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Platform Publishers Kenya Limited
The Platform for Law, Justice and Society is published monthly by Platform Publishers Kenya Ltd
Fatima Court, 2nd Floor Suite 148
Junction at Marcus Garvey/Argwings Kodhek Road, Opposite Studio House
Kilimani, P.O.Box 53234-00200
Nairobi, Kenya

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EDITORIAL

Enemy of the People

There is a way a country begins to know that its President no longer feels answerable to it. It is not always dramatic. There is no siren, no formal announcement, no Cabinet memo titled betrayal. It begins quietly. A secretive arrangement here. A tax there. A dead woman explained away as another incident. A missing child returned to the parents as their private panic. A fuel price announced in the clean language of regulation, while kitchens go silent across the republic.

That is where William Ruto has brought Kenya.

The tragedy is that he did not arrive here as a stranger to suffering. On the contrary, he campaigned as the man who understood the poor. He spoke the language of the roadside trader, the boda boda rider, the unemployed graduate and the mother who stretches two hundred shillings until it becomes supper, fare and hope. He knew the wound. He touched it with political tenderness. Yet, once power was safely in his hands, the wound became useful. The hustler stopped being the moral centre of his politics and became a revenue stream.

That betrayal is what makes the Ebola affair so disturbing. Reuters has reported that Kenya approved a United States plan to open a quarantine facility for Americans exposed to Ebola, with American officials saying the site would be at a Kenyan air force base in Laikipia. Kenya's health ministry has spoken of discussions and protocols, but the public has still not received the clear, complete account it deserves.

President William Ruto

To be clear, no civilised person mocks disease. Americans exposed to Ebola deserve care. Health workers deserve protection. Public health cooperation can be an act of humanity. Yet cooperation cannot be used to smuggle secrecy into public life. Kenya is not the servant quarter of American fear. If Washington does not want Ebola risk on American soil, Ruto has no moral right to make Kenya the convenient answer to that fear without full disclosure, parliamentary scrutiny, local consent and a serious public health plan.

This matters because the insult is larger than the facility itself. The insult is the possibility that Kenyans may be carried into risk without being treated as citizens worthy of truth. It is the familiar arrogance of a government that speaks warmly abroad and impatiently at home. For foreign capitals, there is polish, availability and reassurance. For Kenyans, there is always a lecture waiting. Be patient. Pay more. Understand

the economy. Trust the process. Sacrifice today. Tomorrow will be better.

Meanwhile, tomorrow keeps postponing itself.

Women know this postponement well. Kenya keeps burying them, one terrible headline after another. A 2025 Femicide Report recorded at least 220 women and girls killed in Kenya, many by people they knew and trusted, often after warning signs had already appeared.

A country does not run out of women by accident. It fails them first. It fails them at the police station, where threats are dismissed as domestic noise. It fails them in prosecution, where urgency dies in files. It fails them in shelter policy, where escape is too often a privilege. It fails them in public speech, where dead women receive more sympathy than living women receive protection. Ruto may not hold the knife, but he presides over the State that keeps arriving after the blood has dried.

The same failure follows the child into danger. Government data reported through the Child Protection Information Management System recorded 10,581 child protection cases between January 2025 and March 2026, including abandonment, abductions, missing children cases and trafficking.

Then, almost predictably, officials tell parents to be vigilant. Of course parents must be vigilant. But mothers are not police stations. Fathers are not prosecutors. Neighbours are not immigration officers. A State that collects tax with the appetite of a hawk cannot protect children with the energy of a tired volunteer.

From there, the line to the cost of living is not difficult to draw. A government that treats public safety casually will also treat public hardship abstractly. Fuel is the clearest example. In Nairobi, EPRA's May to June pricing cycle placed super petrol at KSh 214.25, diesel at KSh 242.92 and kerosene at KSh 152.78.

Fuel is not a pump figure. It is fare to work. It is milk. It is unga. It is the price of getting a sick child to hospital. It is the trader wondering whether profit survived the journey from market to estate. It is the worker choosing between movement and supper. When fuel rises, the poor do not revise a spreadsheet. They remove something from life.

That is the cruelty of the hustler betrayal. Ruto asked the poor to see themselves in him. Now they see themselves on his invoice.

Of course, he inherited debt. Of course, Kenya was already wounded. But inheritance is not innocence. He asked for power with both hands. He now owns what power has become under him.

And what has it become? A government too secretive with public health. Too slow for murdered women. Too weak for endangered children. Too hungry for taxes. Too fluent in excuses. Too comfortable with ordinary suffering.

That is why the phrase is no longer wild. It is not abuse. It is judgment.

William Ruto has become the enemy of the people because his presidency has made the Kenyan citizen poorer, less safe, less informed and less respected. He has forgotten that the people are not his audience, his tax base or his campaign memory. They are the owners of the republic. A President who governs against that truth has chosen his side.

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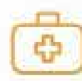

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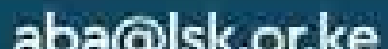
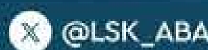
 aba@lsk.or.ke 0717-595-006  @LSK_ABA The Advocates' Benevolent Association

TRIBUTE

Pheroze Nowrojee Road

By Irungu Houghton

When Nairobi renamed Galana Road to Pheroze Nowrojee on 4 May 2026, it transformed a road into a tribute and elevated the name of one of Kenya's most respected constitutional defenders into the city's living memory.

Senior Counsel Pheroze Nowrojee (84) died on 5 April 2025. His passing prompted a global outpouring of tributes to the lawyer, constitutional scholar, poet, and human rights defender. Veteran lawyer, agemate and International Commission of Jurist's Jurist of the Year Award 2025 John Khaminwa urged his wife Viloo Nowrojee at the funeral service; "Kenya should name a street after Pheroze."

Pheroze and Viloo had both known the challenges of renaming Nairobi's streets. Before Pheroze had died, the two had successfully advocated for a road in Westlands/Parklands to be named after the late Pio Gama Pinto several decades after he was assassinated in 1965.Then, as it is now, in Kenya and globally, public space governance is highly political and contested. The naming of public spaces defines and frames. It also uplifts or erases the communities that occupy them. It took several decades of U.S. civil rights organising to inspire more than 900 streets to be renamed after Martin Luther King Jnr. It took the powerful anti-apartheid

movement in the United Kingdom to catalyse many local councils to rename streets after Nelson Mandela.

Sixty years of settler-colonialism has littered Kenya with the names of colonial administrators, soldiers, and settlers. The 1960s saw many buildings, roads and airports named after the post-colonial nationalist elite. According to Open Street Map, Nairobi County may have as many as 47,000 roads, streets, lanes, highways, alleys and other thoroughfares in 2026. Of the 148 more well known street names, about ten per cent are currently named after famous civic, political and business leaders. Presidents, Ministers, the privileged and the powerful dominate them. Most roads are named after former districts and other places in the country.

Naming is always an exercise in state power and privilege. Who is named, by whom and why, are always political questions. Five years ago, Roysambu MCA Peter Warutere passed a motion to rename Dik Dik Gardens, Francis Atwoli Road without any public consultation. The motion kicked off a crisis that led to the Dik Dik Gardens

Association feeling disrespected, outraged and litigious. After a series of confrontations, the Nairobi County Assembly eventually disowned by the road. At the time, the incident revealed how wildly disconnected the Nairobi County Government was from the citizens it served. It also reflected the County Government's capture by politicians who seemed ignorant of bylaws or policies that regulate physical planning and public participation in the naming of streets. Renaming a road after Pheroze Nowrojee would have to proceed differently.

Legally and administratively, the process is straight forward on paper. The 2021 Nairobi City County Property National Addressing System Policy (PASNAP) states street names should be short, simple, and recognisable even for children. They should not be offensive or confusing to the public. More importantly, "the use of names of living persons, including politicians and chiefs, should be avoided." Simple, precise and non-controversial addresses are essential for deploying postal, emergency and other services. Names should generate a sense of belonging, memory, diversity and unity. A Member of the County Assembly or the County Executive supported by area residents can submit a formal motion before the County Assembly. That petition must be debated, voted on and formally approved.

In October 2025, the Kilimani Community Foundation and long-term friend of the Nowrojee family, Hon Martha Karua took up the challenge. The Nowrojee family have lived and worked in the Kilimani ward since 1958. Consultations were held with Minority Leader MCA Waithera Chege, Majority Leader, Kilimani MCA Moses Ogeto and veteran environmentalist Hon. Kamau Thuo Fiunifiu. Committed environmentalist and Karura Ward MCA, Fiunifiu had successfully pressed for the naming of Wangari Maathai Road on 20 October 2016.

On 7 October, the Nairobi County Assembly unanimously approved Chege's motion to

rename a major Kilimani road after Pheroze Nowrojee. Galana Road was selected as it hosts the family home and has no sentimental or political attachment not being attached to the name of a person. Following joint public consultations led by a joint team of County Government officers and Kilimani Community Foundation, the proposal was approved by the County Executive Cabinet. The County Government is also considering renaming six other roads and forty more yet to be named.

Public sensitisation ran from October 2025 to April 2026. An online petition drew 233 supporters, while media coverage reached millions. In January 2026, Kilimani residents conducted door-to-door outreach along Galana Road. Out of 15 respondents, 73% already knew Pheroze Nowrojee. All but one supported the renaming, with the lone concern being potential confusion of clients.

On February 7, over fifty residents, business owners and lawyers joined an e-baraza to consider the findings. The E-Baraza endorsed the change of name and the public participation report was tabled with the County Government. On March 19, hundreds of family members, friends, residents and school children from Kilimani Primary and St. Hannah's planted 250 trees to beautify Galana road over their lunch-hour. Serendipitously, one end of Galana road intersects with the road named after another famous Kenyan lawyer, former Attorney General Clement Argwings-Kodhek. A decision was taken to plant trees along the newly constructed Kilimani Primary School wall there as well.

Speaking at the tree-planting activity, elder Viloo Nowrojee stated, "Today we turn Galana Road and Argwings Kodhek Road into gardens of memory and hope for two great lawyers. As we plant trees we are also planting our future." Law Society of Kenya President (2024-2026) Faith Odhiambo told those gathered "There is no greater honor than to have Galana Road named

after Pheroze Nowrojee. It will serve as a constant reminder of our duty to protect the rule of law."

Well covered in the media, the community greening exercise attracted number of organisations including the Nairobi County Green Army, Friends of Karura Forest, Green Belt Movement, Ankole Restaurant, County Planners Association, Interior Ministry and Shell Kilimani alongside the Kilimani Community Foundation.

On 4 May 2026, family, friends, residents, lawyers and members of the public were hosted by the Ankole Restaurant prior to the renaming ceremony. Livestreamed, the speakers included Professor Issa Shivji, Hon. Martha Karua, Hon. Waithera Chege, Chief Justice Emeritius Willy Mutunga, Social Justice Community leader Njoki Gachanja, Communications Strategist Gina Din Kariuki and Viloo Nowrojee. All who spoke recalled his deep moral conviction, unshakable courage and legal brilliance.

