential for serious environmental and social harm.[32] The court acknowledged the health and environmental risks posed to local communities and ruled in favor of the petitioners, applying the precautionary principle to prevent irreversible damage.[33] This judgment affirmed that economic development must not override environmental protection and human well-being.[34] It also illustrates the growing role of the judiciary in safeguarding constitutional environmental rights when administrative mechanisms fail. Alongside *Save Lamu*, the case demonstrates how public interest litigation is shaping Kenya's environmental justice framework, reinforcing access to justice and judicial oversight in the enforcement of environmental and human rights.

The legal framework in Kenya offers a strong constitutional and statutory basis for advancing environmental justice. Articles 42 and 70 of the Constitution, the mandate of NEMA under the Environmental Management and Coordination Act, and key judicial decisions through public interest litigation provide structured avenues for holding polluters accountable and protecting affected communities. However, these mechanisms are only effective when they are actively and faithfully implemented. The Owino Uhuru case embodies how legal safeguards can fail when institutions are unresponsive or neglect their duties. The next section examines this case in detail, focusing on the human consequences of environmental harm, the legal process pursued by affected residents, and what it reveals about the strengths and gaps in Kenya's environmental justice system.

3.0. Case study: The Owino Uhuru settlement tragedy

The Owino Uhuru case highlights the intersection between industrial pollution, regulatory failure, and the constitutional right to a clean and healthy environment.[35] Situated in Mombasa County, the Owino Uhuru informal settlement became the epicenter of one of Kenya's most significant environmental justice struggles.[36] This section outlines the key facts of the tragedy, the response by state and private actors, and the subsequent legal battle that followed. It provides a grounded illustration of how constitutional rights can be undermined in practice and the efforts taken to seek accountability and redress through litigation.

3.1. Facts, health impact, and key actors

Residents of Owino Uhuru, a densely populated low-income area in Mombasa,

[31]ibid
[32]Rodgers Muema Nzioka & 2 others v Tiomin Kenya Limited [2001] KEHC 844 (KLR)
[33]Ibid
[34]ibid
[35]National Environment Management Authority & another v KM (Minor suing through Mother and Best friend SKS) & 17 others (Civil Appeal E004 of 2020 & E032 of 2021 (Consolidated)) [2023] KECA 775 (KLR) (23 June 2023)
[36]Soila Kenya, 'How Grassroots Campaign Won $12 million Taking on a Lead-Poisoning Battery Plant in Kenya' *Quartz* (21 July 2022) < How a grassroots campaign won $12 million taking on a lead-poisoning battery plant in Kenya> accessed 12 July 2025..

were exposed to dangerous levels of lead from a battery recycling smelter operated by Metal Refinery EPZ Ltd.[37] From 2007 to 2014, the smelter discharged toxic emissions and waste into the surrounding air and soil, resulting in severe environmental contamination.[38] Children and women were especially vulnerable, suffering from miscarriages, neurological disorders, and chronic health conditions associated with lead poisoning.[39] Independent investigations reported dangerously high blood lead levels among residents and lead concentrations in household dust and soil that far exceeded international safety standards.[40] This prolonged exposure caused lasting harm to the community and underscored the failure of both corporate and state actors to protect public health and the environment.[41]

Despite repeated complaints from the community, local authorities and environmental agencies were slow to act on the unfolding crisis in Owino Uhuru.[42] The National Environment Management Authority failed to conduct timely and thorough inspections or suspend the operations of the smelter until years later, by which time the environmental and health damage was already severe.[43] The Ministry of Health also failed to provide urgent medical assistance or carry out comprehensive health assessments for the exposed population. Consequently, in the face of institutional inaction, civil society groups such as the Center for Justice Governance and Environmental Action (CJGEA) stepped in to document the crisis and support residents.[44] The closure of the company in 2014 offered no remedy to those who had already suffered permanent and life-altering harm.[45]

3.2 Government and private sector responses

The response from state institutions to the Owino Uhuru crisis was characterized by delay, denial, and lack of coordination.[46] Notwithstanding its mandate to safeguard environmental health, NEMA failed to act with urgency or transparency.[47] Evidence shows that the agency was aware of harmful emissions from the lead smelter but continued issuing operational licenses without thorough environmental audits or meaningful public participation.[48] The Ministry of Health conducted limited investigations yet did not establish a comprehensive plan for relocation, health screening, or medical treatment for affected residents.[49] Similarly, the County Government of Mombasa did not implement a coordinated response to address the environmental or public health risks.[50] This institutional failure exposed residents

[37]Business & Human Rights Resource Centre, 'Metal Refinery (EPZ) lawsuit (re lead pollution in Kenya)' (20 February 2016) <Metal Refinery (EPZ) lawsuit (re lead pollution in Kenya) - Business & Human Rights Resource Centre> accessed 12 July 2025.
[38]ibid
[39]Human Rights Watch, Kenya, 'Toxic Lead Threatening Lives' (24 June 2014) <Kenya: Toxic Lead Threatening Lives | Human Rights Watch> accessed 12 July 2024.
[40]ibid
[41]Export Processing Zone Authority & 10 others (Suing on their own behalf and on behalf of all residents of Owino-Uhuru Village in Mikindani, Changamwe Area, Mombasa) v National Environment Management Authority & 3 others (Petition E021 of 2023) [2024] KESC 75 (KLR) (6 December 2024)
[42]Human Rights Watch, 'Toxic Lead Threatening Lives' (n 39)
[43]Business & Human Rights Resource Centre, 'Metal Refinery (EPZ) lawsuit (re lead pollution in Kenya)' (n 37)
[44]ibid
[45]Deborah Bloom, 'The Woman Risking her Life to Save a Village from Lead Poisoning' (Pulitzer Center 23 April 2018) <The Woman Risking Her Life to Save a Village from Lead Poisoning | Pulitzer Center> accessed 12 July 2025.
[46]Hannah Wamuyu, 'Owino Uhuru Legal Expert Study Report' (Centre for Justice Governance and Environmental Action April 2018) 6-8.
[47]ibid
[48]Export Processing Zone Authority & 10 others (Suing on their own behalf and on behalf of all residents of Owino-Uhuru Village in Mikindani, Changamwe Area, Mombasa) v National Environment Management Authority & 3 others [2024] KESC 75 (KLR)
[49]Wamuyu, 'Owino Uhuru Legal Expert Study Report' (n 46) 4-6.
[50]Ibid 6-8.

to prolonged harm and undermined constitutional environmental protections.

Metal Refinery EPZ Ltd, the company operating the lead smelter in Owino Uhuru, claimed compliance with existing environmental and safety standards and sought to deflect responsibility onto regulatory authorities.[51] Undeterred by the growing public concern and legal scrutiny, the company ceased operations in 2014 without offering compensation or medical assistance to the affected residents.[52] With government agencies largely inactive, civil society organizations such as the Centre for Justice, Governance and Environmental Action (CJGEA), along with international partners like Human Rights Watch, stepped in to fill the accountability gap.[53] They conducted independent investigations, documented the extent of the environmental and health impacts, and advocated for justice.[54] Their efforts, amplified by national and international media coverage, brought global attention to the crisis and highlighted the urgent need for institutional accountability and systemic reform.[55]

3.3 Litigation Journey and the 2020 High Court Decision

In 2016, a constitutional petition was filed on behalf of residents of Owino Uhuru, citing violations of their rights under Article 42 (right to a clean and healthy environment), Article 43 (right to health), and other constitutional and statutory provisions.[56] The respondents included the National Environment Management Authority, the Ministry of Health, the County Government of Mombasa, and Metal Refinery EPZ Ltd.[57] The petitioners sought remedies including compensation, access to medical treatment, environmental clean-up, and judicial declarations confirming the violation of their rights.[58] This quickly became a landmark case in environmental justice advocacy in Kenya, drawing attention to the human impact of environmental harm and invoking both national and international legal standards to address systemic institutional failure and demand accountability.

In July 2020, the Environment and Land Court at Mombasa delivered a landmark judgment in *KM and 9 others v Attorney General and 7 others, Mombasa ELC Petition No 1 of 2016*, awarding KES 1.3 billion in compensation to the residents of Owino Uhuru and holding the state responsible for failing to prevent severe environmental harm.[59] The court found that the state had breached its constitutional duty to protect the community from foreseeable risks and failed to take timely remedial measures.[60] On appeal, the High Court upheld the decision, affirming the residents' right to a clean and healthy environment under Article 42 of the Constitution.[61] However, this legal victory has been undermined by bureaucratic inertia, prolonged appeals, and delays in disbursing the compensation, casting doubt on the practical effectiveness of judicial remedies.[62] This impasse was resolved in December 2024, when the

[51]Business & Human Rights Resource Centre, 'Metal Refinery (EPZ) lawsuit (re lead pollution in Kenya)' (n 37)
[52]Wamuyu, 'Owino Uhuru Legal Expert Study Report' (n 46) 5.
[53]Wamuyu, 'Owino Uhuru Legal Expert Study Report' (n 46) 4-6.
[54]ibid
[55]Kenya, 'How Grassroots Campaign Won $12 million Taking on a Lead-Poisoning Battery Plant in Kenya' (n 36)
[56]KM & 9 others v Attorney General & 7 Others [2020] eKLR
[57]Ibid
[58]ibid
[59]KM and 9 others v Attorney General and 7 others, Mombasa ELC Petition No 1 of 2016.
[60]ibid
[61]Export Processing Zone Authority & 10 others (Suing on their own behalf and on behalf of all residents of Owino-Uhuru Village in Mikindani, Changamwe Area, Mombasa) v National Environment Management Authority & 3 others [2024] KESC 75 (KLR)
[62]The Star, 'Blow to Owino Uhuru residents as Court of Appeal sets aside Sh13bn payout' (23 June 2023) <Blow to Owino Uhuru residents as Court of Appeal sets aside Sh1.3bn payout> accessed 12 July 2025.

The Owino Uhuru case is a vivid illustration of both the power and fragility of the rule of law in action—and its potential decline when enforcement is delayed, contested, or politically resisted. This case sits at the intersection of environmental justice, public health, state accountability, and judicial independence.

Supreme Court delivered a final judgment reinstating the full KES 1.3 billion award and directing an additional KES 700 million for environmental remediation.[63] The Court reaffirmed the polluter pays principle and held both state agencies and the private company jointly liable, marking a transformative affirmation of environmental justice and judicial authority in enforcing constitutional rights.[64]

The Owino Uhuru tragedy demonstrates the devastating consequences of environmental neglect, institutional failure, and regulatory indifference. Although the High Court decision was a major victory for public interest litigation and constitutional enforcement, the community continues to wait for full justice and reparation. This case raises important questions about the rule of law in practice, particularly how courts, agencies, and other state actors interact when constitutional rights are at stake. The subsequent section examines the extent to which Kenya's legal system, through judicial and administrative responses, has upheld or undermined the rule of law in environmental governance.

4.0. The rule of law in action (or in decline?)

The Owino Uhuru case offers a lens through which to evaluate the performance of legal and institutional framework in upholding environmental rights in Kenya. While the Constitution provides robust protections, their realization depends on how public institutions and the judiciary respond in moments of crisis.[65] This section examines

[63]Export Processing Zone Authority & 10 others (Suing on their own behalf and on behalf of all residents of Owino-Uhuru Village in Mikindani, Changamwe Area, Mombasa) v National Environment Management Authority & 3 others [2024] KESC 75 (KLR)
[64]Ibid
[65]Timonah Chore, 'Reconceptualising the Right to a Clean and Healthy Environment in Kenya: The Need to Move from an Anthropocentric View to a Bicentric View' (2019) Strathmore Law review,72-74.

the dynamics of institutional inaction, judicial intervention, and the challenges of enforcement. It also interrogates whether the rule of law was upheld or undermined and what this reveals about the commitment of Kenya to constitutional environmental governance.

4.1. Institutional inaction and legal delay

The initial response to the Owino Uhuru crisis revealed deep flaws in Kenya's environmental governance.[66] Although community complaints, reports of health complications, and visible signs of pollution were repeatedly raised, the responsible agencies failed to respond with the urgency the situation demanded.[67] The National Environment Management Authority, continued to issue operational licenses to Metal Refinery EPZ Ltd without conducting proper environmental audits or ensuring public participation.[68] This lack of regulatory diligence breached statutory obligations under EMCA and directly enabled the sustained release of hazardous lead emissions into the environment.[69] Therefore, the prolonged inaction exposed residents to preventable health risks, demonstrating how institutional failure can undermine constitutional rights and create conditions for widespread and lasting environmental harm.

In addition, the Ministry of Health failed to mount a timely and coordinated public health response to the Owino Uhuru crisis, even as evidence of lead poisoning and alarming health symptoms among residents continued to grow.[70] While a few investigations were conducted, there were no comprehensive health assessments, treatment programs, or emergency interventions for those affected. Similarly, the County Government of Mombasa showed no coherent plan or coordinated effort to manage the crisis, contain the contamination, or protect public health, thereby exacerbating the community's exposure and deepening the public health risks.[71] These institutional lapses depict a broader pattern of government indifference and poor coordination in the face of serious environmental harm.[72] Although the Constitution guarantees the right to a clean and healthy environment, these promises were undermined by the state's inaction, compelling residents to seek justice through the courts after years of neglect.[73]

4.2. Judicial oversight and Constitutional enforcement

Faced with years of administrative neglect, residents of Owino Uhuru turned to constitutional litigation as a last resort in seeking justice. In *KM and 9 others v Attorney General and 7 others*, the Environment and Land Court in Mombasa issued a landmark decision in 2020, awarding KES 1.3 billion in compensation.[74] The court affirmed the residents' rights under Articles 42 and 43 of the Constitution, finding that the state had breached its duty to protect the community from foreseeable environmental harm.[75] The decision applied

[66]Muigua, 'Revisiting the Role of Law in Environmental Governance in Kenya' (n 9)
[67]Human Rights Watch, 'Toxic Lead Threatening Lives' (n 39)
[68]Neville Mupita, 'Landmark Court Rulings in Kenya and South Africa: Advancing the Right to a Healthy Environment in Africa' *Universal Rights Group* (31 March 2025) <Landmark Court Rulings in Kenya and South Africa: Advancing the Right to a Healthy Environment in Africa | Universal Rights Group> accessed 12 July 2025.
[69]ibid
[70]Nancy A Etiang' et al, 'Environmental Assessment and Blood Lead Levels of Children in Owino Uhuru and Bangladesh Settlements in Kenya' (2018) Journal of Health and Pollution 8(18), 1-2.
[71]ibid
[72]Wamuyu, 'Owino Uhuru Legal Expert Study Report' (n 46) 21.
[73]KM and 9 others v Attorney General and 7 others, 2016.
[74]ibid
[75]ibid

Kenya's 2010 Constitution marked a paradigm shift in the recognition and enforcement of environmental rights, embedding them firmly within the Bill of Rights and establishing the legal foundation for sustainable development, environmental justice, and ecological accountability.

the precautionary principle, emphasizing that scientific uncertainty could not justify inaction when human health was at risk. Consequently, this judgment marked a significant milestone in the development of environmental rights and public interest litigation in Kenya's constitutional order.

The High Court upheld the Environment and Land Court's judgment on appeal, reinforcing that environmental rights are justiciable and form a core part of Kenya's constitutional framework.[77] The decision demonstrated the judiciary's willingness to confront institutional inertia and compel state actors to fulfill their constitutional mandates.[78] It also confirmed the legitimacy of public interest litigation as a tool for environmental justice, particularly for communities facing systemic neglect.[79] The case reflected the broader promise of the 2010 Constitution to empower marginalized groups and ensure state accountability through legal action.[80] Alongside other landmark cases such as *Save Lamu and Rodgers Muema*, the Owino Uhuru litigation affirmed the role of courts as essential guardians of environmental governance where regulatory institutions fall short.

4.3. Limits of remedies without implementation

Even with important judicial victories, the implementation of court decisions in the Owino Uhuru case has faced significant setbacks.[81] After the Environment and Land Court awarded KES 1.3 billion in compensation in 2020, state agencies appealed the ruling.[82] In 2023, the Court

[76]ibid
[77]Wamuyu, 'Owino Uhuru Legal Expert Study Report' (n 46) 2.
[78]Export Processing Zone Authority & 10 others (Suing on their own behalf and on behalf of the residents of Owino-Uhuru Village) v Attorney General & 5 others [2024] KESC 75 (KLR)
[79]Wamuyu, 'Owino Uhuru Legal Expert Study Report' (n 46) 4-7.
[80]Business & Human Rights Resource Centre, 'Class Action Litigation Progress Report 2016 to 2019' (PDF, 2019) 1-20.
[81]Gautum Bhatia, 'Constitutional Compensation: The Supreme Court of Kenya's Owino Uhuru Judgment' *Constitutional Law and Philosophy* (7 December 2024) <Constitutional Compensation: The Supreme Court of Kenya's Owino-Uhuru Judgment – Constitutional Law and Philosophy> accessed 12 July 2025.
[82]Brian Ocharo, 'Kenya: Court of Appeal overturns a 2020 Sh1.3 billion award for damages to Owino Uhuru community in lead contamination & poisoning lawsuit against Metal Refinery (EPZ)' *Business & Human Rights Resource Centre* (23 June 2023) <Kenya: Court of Appeal overturns a 2020 Sh1.3 billion award for damages to Owino Uhuru community in lead contamination & poisoning lawsuit against Metal Refinery (EPZ) - Business & Human Rights Resource Centre> accessed 12 July 2025.

of Appeal set aside the compensation award, effectively denying the residents tangible redress.[83] This reversal, combined with years of bureaucratic delays and government resistance, has left the affected community without meaningful remedy nearly a decade after the harm began.[84] The reluctance of the state to comply with judicial findings highlights a broader crisis in Kenya's environmental governance where enforcement of rights is often undermined by institutional weakness and political unwillingness.[85] This reality casts doubt on the capacity of the rule of law to deliver genuine accountability.