Pheroze Nowrojee road now runs from Argwings Kodhek Road past Lenana Road to Kahywe Road. As we walk, cycle and ride along it, let us remember and emulate the qualities that made him such a steadfast defender of freedom and human dignity for all human beings. May it inspire other residents and community associations to approach their county assemblies and Governments with names of people whose legacies and values offer a moral compass in these trying times.

Let us also remember, remember not to forget, as his friend and fellow poet Ndungi Githuku would say, that among us stood humble giants whose courage and clarity of conviction we owe our fundamental freedoms and rights today and forever.

Thank you Pheroze. Rest in Power always!

COVER STORY

Beyond the bench: Examining the academic scholarship, institutional reforms and constitutional contributions of Justice (Prof) Joel Ngugi

By Caren Nalwenge Mudeyi

By Faith Achieng Mudeyi

Justice (Prof.) Joel Mwaura

Abstract

Justice (Prof.) Joel Mwaura Ngugi occupies a distinctive place in Kenya's post-2010 constitutional order. He is a jurist whose work has shaped the moral and intellectual grammar of transformative constitutionalism in Kenya. Moving between scholarship, institutional reform and adjudication, Ngugi has always read the Constitution of Kenya, 2010 as more than a legal charter. In his hands, the constitution has become an instrument for disciplining public power, recovering dignity from legal invisibility, deepening democratic participation and bringing constitutional meaning closer to the lived realities of ordinary people.

This article examines Ngugi's intellectual formation, academic career and judicial work, tracing how his scholarship and institutional leadership inform his distinctive method of judging. It analyses his contribution to the Building Bridges Initiative judgment on constituent power and constitutional amendment, his defence of liberty and due process in Sudi Oscar Kipchumba v Republic, his feminist dissent in Resma Commercial Agencies v Ngattah, his emerging children's rights jurisprudence, and his sustained advocacy for Alternative Justice Systems under Article 159. Across these interventions, Ngugi appears as a jurist

concerned not only with what the law says but with what the law makes possible for democracy, equality and human freedom.

The article argues that Ngugi's jurisprudence has contributed to a distinctly Kenyan and increasingly African, account of transformative constitutionalism. Its originality lies in the fusion of doctrinal rigour, comparative constitutional thought and close attention to Kenya's social conditions. His legacy therefore extends beyond individual judgments. It lies in a judicial ethic that refuses abstraction without context, power without justification, equality without lived meaning and constitutional interpretation without fidelity to the people in whose name the Constitution speaks.

Keywords
Transformative constitutionalism, Kenyan judiciary, constitutional fidelity, judicial reform, public participation, Alternative Justice Systems, constitutional interpretation, Joel Mwaura Ngugi.

Introduction

Born on 30 October 1972 in Loitokitok, Kajiado County,[1] Ngugi came of age under the long shadow of the Moi era, a period marked by authoritarian consolidation, constrained civic space and mounting demands for democratic reform.[2] His formative years included study at the prestigious Alliance High School, an institution long associated with intellectual excellence and national leadership.[3] The struggle for multiparty democracy in the early 1990s animated by advocates, students, clergy, civil society actors and ordinary citizens calling for greater constitutionalism and democratic openness revealed both the transformative promise of law and the immense influence it exerts in shaping public life. Amid this period of national transition, the young Justice (Prof.) Joel Mwaura Ngugi came to understand law not merely as an instrument of state order but as a dynamic arena in which questions of justice, dignity, citizenship and democratic legitimacy were constantly negotiated.[4] These formative experiences cultivated a constitutional consciousness that would later define the intellectual character of his jurisprudence and anchor a judicial career closely intertwined with Kenya's constitutional renewal and democratic transformation. Ngugi's formal legal journey began at the University of Nairobi, where he obtained his LL.B degree in 1996 and served as National President of the Kenya Law Students Society.[5] Following his admission to the Bar in 1998 after training at the Kenya School of Law, he briefly practised at Kariuki Muigua & Company Advocates and taught at Ilkisonko Secondary School.[6] These early experiences grounded him in the realities of ordinary Kenyan life and sharpened his sensitivity to the social consequences of legal institutions beyond the abstractions of legal theory. His intellectual horizons expanded further at Harvard Law School, where he earned his LL.M in 1999 and later completed his S.J.D. in 2002.[7] His doctoral

[1]Judiciary of Kenya – Hon. Mr. Justice (Prof.) Joel Mwaura Ngugi.
[2]Yash Ghai and Jill Cottrell, 'The State and Constitutionalism in Africa' in Yash Ghai and Jill Cottrell (eds), *Constitutionalism and Democratic Governance in Africa* (Oxford University Press 2010).
[3]John Aino, *The Story of Alliance High School: A Centennial History 1926–2026* (Alliance High School 2025); see also Alliance High School, long recognised as one of Kenya's premier national schools and a historic centre of intellectual and public leadership formation.
[4]Walter O Oyugi, *Politics and Administration in East Africa* (East African Educational Publishers 1994).
[5]University of Washington School of Law – Joel Ngugi Profile accessed 9 May 2026.
[6]Judiciary of Kenya, 'Hon Mr Justice (Prof) Joel Mwaura Ngugi' https://judiciary.go.ke/team_member/hon-mr-justice-prof-joel-mwaura-ngugi/ accessed 27 May 2026.
[7]Harvard Law School, 'SJD Program Alumni: Joel M Ngugi' https://hls.harvard.edu accessed 9 May 2026.

work on law and economic development received the prestigious John Gallup Laylin Prize in International Law.[8] During this formative period, Ngugi served with the United Nations Mission in Kosovo (UNMIK),[9] confronting the institutional and moral complexities of post-conflict reconstruction and later worked at the World Bank and at Foley Hoag LLP in Boston, where he gained experience in international litigation and transnational legal practice.[10] In 2004, the University of Washington School of Law appointed him Assistant Professor of Law and by 2008, he had risen to Associate Professor.[11] His scholarship during this period established him as one of the most compelling African voices in global legal discourse. Writing across constitutional law, law and development, human rights, environmental justice and governance, Ngugi challenged orthodox assumptions about corruption, state legitimacy, ecological justice and postcolonial legal reform.[12] His work consistently reflected a distinctive intellectual orientation: comparative in method, deeply grounded in African realities and attentive to the structural conditions shaping inequality and democratic fragility.[13] Yet professional distinction abroad never eclipsed his commitment to Kenya's constitutional moment. In 2011, Ngugi returned to Kenya, leaving behind the security of academic tenure to participate directly in the institutional reconstruction envisioned by the Constitution of Kenya 2010.[14] His transition from scholar to judge marked not a departure from his intellectual commitments, but their continuation within the judiciary itself transforming the courtroom into a forum through which constitutional ideals could be translated into lived democratic practice.[15]

Architect of institutional renewal: Reimagining justice from within

In 2011, Ngugi answered the call to serve in Kenya's transforming judiciary.[16] His appointment coincided with the implementation of the Constitution of Kenya 2010 and the Judiciary's ambitious transformation agenda under Chief Justice Willy Mutunga and successors. He joined the Kenyan judiciary at a delicate inflection point. The institution was still shedding the accumulated weight of executive deference and colonial-era formalism, striving to reinvent itself under the demanding mandates of the 2010 Constitution.[17] As Head of the Judiciary Transformation Secretariat and Director of the Kenya Judiciary Academy (KJA) between 2012 and 2016, he stood at the very heart of this ambitious reinvention.[18] His influence

[8] University of Washington School of Law, 'Joel Ngugi Profile' https://www.law.uw.edu/directory/affiliate-faculty/ngugi-joel/ accessed 9 May 2026.

[9] Carnegie Council for Ethics in International Affairs, 'Joel Ngugi' (author profile), noting his service with the United Nations Mission in Kosovo and authorship of 'Post-Conflict Institutions That Fall Short: The UN Mission in Kosovo,' Human Rights Dialogue Series 2, No 5 (Winter 2001) https://www.carnegiecouncil.org/media/series/dialogue/human-rights-dialogue-1994-2005-series-2-no-5-winter-2001-human-rights-in-times-of-conflict-humanitarian-intervention-articles-post-conflict-institutions-that-fall-short-the-un-mission-in-kosovo accessed 16 May 2026.

[10] United Nations Office of the Special Adviser on Africa, 'Hon Mr Justice (Prof.) Joel Mwaura Ngugi' https://www.un.org/osaa/en/academic-conference-2024/4-december/hon-mr-justice-prof-joel-mwaura-ngugi accessed 9 May 2026.

[11] 'UW Law Professor Named a Judge of High Court of Kenya' (University of Washington, 28 September 2011) https://www.washington.edu/news/2011/09/28/uw-law-professor-named-a-judge-of-high-court-of-kenya/ accessed 9 May 2026.

[12] Joel M Ngugi, 'Making the Link Between Corruption and Human Rights: Promises and Perils' (2011) 104 *American Society of International Law Proceedings* 246

[13] Joel M Ngugi, 'Stalling Juristocracy While Deepening Judicial Independence in Kenya, Towards a Political Question Doctrine' in Kithure Kindiki and Osogo Ambani (eds).

[14] 'UW Law Professor Named a Judge of High Court of Kenya' (University of Washington, 28 September 2011) https://www.washington.edu/news/2011/09/28/uw-law-professor-named-a-judge-of-high-court-of-kenya/ accessed 10 May 2026.

[15] Karl Klare, 'Legal Culture and Transformative Constitutionalism' (1998) 14 *South African Journal on Human Rights* 146.

[16] Judiciary of Kenya, *Sustaining Judiciary Transformation, A Service Delivery Agenda 2017–2021* (Judiciary of Kenya 2017).

[17] Judiciary of Kenya, *Judiciary Transformation Framework 2012–2016* (Judiciary of Kenya 2012).