The failure to disburse compensation and initiate environmental remediation also raises profound concerns about the practical value of judicial remedies in environmental justice cases.[86] Even when courts issue strong rights-based decisions, their impact is limited if enforcement is obstructed by government agencies or ignored altogether.[87] This disconnect between judgment and implementation exposes a systemic flaw in translating legal victories into lived realities, particularly for vulnerable communities.[88] Although Kenya's Constitution provides robust protections for environmental rights, the realization of these rights depends on an administrative system that respects and enforces court decisions.[89] Without this, legal victories risk becoming symbolic gestures instead of instruments of justice.[90] The role of the judiciary, though critical, remains constrained when institutional support and political commitment are lacking.

In sum, the Owino Uhuru case highlights both the promise and fragility of the rule of law in environmental governance. While the courts upheld constitutional rights and awarded compensation, institutional failure and delayed enforcement exposed the limits of judicial power without political will. This gap between legal decisions and real outcomes, especially for marginalized communities, sets the stage for examining how litigation and civic advocacy advance transformative constitutionalism in Kenya.

5.0. Promoting transformative Constitutionalism

The Owino Uhuru case demonstrates how Kenya's 2010 Constitution can be used as a tool for transformative change in the face of environmental injustice. This section explores how the case advanced constitutional values, empowered civic actors, and contributed to the development of environmental governance. It assesses the broader impact of litigation and civic engagement in reinforcing the rule of law and reshaping institutional behavior. Ultimately, the case highlights the role of public interest litigation in translating constitutional ideals into lived realities.

5.1. Affirming constitutional values through litigation

The Owino Uhuru case powerfully reaffirmed the core constitutional values

[83]ibid
[84]National Environment Management Authority & another v KM (Minor suing through Mother and Best friend SKS) & 17 others (Civil Appeal E004 of 2020 & E032 of 2021 (Consolidated)) [2023] KECA 775 (KLR) (23 June 2023)
[85]Bhatia, 'Constitutional Compensation: The Supreme Court of Kenya's Owino Uhuru,' (n 81)
[86]Ocharo, 'Kenya: Court of Appeal overturns a 2020 Sh1.3 billion award for damages to Owino Uhuru community in lead contamination & poisoning lawsuit against Metal Refinery (EPZ)' (n 82)
[87]Brian Nzomo, 'Supreme Court Reinstates KSh 1.3 bn Compensation for Changamwe Lead Poisoning Victims' (Kenyan Wall Street, 8 December 2024) <Supreme Court Reinstates KSh 1.3bn Compensation for Changamwe Lead Poisoning Victims - The Kenyan Wall Street - Business, Markets News, Investing Data & AI Tools> accessed 12 July 2025.
[88]Bhatia, 'Constitutional Compensation: The Supreme Court of Kenya's Owino Uhuru,' (n 81)
[89]ibid
[90]Ocharo, 'Kenya: Court of Appeal overturns a 2020 Sh1.3 billion award for damages to Owino Uhuru community in lead contamination & poisoning lawsuit against Metal Refinery (EPZ)' (n 82)

of dignity, equality, and environmental justice.[91] Through public interest litigation, the courts recognized that residents had endured significant harm due to lead poisoning and sustained institutional neglect.[92] By upholding their rights under Articles 42 and 70 of the Constitution, both the Environment and Land Court, the High Court, and recently the Supreme court underscored that environmental justice is an essential part of the human rights framework in Kenya.[93] These decisions emphasized that constitutional environmental rights are not mere aspirations but legally enforceable standards that the state must observe.[94] The case advanced the understanding that the state has an active duty to prevent harm and protect vulnerable communities from environmental threats that endanger life, dignity, and social inclusion.

The decisions further demonstrated that litigation can serve as a pathway to achieving the transformative vision of the Constitution.[95] The courts applied principles such as precaution and public participation, signaling a significant shift toward a rights-based approach in environmental governance.[96] In holding the state accountable for inaction, and affirming the need for compensation and remediation, the judiciary stressed that constitutional enforcement must lead to real outcomes, not just declarations.[97] This was especially critical for the Owino Uhuru community, who had suffered for years without institutional relief.[98] The case also established that environmental governance must move beyond compliance with technical regulations to focus on justice and redress.[99] It highlighted the need to protect the inherent dignity of people most exposed to environmental harm and exclusion.

5.2. Citizen-led accountability and public pressure

The Owino Uhuru litigation did not arise solely from formal courtroom proceedings. It was driven by sustained grassroots advocacy, especially from community members supported by the Center for Justice Governance and Environmental Action and allied human rights organizations.[100] These groups played a critical role in conducting independent investigations, collecting medical and environmental data, and raising awareness at both national and international levels.[101] Their efforts highlighted that constitutional accountability is not achieved through legal channels alone.[102] It also depends on civic engagement and public pressure to expose failures and demand action. By taking initiative where state agencies were inactive, these advocates transformed a local environmental crisis into a constitutional cause.[103] Their work

[91]Export Processing Zone Authority & 10 others (Suing on their own behalf and on behalf of the residents of Owino-Uhuru Village) v Attorney General & 5 others [2024] KESC 75 (KLR)
[92]ibid
[93]ibid
[94]Bhatia, 'Kenya: Court of Appeal overturns a 2020 Sh1.3 billion award for damages to Owino Uhuru community in lead contamination & poisoning lawsuit against Metal Refinery (EPZ)' (n 81)
[95]Wamuyu, Owino Uhuru Legal Expert Study Report' (n 46) 5-7.
[96]Export Processing Zone Authority & 10 others (Suing on their own behalf and on behalf of the residents of Owino-Uhuru Village) v Attorney General & 5 others [2024] KESC 75 (KLR)
[97]Wamuyu, Owino Uhuru Legal Expert Study Report' (n 46) 16-22.
[98]ibid
[99]Ibid
[100]Heinrich Böll Stiftung, 'Kenyan Court Order Compensation for Slum Residents over Lead Poisoning' (22 July 2020) <Kenyan Court Order Compensation for Slum Residents over Lead Poisoning | Heinrich Böll Stiftung | Nairobi Office Kenya, Uganda, Tanzania> accessed 13 July 2025.
[101]Business & Human Rights Resource Centre (n 78)
[102]Kenya (n 36)
[103]Njoroge, 'Advancing Environmental Justice: The Supreme Court of Kenya holds State Agencies Accountable for Environmental Harm in Owino-Uhuru case' (n 25)

ensured that the affected community's voice remained central to the struggle for environmental justice.[104]

Additionally, media coverage and investigative journalism were instrumental in sustaining public attention on the Owino Uhuru crisis.[105] Through detailed reporting and documentation, journalists exposed institutional shortcomings and kept the issue within national discourse.[106] Moreover, the collaboration between residents, civil society organizations, and the media significantly elevated the visibility of the case.[107] This helped generate momentum and urgency that public institutions had failed to create on their own.[108] The case exemplifies a model of citizen-led accountability where ordinary individuals, especially from marginalized backgrounds, become key actors in enforcing constitutional values.[109] By recording violations and mobilizing advocacy, they not only safeguarded their rights but also helped shape a more participatory legal culture. Their actions proved that civic participation is essential to holding the state accountable and advancing meaningful reform.

5.3. Shaping future governance and legal culture

The aforementioned case holds significant potential to influence the trajectory of environmental governance and legal culture in Kenya. It establishes a powerful precedent for rights-based decision making and demonstrates that public interest litigation can be a compelling tool for holding the state accountable.[110] Courts are increasingly recognizing that environmental harm implicates constitutional rights, not just regulatory breaches.[111] This evolving approach encourages proactive responses from public institutions and creates legal pressure to prevent similar neglect in the future.[112] The intervention of the judiciary in Owino Uhuru sends a strong signal that environmental justice is embedded in our constitutional framework.[113] It reiterates that courts have both the authority and responsibility to enforce environmental rights when administrative agencies fail to act in the public interest.[114]

Beyond its immediate impact, the Owino Uhuru case calls attention to broader institutional reforms needed in governance landscape in Kenya.[115] By exposing regulatory breakdowns and failures in public health protection, the case highlights the urgency of strengthening interagency coordination and responsiveness.[116] It urges

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[104]Wamuyu, 'Owino Uhuru Legal Expert Study Report' (n 46)
[105]Joackim Bwana, "Frustrations and shattered hopes for lead poisoning victims in Owino Uhuru' Standard Media Co KE (26 June 2023) <Frustrations, shattered hopes for lead poisoning victims in Owino-Uhuru - The Standard> accessed 13 July 2023.
[106]ibid
[107]United Nations Human Rights Office, 'Lead Poisoning on Kenya's Coast: A Poor Community Fights Back' *Exposure* (2018) <Lead Poisoning on Kenya's Coast: A Poor Community Fights Back by United Nations Human Rights Office - Exposure> accessed 13 July 2025.
[108]Bhatia, 'Kenya: Court of Appeal overturns a 2020 Sh1.3 billion award for damages to Owino Uhuru community in lead contamination & poisoning lawsuit against Metal Refinery (EPZ)' (n 81)
[109]Njoroge, 'Advancing Environmental Justice: The Supreme Court of Kenya holds State Agencies Accountable for Environmental Harm in Owino-Uhuru case' (n 25)
[110]Sharon Resian, 'Court Upholds Sh2 bn Compensation for Owino Uhuru Residents Over Environmental Pollution' *Capital FM* (6 December 2024) <Court upholds Sh2bn compensation for Uhuru Owino residents over environmental pollution - Capital Business> accessed 13 July 2025.
[111]Export Processing Zone Authority & 10 others (Suing on their own behalf and on behalf of the residents of Owino-Uhuru Village) v Attorney General & 5 others [2024] KESC 75 (KLR)
[112]ibid
[113]Leo K Kemboi, 'Economic Analysis of the Owino Uhuru Case and Public Policy Lessons' *Institute of Economic Affairs Kenya* (2024) <Economic Analysis of the Owino Uhuru Case and Public Policy Lessons - IEA Kenya> accessed 13 July 2025.
[114]Sadik Hassan, Sitati Reagan, 'NEMA Begins Pollution Remediation of Owino Uhuru Settlement' *Kenyan News* (2 April 2025) <NEMA begins pollution remediation of Owino-Uhuru settlement – Kenya News Agency> accessed 13 July 2025.
[115]Kemboi, 'Economic Analysis of the Owino Uhuru Case and Public Policy Lessons' (n 113)
[116]Export Processing Zone Authority & 10 others (Suing on their own behalf and on behalf of the residents of Owino-Uhuru Village) v Attorney General & 5 others [2024] KESC 75 (KLR)

There can be no true justice without environmental justice. The air we breathe, the water we drink, and the land we live on must be protected for all—not just the powerful.

public officials to move beyond procedural formalities and actively apply constitutional principles in policy and decision making.[117] The case also emphasizes the importance of access to justice, particularly for marginalized communities lacking political and economic power.[118] Consequently, its legacy and legal footprint may inspire policy reform, more vigilant oversight, and bolder judicial interpretation of environmental and social rights.[119] Ultimately, Owino Uhuru contributes to a body of jurisprudence that supports inclusive, transparent, and rights-centered governance aligned with the transformative vision of the 2010 Constitution.

This case offers a compelling illustration of transformative constitutionalism in action. It shows how courts, civic actors, and affected communities can work together to give life to constitutional rights. While challenges in implementation remain, the case has expanded the scope of environmental justice and accountability in Kenya. It provides a valuable foundation for deepening legal reforms and ensuring that constitutional promises are realized for all, especially the most vulnerable.

6.0. Conclusion

The Owino Uhuru case stands as a powerful testament to the enduring promise of Kenya's Constitution and a painful reminder of the human cost when rights remain unrealized. It reaffirmed that dignity, equality, and environmental justice are not distant ideals but urgent and living claims, especially for those whose lives have been shaped by neglect and exposure to harm. Watching this case unfold, I felt more than a legal interest. I felt the weight of stories that echoed beyond the courtroom, of children who lost their futures, of mothers who mourned in silence, and of communities fighting to be seen and heard. As a law student, this case has profoundly shaped how I see the law, not as a set of distant rules but as a lifeline for the vulnerable. I have come to believe that being a lawyer is not just about mastering statutes or winning arguments in courts. It is about standing with those who are unheard and using the Constitution as a shield for their hope. The courage of Owino Uhuru residents, the tireless work of civil society, and the flicker of justice from the bench have stirred something in me, a conviction that my journey in law must be anchored in purpose. This case calls us to act, to care, and to never forget that justice is personal. In honoring their struggle, I commit to using the law not just to argue but to transform lives. That, to me, is what it truly means to uphold the Constitution.

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[117]Business & Human Rights Resource Centre (n 78)
[118]Export Processing Zone Authority & 10 others (Suing on their own behalf and on behalf of the residents of Owino-Uhuru Village) v Attorney General & 5 others [2024] KESC 75 (KLR)
[119]Kemboi, 'Kenya: Court of Appeal overturns a 2020 Sh1.3 billion award for damages to Owino Uhuru community in lead contamination & poisoning lawsuit against Metal Refinery (EPZ)' (n 113)

Informed consent in Data Protection; Voluntary choice or coerced transaction?

By Abida Chacha

Abstract

This article critically examines the principle of informed consent in the context of data protection, questioning whether consent is genuinely voluntary or coerced especially when financial or other incentives are involved. Drawing from the 2025 Kenyan High Court decision in Republic v Tools for Humanity (the Worldcoin case), the paper interrogates how inducements can undermine the legal and ethical validity of consent. Through an analysis of key national, regional, and international legal frameworks including the Constitution of Kenya 2010, the Data Protection Act (2019), the General Data Protection Regulation (GDPR), and the Malabo Convention, the article argues for a stricter interpretation of what constitutes "freely given" consent. It incorporates comparative case law, such as Planet49 (CJEU) and T.O.S v Maseno University, to show how courts have responded to evolving threats to privacy rights. The article concludes with recommendations on strengthening consent standards, particularly for vulnerable populations, and highlights the need for public education and regulatory clarity to uphold digital rights in Kenya.

Informed consent is a cornerstone principle of data protection law. It ensures that individuals have control over their personal information and understand how it is collected, used, stored, and shared. In Kenya, this principle is enshrined in the Data Protection Act, 2019, and reflects international best practices such as the GDPR (General Data Protection Regulation) in the EU.

1.0 Introduction

In this digital age, the concept of informed consent has become central to data protection. Yet, the question remains: is consent truly voluntary, or does it amount to coercion when financial or other incentives are offered in exchange for it? This question came to the forefront in the 2025 High Court decision of Republic v Tools for Humanity[1], commonly referred to as the "Worldcoin case," where the court ruled that consent obtained through inducement in the form of cryptocurrency was not freely given and therefore invalid under Kenyan data protection law. The Court while

[1] [2025] KEHC 5629 (KLR)

emphasizing on the principles in Kenya's Data Protection Act held that consent must be free from coercion, specific, informed, and unambiguous.[2]

This doctrine is further anchored in constitutional privacy rights which protects individuals from the unlawful collection or dissemination of private data.[3] Additionally, it is echoed in international and regional legal instruments such as the General Data Protection Regulation[4] and the Malabo Convention.[5] Through the lens of these frameworks and the Worldcoin judgment, this article interrogates whether consent in the digital economy constitutes a voluntary choice or a coerced transaction, especially when granted under socio-economic pressure or incentive-based systems.

2.0 What is consent?

In order to understand whether consent has been given voluntarily or by coercion, it is vital to understand the meaning of consent. The General Data Protection Regulation defines 'consent' of the data subject as any freely given, specific, informed and unambiguous indication of the data subject's wishes by which he or she, by a statement or by a clear affirmative action, signifies agreement to the processing of personal data relating to him or her.[6] This definition is also echoed in the Data Protection Act of Kenya, 2019 that states "consent" is any manifestation of express, unequivocal, free, specific and informed indication of the data subject's wishes by a statement or by a clear affirmative action, signifying agreement to the processing of personal data relating to the data subject.[7] Having expounded on the meaning of consent, this article shall endeavor to dig deeper on the various legal instruments established and that can be used to determine whether consent has been given voluntarily or by coercion.

3.0 Legal frameworks on the principle of informed consent

3.1 International and regional legal Instruments

The Universal Declaration of Human Rights[8] as well as the International Covenant on Civil and Political Rights[9] uphold the right to privacy by emphasizing that no one shall be subject to arbitrary interference with his privacy. This two specific articles have been reaffirmed by the United Nations General Assembly.[10] The European Convention on Human Rights also advocates for the right to privacy stating that everyone has the right to respect for his private and family life.[11] A new aspect of human dignity is introduced in the African Charter on Human and People's Rights where it emphasizes on the right to human dignity and that it should be respected.[12] The Malabo Convention recognizes that protecting personal data is also an aspect of upholding the right to privacy.[13] The convention provides various principles that have to be adhered to in order to protect personal data including the

[2]Data Protection Act,2019,s 32(1)
[3]Constitution of Kenya 2010, art 31(c)
[4]Regulation (EU) 2016/679 of the European Parliament and of the Council of 27th April 2016 on the Protection of natural Persons with regard to the processing of personal data and on the free movement of such data(General Data Protection Regulation) OJ L 119/1, art 6(1)(a)
[5]African Union Convention on Cyber Security and Personal Data Protection (adopted 27 June 2014)art 13
[6]General Data Protection Regulation, art 4(11)
[7]Data Protection Act 2019, s 2.
[8]Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III)) art 12.
[9]International Covenant on Civil and Political Rights(adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 art 17
[10]UNGA Res 68/167, 'The Right to Privacy in the Digital Age' (adopted 18 December 2013) UN Doc A/RES/68/167
[11]European Convention on Human Rights (adopted 4 November 1950,entered into force 3 September 1953) ETS No 5 art 8
[12]African Charter on Human and Peoples' Rights(adopted 27 June 1981, entered into force 21 October 1986) 1520 UNTS 217 art 5
[13]African Union Convention on Cyber Security and Personal Data Protection (adopted 27 June 2014)art 8

The GDPR is not just a European law—it's a global shift in digital ethics and governance. It empowers individuals, regulates corporate behavior, and sets a high standard for privacy as a human right.

principle of consent, lawfulness, fairness, purpose, accuracy and transparency.[14]

In this article I shall endeavour to expound on the principle of consent. In order to uphold the right to privacy which also includes protecting personal data, various international and regional frameworks have been established to guide on the principle of consent.