[18] Willy Mutunga, 'Transformative Constitutions and Constitutionalism: A New Theory and School of Jurisprudence from the Global South' (2021) 1 *Journal of Law and Political Economy* 77, 82–88.

is evident in several foundational reforms: the pioneering Court-Annexed Mediation programme,[19] progressive Sentencing Guidelines,[20] forward-looking Bail and Bond Policy,[21] Active Case Management framework and most profoundly the Alternative Justice Systems (AJS) Policy.[22] As Chair of the National Steering Committee for AJS Implementation, Ngugi has continued to champion a vision far more ambitious than mere docket clearance. He interprets Article 159(2)(c) not as a polite nod to tradition but as a constitutional directive to build a pluralistic justice ecosystem.[23] For Ngugi, AJS is not a second-class alternative for the poor or a convenient backlog-reduction tool. It is the lived justice system for the vast majority of Kenyans those for whom formal courts remain distant, expensive and culturally alien.[24] By validating indigenous dispute resolution mechanisms while subjecting them to the discipline of the Bill of Rights, Ngugi has advanced a sophisticated project of decolonising justice without romanticising custom or compromising constitutional standards. His proactive embrace of technology in judicial processes further earned him consecutive Legal Tech Judge of the Year awards in 2021 and 2022.[25]

Defining moments: Judgments and rulings that reshaped the constitutional landscape

The BBI judgment (2021): Defending popular sovereignty

The consolidated ***David Ndii & Others v Attorney General*** petitions placed Kenya's young constitutional democracy under its most severe stress test since 2010. On 13 May 2021, a five-judge High Court bench comprising of Justice Odunga, Justice Ngaah, Justice Matheka, Justice Mwita and Justice Ngugi delivered a unanimous judgment that stopped the Building Bridges Initiative (BBI) constitutional amendment process in its tracks.[26]

Ngugi's intellectual footprint runs deep through this judgment. The bench reconstructed in painstaking detail the origins of the process: the March 2018 "Handshake" between President Uhuru Kenyatta and Raila Odinga, the appointment of the BBI Taskforce via Gazette Notice No. 5154 of 24 May 2018 and the subsequent Steering Committee.[27] What emerged was a picture of an initiative that began as an elite political settlement but was repackaged as a popular initiative under Article 257.[28]

The judgment exposed fundamental flaws including the absence of genuine, broad-based public participation and the Executive's orchestration of a process constitutionally reserved for the sovereign people and the misuse of procedural

[19]Pius Langa, 'Transformative Constitutionalism' (2006) 17 *Stellenbosch Law Review* 351.
[20]*David Ndii and Others v Attorney General and Others* [2021] KEHC 9746 (KLR) (Consolidated Petitions) paras 1–13, 520–568, 1015–1089.
[21]Gazette Notice No 5154 of 24 May 2018, *Building Bridges to Unity Advisory Taskforce*.
[22]Judiciary of Kenya, *Alternative Justice Systems Baseline Policy* (2020) https://ajskenya.or.ke/mooxowhi/filr/3584/AJS_Baseline_Policy_2020_Kenya.pdf accessed 10 May 2026.
[23]Constitution of Kenya 2010, art 159(2)(c); Judiciary of Kenya, Alternative Justice Systems Baseline Policy (2020) https://ajskenya.or.ke/mooxowhi/filr/3584/AJS_Baseline_Policy_2020_Kenya.pdf accessed 10 May 2026.
[24]Judiciary of Kenya, Alternative Justice Systems Baseline Policy (2020) https://ajskenya.or.ke/mooxowhi/filr/3584/AJS_Baseline_Policy_2020_Kenya.pdf accessed 12 May 2026.
[25]United Nations Office of the Special Adviser on Africa, 'Hon Mr Justice (Prof.) Joel Mwaura Ngugi' https://www.un.org/osaa/en/academic-conference-2024/4-december/hon-mr-justice-prof-joel-mwaura-ngugi accessed 12 May 2026.
[26]*David Ndii & Others v Attorney General & Others* (Consolidated Petitions) [2021] eKLR (High Court of Kenya, Constitutional and Human Rights Division, 13 May 2021).
[27]*David Ndii & Others v Attorney General & Others* (Consolidated Petitions) [2021] eKLR (High Court of Kenya, Constitutional and Human Rights Division, 13 May 2021).
[28]Willy Mutunga, 'Forty Years of African Constitutionalism: Reflecting on State Reconstruction, Human Rights and Globalisation' (2012) 28 *South African Journal on Human Rights* 183.

tools to advance substantive changes that risked altering the Constitution's basic architecture.[29] It firmly held that neither the President nor state organs could hijack the popular initiative avenue, as doing so would subvert the very sovereignty of the people that Article 1 enshrines.[30]

In helping to crystallise elements of the basic structure doctrine in Kenyan jurisprudence, the judgment recognised that certain foundational features Chapter One on sovereignty and supremacy of the Constitution, the Bill of Rights, the structure of the Executive and Judiciary carry implied limits on amendment power. For Ngugi, this was not an imported foreign theory but a necessary bulwark drawn from Kenya's own constitutional history and the transformative promise of 2010.[31] His contribution supplied much of the judgment's analytical rigour and moral force, transforming it into a global reference point on the boundaries of amendment power and the defence of democratic constitutionalism against elite recapture.[32] It remains a powerful assertion that sovereignty belongs to the people, not to transient political arrangements.[33]

Safeguarding liberty in turbulent times: The Oscar Sudi ruling (2020)

In ***Sudi Oscar Kipchumba v Republic***, Justice Joel Ngugi transformed a pre-plea detention dispute into a searching statement on liberty in Kenya's post-2010 constitutional order.[34] The political atmosphere was heated, but Ngugi refused to let public anger or prosecutorial anxiety stand in for proof. By overturning the detention order, he reaffirmed a basic constitutional truth, freedom is not a favour from the State.[35] It is a right that can only be limited through evidence, legality and reasoned justification.

The ruling's power lay in its method. Ngugi placed the dispute within Articles 24, 29 and 49, insisting that public order, peace, security and fears of witness interference could not be invoked as convenient formulas. They had to be demonstrated. Political heat was not evidence. Suspicion was not justification. Detention could not become the State's shortcut whenever the public mood grew restless.[36]

This is why Joshua Malidzo Nyawa's description of the ruling as an instance of "judicial heroism" feels so apt.[37] Malidzo saw that Ngugi's courage was not theatrical but constitutional. The judgment did not romanticise liberty or weaken criminal justice. It simply required the State to do what the Constitution demands, give reasons, produce evidence and act proportionately.[38]

It gave practical life to the culture of justification promised by the 2010

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[29] *David Ndii & Others v Attorney General & Others* (Consolidated Petitions) [2021] eKLR (High Court of Kenya, Constitutional and Human Rights Division, 13 May 2021).
[30] Constitution of Kenya(2010),Article 1.
[31] Marius Pieterse, 'What Do We Mean When We Talk About Transformative Constitutionalism?' (2005) 20 *South African Public Law* 155.
[32] Gautam Bhatia, 'The Kenyan High Court's BBI Judgment: An Instant Classic' The Elephant (17 May 2021) https://www.theelephant.info/op-eds/2021/05/17/the-kenyan-high-courts-bbi-judgement-an-instant-classic/ accessed 16 May 2026.
[33] Yaniv Roznai, 'The Basic Structure Doctrine Arrives in Kenya' Verfassungsblog (19 May 2021) https://verfassungsblog.de/the-basic-structure-doctrine-arrives-in-kenya/ accessed 16 May 2026.
[34] Joshua Malidzo Nyawa, 'Come and See What Prof Joel Ngugi Has Done, A Tale of Old Memories in the Oscar Sudi Bail Ruling' (2020) SSRN https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3704174 accessed 20 May 2026.
[35] Moshe Cohen-Eliya and Iddo Porat, 'Proportionality and the Culture of Justification' (2011) 59(2) *American Journal of Comparative Law* 463.
[36] *Sudi Oscar Kipchumba v Republic (Through National Cohesion and Integration Commission)* Criminal Revision No 208 of 2020 [2020] eKLR.
[37] Joshua Malidzo Nyawa, 'Come and See What Prof Joel Ngugi Has Done, A Tale of Old Memories in the Oscar Sudi Bail Ruling' (2020) SSRN https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3704174 accessed 20 May 2026.
[38] Moshe Cohen-Eliya and Iddo Porat, 'Proportionality and the Culture of Justification' (2011) 59(2) *American Journal of Comparative Law* 463.

Constitution. It reminded courts that their highest duty is not to echo the crowd or soothe executive discomfort, but to hold the line between lawful authority and coercive convenience. Its lesson remains sharp. Liberty matters most when it is least popular to defend.[39]

Equity in the shadows: The Resma dissent (2025): A feminist constitutional intervention

Some judgments settle disputes. Others expose the hidden architecture of injustice. Justice (Prof.) Joel Mwaura Ngugi's dissent in ***Resma Commercial Agencies v Ngattah*** belongs unmistakably to the latter category.[40] Beneath the surface of what appeared to be an ordinary matrimonial property dispute, Ngugi uncovered a deeper constitutional question. How does the law measure contribution in marriages where the most essential labour leaves no documentary trace? The case revolved around Leah Wangui Ngata, whose matrimonial home in Nakuru was secretly sold by her husband, Francis Ngata Kingori, to a neighbouring company without her knowledge or consent. Married under Kikuyu customary law in 1970, the couple had spent decades building a life together across Laikipia, Eldoret, and Nakuru, raising five children while sustaining businesses, farms and family property through shared sacrifice.[41] Yet when the dispute reached court, the title deed carried only the husband's name. Leah's years of labour in farming, informal trade, caregiving, and the family hotel business appeared legally invisible.[42] Where the majority privileged registered title and strict evidentiary proof, Ngugi interrogated the assumptions beneath that formalism.[43] His dissent recognised that conventional evidentiary standards often mirror a "documentary economy" historically structured around monetised and male-coded forms of labour.[44] Receipts, bank statements, and formal financial records capture only certain kinds of contribution; they rarely record caregiving, domestic management, emotional labour, or informal economic activity, the very forms of work upon which many Kenyan families are built.[45] Ngugi's intellectual contribution lay in reframing matrimonial property law through the lens of substantive constitutional equality. Drawing on equitable doctrines, Supreme Court precedent and feminist constitutional reasoning, he argued that courts must evaluate the totality of spousal conduct rather than reduce contribution to paper documentation alone.[46] To do otherwise, he warned, risks transforming the Constitution into an instrument that silently reproduces historical gender hierarchies under the guise of neutrality.[47] What made the dissent especially powerful was its humanity. Ngugi

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[39]David Dyzenhaus, *The Constitution of Law, Legality in a Time of Emergency* (Cambridge University Press 2006.

[40]*Resma Commercial Agencies v Ngattah (Suing as the Legal Representative of the Estate of Leah Wangui Ngata (Deceased)) & another* [2025] KECA 2214 (KLR) (Civil Appeal 16 of 2019, Court of Appeal at Nakuru, 16 December 2025) (dissenting judgment of JM Ngugi JA).

[41]*Resma Commercial Agencies v Ngattah (Suing as the Legal Representative of the Estate of Leah Wangui Ngata (Deceased)) & another* [2025] KECA 2214 (KLR) (Civil Appeal 16 of 2019, Court of Appeal at Nakuru, 16 December 2025) paras 7–29.

[42]*Resma Commercial Agencies v Ngattah (Suing as the Legal Representative of the Estate of Leah Wangui Ngata (Deceased)) & another* [2025] KECA 2214 (KLR) (Civil Appeal 16 of 2019, Court of Appeal at Nakuru, 16 December 2025).

[43]Patricia Kameri-Mbote and Muriuki Muriungi, 'Much Ado About Nothing? A Critical Analysis of the Matrimonial Property Act in Kenya' (2016) 6 *Zanzibar Yearbook of Law* 71.

[44]*Resma Commercial Agencies v Ngattah (Suing as the Legal Representative of the Estate of Leah Wangui Ngata (Deceased)) & another* [2025] KECA 2214 (KLR) (Civil Appeal 16 of 2019, Court of Appeal at Nakuru, 16 December 2025) (dissenting judgment of JM Ngugi JA).

[45]*Resma Commercial Agencies v Ngattah (Suing as the Legal Representative of the Estate of Leah Wangui Ngata (Deceased)) & another* [2025] KECA 2214 (KLR) (Civil Appeal 16 of 2019, Court of Appeal at Nakuru, 16 December 2025) (dissenting judgment of JM Ngugi JA).

[46]*Resma Commercial Agencies v Ngattah (Suing as the Legal Representative of the Estate of Leah Wangui Ngata (Deceased)) & another* [2025] KECA 2214 (KLR) (Civil Appeal 16 of 2019, Court of Appeal at Nakuru, 16 December 2025) (dissenting judgment of JM Ngugi JA).

[47]*Resma Commercial Agencies v Ngattah (Suing as the Legal Representative of the Estate of Leah Wangui Ngata (Deceased)) & another* [2025] KECA 2214 (KLR) (Civil Appeal 16 of 2019, Court of Appeal at Nakuru, 16 December 2025) (dissenting judgment of JM Ngugi JA).

did not write in abstractions about gender justice, he wrote about the lived realities of ordinary marriages.[48] His reasoning recognised that constitutional values are tested not only in elections, separation-of-powers disputes, or public protests, but also within kitchens, homes, businesses, and intimate spaces where invisible labour sustains entire families.[49] In ***Resma***, Ngugi demonstrated a distinctive jurisprudential method: intellectually rigorous yet socially grounded; theoretically sophisticated yet deeply attentive to lived experience.[50] Even in dissent, he offered Kenyan family law a transformative constitutional vision, one that insists dignity, equality, and equity must extend to those whose contributions have historically remained unseen.[51]

The child at the centre of constitutional justice

Childhood is one of the areas in Kenya's jurisprudence where constitutional law is most easily idealised and most demanding at the same time. Consequently, the best interests of the child are paramount in every matter involving a child, as the Constitution enunciates.[52] In ***Jasreen Kaur Pandher v Kabir Singh Chal***,[53] a three-judge bench comprising Kiage, Tuiyott and Ngugi JJA did more than determine what mattered where a child's life was divided between two parents, two countries, two possible futures and two competing accounts of care. It asked whether Article 53(2) of the Constitution is merely a benevolent statement of judicial concern, or whether it imposes a disciplined method of reasoning upon courts deciding the future of children, safeguarding and promoting the rights and welfare of the child.[54] The deeper question was jurisprudential. How should a court reason when the child's welfare is tied to stability, parental contact, migration, economic opportunity, caregiving labour and the constitutional rights of both parents? Justice (Prof.) Joel Mwaura Ngugi, in his judgment, answered that question by giving the best interests principle a constitutional architecture.[55]

Justice Ngugi's jurisprudential contribution in ***Jasreen Kaur Pandher v Kabir Singh Chal*** lies in his reconstruction of Article 53(2) from a familiar welfare phrase and geographical contestation into a foundational inquiry on the architecture of children's rights under Kenya's post-2010 constitutional order. He approached the best interests of the child not as a self-executing invitation to judicial intuition but as a structured constitutional standard.[56] His contextual and progressive philosophy in this case emphasises that relocation disputes ought to move beyond parental presumptions and be resolved through a structured, evidence-based inquiry which keeps the child's best interests paramount, while treating parental rights and caregiving realities as relevant only where they shape the child's actual welfare.[57]

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[48] *Resma Commercial Agencies v Ngattah (Suing as the Legal Representative of the Estate of Leah Wangui Ngata (Deceased)) & another* [2025] KECA 2214 (KLR) (Civil Appeal 16 of 2019, Court of Appeal at Nakuru, 16 December 2025) (dissenting judgment of JM Ngugi JA).
[49] *Resma Commercial Agencies v Ngattah (Suing as the Legal Representative of the Estate of Leah Wangui Ngata (Deceased)) & another* [2025] KECA 2214 (KLR) (Civil Appeal 16 of 2019, Court of Appeal at Nakuru, 16 December 2025) (dissenting judgment of JM Ngugi JA).
[50] Martha Albertson Fineman, 'The Vulnerable Subject, Anchoring Equality in the Human Condition' (2008) 20(1) *Yale Journal of Law and Feminism* 1.
[51] Catharine A MacKinnon, *Toward a Feminist Theory of the State* (Harvard University Press 1989).
[52] Constitution of Kenya 2010, art 53(2).
[53] Jasreen Kaur Pandher v Kabir Singh Chal, Court of Appeal at Nairobi, Civil Appeal No E223 of 2024, judgment delivered in 2026 (Kiage, Tuiyott and Ngugi JJA.
[54] Section 8 of the Children Act 2022
[55] Constitution of Kenya 2010, art 53(2).
[56] UN Committee on the Rights of the Child, General Comment No 14.
[57] United Nations Convention on the Rights of the Child (Article 3).

Justice Ngugi's nine-principle relocation framework is an immense and constructive jurisprudential architecture for principled decision-making in family law, especially in child-related matters. Justice Ngugi insists that courts must attend to caregiving realities and their gendered distribution, recognising that a primary caregiver is not merely a vessel for parenting outcomes but a rights-bearing person whose dignity, autonomy and lived constraints bear directly on the child's welfare.[58] In that move, he resists the false neutrality that often conceals structural inequality in family adjudication. His careful use of ***Payne v Payne***[59], ***Gordon v Goertz***[60] and Kenyan precedent reflects a disciplined comparative analysis, drawing from foreign jurisprudence without displacing Kenya's constitutional particularity. Justice Ngugi's interpretive approach gives Article 53(2) intellectual structure, feminist sensitivity and constitutional transformation in resolving one of family law's enduring tensions.

The significance of this judgment extends beyond immediate relocation law. It supplies a principled and replicable method where appellate guidance had been thin. For primary caregivers, it gives constitutional visibility to realities too often dismissed as private inconvenience rather than legally material conditions of care.[61] For Kenya's broader constitutional project, it affirms that the emancipatory promise of the 2010 Constitution does not stop at public law's grand questions, but reaches the intimate spaces where family, childhood, labour and dignity meet. Justice Ngugi's contribution is therefore architectural. He did not merely resolve a parental dispute; he built a jurisprudential framework through which courts may reason more honestly about children, caregiving and constitutional rights. In doing so, he restated the central conviction of his judicial work, that a constitution worthy of fidelity must be felt in ordinary lives, and that judging, at its highest, is the disciplined accomplishment of making that promise real.[62]

Justice beyond the courtroom: Ngugi's Alternative Justice System imagination

Article 159(2)(c) of the Constitution of Kenya, makes Alternative Justice Systems (AJS) an integral part of judicial authority by requiring courts to promote traditional and other non-formal mechanisms of dispute resolution as part of Kenya's constitutional vision of justice. The AJS policy 2020 further translates Article 159(2)(c) from principle into practice by recognising that access to justice cannot be measured only by the number of courts, judges or files disposed of, but by the extent to which ordinary people can resolve disputes in forums that are accessible, legitimate, affordable, participatory and responsive to their social realities. It recognizes that communities are not passive recipients of law, but active makers of justice.[63]

Justice Joel Ngugi's contribution, as chair of the Taskforce on AJS and the National Steering Committee on the Implementation of AJS, is consequential because it spans the conceptual, institutional and normative life of the reform.[64] He has played a key role in repositioning AJS from the administrative

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[58]Jasreen Kaur Pandher v Kabir Singh Chal, Court of Appeal at Nairobi, Civil Appeal No E223 of 2024, judgment delivered in 2026 (Kiage, Tuiyott and Ngugi JJA.

[59]Payne v Payne [2001.

[60]Gordon v Goertz 1996.

[61]Children Act 2022, First Schedule, paras 5, 6, 8, 9.

[62]Constitution of Kenya 2010, art 53(2), Section 8 of the Children Act 2022 and General Comment No.14 (on Procedural safeguards to guarantee implementation of the child's best interests 85-9918).

[63]Judiciary of Kenya, *Alternative Justice Systems Framework Policy* (n 22) 1–9.

[64]Judiciary of Kenya, *Alternative Justice Systems Framework Policy* v–viii; NaSCI-AJS, 'AJS Ujuzi' https://ajskenya.or.ke/ajs-ujuzi/ accessed 27 May 2026.

language of "alternative dispute resolution" into a serious jurisprudential project.[65] It reorients AJS into a constitutional inquiry and the sites of justice, the actors who generate legal meaning, and the conditions under which constitutional authority may be shared with communities without surrendering the guarantees of rights, equality and dignity.

Justice Joel Ngugi's public lectures, conferences and interviews on Alternative Justice Systems disclose a distinctive constitutional argument, that Article 159(2)(c) is not a peripheral procedural clause, but a command to rethink justice beyond the institutional monopoly of courts. His central philosophy on AJS is more ambitious. Kenya's transformative Constitution requires a justice system that acknowledges the many social spaces in which Kenyans already seek redress, negotiate harm, restore relationships and rebuild civic peace. Ngugi's originality lies in converting that lived reality into constitutional thought. Article 159(2)(c), in his account, does not merely tolerate community-based justice.[66] It requires the legal system to recognise, promote and discipline it without absorbing it into the formal courtroom. Across his public lectures and AJS conferences, the point he repeatedly makes is that justice must have many doors, because the courtroom is necessary but not sufficient.[67] He therefore refuses two easy positions. He rejects court-centered legalism, which treats formal adjudication as the only serious form of justice. His contribution is

[65]Marc Galanter, 'Justice in Many Rooms, Courts, Private Ordering, and Indigenous Law' (1981) 19 *Journal of Legal Pluralism and Unofficial Law* 1.
[66]Judiciary of Kenya, *Alternative Justice Systems Framework Policy* 3–9.
[67]University of Embu School of Law, 'Public Lecture, Hon Justice (Prof) Joel Ngugi on Alternative Justice Systems and Transformative Constitutionalism' (13 March 2026) https://law.embuni.ac.ke/?p=788 accessed 27 May 2026.

to constitutionalize AJS as people-centered justice, accessible, restorative, participatory and socially intelligible, while keeping it answerable to dignity, equality, fairness and the rule of law.[68]

His central intervention is to frame AJS not as inferior informal justice, but as a rights-disciplined, culturally rooted and restorative form of legality, one capable of widening access, repairing broken social relations and decolonizing adjudication, while still subjecting community power to the demands of dignity, equality and protection from exclusion.[69] Justice Ngugi's county-based AJS work, reflected in launches and roll-outs across counties such as Laikipia, Trans Nzoia, Nakuru, Kajiado, Isiolo, Lamu, Mombasa and Busia among others gives institutional life to Article 159(2)(c).[70] Consequentially, County based AJS systems have been a major achievement to Kenya's AJS system. Its strength lies in its homegrown and locally anchored character. Rather than impose a uniform courtroom logic on diverse social worlds, the model brings together courts, elders, communities and other local actors to craft justice around the disputes, customs and vulnerabilities of particular places. Through this model, AJS has become more accessible, participatory and restorative, while remaining subject to the constitutional demands of dignity, equality, fairness and rights protection.[71]

Justice Ngugi's AJS project ultimately recasts Article 159(2)(c) as a living constitutional command to democratise justice beyond the formal courtroom.[72] Its lasting contribution is to show that justice becomes most legitimate when it is accessible to the people, rooted in their social realities and guided by the Constitution's promise of equal citizenship.[73]

Conclusion: The constitution where life happens

Justice (Prof.) Joel Mwaura Ngugi's jurisprudence is animated by one enduring concern, whether constitutional form can be made morally alive in the places where people actually encounter power. His work does not treat the Constitution as a ceremonial charter nor as a lawyer's instrument sealed off from social consequence. It treats the Constitution as a discipline imposed on authority, a language for recovering dignity and a method for bringing law nearer to the people in whose name judicial power is exercised. This is what binds his contributions across BBI, liberty, family law, children's rights, institutional reform and Alternative Justice Systems. They all return to the same demanding question, does the legal system make constitutional promises usable where life is lived and power is felt?