First is the General Data Protection Regulation that clearly emphasizes that data processing shall only be lawful if the data subject has given consent.[15] This position is also upheld in the Malabo convention[16] and the ECOWAS Supplementary Act.[17] The General Data Protection Regulation goes on to give the conditions for the consent.[18] Firstly, where processing is based on consent, the controller shall be able to demonstrate that the data subject has consented to processing of his or her personal data.[19] Secondly, if the data subject's consent is given in the context of a written declaration which also concerns other matters, the request for consent shall be presented in a manner which is clearly distinguishable from the other matters, in an intelligible and easily accessible form, using clear and plain language.[20] Any part of such a declaration which constitutes an infringement of this Regulation shall not be binding.[21] Thirdly, the data subject shall have the right to withdraw his or her consent at any time.[22] Lastly, when assessing whether consent is freely given, utmost account shall be taken of whether

[14]African Union Convention on Cyber Security and Personal Data Protection (adopted 27 June 2014)art 13
[15]General Data Protection Regulation, art 6(1)(a)
[16]African Union Convention on Cyber Security and Personal Data Protection (adopted 27 June 2014)art 8
[17]ECOWAS Supplementary Act A/SA. 1/01/10 on Personal Data Protection within ECOWAS (adopted 16 February 2010) art 23(1)
[18]General Data Protection Regulation, art 7
[19]General Data Protection Regulation, art 7(1)
[20]General Data Protection Regulation, art 7(2)
[21]Ibid
[22]General Data Protection Regulation, art 7(3)

the provision of a service, is conditional on consent to the processing of personal data.[23]

Recital 32 of the General Data Protection Regulation further sheds light on the principle of consent. It states that, consent should be given by a clear affirmative act establishing a freely given, specific, informed and unambiguous indication of the data subject's agreement to the processing of personal data.[24] This could include ticking a box when visiting an internet website, choosing technical settings for information society services or another statement or conduct which clearly indicates in this context the data subject's acceptance of the proposed processing of his or her personal data.[25] It emphasizes that silence, pre-ticked boxes or inactivity should not therefore constitute consent.[26] Consent should cover all processing activities carried out for the same purpose.[27] When the processing has multiple purposes, consent should be given for all of them.[28] If the data subject's consent is to be given following a request by electronic means, the request must be clear, concise and not unnecessarily disruptive to the use of the service for which it is provided.[29]

In the case where the data subject is a child, the General Data Protection Regulation states that such processing shall be lawful only if and to the extent that consent is given or authorised by the holder of parental responsibility over the child.[30]

Additionally, the OECD Privacy Guidelines state that collection of personal data and any such data should be obtained by lawful and fair means and with the knowledge or consent of the data subject.[31] It also states that personal data should not be disclosed, made available or otherwise used for purposes other than those that the data subject has consented to.[32] The Council of Europe convention while emphasizing on the rights of a data subject states that the data subjects view should also be put into consideration even as they give consent to the use of their data.[33] All these international and regional legal instruments clearly show the emphasis that is put to ensure data subjects give voluntary consent.

3.2 National legal instruments

Every person has the right to privacy which includes the right not to have information relating to their family or private affairs unnecessarily required or revealed.[34] Private affairs also include personal data.[35] Therefore this provision emphasizes on the right of protection of personal data. However, this right is not absolute and it can be limited so long as it passes the limitation test that is the right is interfered with while adhering to legality, proportionality and serving a legitimate aim.[36] Therefore, one's personal data can be acquired so long as it is used to serve a legitimate aim, it is collected lawfully and it is proportionate to the aim that is to be achieved.

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[23]General Data Protection Regulation, art 7(4)
[24]General Data Protection Regulation, recital 32
[25]Ibid
[26]Ibid
[27]Ibid
[28]Ibid
[29]Ibid
[30]General Data Protection Regulation, art 8(1)
[31]OECD Guidelines on the Protection of Privacy and Transborder Flows of Personal Data(revised 11 July 2013,OECD) para 7
[32]OECD Privacy Guidelines, para 10
[33]Protocol amending the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data(adopted 18 May 2018) CETS No 223, art 9(1)(a)
[34]Constitution of Kenya, 2010, art 33(1)(c)
[35]https://cfllegal.com/an-overview-of-the-laws-governing-data-protection-in-kenya/ accessed 4 July 2025
[36]Constitution of Kenya, 2010, art 24

In order to give effect to Article 31(c) and (d) of the Constitution of Kenya, the data protection act was enacted.[37] It emphasizes that every data processor should ensure that personal data is processed lawfully, fairly and in a transparent manner.[38]

It also gives the conditions of consent which are to be considered by a data controller or data processor.[39] Firstly, a data controller or data processor shall bear the burden of proof for establishing a data subject's consent to the processing of their personal data for a specified purpose.[40] Secondly, unless otherwise provided under this Act, a data subject shall have the right to withdraw consent at any time.[41] Thirdly, the withdrawal of consent shall not affect the lawfulness of processing based on prior consent before its withdrawal.[42] Fourthly, in determining whether consent was freely given, account shall be taken of whether, among others, the performance of a contract, including the provision of a service, is conditional on consent to the processing of personal data that is not necessary for the performance of that contract.[43] In regards to the processing of a child's personal data, the act provides that consent shall be given by the parent.[44]

All these international and national laws have been instrumental in determining cases where the consent provided by the data subject is in contention.

4.0 Application of these laws in various cases

4.1 International cases

4.1.1 Case C-673/17

In the landmark *CJEU case C-673/17*[45], Planet49 GmbH, the German Federal Court of Justice sought clarification on the validity of consent obtained through pre-ticked checkboxes for online promotional lotteries, specifically regarding the installation of cookies for advertising purposes. The case arose from a complaint by the Federation of German Consumer Organisations against Planet49, whose online lottery involved users providing personal data and being presented with a pre-ticked box for cookie consent that required de-selection. The CJEU was asked to rule on whether such a mechanism constituted "freely given" and "informed" consent under European Union data protection law. In regards to consent the court stated the following;

> *"63.It follows that the consent referred to in Article 2(f) and in Article 5(3) of Directive 2002/58, read in conjunction with Article 4(11) and Article 6(1)(a) of Regulation 2016/679, is not validly constituted if the storage of information, or access to information already stored in the website user's terminal equipment, is permitted by way of a pre-ticked checkbox which the user must deselect to refuse his or her consent."*

The European Court of Justice, in its judgment in Case, unequivocally concluded that consent for the storage of, or access to, information on a user's device (such as cookies) is not validly obtained through a pre-ticked checkbox. The Court stipulated that for consent to be "freely given"

[37]Data Protection Act, 2019
[38]Data Protection Act, 2019, s 25(b)
[39]Data Protection Act,2019, s 32
[40]Data Protection Act,2019, s 32(1)
[41]Data Protection Act,2019, s 32(2)
[42]Data Protection Act,2019, s 32(3)
[43]Data Protection Act,2019, s 32(4)
[44]Data Protection Act,2019,s 33(1)(a)
[45]Case C-673/17 Planet49 GmbH v Bundesverband der Verbraucherzentralen und Verbraucherverbände – Verbraucherzentrale Bundesverband eV [2019] ECLI:EU:C:2019:801, Judgment of the Court (Grand Chamber), 1 October 2019

The Republic v Tools for Humanity ruling is a watershed moment for data protection, privacy, and digital rights law in Kenya. It affirms that informed consent, regulatory compliance, and constitutional safeguards remain paramount—even in the face of technological innovation and financial incentives.

and "informed," it must involve a clear affirmative action by the user, explicitly rejecting silence or inactivity as a form of consent.

4.2 Kenyan cases

4.2.1 Republic v Tools for Humanity (2025)

One of the Kenyan landmark cases that has endeavoured to determine whether consent was given voluntarily is the case of *Republic v Tools for Humanity*[46]. In this case, Tools for Humanity and its affiliates, via the Worldcoin project, collected iris and facial scans from thousands of Kenyans. In exchange, participants received cryptocurrency tokens. The project was neither registered under Kenya's data laws nor subjected to the requisite Data Protection Impact Assessment or type approval from the Communications Authority. Katiba Institute, joined by the Law Society of Kenya, ICJ Kenya, and KHRC, filed a constitutional petition and judicial review, challenging lack of informed and voluntary consent and breach of other data protection rules.

The court relied heavily on data protection rules to make its determination. On the aspect of informed consent, the court used Data Protection Regulation to state its point.

> *"180. Regulation 4 of the Data Protection (General) Regulations, 2021 emphasizes that consent must be obtained without any coercion and it must be informed, meaning, the data subject must be fully aware of what data is being collected and the purpose of the processing of such data."*

> *"182. I must emphasize that Informed consent, in the context of data privacy and protection, means that individuals (data*

[46][2025] KEHC 5629 (KLR)

subjects) must fully understand what they are agreeing to when providing their personal data. They must be made aware of:

i. What data is being collected.
ii. Why the data is being collected.
iii. How the data will be used, and if relevant, shared with third parties.
iv. The potential risks involved.
v. The ability to withdraw consent at any time."

In stating its point that consent should be unambiguous, the court used a European Court of Justice Case.

"183. In Google Spain v. AEPD (2014), the European Court of Justice (ECJ) clarified the right to be forgotten, but it also touched on the nature of consent for processing personal data. The judgment highlighted the need for clear and specific consent for the processing of personal data, especially in relation to online search engines. It emphasized that consent should not be ambiguous."

In answering the question of whether the consent given was a voluntary choice or coercion, the court stated the following;

"184. Again, for consent to be valid under the Data protection Act and Regulations, it must be freely given, affirmative, specific, informed and unambiguous. This includes not being coerced, manipulated or tricked into providing consent.

185. In the instant case, the use of Incentives (Cryptocurrency Tokens), in exchange for data collection and processing from the data subjects raises questions about whether the consents were freely given.

186. This is because, If the tokens are offered as a reward for participation, there may be concerns that individuals feel pressured to consent to data collection because the offer of tokens could be seen as an irresistible incentive, especially for vulnerable people who have no information and knowledge of their rights to privacy and data protection. This in essence, clearly indicates that consents were not given freely, as the data subjects might feel they need to agree to the data collection in order to receive the reward"

The Court declared that the consent was invalid. This is because the offer of cryptocurrency to often poor or unemployed individuals constituted coercion. True consent cannot be bought. Additionally, to show the seriousness of the issue, the Court under paragraph 207 ordered all collected data to be deleted under the supervision of the Data Commissioner within 7 days.

"C. Judicial review order of Mandamus is hereby issued compelling the 1st to 5th Respondents to, within 7 days of this order, permanently erase and destroy (under the supervision of the Data Protection Commissioner) the personal biometric data collected by the 1st to 5th Respondents from Kenya data subjects using the Orb, for having been obtained unlawfully."

4.2.2 T O. S v Maseno University & 3 others

In the case of T O. S v *Maseno University*[47] the Petitioner alleged that in a legal suit, the 4th Respondent exhibited documents that included private and confidential medical records, names, and photographs of his wife and minor children, along with his wife's work details and their place of residence. The Petitioner contended that these documents were irrelevant to the suit and were disclosed without consent, causing psychological suffering and contravening his family's

[47][2016] KEHC 6436 (KLR)

privacy rights. He sought damages and compensation for the alleged violation of his family's constitutional right to privacy. On the issue of consent the court stated as follows;

> *"19. Based therefore on the evidence placed before this court, it is clear in my mind and I am satisfied that there was wrongful invasion of the minors' right to privacy. The 4th Respondent went ahead to expose photographs, names, place of residence and personal details of minors who were not parties to the suit without consent. This was in clear violation of Section 19 of the Children Act which guarantees a child's right to privacy. It is also clear in my mind that the exposure of the document was intentional. I say so because, it is clear from the pleadings in HCCC No. 25 OF 2014 that the 4th respondent intended to demonstrate the petitioner's involvement in termination of its security services contract with the 1st respondent through his wife who was a legal officer of the 1st respondent."*

The High Court ruled that the publication and use of the minors' images and personal details without consent constituted a violation of their right to privacy and Section 19 of the Children Act. This clearly emphasizes on the importance of consent and how it should be voluntary given before personal details of a person are used.

5.0 Conclusion

The doctrine of informed consent lies at the heart of data protection frameworks, both domestically and internationally. Yet, as illustrated by the High Court in Republic v Tools for Humanity,[48] consent given under inducement or socio-economic pressure cannot be deemed voluntary. The use of financial incentives particularly when targeting vulnerable populations erodes the foundational requirement that consent must be free, informed, specific, and unambiguous.[49]

As digital technologies expand across the African continent, Kenya must adapt to this new reality.[50] This includes enforcing clear consent standards, prohibiting coercive practices, and adopting regional instruments like the Malabo Convention[51] to complement national laws. Ultimately, meaningful consent cannot be achieved without empowering data subjects with full knowledge of their rights, a principle firmly rooted in both the Constitution of Kenya[52] and international human rights law.[53]

6.0 Recommendations

In light of the jurisprudence and legal frameworks discussed, it is recommended that both data controllers and data protection regulators adopt a more stringent interpretation of consent especially in contexts involving vulnerable populations. This will assist in ensuring that the consent given is specific, informed, unambiguous and most especially voluntary.

6.1 Establish clear consent standards

First and foremost, the Kenyan Office of the Data Protection Commissioner should adopt detailed guidelines clarifying what constitutes freely given consent. These should be modeled after the General Data Protection Regulation, which provide that consent must be an unambiguous,[54]

[48][2025] KEHC 5629 (KLR)
[49]General Data Protection Regulation, art 4(11)
[50]https://ict.go.ke/sites/default/files/2024-09/Kenya-Digital-Economy-2019.pdf accessed 4 July 2025
[51]African Union Convention on Cyber Security and Personal Data Protection (adopted 27 June 2014)
[52]Constitution of Kenya, 2010, art 33(1)(c)
[53]International Covenant on Civil and Political Rights(adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 art 17
[54]General Data Protection Regulation, art 7

Protecting children's personal data is a critical legal and ethical obligation, especially in the digital era where children are active online yet vulnerable to exploitation.

affirmative act, not based on silence or pre-ticked boxes.[55]

6.2 Prohibit incentivized consent in high-risk processing

The decision in Republic v Tools for Humanity[56] demonstrates how financial incentives may distort voluntariness. In line with this precedent and *Google Spain SL v AEPD Case*[57], regulators should ban consent obtained through undue influence or economic reward in high-risk biometric processing.

6.3 Child-specific safeguards

Given the vulnerabilities of children, both the General Data Protection Regulation[58] and the Data Protection Act Kenya[59] require that consent must be given by a parent or guardian. The Kenyan Office of the Data Protection Commissioner should strictly monitor compliance with these safeguards.

6.4 Ratification of regional frameworks

Kenya should consider ratifying the Malabo Convention to demonstrate continental leadership on digital rights and reinforce its national legal protections. The convention reiterates the need for consent to be free, specific, and informed.[60]

6.5 Enhance public awareness on data rights
Informed consent cannot exist without informed individuals. The state and civil society must invest in public legal education on digital privacy, echoing the International Covenant On Civil and Political Rights[61] and the Constitution of Kenya 2010.[62]

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[55]General Data Protection Regulation, Recital 32.
[56][2025] KEHC 5629 (KLR)
[57]C-131/12 [2014] ECLI:EU:C:2014:317
[58]General Data Protection Regulation, art 8(1)
[59]Data Protection Act,2019,s 33(1)(a)
[60]African Union Convention on Cyber Security and Personal Data Protection (Malabo Convention, adopted 27 June 2014, not yet in force), arts 13.
[61]International Covenant on Civil and Political Rights(adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 art 17
[62]Constitution of Kenya, 2010, art 33(1)(c)

REDEFINING LEGACY

From the cold to the fold: Kenya's Supreme Court enclasps rights of 'Illegitimate' children in Islamic succession

By Joshua Malidzo Nyawa

Introduction

In today's landmark decision, the Supreme Court of Kenya has effectively endorsed the concept of a total Constitution. The concept of a total Constitution has at its kernel a key principle that all laws, including customary law and religious beliefs, must bow to the Constitution. As such, there can never be a religious segregation where a section of a community is deprived of their constitutional and human rights. The Court has dealt a deadly blow to the idea that *illegitimate* children (those born out of wedlock) cannot inherit under Muslim law. The court has reaffirmed our constitutional truth and promise that the best interests of a child do not recognise religious or cultural exceptions. Our Constitution does not go into slumber, whether due to religious lullabies or choruses.

In an embracing decision, the Supreme Court reassures Edmund, the son of the Earl of Gloucester in Shakespeare's play King Lear, who cried aloud, *Why bastard? Wherefore base?*, That is, in a constitutional democracy such as Kenya, there can never be a bastard. In this decision, Kenya's Supreme Court has leapfrogged the slow development of unjust Islamic law by balancing the competing orders or what Hirschl and Shachar call the ***challenge of religion to modern constitutionalism.*** The court has told us that, in a collision between the rule of law and the rule of religion, the rule of law swims supreme.

In Islamic (Sharia) law, the status of a child born outside of a lawful marriage—often termed "illegitimate" in legal texts—has profound implications for inheritance rights (succession). This remains a sensitive and complex area, especially in jurisdictions like Kenya where Islamic law is recognized under Kadhi's Courts (Article 170 of the Constitution) for matters of personal law affecting Muslims.

Fatuma Athman Abud Faraj Case

The facts of this case are pretty straightforward. The deceased was a Muslim who married Fatuma under Islamic law in 2006, and their marriage was blessed with four children. Upon his death, Fatuma initiated succession proceedings and listed

her children as beneficiaries. Another woman, Ruth, initiated other proceedings in which she named her four children as beneficiaries. At the same time, a third woman, Marlin, joined the proceedings and listed one child as a beneficiary. Fatuma objected to these proceedings, insisting that she was the only legally wedded wife under Muslim law and her children were the only legitimate children.