The measure of that contribution cannot be reduced to office, seniority or reputation. It lies in the intellectual pressure his work places on Kenyan law. It asks constitutional lawyers to stop treating rights as elegant language without institutional consequence. It asks judges to see procedure not as neutral technique, but as a site where injury may be inflicted or repaired. It asks

[68]Judiciary of Kenya, *Social Transformation Through Access to Justice, STAJ Blueprint 2023–2033* (Judiciary of Kenya 2023.

[69]Sally Engle Merry, 'Legal Pluralism' (1988) 22(5) *Law and Society Review* 869; Boaventura de Sousa Santos, 'Law, A Map of Misreading, Toward a Postmodern Conception of Law' (1987) 14(3) *Journal of Law and Society* 279.

[70]Judiciary of Kenya, 'AJS Launched in Trans Nzoia County' https://judiciary.go.ke/ajs-launched-in-trans-nzoia-county/ accessed 27 May 2026.

[71]NaSCI-AJS, Nakuru County Alternative Justice Systems Action Plan (NaSCI-AJS 2022) https://ajskenya.or.ke/mooxowhi/filr/3668/AJS%20ACTION%20PLAN%20-%20NAKURU%20COUNTY%20%281%29.pdf accessed 27 May 2026.

[72]Francis Kariuki, 'Conflict Resolution by Elders in Africa, Successes, Challenges and Opportunities' (2015) 3(2) *Alternative Dispute Resolution* 30.

[73]NYU Center on International Cooperation, *Multiple Doors to Justice in Kenya, Engaging Alternative Justice Systems* (NYU CIC 2023.

reformers to build institutions that ordinary people can actually reach, trust and use. It asks communities to accept constitutional discipline even when they speak in the name of tradition. These are difficult demands, but they are the demands of the 2010 Constitution itself. A Constitution that promises dignity, equality, participation and access to justice cannot remain content with beautiful text and distant institutions.

Ngugi's enduring contribution lies in the coherence of that constitutional demand. In BBI, it guarded popular sovereignty against elite capture of the amendment power. In Sudi, it protected liberty from coercive convenience and insisted that the State must justify detention with evidence rather than anxiety. In Resma, it made invisible labour legible to constitutional equality. In Jasreen, it gave structure to the best interests of the child in the intimate terrain of family life, migration, care and parental conflict. In AJS, it returned justice to communities without abandoning them to unaccountable custom. Across these settings, his judging and institutional leadership offer a distinctly Kenyan account of transformative constitutionalism. It is rigorous without being bloodless. It is comparative without being derivative. It is doctrinal without being blind to context. Above all, it reminds us that fidelity to the Constitution is not proved by reverence for text alone. It is proved when courts, institutions and communities make justice reachable, intelligible and humane. That is where the Constitution lives, not only in its clauses, but in the ordinary lives it enables law to dignify.

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African judiciaries and authoritarianism: Rethinking standards of proof in presidential election petitions

By Olang'o Thomas Omondi

Prologue

African judiciaries, as virtually all judiciaries, have one fundamental duty; to be the guardians of constitutionalism, yet in practice they sometimes entrench authoritarian tendencies knowingly and sometimes unknowingly by conjuring unnecessary evidentiary barriers that frustrate democratic accountability. Nowhere is this more evident than in presidential election petitions, where courts such as the Supreme Court of Kenya have adopted an "intermediate" standard of proof that departs from the civil law principle of balance of probabilities. This judicial innovation, lacking clear justification, elevates an unyielding burden on petitioners and risks shielding electoral irregularities from meaningful scrutiny.

By situating Kenya's jurisprudence within comparative civil law experiences from Canada, Mauritius and the United Kingdom, this paper offers a perspective that presidential election disputes are civil in nature and should be adjudicated on the ordinary civil threshold. Although the intermediate standard threshold seems to have been largely influenced by the Supreme Court decisions of Zambia and India in *Lewanika and others v Chiluba (1999) 1LRC 138 and Shri Kirpal Singh v Shri VV Giri (1970) INSC 191: AIR 1970 SC 2097; 1971(2) SCR 197; 1970(2) SCC 567* respectively, comparative traditions suggest election petitions are civil matters, hence there is a real risk of isolating the country from best global constitutional practice.

It is argued that settling for an intermediate standard in presidential election petitions depicts the court as an enabler in chief of authoritarianism. The continued insistence on this standard, for almost a decade, justifies the notion that courts have and continue to engage in abusive judicial review which rubberstamp democratic erosion in the would-be democratic states. By oscillating from weird standards of proof threshold for annulling elections, the Supreme Court has made it virtually impossible to achieve electoral justice even in the presence of the most glaring constitutional and statutory electoral violations in the conduct of presidential elections. Therefore, rethinking the standard of proof is a constitutional imperative not only to restore coherence in electoral justice but also to prevent the court from becoming an inadvertent agent of authoritarian consolidation within the Kenyan state.

Ultimately, the paper calls for reclaiming judicial legitimacy by restoring the civil character of election petitions, aligning

evidentiary standards with constitutional principles and ensuring that the Supreme Court remains a vigilant guardian of free and fair elections and not authoritarian consolidation. This perspective aims to stimulate further scholarly debate on the subject.

1.0 Introduction

Disputes involving the presidential elections are not a new phenomenon in Kenya. Kenya witnessed similar cases after the general elections of 1992, 1997, 2013, 2017 and 2022. Six petitions were filed in the High Court in 1992 after the late President Daniel Arap Moi was declared winner in the polls.[2] The court struck five out of six petitions on procedural grounds even before the hearing commenced. Kenneth Matiba's case was the only one heard but the court of Appeal later dismissed it too because he did not sign the petition himself as required under the then Rule 4(3) of the National Assembly Elections (Election Petition) Rules 1993.[3] It bears recalling that Kenneth Matiba became sickly and physically incapacitated after suffering a stroke during his detention without trial and thus gave his wife the power of attorney to sign the court papers in 1993.[4]

While the High Court, sitting as an election court, breathed life into the petition, the Court of Appeal (JM Gachuhi, AM Cockar & RSC Omolo, JJA) declared the petition was incompetent *ab-inito*. In the words of AM Cockar, "It was still born. Mr Kariuki, understandably and commendably, made

Daniel Arap Moi

every effort to infuse life into it, but one cannot succeed in doing that in the case of a still born". The Election Court judges, for reasons best known to them only took it upon themselves to put life into a still born. That was not its function. Its function was simple, just to find on a judicial basis whether words *"and shall be signed by all the petitioners'* were of a mandatory or a directory nature.[5] The Court of Appeal would then go ahead and muddy the waters and lament how Matiba, a man who likes to play for very high stakes would let himself be caught up on such an elementary requirement like signing a petition.[6]

Fast forward to the 1997 elections, where the late President Moi's win was again challenged by three contesters namely Mwai Kibaki, Kijana Wamalwa and Raila Odinga. At the time, the law required petitioners to serve respondents physically.[7]

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[2]John Kamau, 'The grim history of presidential petitions in Kenya' *Daily Nation* (Nairobi, 10 August 2017) <https://nation.africa/kenya/news/politics/the-grim-history-of-presidential-petitions-in-kenya--436750> accessed 10 May 2026

[3]John Mbati, 'How a Signature Blunder Saved Moi from Losing His Presidency' (Nairobi, 24 June 2019) <https://www.kenyans.co.ke/news/41007-how-signature-blunder-saved-moi-losing-his-presidency> accessed 18 November 2025

[4]Ibid

[5]*Moi v Matiba; Electoral Commission & another* (Interested Parties) (Civil Appeal 176 of 1993) [1994] KECA 117 (KLR) 78

[6]Ibid [8]

[7]Africa Press, 'How Kibaki failure to serve court papers saved Moi from poll petition' (Africa Press, 6 February 2020) https://www.africa-press.net/kenya/policy/how-kibaki-failure-to-serve-court-papers-saved-moi-from-poll-petition accessed 5 March 2025

One week after filing the petition, Kibaki published in the Kenya Gazette a notice of the petition informing Moi and then Electoral Commission of Kenya boss Samuel Kivuitu of the case urging them to pick copies of the plaint at the court registry. At the hearing (Emmanuel O'Kubasu, Mbogholi Msagha & Moijo ole Keiwua), Moi claimed he was not served in person within 28 days after the election. The court, in dismissing the petition, agreed with the black letter of the law which insisted on personal delivery and not publication in the Kenya Gazette.

At the Court of Appeal, Moi's contention on personal service was upheld. The Court of Appeal held:

> *"We would add this with regard to service of petitions upon an elected person. Service by way of publication in the Kenya Gazette, in view of section 20(1)(a) of the Act, cannot be proper service. The publication in the Gazette, as in this case, directs a respondent to obtain a copy of the petition from the office of the Registrar/ Deputy Registrar of the High Court of Kenya. In view of the fact that section 20(1) (a) requires presentation and Service of the petition (emphasis supplied), asking a respondent to collect a copy thereof from the High Court Registry cannot be proper service. This is yet another aspect which shows that Rule 14(1) conflicts with section 20 (1) (a) of the Act."* [8]

The petitioner failed because the process server could not serve the late president Moi inside the State House. The court enforced the law as is and dismissed the case.[9] It is apparent that while the above presidential election petitions were dismissed on account of procedural technicalities, their dismissal mirrored a judicial tendency that favoured procedure over substance. Therefore, it is no surprise that following a disputed presidential election which led to the deaths of over one thousand people and the displacement of over 600,000 in 2007-8, the contesting parties refused to move to court to ventilate their grievances.[10] From the foregoing, the conclusion by John Kamau that it is easier to remove a sitting president through the ballot than through a petition is tacit[11] because parties were effectively barred from the citadel of justice on the basis of technicalities and rules of procedure.