At the High court, the judge held that the Muslim law was the applicable law per the Law of Succession Act. Second, the judge found that Fatuma and Ruth were the legal wives of the deceased. As for Marlin, the judge held that the marriage was illegal as Marlin lacked the capacity to marry. Third, the judge was confronted with the issue of the children born to Ruth and Marlin. These children were all born before their respective mothers celebrated their Marriage with the deceased. As such, they were illegitimate children, and only Fatuma's children were heirs of the estate. This decision followed other precedents such as those of CCBH and Chelanga.

Aggrieved by this decision, Ruth appealed to the Court of Appeal. The Court of Appeal reversed the High Court's finding. The Court of Appeal found that there was no rational justification to warrant the distinction between children born in wedlock and those born out of wedlock regarding their entitlement to their father's estate. The Court was emphatic that to deny children born out of wedlock their entitlements would amount to punishing them for the sins of their parents and an endorsement of discrimination. Further, the Court used the best interest principle and the national values (non-discrimination, dignity and protection of the marginalised) to hold that any cultural practice that discriminates against children on the ground of their parents' marital status must be abhorred.

The battle arrives at the Supreme Court as Fatuma appeals the Appellate Court's decision. The grounds of appeal can be condensed into two: first, that the appellate court erred in law for failing to appreciate that the freedom from non-discrimination is expressly limited by Article 24(4) of the Constitution in relation to persons who profess the Islamic faith, in matters relating to personal status, marriage, divorce and inheritance. Second, the Court erred by failing to apply the Muslim law of inheritance, which was the Muslim law of the deceased as required under section 2(3) of the Law of Succession Act.

How to interpret constitutional clauses allowing derogation of rights: Kenya's Article 24(4)

Article 24(4) provides as follows:

> *The provisions of this Chapter on equality shall be qualified to the extent strictly necessary for the application of Muslim law before the Kadhis' courts, to persons who profess the Muslim religion, in matters relating to personal status, marriage, divorce and inheritance.*

Although the Court of Appeal ultimately reached the correct conclusion, it ignored the existence of Article 24(4) of the Constitution and failed to engage with it. This omission renders the decision vulnerable to legitimate challenge, and indeed, the Appellant fronted the argument to the Supreme Court. It is wrong, unjustifiable and deeply troubling when a court of law glosses over pleadings. However, it is even more concerning when a court of law ignores a constitutional provision in its analysis. For the Court to have properly resolved the dispute, it was required to confront the constitutional hurdle placed by Article 24(4). Ignoring the hurdle placed by Article 24(4) and proceeding as if the same does not exist is, with deep respect to the court, indefensible. Indeed the Supreme court in the goodwill decision (Jovet v Baharia) admonished the lower courts for failure to consider pleaded

issues and Article 40 of the Constitution, holding that *the trajectory taken by the courts is akin to constitutional avoidance which entails that a court will not determine a constitutional issue, when it may properly be decided on another basis.*

To its credit, the Supreme Court sees the hurdle and confronts it head-on. The court engages with Article 24(4) of the Constitution. Article 24(4) of the Constitution is one of the provisions in the Constitution that makes less sense to me. For a Constitution founded on values such as dignity and equality, it is counterproductive to have a provision that allows for a zone where the full effect of the Constitution is not felt. In effect, a formalist interpretation of Article 24(4) would leave a scenario where there is a zone where lawlessness and nastiness reign supreme and the rule of law does not reach. This is the interpretation adopted by the High Court, which ultimately tolerated the idea that there can be children called *bastards or illegitimate*. A constitutional absurdity!

To properly understand Article 24(4) and Article 170 of the Constitution is to appreciate the context and history behind these provisions. These provisions were reached as a compromise and have evolved since the days of the Sultan of Zanzibar, colonial and post-colonial Kenya. Others note that the compromise was made so that the politicians could get a significant voting bloc. It was therefore a compromise, as shown by various authors (here and here). The Supreme Court starts from this point and holds that the provisions were ***a settlement reached through a long process of negotiation, compromise, public debate, and consensus*** (Para 42). The idea of compromises in constitution-making is not foreign. Almost all constitution-making processes require compromises, and as the Supreme Court once noted (opinion of Chief Justice Mutunga),

> *The Court must also remain conscious of the fact that constitution-making requires compromise, which can occasionally lead to contradictions; and that the political and social demands of compromise that mark constitutional moments, fertilize vagueness in phraseology and draftsmanship.*

With this background, what then is the proper import and effect of Article 24(4) of the Constitution of Kenya? To interpret this provision, the Supreme Court starts with article 259 of the Constitution, the interpretation clause, which asks courts to interpret the Constitution in a manner that promotes and advances human rights and values. The court adds that the interpretation must be one that safeguards 'the architectural integrity and normative coherence of the Constitution' (para 38). Second, the Court holds that Article 24(4) has internal qualifiers that demarcate its boundaries. Such a qualifier is *qualified to the extent strictly necessary.* The court then admirably and adequately interprets this internal qualifier to mean that the derogation from the right to equality under the Bill of Rights should be 'narrowly tailored and circumscribed'. The Court, while relying on the progressive works of Murray and Miyandazi, also holds that Article 24(4) is not a *carte blanche* for overriding the right to equality and freedom from discrimination. For a limitation, it must go through the test of Article 24(1) of reasonableness, justification, necessity, and proportionality (Paras 44-53).

Two quick things can be said about this finding. First, the Court must be commended for using one of the arsenals in a judge's toolkit, the arsenal of constitutional interpretation. Constitutional interpretation is a tool entrusted to judges to ensure that they can illuminate the legal penumbras and silences to ensure that the people's aspirations are not defeated. Put differently, through constitutional interpretation, judges are required to bring to the fore the full potential of the Constitution. In a Constitution with a bill of rights and a

Upholding the rights of minorities and ensuring the best interests of the child are foundational obligations under both domestic and international law. These principles intersect in areas such as education, family law, health, data protection, religious freedom, and juvenile justice.

limitation clause, such as any other post-World War 2 Constitution, rights are the norm and limitations are the exception. By subjecting article 24(4) to the limitation test of article 24(1), the supreme court has today reminded Kenyans that the Bill of rights is a permanent chapter and that the theme as held by the Court of Appeal is that of 'maximisation and not minimization; expansion, not constriction; when it comes to enjoyment and concomitantly facilitation and interpretation'.

The second thing to be unpacked from the court's finding is that courts do not have jurisdiction to do injustice. They only have a duty and obligation to do justice. The idea of justice in human rights matters in Kenya is correctly spelt out by Article 24(1), which spells out the limitation criteria. It emphasises the centrality of the Bill of Rights and strikes a balance for any limitation. The idea of justice is that rights are the king. Two, exceptions must be proportional and justifiable in a democratic society. As such, in this case, and as correctly held by the Supreme Court, Article 24(4) does not stand for the idea of broad indiscriminate or automatic exclusions of Muslims from constitutional equality protections, but instead permits limited exceptions and under stringent conditions in any event (para 51). Also, the court strikes a blow for the culture of justification by requiring justification to be advanced before the equality reach of the Constitution is limited. In this case, no justification was offered, and indeed, children can be punished for the parents' sins. This is not a constitutional justification for limiting the right to equality.

A total Constitution: Protecting the minorities and the best interests of the child

The Constitution imposes a constitutional injunction on the judiciary to consider a child's best interest in every matter before it for adjudication. Article **53(2)** of the Constitution provides that "in all actions concerning children, whether undertaken by a public or private institution, courts of law, administrative authorities or legislative

bodies, the best interest of children shall be a primary consideration. The courts are therefore injuncted to give more weight to the child's best interests. Further, the constitutional injunction requires courts to develop a child-centred approach in adjudicating disputes involving children. This recognises that children are vulnerable and developing and deserve special protection.

The Supreme Court, while adhering to this constitutional injunction, holds that even in cases touching on religious laws, doctrines, teachings, rules, or tenets, the paramount consideration by the court must be the protection of the welfare and best interests of the child. Further, that since the Constitution provides that every child is entitled to parental care and protection, 'it would be contrary to the best interests of the child for the courts to deny a child such care and protection based on the marital status or perceived "sins" of the child's parents' (Para 59).

The Supreme Court, in my view, has embraced the concept of total Constitution that I discussed earlier (here). The court has correctly appreciated that ours is a total Constitution where the minority and vulnerable are judicially protected and that rights and entitlements that one can demand and stand on. Further, in a state governed by a total Constitution, also referred to as an all-pervasive Constitution, there is nowhere that the transformative reach of the Constitution cannot reach. There is no enclave, whether religious or otherwise. What the Supreme Court has said today is that the reach of our constitutional sunshine liberty and equality must shine in all areas of our lives. In an all-pervasive Constitution, all laws, including religious texts, must bow to the Constitution.

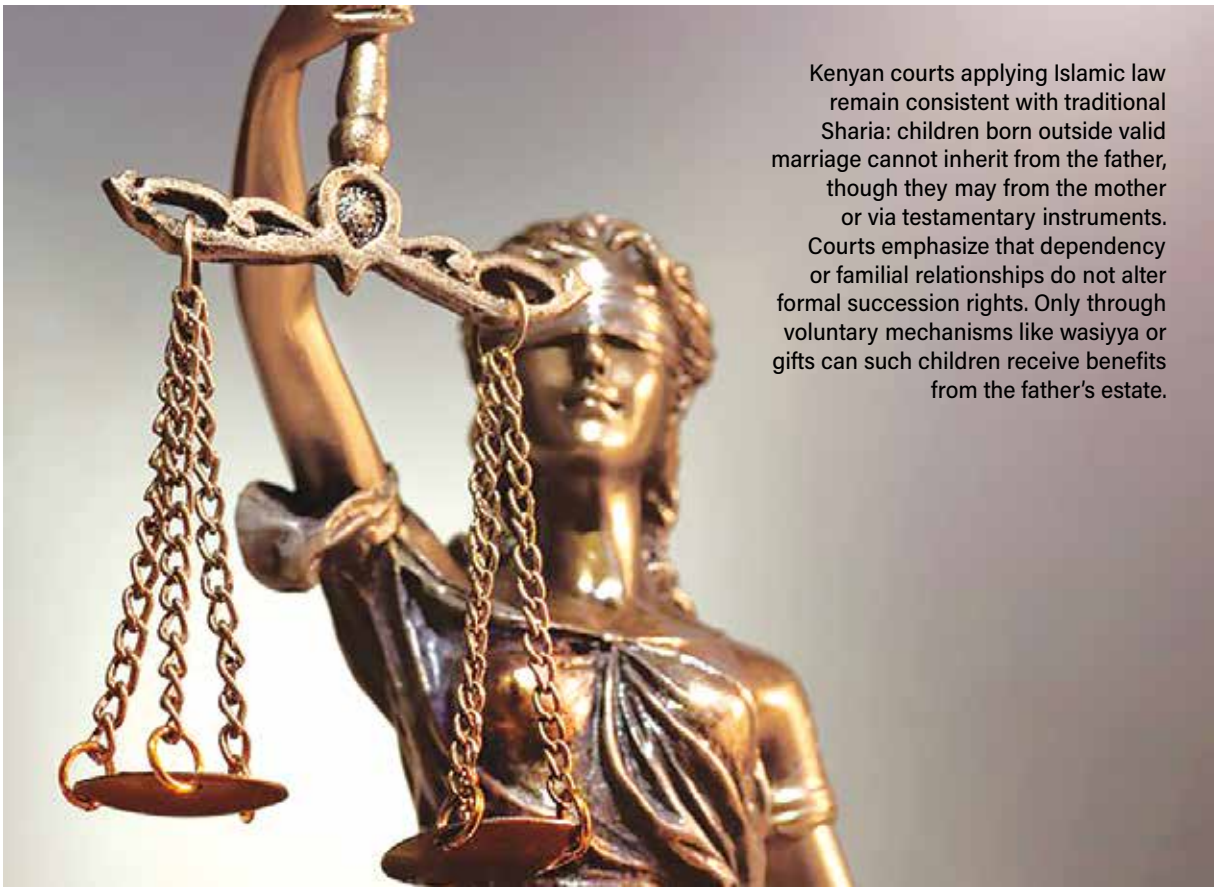
Kenya's developmental clause and Muslim law

Article 20(3) of the Constitution requires all laws to be developed to the extent that they don't give effect to a right, and the court to adopt an interpretation that most favours the enforcement of a right. This means that all laws must be in line with the Constitution. This, again, is a constitutional injunction on the courts. Courts can no longer be heard saying that it is *unjust, but it is the law*. Instead, they are required to ***'be in an activity that seeks to discover a deeper constitutional logic than the crude absolute of statutory omnipotence'.*** As I have argued before, the duty of judges as circumscribed by Article 20(3) of the Constitution requires judges to clip/modify existing laws to bring them into conformity with the Constitution. The Courts are therefore called upon to adopt a constitutionally conforming approach when interpreting statutes.

In this case, the appellant argued that, according to section 2(3) of the Law of Succession Act, the Court was required only to apply the Islamic law as the deceased was a Muslim. She faulted the Court of Appeal for using articles 27 and 53 to defeat the intent of section 2(3) of the Law of Succession Act. While upholding the decision of the Court of Appeal, the Supreme Court deployed a Constitutional injunction in Article 20(3) to hold that:

> *The implication of this provision is that all laws, including religious or customary law, must be interpreted and applied through the lens of the Bill of Rights. Where the law applicable to a dispute does not yield an outcome consistent with those values and rights, the courts must integrate the normative content of the Bill of Rights into the interpretation and application of that law. In doing so, the law is transformed and applied in a manner that promotes the Constitution's transformative vision.*

Today's interpretation of Article 20(3) of the Constitution by the Supreme Court is revolutionary and revolutionises the role of judges in our society. Judges are no longer passive partners but are expected to



Kenyan courts applying Islamic law remain consistent with traditional Sharia: children born outside valid marriage cannot inherit from the father, though they may from the mother or via testamentary instruments. Courts emphasize that dependency or familial relationships do not alter formal succession rights. Only through voluntary mechanisms like wasiyya or gifts can such children receive benefits from the father's estate.

be active partners in democratisation. Put differently, courts have been transformed into a 'co-ordinate' and 'co-equal 'arm of government. The Supreme Court has appreciated that only by developing laws will courts effectively perform the role of midwifing transformative constitutionalism in Kenya. For this, the court should be commended.

Conclusion

Today, the Supreme Court refused to hide behind a formalistic and literalist interpretation of Article 24(4). Instead, the court infused Article 24(4) with the leitmotifs of the Constitution and interpretation theory of the Constitution that calls for a holistic reading of the Constitution and in a manner that promotes the bill of rights. The court has sent out the much-desired constitutional alarm that article 24(4) is not and will never be a blank cheque to perpetuate discrimination. Any limitation or derogation from equality must be strictly necessary, narrowly tailored, and justifiable.

If today's decision is to be celebrated for a single reason, then it must be that the Supreme Court did not leave the vulnerable and minorities in the cold; instead, it brought them into the fold and embraced them. It has told children in Kenya that religious or cultural doctrines cannot override the constitutional dream; it crushes the stigma that children born out of wedlock are made to carry on a day-to-day basis. It unequivocally and resoundingly tells them that they are not illegitimate, and if there is anything illegitimate, it is the outdated laws or the application of those laws. Today's decision is a beacon of hope not only for reminding us of the constitutional truths but also for provoking the conscience of the nation, that rules that dehumanise children have no place in our society.

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A HISTORIC FAREWELL

Ethics in resignation from Public Office: Jaramogi Oginga Odinga's letter in perspective

By Ouma Kizito Ajuong'

While laws are often very prescriptive and descriptive on instances when a Public or State Officer may leave or is removed from office; resignation from office in Kenya is one of the ways that is almost unheard of. It is almost taboo, especially, for those in the political class, to be seen to have resigned from office. As history may have it, Jaramogi Oginga Odinga stands as the highest profile politician to ever resign from office as the first Vice President of the Republic of Kenya on April 14, 1966. In his resignation letter, Odinga agonized stating that his conscience had pricked him and could not allow him to continue earning a salary from the public with nothing to do. He continued to state that the act of earning from public office without providing service is not only insincere to the public but also a waste of public funds. If this was let to continue, the future may not be kind to him. Perhaps Odinga did not recognize it then but the fabric of this letter forms the foundation of the concept of leadership and integrity as it ought to be. The letter is also relevant in this era of the Constitution of Kenya, 2010 as it does not only propagate integrity in leadership but also adopts the twin-ticket executive structure making the deputy president and deputy governors elected as opposed to appointed. This has led to a lot of embarrassing political quarrels within the leadership class leading to impeachment

Jaramogi Oginga Odinga

and airing of dirty political linen in public. No one has opted for Odinga's resignation route.

Like Odinga, there is need for the leadership in Kenya especially those in politics to embrace the ethics of resignation when necessary. Resignation supports personal integrity and resigning with brevity and grace when one's service is unappreciated does speak volumes. This has been described as the ability to act responsibly and be discipline within one's self. It has also been said to be the ability to take a reflective stand on issues. When people have personal integrity, they can therefore build a

Jaramogi Oginga Odinga (1911–1994) was a pivotal figure in Kenya's independence movement and post-colonial politics. He is remembered as a nationalist, Pan-Africanist, and a powerful symbol of opposition politics in Kenya.

character and self-discipline that overcomes temptations, oppositions and problems. Reflection when making decisions was clearly seen in Odinga's resignation letter. He discussed his no role in the Office of the Vice President and the harm this was doing to the public hence the choice to resign. By this letter, Odinga clearly stands out as one of the Kenyan politicians with high personal integrity.

Resignation from public office is a way of taking moral responsibility. Individuals in public offices are there to take responsibility for their actions and resignation is the moral way of taking responsibility. When dealing with leadership at the highest level, the buck will often stop with those in leadership- in the words of President Richard Nixon- and therefore it is only strange to hear those in political leadership in Kenya "following orders", "had no choice" or "not my job". Leadership at the highest level is also about institutional responsibility. This is an aspect also seen in Odinga's letter. The Vice President then was of the view that he bore a responsibility to the office and service he was to provide to the nation and now that the President at the time - Mzee Jomo Kenyatta did not have faith in him it was very necessary to resign as opposed to fighting from inside, as politicians put it nowadays.