1.1 Enter a new dawn

The promulgation of the Constitution of Kenya 2010 brought forth a new breath of fresh Constitutional air. The newly constituted Supreme Court, for the first time, would sit to determine a presidential election petition for the first time following the 2012 general elections. Subsequently two presidential petitions were determined in 2017 and a further one in 2022.

With the promulgation of the new Constitution and a new Supreme Court clothed with both original and exclusive jurisdiction which is a position so eloquently elucidated *in the Matter of the Principle of Gender Representation in the National Assembly and the Senate*[12], a new sense of hope engulfed the citizenry. This newfound hope was even more profound because

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[8] *Kibaki v Moi* [1999] KECA 1 (KLR)
[9] Ibid
[10] For a disturbing account of the post-election violence, see the Final Report of the Truth and Reconciliation Commission of Kenya (TJRC Report) (2013) <http://www.kenyalaw.org/CaseSearch/view_preview1.php?link=37779366692853178723650> accessed 6 May 2026
[11] Ibid (n 2)
[12] *In the Matter of the Principle of Gender Representation in the National Assembly and the Senate* (Advisory Opinions Application 2 of 2012) [2012] KESC 5 (KLR

the Constitution of Kenya 2010 provided guidance on how it ought to be interpreted. Indeed, in a sharp contrast to the former Constitution and the statutes governing electoral laws, the Constitution 2010 abhorred a formalistic interpretation of the law and favoured a holistic and purposive interpretation.

While a presidential election petition is a constitutional issue warranting an interpretation of the Constitution itself, its inherent nature does not change but remains a civil matter clothed in constitutional terms. The implication of this is that whenever the validity of a presidential election is called into question, the decision of the Court though consequential within a polity, cannot be a proper legal justification to elevate the standard of proof to an intermediate threshold. Indeed, the dispute remains a civil one from its commencement all through to its conclusion. It cannot oscillate from the standard of balance of probabilities to an undefined intermediate and yet sometimes to a higher threshold of beyond reasonable doubt. It must always remain in its proper place, that is on the balance of probabilities.

In this paper, three arguments are advanced justifying a rethink of the standard of proof in election disputes particularly the presidential election petitions in Kenya from an intermediate standard set in 2013 and subsequently affirmed in 2017 and 2022. From the outset, it is posited that presidential election petitions are civil in nature and should be adjudicated on the balance of probabilities the controversy surrounding the standard of proof in other jurisdictions notwithstanding. Secondly, the paper assails the Supreme Court's decision to settle for the intermediate standard which is a standard beyond the balance of probabilities but slightly below proof beyond reasonable doubt without any proper legal justification. In this sense, it is theorised that decolonizing Kenya's electoral jurisprudence favours a balance of probability standard.

The third segment contends that recent comparative jurisprudence favour treatment of election disputes as civil in nature thereby justifying the use of a standard of a balance of convenience. Higher standards of proof risk entrenching authoritarianism by shielding electoral irregularities. In sum, the article calls for a review by the Court to depart from its position on the standard of proof in presidential election disputes because anything less risks portraying the court as an agent of authoritarianism when they frustrate democratic accountability through an opaque standard of proof that is not supported within Kenya's Constitutional architecture. By restoring the threshold to a balance of convenience, the Court will restore coherence, predictability and strengthen democracy. In any case, judicial legitimacy requires reasoned justification, otherwise decisions may appear arbitrary and capricious.

2.0 Ballots, not bayonets: Reclaiming election petitions as civil justice

The Constitution of Kenya, 2010 recognizes the aspirations of Kenyans to be governed, *inter alia*, by the rule of law. The Constitution entrusts the judiciary with the task of keeping every organ of the state within the limits of the law and thereby making the rule of law meaningful and effective.[13] In this

[13]Article 2(1) of the Constitution cements for the supremacy of the Constitution. Further Article 159(1) is to the effect that judicial authority which is derived from the people is vested in, and shall be exercised by, the courts and tribunals established by or under this Constitution. The net effect is that it the greatest role and responsibility of the courts to ensure the observance of the rule of law within the Kenyan republic. This enormous role is without exception and includes nullification of the presidential election, if need be.

sense, and insofar as disputes relating to the Presidential election are concerned, the Kenyan Supreme Court bears an enormous responsibility. Similarly, Article 38 (2) of the Constitution guarantees the right to free, fair and regular elections. While elections in Kenya have been held with regular certainty, whether they have been ever free and fair is debatable if our political history is anything to go by.

Ballots are the lifeblood of democracy and bayonets are its antithesis. When citizens cast their votes, they entrust the judiciary with the solemn duty of safeguarding that choice through fair adjudication as demanded under Article 140 of the Constitution. Yet by imposing an intermediate standard of proof, the Supreme Court of Kenya has by and large transformed election petitions into battles fought with evidentiary bayonets rather than civil reasoning. Presidential election disputes are not criminal prosecutions nor should they be treated as extraordinary contests beyond the reach of ordinary justice. They are civil matters, rooted in rights and obligations and should be judged on the balance of probabilities. To insist otherwise is to blur the line between democracy and authoritarianism, and to deny petitioners the justice that ballots, not bayonets, demand.

2.1 Supreme Court and intermediate standard

A challenge on the validity of presidential election though clothed in constitutional regalia remains a civil dispute which should not warrant a higher threshold because it is litigation much in the nature of civil proceedings and that the standard of proof should be the same as in civil causes. In *Raila Odinga & 5 others v Independent Electoral and Boundaries Commission & 3 others [2013] KESC 6 (KLR)*[14] *(Raila Odinga I)*, the Supreme Court held that:

> *"The threshold of proof should, in principle, be above the balance of probability, though not as high as beyond-reasonable-doubt – save that this would not affect the normal standards where criminal charges linked to an election, are in question."*[15]

A similar trend is to be found in the 2017 judgment, a first of a kind judgment which nullified the presidential election in Kenya's history. In *Odinga & another v Independent Electoral and Boundaries Commission & 2 others; Aukot & another (Interested Parties); Attorney General & another (Amicus Curiae) (Presidential Election Petition 1 of 2017) [2017] KESC 42 (KLR) (Odinga II case)*, the Court was emphatic that:

> *"In many other jurisdictions, including ours, where no allegations of a criminal or quasi-criminal nature are made in an election petition, an intermediate standard of proof, one beyond the ordinary civil litigation standard of proof on a balance of probabilities, but below the criminal standard of beyond reasonable doubt, is applied. In such cases, this court stated in the 2013 Raila Odinga case that [t]he threshold of proof should, in principle, be above the balance of probability, though not as high as beyond-reasonable-doubt.*
>
> *This is the standard of proof that has been applied in literally all election petitions in this country. For instance, in the case of* ***M'nkiria Petkay Shen Miriti v Ragwa Samuel Mbae & 2 others Civil Appeal 47 of 2013; [2014] eKLR****, the Court of*

[14]Odinga & 5 others v Independent Electoral and Boundaries Commission & 3 others (Petition 5, 3 & 4 of 2013 (Consolidated)) [2013] KESC 6 (KLR).
[15]Ibid

Appeal observed that [f]rom the practice and history of this country, the standard of proof required in Election Petitions is higher than a balance of probabilities but not beyond reasonable doubt save where offences of a criminal nature are in question." Paras 148 and 149.

Notably, the court failed to appreciate that it is that painful political history that Kenyans wanted to depart from in the post-2010 dispensation. This history is captured elsewhere by the court when it remarked thus:

"To understand the past is to prepare for the future because lessons from human history are full of insights into the nature of human experience and the culture of man. History does not have to repeat itself, but it will, if we fail to learn from it." [16]

It is that history that has always made it impossible to overturn presidential election results through judicial means. Fundamentally though, the court did not appreciate that, in presidential election petitions, the court sits as a civil court and not a criminal court nor a quasi-criminal court. The focus whilst determining election disputes should be whether it is more probable than not that a right enshrined under the Constitution or election law has been breached. If the answer is to the affirmative, then such an election must be nullified because what our Constitution envisages is how-process as opposed to the end- one ascends the presidency. It is the 'how' that matters to the Constitution. That 'how' must be in accordance with the articles 3(2), 10 and 140 of the Constitution.

Even more troubling is the fact that the Supreme Court, while acknowledging that election petitions are civil, nevertheless goes ahead to baptize it anew. The court remarks that:

"We recognize that some have criticized this higher standard of proof as unreasonable, however, as we have stated, electoral disputes are not ordinary civil proceedings hence reference to them as sui generis."

The court coined a new word for election disputes-not ordinary civil proceedings. But is it not true that all cases, both civil and criminal, require cogent evidence on record? In any event, while the court states that the use of a higher standard of proof is justified, it holds that *"it must be ascertainable, based on the evidence on record, that the allegations made are more probable to have occurred than not."* This phrase is essentially a restatement of the balance of probabilities standard which the court has been dismissive of.

This is a classic example where the court blows hot and cold in equal measure. It is what the renowned Kenyan scholar and jurist Joshua Malidzo Nyawa would describe as a lack of judicial humility to acknowledge a misstep and depart from it.[17] According to Malidzo, the Supreme Court has engaged in what he considers to be under the table overruling of precedents or departure *sub silentio*.[18]

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[16]See the opening remark of the Supreme Court of Kenya in *Sonko v County Assembly of Nairobi City & 11 others (Petition 11 (E008) of 2022) [2022] KESC 76 (KLR)*. The Court went ahead to use the biblical story of Solomon in the following terms: *"The story of Solomon is another such powerful story that demonstrates that even the wisest among us can lose their way as leaders; that leadership should never be about the quest for wealth, unbridled fame and power. From these and many other examples in history, it should be obvious that there exists a relationship between leadership, accountability, and integrity." Para 3*

[17]Malidzo Nyawa, J. (2024). Judicial humility and Kenya's Supreme court 'under the table' overruling of precedents. Judicial Humility and Kenya's Supreme Court 'under the Table' Overruling of Precedents.