Resignation from public office further helps in ensuring responsibilities to democratic institutions. Public officers ought to understand that where there is a need for

Jaramogi Oginga Odinga with Mzee Jomo Kenyatta.

public officers to demonstrate accountability or where a leader feels that they are not able to be accountable, resignation is therefore the way. Political leaders in Kenya avoid resignation based on the notion that it is an admission of guilt, more so, where questions are being asked. Resignation in the contrary, demonstrates respect for institutions, and belief in systems and when the system clears up; then leadership and integrity are restored. Resignation from public office also morally distinguishes the difference between the officeholder and the office. In other words; the idea that state and public officers only hold those offices in trust and not as personal property. This is an aspect that was also clearly demonstrated in Odinga's letter. He was very aware of his office, his person and the purpose of his being in office. Today, people in public or political offices do not resign. There are in fact a few politicians over the years who have stated that they would rather *'die than resign from office"*. This is of course not the right attitude and needs to change.

Resignation from public or state office is not a sign of political weakness. It is not giving up as a lot of those in the political space may always assert. It is no secret that the fear to resign from office even when they do not agree with the system and the regime in principle is borne out of the fear of losing influence and disappearing into political oblivion. This as has been proven over time is a myopic way of looking at things as when there is a public refusal to resign, it often comes across as hypocrisy. When the center can no longer hold; it is only prudent to resign as opposed to waiting for impeachment or any other procedures that lead to one being hounded out of office. How many politicians resign from office when they disagree with the ideas of their political parties? Again, this is a culture that is really not seen and perhaps Raila Odinga may have been the only politician to resign from a political party to seek fresh mandate from the people, no wonder, he is today referred to as *Baba*.

Resignation from public and state offices when appropriate also brings out the notion that other people are capable of performing the function of the said office other than the current holder. In former South African President Thabo Mbeki's resignation speech, he was very categorical and confident that as much as he was resigning from office; others from the incoming administration were capable of doing better and improving on the work his administration had done. The width and breath of this is that leaders in Kenya ought to embrace integrity and adopt the culture of resigning when appropriate. It is not wrong to walk away from unnecessary fights; it can in fact be considered dignifying.

"The press must be a champion of political, social and economic development of the people. It must thus seek to report on the effect of the people to bring about this development. The press must indeed go further than this and champion social, political and economic systems best suited for the development of Africa. In a nutshell, the press must be involved in championing the correct direction of development in Africa". **Jaramogi Oginga Odinga**

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

Sexual violence as a political weapon: A legal analysis of male victimization in East Africa

By Marion Aromo

I. Introduction

The overlooked wounds of conflict: Sexual violence against men in East Africa

Sexual violence during armed conflict is often a deliberate and tactical tool to meet specific military and political aims. This makes it more than just random criminal behaviour; it becomes a calculated weapon of war and political violence.[1] The goal is to frighten people, disrupt communities, and gain power over enemies. This shows a troubling side of conflict, where the human body becomes a site for political struggle. Despite being widespread, sexual violence against men in conflict zones is not well researched or rather, it's rarely reported. This gap in documentation is a systemic issue tied to social norms and historical biases in research, which has mainly focused on female victims.[2] Men often don't report their experiences because of social expectations about male strength, which keeps them silent. Also, legal systems usually don't recognize men as victims,

Governments or security forces use sexual violence to punish dissent, intimidate opposition, or break the spirit of protest movements.

making the issue worse. This lack of recognition has big consequences for policy, resource allocation, and support services. It lets perpetrators go unpunished and survivors suffer because the lack of data is used to justify not having specific help for male victims.

This paper aims to clarify how sexual violence against men is used as a weapon in East Africa. It will closely study the political goals behind these acts, detail how they

[1]Sexual Violence in Armed Conflict: Global Overview and Implications for the Security Sector demonstrates the horrifying scope and magnitude of sexual violence in armed conflict. https://www.dcaf.ch/sites/default/files/publications/documents/sexualviolence_conflict_full.pdf

[2]Scott-Storey K and others, 'What about the Men? A Critical Review of Men's Experiences of Intimate Partner Violence' (2022) 24 Trauma, Violence, & Abuse 858 https://pmc.ncbi.nlm.nih.gov/articles/PMC10009901/

Sexual violence with political objectives is a deliberate tactic used by state or non-state actors to manipulate power relations, control populations, suppress dissent, and maintain political dominance. It is not random or personal—it is a calculated strategy aimed at achieving specific political ends.

appear across the region, and look at the legal issues in prosecuting them. It will also talk about the physical, mental, and social problems faced by male survivors, and the ongoing difficulties in getting justice.

II. The weaponization of sexual violence: Political objectives and forms of abuse

Using sexual violence against men in East Africa is a deliberate war and repression tactic, meant to gain certain military and political advantages[3]. These goals go beyond just personal satisfaction, aiming to disrupt and control society.

Strategic objectives

One key goal is to scare and shame opponents. Those responsible use sexual violence to cause deep fear and shame to individuals and communities, weakening the morale of enemy forces. This form of psychological warfare is a strong way to control people.

Second, sexual violence is used to ruin communities and their social structure. By attacking men, who are often seen as protectors, perpetrators try to break family ties, weaken unity, and cause large-scale displacement. By damaging these basic social structures, they can destabilize and control populations.

A third, very harmful goal is to show power and take away masculinity. These actions are often meant to feminize male victims, taking away their sense of manhood and proving the perpetrator's control. This harms the victim's identity and standing in the community. The many forms of sexual violence against men show this plan to cause harm on many levels—physical, emotional, and social. Survivor stories show that the main goal is not sexual pleasure but a

[3]United Nations, 'Sexual Violence: A Tool of War' (2014) https://www.un.org/en/preventgenocide/rwanda/assets/pdf/Backgrounder%20Sexual%20Violence%202014.pdf

planned attack on their identity and position in society.

Lastly, in some situations, sexual violence is used for ethnic cleansing and demographic changes. Forced sterilization or mutilation aims to prevent births within a group or change the ethnic mix. This shows the extreme political and social intentions of those responsible.

III. Forms of sexual violence against men[4]

The types of sexual violence against men are varied and cruel, including physical acts and psychological harm. These include:

Anal and oral rape: These are common types of sexual assault.

Gang Rape: When multiple people commit rape, it increases the shame and reinforces the power difference.

Genital torture: This is common and includes castration, cutting off the penis, beating the testicles, and putting objects into the anus or urethra. Such actions often aim to destroy the ability to reproduce and completely take away masculinity.

Sexual slavery: Forcing someone to stay and experience repeated sexual abuse for a long time happens as sexual slavery.

Forced nudity: Used to publicly shame and degrade victims, taking away their dignity.

Forced participation in sexual violence: Making victims rape others, like family, is a tactic to break social bonds and cause severe harm.

Other forms: Stories also include rapes with objects, forcing men to hold their genitals over fire, dragging rocks attached to their penis, or forcing them to perform oral sex on soldiers.

Using sexual violence to feminize or homosexualize in places where same-sex relations are illegal adds more vulnerability

Sexual violence against men is a severely underreported and often overlooked human rights violation. Despite its silence in public discourse, it occurs in many contexts—conflict, detention, political repression, migration, and domestic spaces—and has devastating psychological, physical, legal, and social consequences.

[4]T Olaluwoye, E. Hoban and J. Williams, *'Forms of Sexual Violence Perpetrated in Conflict and Post-Conflict Settings against South Sudanese Men Resettled in Two Communities in Uganda: An Exploratory Qualitative Study'* (2023) 17 Conflict and Health. https://conflictandhealth.biomedcentral.com/articles/10.1186/s13031-023-00544-7#:~:text=The%20direct%20forms%20include%20(1,8)%20taking%20men%20as%20wives.

and fear for male survivors. This environment makes it harder to report and get help, as men face the assault and the chance of legal issues and social isolation if they speak up.

IV. Regional cases and legal responses in East Africa

Sexual violence against men as a political tool shows up differently across East Africa, shaped by local conflicts, culture, and laws.

Democratic Republic of Congo (DRC)

The DRC is often called the rape capital of the world, where sexual violence is widely used as a weapon by different groups. Studies show that it is common against men.[5] For example, 38.5% of male refugees from the DRC resettled in Uganda said they had experienced sexual violence[6]. Other research shows that 22% to 23.6% of men in Eastern Congo have suffered conflict-related sexual violence.[7] The types of abuse are cruel, including anal and oral rape, gang rape, genital torture, sexual slavery, and forced rape. Some accounts tell of rapes using objects, forcing men to hold their genitals over fire, or making them perform oral sex on soldiers. Men and boys continue to suffer sexual violence in detention, often by state officials such as police and military.

Uganda

Uganda hosts many refugees from the DRC and South Sudan who have experienced conflict-related sexual violence. Male refugees have trouble getting medical care because of stigma, negative views from health workers, and beliefs about masculinity.[8] Social norms that value male strength create a code of silence, so men don't discuss their experiences. Also, because homosexuality is illegal in Uganda, it increases fear of mistreatment, which makes men less likely to report sexual violence. While Uganda's law describes sexual abuse in neutral terms, its use and reporting for male victims are limited by stigma.

Rwanda

During the 1994 genocide, the International Criminal Tribunal for Rwanda (ICTR) was important in naming rape as part of genocide, but it mainly focused on female victims. However, there is proof that men also went through castration, genital mutilation, threats of sexual acts, and rape[9]. ICTR judgments include witness accounts of men with mutilated sexual organs displayed in public. Today, Rwandan law makes the rape of both men and women illegal, including spousal rape, with punishments from 10 years to life. Homosexuality is legal in Rwanda, which may reduce the stigma faced by male survivors compared to other East African countries.

Sudan and South Sudan

Sexual violence against men is common in Sudan and South Sudan, happening in communities, detention sites, during displacement, and in resettlement areas. The United Nations Mission in South Sudan

[5]A Bosch , **'The Impact of Sexual Violence in the Democratic Republic of the Congo: Implications for the Care of Congolese Refugees'** (2019) https://med.virginia.edu/family-medicine/wp-content/uploads/sites/285/2019/09/Allison-Bosch-DRC-Paper-Final.pdf
[6]Centre for African Justice. (2021). Report on sexual violence against the male gender:https://centreforafricanjustice.org/wp-content/uploads/2021/05/DRC-report-1.pdf
[7]Kirsten Johnson, 'Association of Sexual Violence and Human Rights Violations with Physical and Mental Health in Territories of the Eastern Democratic Republic of the Congo' (2010) 304 JAMA 553. https://pubmed.ncbi.nlm.nih.gov/20682935/
[8]Carmen H Logie and others, 'Sexual Violence Stigma Experiences among Refugee Adolescents and Youth in Bidi Bidi Refugee Settlement, Uganda: Qualitative Insights Informed by the Stigma Power Process Framework' (2023) 4 SSM - Mental Health 100242 <https://www.sciencedirect.com/science/article/pii/S2666560323000579>.
[9]C. Bradford and D Caro, 'Call it what it is: genocide through male rape and sexual violence in the former yugoslavia and rwanda' (2019) <https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1555&context=djcil>.

(UNMISS) has documented cases, like 5 men in 2020 alone[10]. Documented abuses include rape, threats of rape, forced nudity, and genital beatings. Underreporting is a problem because of shame, fear of prosecution under anti-sodomy laws, and rejection by families. Reports from human rights organizations, like Amnesty International and Human Rights Watch, often report sexual violence by armed groups, especially the Rapid Support Forces (RSF) in Sudan.

Kenya and regional accountability

In Kenya, the 2007-2008 post-election violence (PEV) saw men and boys go through forced castration and circumcision. These acts were used to show dominance and violate the cultural identity of groups. The Kenyan Sexual Offenses Act 2006[11] was created to address sexual violence, defining rape to include male on male rape and bringing tougher penalties. It suggests that rape can be committed by anyone against anyone, no matter their gender. The Act also provides for medical services, easier police reporting, and forensic evidence management.

Even with the views in laws like Kenya's Sexual Offenses Act, there is a gap between legal recognition and real use at the national level, especially for male victims. The way courts classify male sexual violence as torture is a barrier to justice. This makes the sexual harm less visible and can leave victims without the help they need.

The case of Boniface Mwangi, a Kenyan activist, in Tanzania in May 2025, shows sexual violence as a political weapon. Mwangi and Ugandan activist Agather Atuhaire were sexually assaulted and

Activist Boniface Mwangi

tortured during detention in Tanzania.[12] Mwangi was stripped, hung upside down, and sexually assaulted while being forced to praise the Tanzanian President. This occurred as they watched the trial of opposition leader Tundu Lissu, showing how state power and laws are used for political repression during elections. Mwangi and Atuhaire plan to sue the Tanzanian government in national, regional, and international courts. This case shows the important role of human rights mechanisms in addressing impunity and the problems faced by activists.

Burundi

Sexual violence against men occurs in conflicts in Burundi. Burundi's 2016 Gender-Based Violence (GBV) law defines rape based on consent, making it neutral.

[10]United Nations, *'Sudan: UN Fact-Finding Mission Documents Large-Scale Sexual Violence and Other Human Rights Violations in Newly Issued Report'* (OHCHR2024) <https://www.ohchr.org/en/press-releases/2024/10/sudan-un-fact-finding-mission-documents-large-scale-sexual-violence-and>.
[11]Sexual Offences Act,2006
[12]https://www.bbc.com/news/articles/cwy6x7jgx75o

However, it contains issues, including disagreements with the 2017 Penal Code and smaller penalties for marital rape.[13] Prosecution for male victims in Burundi is difficult because same-sex relations are illegal under Article 567 of its Penal Code, which punishes such actions with imprisonment. This discourages male victims from reporting sexual violence, because they fear being prosecuted for perceived homosexuality.

V. Legal systems and justice for male victims

Getting justice for male victims of sexual violence in East Africa involves a mix of international, regional, and national laws, each with opportunities and problems.

The International Law regime

The **Rome Statute of the International Criminal Court (ICC)**[14] deals with gender-related issues, listing sexual violence as crimes against humanity and war crimes. Article 21(3) states that **'The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender as defined in article 7, paragraph 3, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status.'**. However, the application of ICC law to male victims has not been consistent. While the Bemba case was important for including charges and convicting for sexual violence against both women and men (though later overturned), the ICC's ruling in the Kenya case to classify forced circumcisions as other inhumane acts instead of sexual violence has limited justice.[15]

International Criminal Tribunals have been important in prosecuting wartime sexual violence. The ICTR recognized rape as part of genocide. The ICTR also looked at sexual assault charges against men, including forced fellatio and genital torture, though some classifications of male sexual violence were under torture instead of sexual violence.

Under International Humanitarian Law (IHL) and the Geneva Conventions, sexual violence is illegal in armed conflicts.[16] The International Committee of the Red Cross (ICRC) defines sexual violence broadly as any victim – man, woman, boy or girl. Rape is a violation under IHL and can be prosecuted as a war crime.

African regional laws

The **African Charter on Human and Peoples' Rights** does not mention sexual violence against men. However, its rules against exploitation and degradation of man, torture, and cruel punishment apply to everyone, including men.[17] Also, General Comment No. 4 on Article 5 says that sexual violence against men is important and requires attention from State Parties.

The Maputo Protocol focuses on violence against women and girls. While it does not include male victims, it supports involving men as allies in addressing the causes of gender-based violence.

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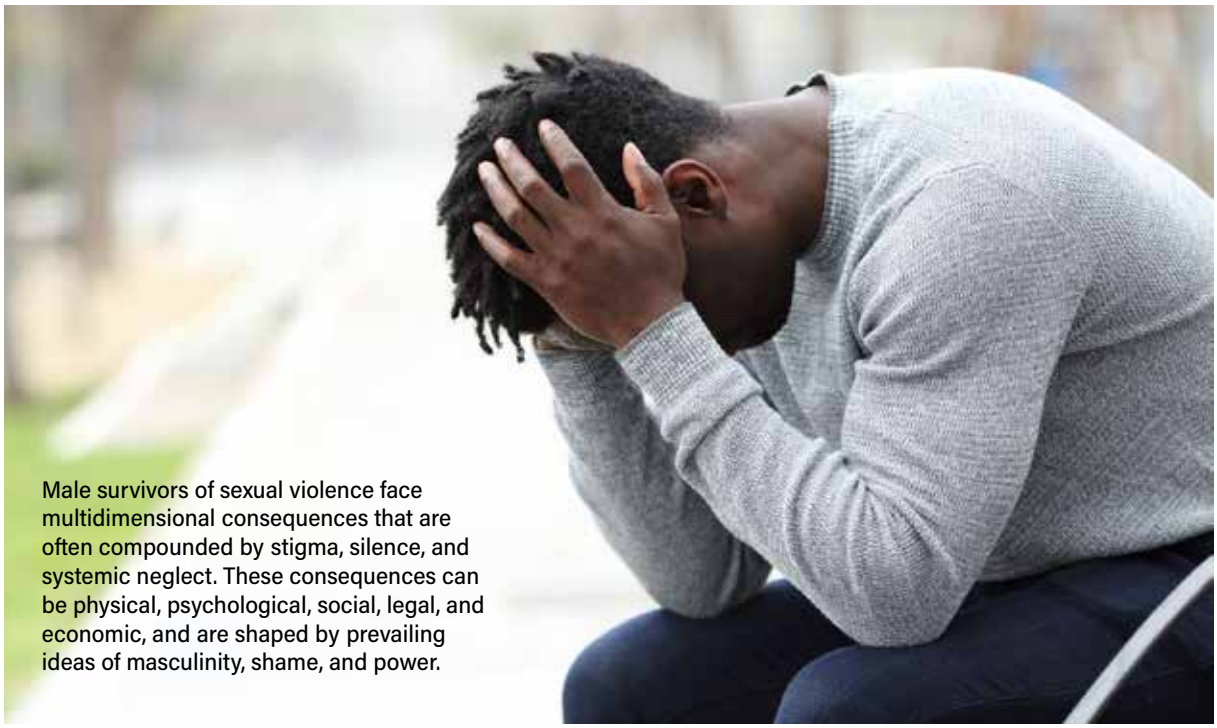
[13]'Burundi – SOAWR' (Soawr.org2016) <https://soawr.org/protocol_watch/burundi/> accessed 14 July 2025.
[14]Rome Statute of the International Criminal Court
[15]Morma, 'The Bemba Judgement and "Justice" for Survivors of Rape and Sexual Violence - SVRI' (SVRI15 July 2016) <https://www.svri.org/the-bemba-judgement-and-justice-for-survivors-of-rape-and-sexual-violence/>.
[16]International Committee of the Red Cross, 'Q&A: Sexual Violence in Armed Conflict' (*International Committee of the Red Cross*18 August 2016) <https://www.icrc.org/en/document/sexual-violence-armed-conflict-questions-and-answers>.
[17]African Charter on Human and Peoples' Rights



Male survivors of sexual violence face multidimensional consequences that are often compounded by stigma, silence, and systemic neglect. These consequences can be physical, psychological, social, legal, and economic, and are shaped by prevailing ideas of masculinity, shame, and power.