[18]Ibid

The 2022 presidential petition dealt a further blow to the viability of the balance-of-probabilities standard in Kenyan presidential election disputes. In *Odinga & 16 others v Ruto & 10 others*[19], the Court affirmed that there was no basis to depart from its earlier approach and reiterated that Kenyan election petitions operate with two standards: proof beyond reasonable doubt for criminal or quasi-criminal allegations, and an intermediate standard for all other claims. The Court held thus:

> *"As to the standard of proof, the court's position rests with its decisions in Raila 2013 , Raila 2017 and the Harun Mwau in which it adopted the intermediate standard striking a middle ground between the threshold of proof on a balance of probability in civil cases and beyond reasonable doubt in criminal trials, save for two instances; where allegations of criminal or quasi-criminal nature are made; and where there is data-specific electoral pre-condition and requirement for an outright win in the presidential election, such as those specified in article 138(4) of the Constitution."*[20]

The court then went on to conclude that there are only two categories of proof in relation to election-related Petitions in Kenya, the application of the criminal standard of proof of beyond reasonable doubt, as explained and the intermediate standard of proof.

2.2 Case for electoral justice

Judicial adjudication is considered critical in ensuring electoral justice.[21] An electoral justice system aims to prevent and identify irregularities in elections and to provide the avenues to correct those irregularities.[22] It is at the cornerstone of democracy in that it safeguards both the fundamental role in the continual process of democratisation and catalyses the transition from the use of violence as a means for resolving political conflicts to the use of lawful means to arrive at a fair solution.[23] Tied to electoral justice is article 140 of the Constitution, which brings the validity of the presidential election within the remit of the Supreme Court.[24]

By the same token, a challenge to a presidential election is a direct enforcement of Article 3(2) of the Constitution, which abhors the establishment of a government in contravention of the Constitution. At the very beginning, Kenyans aspired for a government based on, among other things, the rule of law. Simply put, a government headed by the president cannot guarantee these very fundamental ideals if its formation offends the dictates of the Constitution in the first place.

Given the constitutional underpinning and the need for electoral justice, the court acts as a strangler of democracy and the rule of law when lays down a new rule of law. There is only one rule of law, namely that the occurrence of the fact in issue must

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[19]*Odinga & 16 others v Ruto & 10 others; Law Society of Kenya & 4 others* (Amicus Curiae) (Presidential Election Petition E005, E001, E002, E003, E004, E007 & E008 of 2022 (Consolidated)) [2022] KESC 56 (KLR)

[20]Ibid

[21]Fall, I.M., Hounkpe, M., Jinadu, A.L. & Kambale, P. (2011) Election Management Bodies in West Africa: A Comparative Study of the Contribution of Electoral Commissions to the Strengthening of Democracy, Dakar, Senegal: Open Society Foundations.

[22]International Institute for Democracy and Electoral Assistance, 2010a, *Electoral Justice: The International IDEA Handbook* (2014) http://www.idea.int/publications/electoral_justice/upload/ inlay-Electoral-Justice.pdf accessed 20 June 2014

[23]Ibid

[24]By this, the Court ensures that the rules governing the conduct of elections and the conduct of the elections itself are in consonance with the higher norms and principles of the constitution.

be proved to have been more probable than not. At the House of Lords tacitly put it, common sense, not law, requires that in deciding this question, regard should be had, to whatever extent appropriate, to inherent probabilities.[25] The House of Lords in this case used the following analogy, which I fully associate with, that if a child alleges sexual abuse by a parent, it is common sense to start with the assumption that most parents do not abuse their children. But this assumption may be swiftly dispelled by other compelling evidence of the relationship between parent and child or parent and other children.

It would be absurd to suggest that the tribunal must in all cases assume that serious conduct is unlikely to have occurred (as is the case with the Supreme in elevating the standard of proof to a very high level). In many cases, the evidence will show that it was all too likely. If, for example, it is clear that the would be referee in the presidential elections (in this case the Independent Electoral and Boundaries Commission (IEBC)) had breached one or more provisions of the Constitution and the election laws, it would make no sense to start the court's reasoning by saying that a breach of the Constitution is a serious matter and therefore the IEBC is unlikely to have done so. The question for the court is simply whether it is more probable that the IEBC is the perpetrator given the evidence presented by a party before it.

Because our history is replete with elections that are manipulated but remain competitive enough that they perform legitimating, co-opting or informative.[26] Under these conditions, then, elections can help protect the government's incumbency, the broader interests of elites, and the authoritarian regime's durability.[27] Therefore, the Supreme Court's intervention in these circumstances is crucial to not only restore the balance of powers that be but to also guarantee strict adherence to the constitutional dictates of a free, fair and regular elections.

2.3. Reclaiming Judicial Legitimacy

What commends itself from the analysis of three presidential election petitions by the Supreme Court is that the Court has strayed from its proper role by inventing a non-existent evidentiary threshold hence justifying the need to return to the balance of probabilities threshold, which should not have been departed from to begin with. In this manner coherence, fairness, and accessibility in electoral justice with be achieved. In any event, judicial legitimacy may only be achieved through application of standards consistently across similar disputes of civil nature.

By treating presidential petitions differently from other civil disputes, the Court created a doctrinal inconsistency that weakens predictability. It is time for the court to reclaim constitutional legitimacy by harmonizing presidential petitions with the broader civil justice framework. In any event, by pegging the nullification of the election only cases of major breach of electoral law are inimical to the constitutional demand for accountability, openness and transparency required of independent institutions, such as the IEBC.

3.0 Culture of Justification embedded in the Constitution

Inherent within our Constitution is the culture of justification: the duty to give

[25] *In re B (Children)* (FC) [2008] UKHL 35.
[26] Boix C and Svolik M (2007) Non-tyrannical autocracies. Unpublished paper.
[27] William Case, 'Electoral authoritarianism and backlash: Hardening Malaysia, oscillating Thailand'. *International Political Science Review*, (2011) 32(4) 438-457.

reasons. This constitutional imperative borrows from Kenya's sad political history which was characterized by caprice and arbitrariness which embodied no accountability from both occupiers of public institutions as well as the institutions themselves. It is this unfortunate history that necessitated the agitation for a change culminating into the Constitution, 2010. At the preamble, the aspirations of all Kenyans for a government based on essential values of human rights, equality, freedom, democracy, social justice and the rule of law is painstakingly clear. Article 10 of the Constitution embodies national values and principles which bind all persons, be it public officers, state officers and state organs- and the judiciary is no exception.

Therefore, to the extent that the Supreme Court acknowledged the controversy over standards of proof in presidential election petitions but failed to explain why balance of probabilities was rejected, it ran afoul the national values and principles of governance particularly integrity, transparency and accountability. It cannot be gainsaid that judicial legitimacy rests not only on outcomes but on the quality of reasoning leading to such outcomes. For context, the following paragraph is relevant for most part.

> *"The lesson to be drawn from the several authorities is, in our opinion, that this court should freely determine its standard of proof, on the basis of the principles of the Constitution, and of its concern to give fulfilment to the safeguarded electoral rights. As the public body responsible for elections, like other public agencies, is subject to the "national values and principles of governance" declared in the Constitution [article 10], judicial practice must not make it burdensome to enforce the principles of properly conducted elections which give fulfilment to the right of franchise. But at the same time, a petitioner should be under obligation to discharge the initial burden of proof, before the respondents are invited to bear the evidential burden.*
>
> *The threshold of proof should, in principle, be above the balance of probability, though not as high as beyond-reasonable-doubt – save that this would not affect the normal standards where criminal charges linked to an election, are in question. In the case of data-specific electoral requirements (such as those specified in article 138(4) of the Constitution, for an outright win in the Presidential election), the party bearing the legal burden of proof must discharge it beyond any reasonable doubt."*[28] *Para 203*

The conclusion from the above excerpt suggests that the Court recognized the unsettled nature of the standard of proof in presidential election petitions in the world drawing from comparative jurisprudence. Even so, the court fell short of justifying why it settled on the intermediate standard of proof thereby undermining the confidence of the court as decisions appear arbitrary rather than principled. The effect of this is that it undermines access to justice and fairness guaranteed under the Constitution.

Courts of law must always apply standards consistently across similar disputes and by treating presidential petitions differently from other civil disputes, the Court created a doctrinal inconsistency that weakens predictability.

[28] Ibid (n 6)

4.0 Legitimacy through Comparative Alignment

In this segment, it is posited that Kenya diverged from global practice, thereby isolating its jurisprudence. Comparative jurisprudence (Canada, Zambia, Nigeria and Canada) shows that balance of probabilities is the accepted civil standard even in presidential election petitions. This deviation without justification isolates the Supreme Court's jurisprudence and raises questions about whether the Court is shielding incumbents rather than safeguarding democracy.

4.1. Standard of proof in Opitz v Wrzesnewskyj[29], Jugnauth v Ringadoo[30] and in re B (Children)[31] cases

In *Opitz (supra)*, the successful candidate's election in the electoral district of Etobicoke Centre for the 41st Canadian federal election, with a plurality of 26 votes was challenged by the runner-up, who applied to have the election annulled, on the basis that there were irregularities that affected the result of the election under section 524(1)(b) of the Canada Elections Act. The Ontario Superior Court of Justice granted the application, finding that 79 votes amounted to such irregularities and that, since this number exceeded the plurality of 26 votes, the election could not stand. Opitz appealed to the Supreme Court of Canada as of right.

The Supreme Court of Canada (McLachlin C.J. and LeBel and Fish JJ. dissenting) allowed the appeal and dismissed the cross-appeal. In this case, the court restated the applicable standard of proof thus:

"The applicable standard of proof is the civil standard, namely, proof on a balance of probabilities [...] Central to the issue before us is how willing a court should be to reject a vote because of statutory non-compliance. Although there are safeguards in place to prevent abuse, the Act accepts some uncertainty in the conduct of elections, since in theory, more onerous and accurate methods of identification and record-keeping could be adopted. The balance struck by the Act reflects the fact that our electoral system must balance several interrelated and sometimes conflicting values. Those values include certainty, accuracy, fairness, accessibility, voter anonymity, promptness, finality, legitimacy, efficiency and cost. But the central value is the Charter-protected right to vote."[32]

The same standard of proof was used in *Jugnauth (supra)* by the Judicial Committee of the Privy Council whilst affirming the decision of the Supreme Court of Mauritius, which nullified the election of the appellant, a Member of Parliament and Minister of the Government. The following passage occurs in the judgment of the Privy Council:

> *"If that is right and the legislature was adopting the civil, as opposed to the criminal, standard of proof, then, even though what is in issue is whether or not the election should be avoided on the ground of bribery, there is no question of the court applying anything other than the standard of proof on the balance of probabilities. In particular, there is no question of the court applying any kind of intermediate standard."* [33]

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[29] *Opitz v Wrzesnewskyj* 2012 SCC 55-2012-10-256.
[30] *Jugnauth v Ringadoo and others* [2008] UKPC 50.
[31] *In re B (Children) (FC)* [2008] UKHL 35.
[32] Ibid, para 44.
[33] Ibid (n 30) 17

Perhaps the strongest argument in favour of the contention that an intermediate standard is nevertheless the appropriate standard, is that the court should be slow to set aside the result of a democratic election and should do so only where the bribery etc is established to this high standard. But a powerful argument the other way can also be advanced that if the court is indeed satisfied on the evidence that the result of the election was tainted by bribery etc, then it should intervene and set aside the election in order to ensure that a fresh election can be held in which the result truly reflects the wishes of the electors.