VI. Problems in prosecution

Despite the increasing gender-neutral language in international laws, there is still a gap between legal recognition and real use at the national level, especially for male victims. This shows in these problems:

Underreporting and stigma: Male victims often stay silent due to shame and the risk of being labelled. This is worsened by anti-sodomy laws in East African countries, which discourage reporting by creating a risk of prosecution for the victim.

Legal problems: Limited case law and definitions of sexual violence as applied to men create issues. The classification of male sexual violence as torture, instead of sexual violence, hides the harm and impacts help for victims.

Difficulties with evidence: Collecting evidence is difficult, often made worse by victims delaying reporting because of shame.

Impunity: Those responsible often go unpunished because of gaps in legal systems and corruption. The mix of international and national legal systems makes it tougher to deliver justice. The challenges in prosecuting male sexual violence cases, made worse by society and legal confusion, add to a culture of impunity. This enables sexual violence as a political weapon, as that responsible face few consequences.

VII. Consequences and the way forward

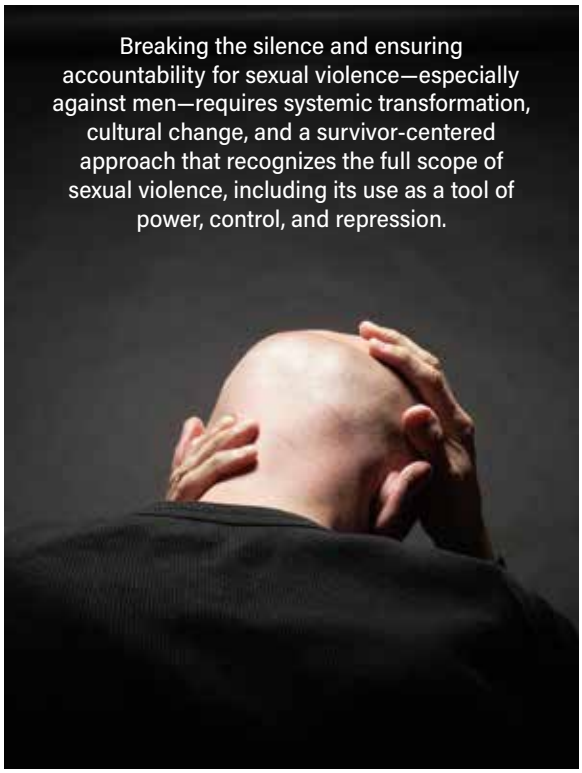
The impact of sexual violence on men is long-lasting, affecting many parts of their lives. This is a health and human rights issue that is not addressed because of the code of silence and lack of support.

Consequences for male survivors

Physical health: Survivors often have health issues, including injuries, infections, and problems with work and reproduction.

Mental health: Survivors have usually encounter mental health issues due to the trauma encountered during the violence.

Social: Survivors face stigma and isolation from the society instead of care and attention as opposed to the women.



Breaking the silence and ensuring accountability for sexual violence—especially against men—requires systemic transformation, cultural change, and a survivor-centered approach that recognizes the full scope of sexual violence, including its use as a tool of power, control, and repression.

The Way forward: Breaking the silence and ensuring accountability

Addressing sexual violence requires legal changes and changes to society, along with support services.

Recognition: We need studies to understand male sexual violence, allowing them to share their experiences.

Support: We need support services for male survivors.

We must recognize sexual violence against men in law, as it is related to torture and ensure reparations. National laws need change to ensure gender-neutral definitions. Perpetrators must be held responsible through investigations and prosecutions. Reparations should address the harms suffered by male victims.

VIII. Conclusion

Sexual violence against men in East Africa is not a random side effect of war but a calculated war strategy and political tactic. It is practiced with intentionality to create fear, disarticulate communities, assert power, and play with identity. From rape camps in East Congo to post-election violence in Kenya and silent survival in refugee camps, male body weaponization signals a very deep-seated disregard for gender-neutral protection in legal, medical, and social contexts. Not only does such violence physically and psychically damage survivors, but it also undermines the very foundations of war-torn societies.

The glaring legal gap of recognition and institutional support for male survivors is one of the most pressing agendas. As the paper has unfolded, despite several nations such as Rwanda and Kenya having made significant legislative achievements, deep-rooted social stigma, underreporting, and legal loopholes continue to override justice. Male survivors are ridiculed by society, rendered invisible in law, and subjected to double punishment—abuse first, followed by silence. Their experiences are pushed into the background, and when they are recognized, they are easily mistaken for torture, and not rape, again excluding their suffering and taking reparative justice further from reach.

More than inorganic law is required to meet this crisis. It calls for a regional awakening—where legal reforms are married with integral survivor support networks, gender-sensitive policy, and firm accountability mechanisms. Human rights organizations, states, and civil society need to come together to ensure that sexual violence against men is no longer an invisible crime. Only then can we start working towards dismantling the culture of impunity, promoting the dignity of all survivors, and creating a truly inclusive justice system in post-conflict East Africa.

Marion Aromo is a finalist law student at Embu University awaiting graduation.

Bibliography

1. Bosch A, 'The Impact of Sexual Violence in the Democratic Republic of the Congo: Implications for the Care of Congolese Refugees' (2019) <https://med.virginia.edu/family-medicine/wp-content/uploads/sites/285/2019/09/Allison-Bosch-DRC-Paper-Final.pdf>

2. Bradford C and Caro D, 'Call it what it is: Genocide through male rape and sexual violence in the former Yugoslavia and Rwanda' (2019) https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1555&context=djcil

3. 'Burundi-SOAWR' (Soawr.org2016) https://soawr.org/protocol_watch/burundi/ accessed 14 July 2025

4. International Committee of the Red Cross, 'Q&A: Sexual Violence in Armed Conflict' (*International Committee of the Red Cross* 18 August 2016) https://www.icrc.org/en/document/sexual-violence-armed-conflict-questions-and-answers

5. Johnson K, 'Association of Sexual Violence and Human Rights Violations with Physical and Mental Health in Territories of the Eastern Democratic Republic of the Congo' (2010) 304 JAMA 553

6. Logie CH and others, 'Sexual Violence Stigma Experiences among Refugee Adolescents and Youth in Bidi Bidi Refugee Settlement, Uganda: Qualitative Insights Informed by the Stigma Power Process Framework' (2023) 4 SSM – Mental Health 100242 https://www.sciencedirect.com/science/article/pii/S2666560323000579

7. Morma, 'The Bemba Judgement and "Justice" for Survivors of Rape and Sexual Violence - SVRI' (SVRI15 July 2016) https://www.svri.org/the-bemba-judgement-and-justice-for-survivors-of-rape-and-sexual-violence/

8. Scott-Storey K and others, 'What about the Men? A Critical Review of Men's Experiences of Intimate Partner Violence' (2022) 24 Trauma, Violence, & Abuse 858 https://journals.sagepub.com/doi/10.1177/15248380211043827

9. 'Sexual Violence in Armed Conflict: Global Overview and Implications for the Security Sector Demonstrates the Horrifying Scope and Magnitude of Sexual Violence in Armed Conflict. In Its First Part, the Global Overview, the Report Profiles Documented Conflict-Related Sexual Violence in 51 Countries - in Africa' https://www.dcaf.ch/sites/default/files/publications/documents/sexualviolence_conflict_full.pdf

10. Tosin Olaluwoye, Hoban E and Williams J, 'Forms of Sexual Violence Perpetrated in Conflict and Post-Conflict Settings against South Sudanese Men Resettled in Two Communities in Uganda: An Exploratory Qualitative Study' (2023) 17 Conflict and Health

11. United Nations, 'Sexual Violence: A Tool of War' (2014) https://www.un.org/en/preventgenocide/rwanda/assets/pdf/Backgrounder%20Sexual%20Violence%202014.pdf

12. 'Sudan: UN Fact-Finding Mission Documents Large-Scale Sexual Violence and Other Human Rights Violations in Newly Issued Report' (OHCHR2024) https://www.ohchr.org/en/press-releases/2024/10/sudan-un-fact-finding-mission-documents-large-scale-sexual-violence

Kenya's revolving prison door: Why jailbirds keep returning to prisons after release

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Macegera's story
Kamiti's iron gates creak,
***Macegera* is free,**
However, not from recidivism's shame

No coin,
No kin,
Just hunger's sharp sting

First *'twas uhalifu wa mtandao,*
Pili, *Unga's* lure
Tatu, *Wizi wa Kimabavu*

Slammer doors have thrice revolved
And *Macegera* respectfully bowed

Spit out, then pulled back,
in Kamiti's hold,
Does the System end up breaking what it claims to mold?
There is no correction here, just walls that confine,

Kenya's revolving prison door is not about crime alone, but about Inequality, State neglect of social services, Punishment of survival and a failed transition from colonial justice models.

See how *Macegera's* spirit is crushed; by design?

Will he flee the rusted gate's embrace?
Will freedom hold, or will vanish in haste?

I hope this time, *Macegera* thrives

I. Abstract

Macegera's story is not just a poetic stanza on prisons and prisoners, it is a lived reality to many, often described as jailbirds, in Kenya and globally. This Paper analyzes recidivism in Kenya; trying to crack the hard nut question of why sanctioned

offenders re-offend. Is it a morality issue i.e. personal responsibility? Alternatively, is it an Institutional failure and System flaw? The article starts on a historical point of view; explaining the origin and evolution of Kenya's prison system since the colonial era. Additionally, the article rationalizes the original purpose of incarceration, and weighs that philosophically contrasting it with Kenya's, and other countries', current realties in prisons. The authors go further to discuss the probable causes of recidivism and the impact it has to inmates and communities e.g. shame and discrimination. Lastly, the article gives a global perspective of recidivism by discussing the global statistics and trends in incarceration and recidivism in Norway and Canada outlining the lessons Ke can learn from such progressive and transformative systems.

Recidivism is the relapse or return of ex-convicts, or sanctioned perpetrators into criminal acts or behavior once they are sanctioned or released from prison. The percentage rate of recidivism is pertinent to a nation since it depicts a country's Correctional Services' efficiency, or lack of it thereof, in remodeling behavior and rehabilitating inmates to be released back to the society. High rates of recidivism in a country are very costly in terms of public safety, government capitation to prisons, the cost of re-arresting and prosecuting them again[1] etc. On the other hand, lower recidivism rates are definitely a proof of a working Correctional Services i.e. inmates are being rehabilitated and released to freely integrate with the society.

Generally, recidivism is measured using common criminal offences that elicit rarest, reconnection and return to prison; mostly within a 3-year period after the inmate's discharge.

Recidivism refers to the tendency of a previously convicted individual to reoffend and return to the criminal justice system, usually through rearrest, reconviction, or reincarceration. It is a key indicator of the effectiveness (or failure) of a country's correctional and rehabilitation systems.

In trying to rationalize recidivism, we would probably end up unpacking layers and layers of reasons and push factors. That is to simply say there are many reasons, as Studies have proved, that try to theorize this epidemic; from poverty to institutional and systemic flaws, *inter alia*. Recidivism has been on a steady rise globally, which is a worrying trend. In the recent decade, Kenya's rate has been at about 47%, with South Africa topping in Africa at 74%[2].

This paper seeks to do an in-depth exploration on the historical, systemic, social-cultural, and economic factor contributing to high recidivism rates in Kenya and globally; and to propose pathways for reforms through applying best practices from other transformative jurisdictions.

However, before that, let us first understand the scope of the problem beginning a discourse on the history and evolution of Kenya's Prison System, and the philosophical justifications of prisons.

[1]Mears, Cochran & Cullen, 2015 *Examining Prison Effects on Recidivism*
[2]Stahler et al 2013

Kenya's prison system has its roots in colonial control, developed initially to punish dissent, manage forced labor, and enforce segregation. Over time, it evolved into a complex carceral apparatus that still retains many of its punitive colonial features, despite reforms.

I. Origin and evolution of Kenya's prison system

There is no evidence of pre-colonial prisons in Kenya[3]. Before colonialism, African Justice Systems were victim- rather than perpetrator-centered, with the end goal being compensation instead of incarceration[4]. However, it is noteworthy that prisons were among the first buildings the British built to stamp their authority in a colony. For instance, within 16 years of British takeover in Kenya, since 1895, 30 prisons had been built. The British Protectorate through the enactment of the East Africa Prisons Regulations in April 1902 officially introduced the Prison System in Kenya. Kenya Prisons Service later gained autonomy in 1911.

By 1951, on the eve of the MauMau Uprising, Kenya's prisons had a population of nearly 12,000 people. The heightened resistance during the MauMau and State of Emergency period made these numbers to skyrocket into more tens of thousands. At independence, Kenya enacted Caps 90 & 92 of the Laws of Kenya; The Prisons Act and the Borstal Institutions Act respectively, which stablished the Kenya Prisons. Cap 90, the Prisons Act empowers and mandates the Prisons Service to, *inter alia*, contain prisoners, facilitate administrative justice, rehabilitate and reform prisoners, and, train offendors in Borstal Institutions & Youth Corrective Training Centers (YCTC).

Kenya Prisons Service used to be a department under the Office of the Vice President & Ministry of Internal Affairs. Under the current Organizational structure, the Prisons service is a department under the Ministry of Interior and Internal Coordination of the National Government.

[3]Patrick Gathara, 2020 The Elephant; *Settler colonialism; the root of Kenya's Brutal Penal System*
[4]Prof Jeremy Sarkin

It comprises of at least 118 Institutions; 115 for adult offenders, 2 Borstal Institutions and 1 YCTC- both being for youthful offendors.

Meaningful and tangible reforms in Kenya's prisons service took place in 2003; with the ascension to power of the NARC government under President Kibaki. Moody Awori, the then Vice President and in-charge of the Ministry of Home Affairs, is credited for his transformative agenda to the Service. He has quoted, "Prisoners are human beings who need to be rehabilitated. They're not social, rejects bereft of any claim to the human right to love and the desire for acceptance"[5]. Some of the notable reforms and developments in the Service under his tutelage are; prisoners being allowed conjugal visits. The NARC government also opened prison doors to reporters and human rights activists; lifting the Restricted Access policy that made information about prison conditions scarce[6]. According to the World Prison Brief, Kenya's official prison capacity, as at December 2023, was 34,000; but had an occupancy level of 176.5%[7].

Rationale and original purpose of prisons

Incarceration was originally intended to a mechanism of addressing crime within the society by balancing out the needs of justice, public safety and social order. Traditionally, prisons core purpose encompassed a three-pronged objectives approach; retribution, deterrence and rehabilitation.

Before prisons, most societies primarily used capital punishment (execution), corporal punishment eg whipping, banishment, and or fines as punishment for criminal conducts and behavior. Reformists who viewed the aforementioned punishment either as inhumane, and or, ineffective in at deterring crime drove the initial intent of prisons establishment. Thus, prisons were at first introduced as a humanitarian reform intended to be humane and effective in deterring crime, ensuring public safety and rehabilitating offendors.

However, from their inception, prisons have faced criticism for failing to meet expectations and fulfill the intended purposes. Despite being entrenched as a societal norm, challenges such as insufficient resources have led to persistent failures, which prompt questions on their efficacy in addressing crime.

II. Why the door keeps revolving root causes of recidivism

Socio-economic and personal factors influencing recidivism in Kenya

Recidivism has been a nagging and painful experience in Kenya, where it is estimated that[8] 47 percent (47%) of the prisoners released go back to prison within a couple of years. The high recidivism rate in Kenya is an indicator of the failure of not only the correctional system but also a failure in society and the economy which contribute to recidivism through poverty, unemployment, stigma, lack of support systems, and peer influence; factors that it is difficult to overcome once ex-offenders get out of imprisonment.

Poverty and lack of economic opportunities

Systemic poverty and economic inequality in Kenya, particularly among marginalized groups, exerts pressure on former inmates to resume criminal activities as they reenter

[5]Moody Awori - The Daily Nation 2003
[6]IRIN News; UN Office for the Coordination of Humanitarian Affairs
[7]World Prison Brief; ICPR
[8]Determinants of Inmates Recidivism Rate in Kenya: The Case of Kamiti Maximum Prison in Nairobi City County, Kenyatta University, 2017

Stigma is a negative label or stereotype applied to individuals or communities based on perceived differences or 'undesirable' traits, leading to shame, discrimination, and dehumanization.

systems with limited access to work, resources, or structure, making prison life seem safer and more reliable than life in the outside world. This is according to one of the repeat offenders in[9] Lamu who openly said, "*In jail there is food, shelter and security - out here there is nothing for people like us.*" This paints a picture of the cruel real world that they face out there.[10] Furthermore, it can be deduced that with the harsh economic times, including the high cost of living, repeat offenders find that life in prison is cheaper than outside.

Kenya's labour market is almost closed to ex inmates who have no formal qualifications, capital and networks, with majority of the positions being in an unstructured sector and the jobs demand resources and assistance, which is beyond their reach, making it even more difficult to recover their lives without specific reentry programs and post-release training.[11] This leads to a situation whereby most former prisoners go back to stealing, petty crimes or drug trafficking not because they want to, but because it is an alternative to make ends meet. Poverty thus does not merely accompany recidivism; it creates and maintains it.

Stigma and social exclusion[12]

Convicts are seen to be rejects and outcasts of any community, especially those who have committed capital offences. Societies fail to accept ex-prisoners and they continue to consider them as criminals and do not provide them forgiveness and acceptance which causes them emotional and psychological alienation that negate any chance of working toward correction in self and they are more likely to go back to crime as a resigned style of living.

Lack of post-release support systems

One of the most glaring holes in the Kenyan criminal justice system is the absence of a system of organized post-release supervision of former inmates. After a prisoner serves his or her term, the State does not have any

[9]https://www.the-star.co.ke/counties/nyanza/2023-05-25-i-choose-jail-why-lamu-prison-is-teeming-with-repeat-offenders
[10]Ibid
[11]Faith Judith Atieno, Determinants of Inmates Recidivism Rate in Kenya: The Case of Kamiti Maximum Prison in Nairobi City County, Kenyatta University, 2017
[12]Austin, R. (2004). The shame of it all: Stigma and the political disenfranchisement of formerly convicted and incarcerated persons. Colum. Hum. Rts. L. Rev., 36, 173.

formal process of helping them to readjust to society. They usually come out with no financial support, nowhere to live, and no counselling or referrals.[13] To most people, the release day is only the start of another battle, one full of loneliness, disorientation, and desperation. The way of least resistance often brings one back to crime without assistance in negotiating this rough transition. Halfway houses, counselling centres, or well-organized reentry programs do not exist in most parts of Kenya. This support gap implies that the majority of former inmates are left to sustain themselves with their meager resources, in the same conditions that made them turn to crime in the first place.

Peer influence and criminal networks

Ex-convicts experience this problem so many times when they are released from prisons. They then go back to the very society that is infested with criminals and where crime is very much deep-rooted in the society. They hence have an easy time accessing their former compatriots, and through their influence and coercion, and promise of a better life, they relapse very fast.[14] To those who have felt rejected by their families and communities through stigma, criminal networks may seem to provide them with a sense of support, identity, and even a means of livelihood. However, sadly, almost every time they get back in touch with these networks, they end up reoffending. Also in Kenya, most youths get initiated into crime due to group influence or survival partnerships. Such bonds are not severed when they get into prison; in fact, they tend to be reinforced in prison, where criminal hierarchy and belonging are reaffirmed. When they are released, the same networks are available to reabsorb them and provide them with easy cash, company, and the feeling of being part of something, albeit an illegal operation. This, hence, results in recidivism.

Institutional failures within Kenya's correctional system

Punitive versus rehabilitative focus

As has been mentioned above, excessive focus on punishment, at the cost of rehabilitation and reform, can be regarded as one of the most characteristic elements of the Kenyan prison system.[15] Under these circumstances, prisons are resorts of stagnation instead of transformation. In Kenya, most of the correctional facilities do purport to be rehabilitative but the systems are underfunded, do not have a personalized approach as well as these systems have no cognizance of the most critical behavioral, emotional needs so that upon the release of the prisoners, they are unwillingly released in an unworthy state as well as most of them being released in another set mind worse than before. Verily, the very water that was supposed to soften the potato has actually hardened the egg.

Systemic challenges and conditions

Kenyan prisons present physical and operational environments that are a challenge to rehabilitation. Overcrowding is systemic, and the facilities hold many more people than they were originally intended to. [16]According to data by the World Prison Brief, as of December 2023, Kenyan prisons recorded a countrywide prison population of inmates to be around 60,000 people, including pre-trial detainees/

[13]Rowe, D. (2003). Depression: The way out of your prison. Routledge.
[14]Bidola, V. R., De Leon, R., Ignacio, E., Mori, M. J., Valdez, S. N., & Bernabe, J. (2024). Life after bars: A narrative-case study of ex-convicts. American Journal of Human Psychology, 2(1), 22-32
[15]https://www.the-star.co.ke/counties/nyanza/2023-05-25-i-choose-jail-why-lamu-prison-is-teeming-with-repeat-offenders
[16]https://www.prisonstudies.org/country/kenya

Harassment and abuse by prison officers and wardens is a serious human rights issue that undermines the purpose of correctional institutions, which should prioritize rehabilitation, dignity, and lawful treatment of all incarcerated persons.

remand prisoners.[17] This is well over the official prison capacity of 34,000 inmates countrywide as of December 2023.[18] This is to the net effect that our Kenyan prisons are actually at an official occupancy level of 176.5%, as of the said time. The result of this congestion is poor sanitation, lack of access to healthcare, and an overall worsening of the standards of living. Survival is the priority in such environments. Self-improvement or introspection is stifled under the noise, absence of privacy, and emotional fatigue. Instead of straightening, overcrowded prisons result in dehumanizing conditions, which reduce the chances of change.[19] Moreover, congestion, badly cooked food, and wearing poor quality, ill-fitting striped jail uniforms are some of the images that come to mind at the mention of prison. Consequently, this hampers all reform efforts as prisoners focus on survival in such dilapidated spaces.

Harassment and abuse by prison officers and wardens

Abuse of power by the prison officers is one of the more insidious failures in the system. Verbal abuses, coercion, and physical intimidation are usually perpetrated against inmates. There have also been cases of sexual abuse and exploitative procedures especially in facilities that are understaffed or under-surveilled. This kind of abuse is usually committed with ease because prisoners are afraid of coming out to report such acts since they may be victimized, shunned or labelled as an informant, or as they have it, a rat. Such power imbalance causes an environment of fear and mistrust - not the environment conducive to healing or rehabilitation. With this in mind, it is important to realize that when abuse becomes routine, so too does recidivism.

[17]Ibid
[18]Ibid
[19]https://www.the-star.co.ke/counties/nyanza/2023-05-25-i-choose-jail-why-lamu-prison-is-teeming-with-repeat-offenders

Lack of effective rehabilitation programs

In Kenyan prisons, rehabilitation is still largely undeveloped, with few, poorly funded, and frequently inaccessible programs that do not assist the most vulnerable inmates. As a result, many inmates are left without opportunities for reform or meaningful interventions, which contributes to ongoing recidivism.

Remand and retrial detention failures

In true fashion of one ancient Greek saying, the wheels of justice turn slowly… The issue of pre-trial detention has proven to be the Weakness when it comes to combating recidivism. In Kenya, thousands of remanded are detained for years without being found guilty, frequently in the same conditions as convicted prisoners. Even after being acquitted, exposure to seasoned criminals, subpar conditions, and a dearth of rehabilitation programs can turn young offenders into seasoned criminals.

III. A global perspective: lessons from elsewhere global trends in incarceration and recidivism

Rising Prison populations globally

It is doleful to note that the number of inmates in most countries has grown tremendously. In fact, according to the[20] United Nations Office on Drugs and Crime, as of the end of 2022, there were approximately 11.5 million inmates worldwide. This is a 1.6% increase from 2021 and a staggering 5.5% increase from 2012.[21] This loosely translates to approximately 144 people per 100,000 worldwide, which is mind-blowing by itself.

Global incarceration has increased not predominantly due to more crime but rather a harder approach to sentencing, less use of alternatives to prison, and greater pretrial detention, especially in the less-developed world where the poor court structures and political and socio-economic inequities have stuffed prisons with the undesirable instead of the dangerous individuals, weakening the intent of rehabilitation.

Persistently high recidivism rates
The inability to curb recidivism is a trend that is persistent in most countries. The reoffending rates in the countries continue to be high with the proportions staying higher than 40%, others such as[22] Australia having crazy proportions of 54.9%. The failure of transitional planning around the world demonstrates that incarceration alone, particularly in the absence of effective rehabilitation and reintegration support, has little effect on preventing crime. Instead, it strains communities and justice systems and increases the recidivism rate of people who are released without mental health services, housing, or employment.

Case studies on successful rehabilitation models

Norway's humane and rehabilitative approach

[23]Norway has attracted global concern in its criminal justice procedures given the very low levels of recidivism,[24] 17.6% to be exact. This is the lowest recidivism level worldwide. Norway provides a model of successful reintegration and recidivism prevention based on humane and pragmatic principles, emphasizing normalization, education, and rehabilitation over punishment.

[20]https://www.unodc.org/documents/data-and-analysis/briefs/Prison_brief_2024.pdf
[21]Ibid
[22]https://ora.ox.ac.uk/objects/uuid:42e604d8-31d0-4067-a08c-fd1fa0065946/files/r5h73pw95k
[23]Carolyn W. Deady, "Incarceration and Recidivism: Lessons from Abroad," The Pell Center for Inter national Relations and Public Policy at Salve Regina University.
[24]https://ora.ox.ac.uk/objects/uuid:42e604d8-31d0-4067-a08c-fd1fa0065946/files/r5h73pw95k

Education and Reintegration as Rehabilitation Tools are foundational strategies in building a just, effective, and humane correctional system—especially in countries like Kenya grappling with high recidivism, overcrowding, and prison-based marginalization.

Rehabilitation over retribution: Core philosophy

The Norwegian system of prisons has a core, which revolves around rehabilitation. The formal philosophy behind it is that the penalty would consist in loss of liberty, not degradation of the individual. After the entry, inmates receive good treatment and are provided conditions, which are as close to normal life as possible.[25] Incarcerated offenders are called by name and accommodated in good and human living conditions; they are also allowed to be in control of their own schedules. By treating prisoners with dignity in a nurturing setting where staff members serve as mentors rather than enforcers, the normalization theory in Norway's prisons encourages self-responsibility and accountability. This helps to build trust and emotional healing, two important factors that contribute to the low recidivism rates in the nation.

Open prisons and the power of responsibility

Norway has one of the unique innovative systems, which goes by the name of open prisons[26]. In such facilities, there are minimal security measures such that inmates have more freedom of movement. Prisoners have access to their own clothes, they cook their own food, and most of them have their own rooms and facilities such as bookshelves, TVs, and desks. Not to say that it is too soft to please, but this model will allow creating conditions similar to the outside world, prompting inmates to make their choices, solve problems, and be ready to integrate into society.[27] More importantly, inmates in open prisons are frequently allowed to come back to prison at night after work or education during the daytime, a mechanism that allows them to develop skills, confidence, and income. The open prisons in Norway pave the culture shock of reentry because they enable inmates to gradually reintegrate by mixing with the general population, and increase personal accountability and autonomy by managing time, money, and hygiene by themselves, and serve as transitional areas that merge into low recidivism rates.

Education and reintegration as rehabilitation tools

One notable aspect about the Norwegian correctional system is the fact that it relies on large-scale education system, and allows prisoners to occupy themselves with everything ranging from basic literacy to university level qualification they are tutored by outside teachers. Moreover, the system also makes sure there is connection between prison life and post-release life by reintegration officers, which make education a tool of re-entry, and a form of

[25]Meagan Denny, Norway's Prison System: Investigating Recidivism and Reintegration, Bridges: A Journal of Student Research, Issue 10, 2016
[26]Ibid
[27]Ibid

rehabilitation within a psychological sense as the absence of recidivism is pronounced.

Canada's restorative justice approach

Restorative justice: Accountability through dialogue and reparation

The restorative justice model in Canada considers crime in terms of relationship breach, with a focus on healing, accountability, and understanding through inclusive conversation among offenders, victims, and communities. Typical programs are ones involving victim-offender mediation, community justice forums, and sentencing circles, which humanize justice and facilitate change. These restorative practices have been proven to work with empirical support. [28]Reviewing more than 40 studies containing approximately 23,000 participants, a meta-analysis on restorative interventions has shown the potential to decrease recidivism by an average of 3% and by as much as 8 per cent once restitution took place in adult-related programs such as apology, community service or financial compensation. Recidivism has proven to be lower in the participants of restorative justice in some local jurisdictions, notably in Winnipeg: 15 percent within one year compared to 38 percent in normal probation; and 35 percent versus 66 percent within three years against a control group[29]. Restorative justice is particularly important in indigenous communities in Canada, where culturally based practices such as sentencing circles, which are closely aligned with restorative justice principles, emphasize harmony, respect for elders, and community healing. This does not only minimize recidivism but also resolves underlying socio-cultural resentments based on the idea of systematic alienation[30].

Canada's 2022 Federal framework to reduce recidivism

In an attempt to institutionalize and standardize its rehabilitative priorities, the Canadian government introduced the Federal Framework to Reduce Recidivism in 2022. The Framework offers a coherent plan of action to respond to the most significant social determinants of recidivism: housing, education, employment, health and positive support networks[31]. It is an acknowledgment that reintegration cannot be a point, but must be a process, which starts in custody and continues into the community with long-term, evidence-based interventions. The framework recognizes that marginalized groups are over-represented in prisons and highlights the importance of community cooperation, indigenous healing, and culturally appropriate programs for successful rehabilitation. A national accountability mechanism on implementation is also in place with annual reporting to the Parliament on progress by 2025, which shows the government is committed to long-term change and transparency[32]. By presenting rehabilitation as a shared social responsibility requiring cooperation between the government, civil society, and rights-based institutions, Canada's approach transforms reintegration from dispersed efforts to a national policy.

Evidence-based programming and reintegration support

Canada's correctional services follow the Risk-Need-Responsivity (RNR) model,

[27]Ibid
[28]Public Safety Canada, Punishment and Recidivism: What Works, What Doesn't, and What's Promising - https://www.publicsafety.gc.ca/cnt/rsrcs/pblctns/pnshnt-rcdvsm/index-en.aspx
[29]Ibid
[30]Ibid
[31]Public Safety Canada, Federal Framework to Reduce Recidivism (2022) - https://www.publicsafety.gc.ca/cnt/rsrcs/pblctns/2022-fdrl-frmwrk-rdc-rcdvsm/index-en.aspx
[32]Ibid

assessing offenders at intake to identify criminogenic factors and tailoring correctional plans, such as therapy, education, or job training so to address their specific risks and needs. The programs are implemented both at institutions and in communities and are constantly reviewed on their effectiveness by the Research branch of the Correctional Service of Canada (CSC)[33]. In Canada, early pre-release planning guarantees housing, employment, and support through coordinated community partnerships, while CORCAN programs help inmates develop their skills through work and education. Such continuity of care translates into statistical data that the proportion of offenders not committing a crime five years after sentence was served increased in 2022-23 to 88.6%, and the proportion of inmates not revoked during the statutory period of release reached 61.5%, compared to 54.3% in 2013-14[34].

Culturally-specific and community-based innovations

The other aspect of the correctional reform in Canada is specifically centering attention on culturally specific and community-based efforts to serve the historically marginalized communities. A prominent example is the Circles of Support and Accountability (CoSA) a volunteer-based initiative assisting people e.g. people with a history of sexual offences to integrate back into society following release. The rates of recidivism of CoSA participants have been shown to be down to 83 percent of control groups.[35] Healing Lodges are a culturally specific correctional program used amongst Indigenous prisoners in Canada, focusing on spiritual healing, land-based learning, and community connection under the mentorship of elders. They facilitate dignity, trust, and social integration, and have been associated with much better recidivism figures than at mainstream facilities, highlighting the importance of context-specific rehabilitation based on the respect to cultural identity.

IV. Recommendations for a sustainable solution

Policy reforms

One of the most crucial interventions in curbing recidivism in Kenya lies in shifting policy frameworks from punitive to rehabilitative justice. Historically, the sentencing system in Kenya focuses more on incarceration and even petty and non-violent crimes, making the system one of the factors contributing to congestion of prisons and recidivism. One of them is making the decriminalization of minor offenses like loitering, hawking without a permit, or minor theft, especially when perpetrated under socio-economic pressure. These crimes are in most cases because of structural poverty and not ill will. An example is the young person who is caught stealing food when he/she is hungry, such an individual should be dealt with under the diversion programs as opposed to him/her being imprisoned.[36] There should also be a change in sentencing guidelines in such a way that non-custodial sentences will be encouraged. Proportionate punishment because of community service, probation, and conditional discharge will not only prevent the criminogenic consequences of

[32]Ibid
[33]Public Safety Canada, Punishment and Recidivism: What Works, What Doesn't, and What's Promising - https://www.publicsafety.gc.ca/cnt/rsrcs/pblctns/pnshnt-rcdvsm/index-en.aspx
[34]Correctional Service Canada, Emerging Research Results 19-02: Trends in Federal Offender Recidivism https://www.canada.ca/en/correctional-service/corporate/library/research/emerging-results/19-02.html
[35]Public Safety Canada, Punishment and Recidivism: What Works, What Doesn't, and What's Promising - https://www.publicsafety.gc.ca/cnt/rsrcs/pblctns/pnshnt-rcdvsm/index-en.aspx
[36]Legal Resources Foundation Trust, Access to Justice for Marginalized Communities: The Role of Reintegration (2021).

Enhancing in-prison rehabilitation is vital to shifting correctional systems from punitive warehouses to centers of restoration, reform, and reintegration. In Kenya and globally, prisons often fail to rehabilitate due to underfunding, stigma, overcrowding, and outdated penal models. A transformative approach centers the human dignity of incarcerated people and equips them with the tools to return as responsible, empowered citizens.

imprisonment but can be used to cause the same. It is upon the court system to be given power and trained on how to give first time and low-risk offenders' priority over such options.[37]

Moreover, the rehabilitation has to be institutionalized by transforming the legislation. Prisons should be governed by law to come up with organized rehabilitation such as psychological counseling, education programs, vocational trainings among others. As a concrete example, after entering any prison, every inmate ought to receive an individual needs assessment, which will on its turn result in his or her personalized reform plan that will be tracked throughout his or her involvement in the prison system.[38]

It is also pivotal that reintegration planning is institutionalized. It implies that a reintegration officer must be assigned to all the prisoners regardless of the sentence at intake. This officer would facilitate the creation of a post-release plan of housing, employment, mental health, as well as social support, with milestones to be followed through post-release too. This is similar to the examples existent in Canada who's such reintegration plans form a normal correctional practice.

[37]National Council on the Administration of Justice, *State of the Judiciary and Administration of Justice Report* (2022).
[38]A Mokua and G Wanjiru, 'Rehabilitation or Recidivism? A Critical Appraisal of Kenya's Correctional Framework' (2019) 8(2) *African Journal of Criminology and Justice Reform* 45.

Enhancing in-prison rehabilitation

The Kenyan prisons need to be converted into correctional centers as opposed to being punitive as holding facilities. This starts with the process of enhancing the living conditions of prisoners. Most prisons are now run at capacity that is almost twice, what they are supposed to be. To illustrate, Kenya had 176.5% occupancy rate in its prisons as at December 2023. This results in poor sanitation, malnutrition and lack of health-care facilities that are detrimental to rehabs.[39] There should also be investment in updated, market-based, vocational, and educational initiatives. A great number of prisoners are discharged out with no productive skills and this makes them go back to crime. Skills training in carpentry, plumbing, information technology and agri-business- will also be included in such programs because these are skills that are coherent with national development objectives. They can be partnered with the TVET institutions to certify such trainings, which increases workforce employability. Primary level inmates must have a chance to receive secondary school and above.

Besides training of skills, psychosocial assistance is necessary. The large number of offenders experience unmanaged trauma, drug abuse, or psychiatric problems. As an example, a person jailed upon his or her violent actions could in fact have untreated PTSD. There should be professional counselors, social workers and therapists, who are part of the correction system so that someone is always available to give care. Prison wardens should as well change their role. They should rehabilitate instead of acting in a purely custodial manner. Forceful education in correctional psychology and dispute administration will give them the capacity to promote and not prevent inmate reshaping. One can refer to the Norwegian model when prison officers act as mentors and coaches.[40]

Strengthening post-release support

One of the factors of recidivism is the absence of orderly post recovery assistance. A large number of former offenders get out into the streets as homeless without jobs or social acceptance. To avert this Kenya should invest in transitional support systems, which commence before release and last at least 6-12 months after the release. To start with, half way houses ought to be created in each county. The following would have such facilities as short-term housing, food, counseling, and job-readiness. An example is that the Langata Women Prison can liaise with the NGOs to build a transition home to the female ex-inmates especially with children.[41]

Support of peers and mentorship are also of great importance. Mentors can be those former inmates who have managed to go through the successful reintegration process, share their knowledge, and hope with new people released. Such schemes as the U.S. Clean Slate and U.K. Unlock have shown that formal peer mentorship can lead to a 75% rate cut in reoffending. The other pillar of successful reintegration is economic empowerment. Government should initiate a reentry fund through which the ex-offenders who are willing to start entrepreneurs would be provided with micro-loans or grants. In addition, there should be tax breaks to firms giving jobs to former inmates. As an example, a furniture referring company can cooperate with a prison to provide inmates lessons in carpentry and then provide them with an apprenticeship once they are released. Stigma should also be reduced by

[39]World Prison Brief, 'Kenya Country Report' (International Centre for Prison Studies, 2023).
[40]Norwegian Ministry of Justice and Public Security, Criminal Justice System in Norway: A Focus on Rehabilitation and Reintegration (2020).
[41]Kituo cha Sheria, Policy Recommendations on Penal Reforms and Access to Justice (2020)

carrying out public awareness campaigns. Through media, schools, churches, and community forums, Kenyans need to be urged and made to think that ex-offenders are redeemable and that they should be given the second chance. There should be a change in the story of once a criminal to always a criminal and now it should be convict to contributor.

Collaboration

The multi stakeholder approach is necessary to reduce recidivism. Any institution alone cannot do this. Other ministries like the Interior, Public Service, Youth affairs, Labour, Health, and Education should work together to maintain coordinated feedback. Civil society organizations and academic institutions, respectively may exhibit community-based support and innovation. Spiritual and moral authority may be provided through faith-based institutions and county governments can place reintegration services on the ground. As an example, a pilot program with the churches, mosques, the judiciary, and local NGOs in Mombasa County can be created to assist released inmates.[42] Accountability requires the collection and sharing of data. The Kenya national bureau of statistics together with the Kenya prisons service ought to release annual reports on rates of recidivism, effectiveness of programs, and issues of re-entry. This information will aid in tightening the strategies and resource allocation.

V. Conclusion

A. Reiterate the core problem

Recidivism in Kenya is not merely a personal failing; it is a systemic reflection of how the country manages crime, punishment, and reintegration. People like Macegera, who cycle in and out of prisons due to poverty, trauma, and social exclusion, are not anomalies. They are casualties of a broken system that punishes but rarely reforms. The revolving prison door continues to spin because the journey after release is paved with obstacles rather than opportunities.

Emphasize urgency and opportunity

Kenya now stands at a historical crossroads. The current approach, grounded in retribution and neglect, has failed. However, global examples prove that reform is possible. Norway's investment in humane incarceration and Canada's embrace of restorative justice show that a society can choose transformation over punishment and still achieve public safety.[43]

The urgency is clear: every year, thousands of Kenyans re-enter prison not because they want to, but because they have nowhere else to go. This is a colossal loss, not just of public resources, but also of human potential. Yet within this crisis lies opportunity. Kenya has the chance to reimagine its justice system as one that heals, restores, and reintegrates.

0ur collective responsibility: Break the cycle, build the future

To policymakers: legislate with purpose.
To correctional officers: lead with humanity.
To civil society: advocate with persistence.
To the public: forgive with courage.
In addition, to the system: evolve. Because the measure of a just society is not in how it punishes the wicked, but in how it redeems the fallen.
It is time to stop building revolving doors, and start opening real ones.

The authors are law students at the University of Nairobi.

[42]Kenya Prisons Service, Annual Report on Penal Institutions and Inmate Populations (2023).
[43]Norwegian Ministry of Justice and Public Security (n 8).

THE CLIMATE CRISIS CALL

The urgent call for climate justice: Addressing Loss and Damage in the wake of unprecedented weather phenomena

By Thomas Mariwa

In recent times, the global community has borne witness to an onslaught of extreme weather events that defy historical norms. From record-breaking downpours to eerie scenes of midday darkness reminiscent of recent eclipses, the manifestations of these phenomena have been both awe-inspiring and alarming. Concurrently, floods of unprecedented scale have ravaged communities worldwide, with the Indian Ocean swelling by a staggering four meters, Lake Victoria reclaiming vast swathes of land, and infrastructure succumbing to the relentless force of nature.

Particularly distressing is the disproportionate impact of these climatic upheavals on vulnerable populations, including the disabled, the sick, and those residing in informal settlements and rural areas. Images flooding the internet in the recent past depict homes submerged, livelihoods destroyed, and lives lost amidst the chaos. Such events demand urgent attention and concerted action from the global community.

The scale and severity of these phenomena prompt a critical inquiry into their root causes and possibly to establish culpability for this disasters. While natural disasters have historically been attributed to Mother Nature's whims, mounting evidence suggests a complex interplay of factors, including human activity and policy shortcomings. Indeed, the reactive stance of governance

Climate justice recognizes that the climate crisis is not only an environmental issue, but a profound human rights and social justice issue. The call for climate justice is increasingly urgent as vulnerable communities—especially in the Global South—face disproportionate burdens from a crisis they did little to cause.

structures, exemplified by delayed responses such as the recent postponement of school openings, exacerbates the crisis at hand.

In Kenya, as in many parts of the world, a paradigm shift is imperative. A holistic reassessment of resource utilization, land management practices, and urban development strategies is essential to mitigate future risks. The removal of crucial tree cover, for instance, disrupts natural drainage systems, rendering landscapes susceptible to flooding and landslides. Moreover, the proliferation of impermeable surfaces exacerbates runoff, amplifying the destructive potential of rainfall events.

While governmental entities inevitably shoulder responsibility for policy formulation and disaster response, attributing blame solely to these institutions oversimplifies the issue at hand. Addressing the multifaceted challenges of climate change demands a collaborative approach,

transcending political divides and bureaucratic inertia.

Reflecting on discussions held at the Africa Climate Summit and subsequent global forums, it is evident that the pursuit of climate justice must remain paramount. While initiatives such as the Nairobi Accord signify progress, gaps persist in addressing the inequitable distribution of climate impacts and resources. Embracing principles of justice requires a re-evaluation of priorities, ensuring that marginalized communities receive due consideration in climate adaptation and mitigation efforts.

Global Greens 'Road to COP28' webinar series kickstarts with the focus on a positive win at COP27: Loss and Damage. A recap!

Statement on the persistent drought in the horn of Africa

Ladies and gentlemen, esteemed members of the Global Greens Federation, distinguished guests, and fellow advocates for a sustainable future, I extend warm greeting and regards from my party the Green Congress Party of Kenya as well as our regional and continental cohort.

I appear before you today with a heavy heart, a heart burdened by the profound crisis unfolding in the Horn of Africa – a crisis that touches upon a multitude of pressing issues, including climate change, climate finance, war, human-wildlife conflict, soil erosion, deforestation, overgrazing, agriculture, and industrial pollution. It is a crisis that transcends borders and affects us all. But, it is also a crisis that calls for action, solidarity, and a reset in the way we address these interconnected challenges.

In the past three years, a World Bank report stated that an estimated 66.4 million people in the Horn of Africa region – including 10 million children – were forecast to experience food stress or a food crisis, emergency, or famine.

Africa is on the front lines of climate change—despite contributing the least to global emissions (less than 4%), the continent bears some of the harshest and most immediate consequences of the climate crisis. From floods and droughts to food insecurity and mass displacement, the situation is both urgent and deeply unjust.

According to the WFP, the number of people at risk of starvation has increased to 22 million. Additionally more than 2 million livestock have perished in Kenya alone due to drought – a stark reminder of the devastating impact of this prolonged natural disaster. It is a tragedy that has reverberated throughout the region, causing untold suffering to communities that rely on these animals for their livelihoods. The Horn of Africa is reeling, and its people are bearing the brunt of this crisis.

Climate change, driven by emissions from other continents, is intensifying the drought in the Horn of Africa. It is altering climatic patterns, rendering rainfall unpredictable, and contributing to the environmental degradation of the region. Yet, Africa, despite being a minimal contributor to global emissions, shares in the consequences of pollution. This is a profound injustice, and a clear case for climate justice action. The time has come for the world to recognize the disproportionate impact of climate change on the most vulnerable regions and communities, and to take decisive action to rectify this injustice.

But it doesn't stop there. Our approach to addressing this crisis must undergo a fundamental reset, a reimagining of how we tackle these multifaceted issues. We cannot simply continue on the same path and expect different results.

Firstly, we must bridge the funding gap that hinders effective response to the crisis. It is unacceptable that upwards of 60% of funds meant for relief and development in the region are swallowed by administrative costs within some NGOs. It is indeed sad to note that many of the expatriates who ran most of these NGO's as well as some locals are elitist at best and totally disconnected from the realities on the ground. And yet it is these very elitist cabal that has the technical capabilities to access climate finance. This means that the end users and implementers are disconnected from the funders and the narrative is easily hijacked by individuals and entities who may be well meaning, but are ultimately conflicted. We must demand greater transparency, accountability, and efficiency in the allocation of funds, ensuring that resources reach the communities most in need.

Secondly, we must advocate for a shift from rain-fed agriculture to irrigation and the adoption of climate-smart agricultural practices. This transition will not only enhance food security but also safeguard against the ravages of drought.

Thirdly, we cannot underestimate the significance of forestry as an area for investment. Around the world, we have seen successful examples of reforestation and sustainable forest management initiatives. These projects provide jobs, sequester carbon, and restore ecosystems. Investing in forestry is a step towards a more sustainable future.

Finally, legislative interventions are crucial to achieving these goals. We must enact comprehensive climate resilience laws that prioritize sustainable land use, reforestation, and the transition to climate-smart agriculture. We must also regulate and reduce industrial pollution, protecting both human health and the environment. These laws will serve as the framework for lasting change.

In conclusion, the drought crisis in the Horn of Africa is a dire challenge that demands our unwavering commitment. As we approach COP28, let us unite in our call for action. We must address the issues of climate change, climate finance, conflict, environmental degradation, and inefficient NGO spending patterns. Together, we can reset our approach, create positive change, and offer hope to the communities enduring the hardships of drought in the Horn of Africa.

Let us, as members of the Global Greens Federation, stand united in our pursuit of

Factories are one of the major sources of greenhouse gas emissions and air pollution. Industrial processes contribute significantly to climate change and environmental degradation.

climate justice, environmental sustainability, and social equity. The world is watching, and history will judge us by our actions. Let our actions today shape a more equitable and sustainable tomorrow for all.

I thank you for your attention, and may our collective efforts lead to a brighter future for the Horn of Africa and beyond

Although we have progressed with the COP series and are moving towards the next one, it is apparent that not much has changed. The recent escalation of weather-related challenges underscores the critical intersection between climate dynamics and developmental imperatives. With the crisis of droughts and the looming spectre of escalating damages, it is evident that weather patterns will increasingly shape the developmental matrix. Africa, bearing a disproportionately heavy burden of climate impacts, faces a pivotal moment in charting a sustainable course forward.

Despite Africa's minimal contribution to global pollution—only 4% compared to accommodating 17% of the global population—it remains on the frontline of climate crises. Moreover, Africa stands as one of the largest carbon sinks, a vital asset in the fight against climate change. Recognizing this reality, it becomes imperative to re-evaluate energy usage patterns and explore energy mixes conducive to Africa's development trajectory.

Energy, a fundamental prerequisite for progress, must be democratized to ensure equitable access. In the discourse on climate justice, the democratization of energy access emerges as a central tenet, aligning with broader principles of democracy and fairness. As we navigate the COP series and beyond, it is incumbent upon us to heed the voices from the front lines of climate change, advocating for a just and sustainable future.

Embracing principles of equity, resilience, and shared responsibility, we can forge a path toward a more inclusive and sustainable world. By prioritizing energy equity and climate justice, we honor our collective commitment to safeguarding the planet for current and future generations. As we confront the challenges ahead, let us seize this moment to drive meaningful change, grounded in the values of justice and solidarity.

Thomas Mariwa returns to the Platform after a long hiatus. He describes himself as an Entrepreneur | Dabbler | Afro-Optimist | Author | Poet | Green Politician | CEO / Co-Founder @hela.money | Commissioner, EAGF. He serves as the Chairman of the Green Congress Party of Kenya.

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JUDICIAL SERVICE COMMISSION

17th July 2025

PRESS RELEASE

STATEMENT BY THE JUDICIAL SERVICE COMMISSION ON UNWARRANTED ATTACKS AGAINST JUDICIAL OFFICERS

1. The Judicial Service Commission (JSC), established under Article 171 of the Constitution of Kenya, is mandated by Article 172 to promote and facilitate the independence and accountability of the Judiciary. In fulfilling this constitutional obligation, the Commission bears the solemn responsibility of safeguarding the integrity of judicial processes and protecting Judicial Officers from any form of undue pressure, interference, or intimidation.

2. It is in this context that the Commission expresses grave concern over the escalating trend of public vilification and unwarranted personal attacks directed at Judicial Officers in the discharge of their judicial functions. This pattern has recently been manifested in reaction to bail and bond decisions issued by the Nanyuki and Kahawa Law Courts.

Such conduct misrepresents the Judiciary's constitutional role, undermines judicial independence and corrodes public trust in the administration of justice a cornerstone of our democratic society.

3. The Commission underscores that bail and bond determinations are not made arbitrarily. These decisions are informed by the Constitution, the Criminal Procedure Code, and the Judiciary's Bail and Bond Policy Guidelines. These instruments provide a structured legal framework and clearly articulated criteria to guide the exercise of judicial discretion — taking into account the specific facts and circumstances of each case.

4. The public is reminded that Kenya's legal architecture provides legitimate and structured mechanisms for recourse. Any party aggrieved by a judicial decision whether relating to bail, bond, or any other matter has an unfettered right to seek redress through appeals or reviews in accordance with the law. Resorting to personal attacks against Judicial Officers not only subverts due process but also imperils the sanctity and independence of the Judiciary.

5. The Judicial Service Commission reaffirms its unwavering commitment to defending the decisional independence of all Judicial Officers and Judges. The Commission commends

judicial officers across the country for their dedication and encourages them to continue executing their constitutional mandate with integrity, courage, and fidelity to the law without fear, favour, bias, or undue influence.

6. The Commission also assures all Judicial Officers that the Office of the Chief Registrar of the Judiciary, working in close coordination with the Judiciary Police Unit (JPU), remains on hand to provide any security arrangements necessary to ensure their safety and the secure functioning of court stations. The Judiciary leadership is fully committed to supporting judicial officers and court personnel, especially during this period of heightened concern.

7. Finally, the Commission calls upon all members of the public, civic leaders and institutional stakeholders to respect the dignity of judicial institutions. Engagement with the Judiciary must be grounded in civility, constructive dialogue and an unyielding respect for the rule of law. This is imperative not only for the administration of justice but for the preservation of constitutional order in the Republic.

HON. WINFRIDAH B. MOKAYA, CBS
SECRETARY
JUDICIAL SERVICE COMMISSION

Independent Electoral and Boundaries Commission

PRESS RELEASE

FOR IMMEDIATE RELEASE

Nairobi, Kenya: Friday, 11th July 2025

SUBJECT: Election of the Commission Vice Chairperson

Following the gazettement and subsequent swearing in of the Chairperson and members of the Commission, we are pleased to announce to members of the public and stakeholders that the Commission in its **288th Plenary Meeting** Elected **Commissioner Fahima Araphat Abdallah** as the **Vice Chairperson of the Commission**. The Plenary meeting was held at the Commission Boardroom today Friday 11th July 2025.

The Commission takes this opportunity to congratulate Commissioner Fahima on her election.

We assure members of the public and our stakeholders that the Commission remains steadfast in its commitment to strengthening Kenya's democracy.

Erastus Edung Ethekon, HSC
Chairperson

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