Because an election petition is unquestionably a civil proceeding, it is imperative that the Supreme Court's jurisprudence is realigned with comparative practice to restore credibility and situate Kenya within a global constitutional tradition. This is particularly important and in the words of the Supreme Court of Kenya in *Gatirau Peter Munya v. Dickson Mwenda Kithinji & 2 Others*[34] wherein the Chief Justice stated thus:

> *"References to Black's Law Dictionary will not, therefore, always be enough, and references to foreign cases will have to take into account these peculiar Kenyan needs and contexts."*[35] *Para 232*

From the foregoing, it is no surprise that the burgeoning literature on democratic backsliding in Africa and elsewhere suggest that the politicization of courts is one the main tools of contemporary de-democratization[36] which is a sharp contrast from democratic erosion through the complete dismantling of democratic institutions, often through direct military intervention.[37] According to Nicholas Kerr and Michael Wahman, democratic institutions are rarely dismantled in the contemporary state. Instead, it is the courts that have become the greatest threat to democratic ideals embedded in African Constitutions. Consequently, the courts handle the uncertainty of elections and maintain the democratic façade of the state.[38] Possibly even more troubling, hybrid regimes in Africa and elsewhere have been known to use courts to entrench presidential powers and undercut the opposition.[39]

On the strength of a never again moment and the need to hold public institutions accountable, revisiting the standard of proof to one pegged on the balance of probabilities which, in any case, should be the proper test would do justice to Kenya's electoral justice that has seemed elusive thus far. We must hold to account our constitutional bodies, such as the Independent Electoral and Boundaries Commission (IEBC). There is no plausible explanation why the IEBC cannot conduct free, fair, and regular elections as commanded by the Constitution. Borrowing from the reflections of Kenya's distinguished constitutional lawyer, Professor Yash Pal Ghai, the Kenyan Constitution sets, through the judiciary, its barricades against the

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[34]*Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others* [2014] eKLR.

[35]Ibid.

[36]Nicholas Kerr and Michael Wahman, "Electoral Rulings and Public Trust in African Courts and Elections" *Comparative Politics*, (2021) 53 (2), 257-281.

[37]Ibid.

[38]See generally, Steven Levitsky and Daniel Ziblatt, How Democracies Die (London: Penguin Books, 2018); Lise Rakner, "Democratic Rollback in Africa," in Nicholas Cheeseman, ed., *Oxford Encyclopedia of African Politics* (Oxford: Oxford University Press, 2019), 1–15; Anna L¨uhrmann and Staffan I. Lindberg, "A Third Wave of Autocratization is here: What is New About It?," *Democratization*, 7 (2019), 1095–113.

[39]Fiona Shen-Bayh, "Strategies of Repression: Judicial and Extrajudicial Methods of Autocratic Survival," *World Politics*, 70 (July 2018), 321–57

destruction of its values and weakening of its institutions by forces external to itself.[40] Such responsibility, in my view, cannot deny Kenyans electoral justice by setting the threshold for annulling the presidential election so high in the name of an intermediate standard.

5. Conclusions. What next?

In its judgment, the Supreme Court of Canada underscores that:

> *"An applicant who seeks to annul an election bears the legal burden of proof throughout. The word "established" places the burden squarely on the applicant. The applicable standard of proof is the civil standard, namely, proof on a balance of probabilities."*[41]

Ballots, not bayonets remind us that democracy is defended through civil justice, not judicial inventions that raise the evidentiary bar beyond reach. The silence of reason or justification exposes how the Supreme Court has failed to justify its departure from the balance of probabilities, leaving its authority vulnerable to charges of arbitrariness and caprice.[42] By the same

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[40]Kenya's distinguished constitutional lawyer, Professor Yash Pal Ghai in one of his unpublished reflections has stated that: "Perhaps realizing its own ambitious project, and hence its vulnerability and fragility, the Kenyan Constitution sets, through the judiciary, its barricades against the destruction of its values and weakening of its institutions by forces external to itself. Such is the responsibility of Kenya's judiciary.

[41]Ibid (n 14), paras 52 & 53. See also *Cusimano*, at para. 74; *Abrahamson v. Baker and Smishek* (1964), 1964 CanLII 380 (SK CA), 48 D.L.R. (2d) 725 (Sask. C.A.) and Camsell, at p. 199.

[42]The Supreme Court in Raila Odinga I acknowledged that the practice varies from one jurisdiction to another. That in some countries such as Mauritius, it is held that election petitions are litigation much in the nature of civil proceedings – and that the standard of proof should be the same as in civil causes (*Jugnauth v Ringadoo and others* [2008] UKPC 50. In certain jurisdictions, a higher standard of proof has been required, depending on the specific element in the cause being proved (*Shri Kirpal Singh v Shri VV Giri* (1970) INSC 191: AIR 1970 SC 2097; 1971(2) SCR 197; 1970(2) SCC 56, while other jurisdictions have adopted a standard of proof that goes beyond the balance of probability but falls slightly below proof-beyond-reasonable-doubt (Zambia in *Lewanika and others v Chiluba* (1999) 1LRC 138). Despite three standards of proof available, the Court fell short of giving reasons why it settled on the intermediate standard (standard of proof that goes beyond the balance of probability but falls slightly below proof-beyond-reasonable-doubt) and not the other two. The Court observed: *"The lesson to be drawn from the several authorities is, in our opinion, that this court should freely determine its standard of proof, on the basis of the principles of the Constitution, and of its concern to give fulfilment to the safeguarded electoral rights… The threshold of proof should, in principle, be above the balance of probability, though not as high as beyond-reasonable-doubt – save that this would not affect the normal standards where criminal charges linked to an election, are in question."*

Joshua Malidzo Nyawa

token, continental drift warns that Kenya's jurisprudence has strayed from comparative traditions that treat election petitions as civil matters, isolating the country from global constitutional practice.

Taken together, these legitimate concerns converge on a single truth, the intermediate standard is an alien judicial creature, complicit in entrenching electoral authoritarianism. To reclaim legitimacy, the Supreme Court must return to the civil threshold of balance of probabilities, ensuring that even minor constitutional infractions are not dismissed as trivial but recognized as cracks that erode democracy. In doing so, the Court will fulfill its solemn role as guardian of the Constitution so that the fruits of free and fair elections may insure to all within Kenya's borders.

While the idea of aligning the Supreme Court's standard of proof in presidential elections may not be well received in some quarters within the polity, it is supported by the aversive constitutionalism and the use of history as a tool of constitutional interpretation.[43] The court echoed the enormous responsibility bestowed upon it to provide authoritative and impartial interpretation of the Constitution.[44] and to develop rich jurisprudence that respects Kenya's history and traditions and facilitates its social, economic and political growth.[45] Indeed, history is a great revealer of intent of passing laws and events inspire laws and public processes. It is equally true that at the heart of these laws and processes are shortcomings to be remedied, crises to be averted.[46] As Joshua Malidzo Nyawa authoritatively sums it, this expression acknowledges that Kenyans were reacting to a dark past, and every interpretation must recognise the 'never again' moment.[47] If the court were to remain true to this historical context, then it behoves the court to exercise judicial humility to review and depart from the intermediate standard of proof in presidential election petitions in Kenya. The court need not do this *sub silento*.[48] A judicial missile to the torrens system: Rethinking

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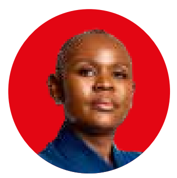
[43]*In the Matter of the Kenya National Human Rights Commission, Sup. Ct. Advisory Opinion Reference* No. 1 of 2012; [2014] eKLR.
[44]Supreme Court Act, s 3(b)
[45]Ibid, 3(c)
[46]Joshua M. Nyawa, 'From Aversive to Amnesiac Constitutionalism: How the Police Recruitment Decision Reopens the Doors We Closed in 2010: Part 2.' Available at: https://joshuamalidzonyawa.wordpress.com/2025/11/01/from-aversive-to-amnesiac-constitutionalism-how-the-police-recruitment-decision-reopens-the-doors-we-closed-in-2010-part-2/. (Last Accessed 7 May 2026).
[47]Ibid
[48]See Joshua M. Nyawa, Judicial humility and Kenya's Supreme court 'under the table' overruling of precedents. (2024) The Platform, 'BUDGETING FOR THE BANDIT'S ECONOMY' 101 (2024): Available at https://www.theplatformke.co.ke/issues/.

Jurisdiction, review and restraint: Re-Examining the High Court's supervisory jurisdiction in Kenya



By Caroline Achieng Oduor

Abstract

While the High Court is vested with unlimited original jurisdiction in criminal and civil matters, one of its roles includes supervisory jurisdiction over all other subordinate courts and any other persons, body or authority exercising a judicial or quasi-judicial function. This article examines the High Court's application of the supervisory mandate, analyzing the inherent tension between the just need for judicial intervention and the doctrine of restraint. By exploring the High Court's historical reluctance to interfere with subordinate courts and specialized administrative bodies, this paper argues for a balanced approach that respects the appellate & review process as well as the set procedure for enforcing the right to fair administrative action without collapsing the distinction between a review of process and a merits-based appeal. Further, the article provides a comparative analysis between the constitutional oversight of Article 165(6) and Review under Order 45 of the Civil Procedure Rules. It concludes that while the High Court must remain a reluctant supervisor to preserve the autonomy of subordinate courts, its intervention remains a non-negotiable safeguard for the rule of law. High court's supervisory jurisdiction provides a critical stop gap measure that provides a platform to avert civil rights leaders and philosophers compelling argument that individuals have a moral duty to deliberately defy unjust orders.

Keywords: Supervisory jurisdiction, revisionary jurisdiction, review, appeal.

Introduction

The High Court of Kenya, as established under Article 165,[2] serves a multifaceted jurisdictional function. Beyond its role as a court of unlimited original jurisdiction in both criminal and civil matters, the Court is uniquely positioned as the 'constitutional sentinel' of the legal system through its supervisory mandate. This power, codified under Article 165(6), provides that the High Court holds supervisory jurisdiction over all subordinate courts and any other person, body, or authority exercising a judicial or quasi-judicial function.

Courts have held that this power is used sparingly only when the lower court or tribunal has exceeded its jurisdiction or proceeded under erroneous presumption of

[2]Constitution of Kenya 2010, Laws of Kenya.

jurisdiction and that the High Court under the guise of Article 165 (6) cannot assume unlimited prerogative to correct all species of hardship or wrong decisions. For it to interfere, there must be a case of fragrant abuse of fundamental principles of law or where the order has resulted in grave injustice.[3]

This constitutional supervisory jurisdiction confers on the High Court an extremely broad-based authority with which to call up proceedings of both civil and criminal matters from all subordinate courts, tribunals and authorities (except superior courts) without limitation of timeframe or nature of the case.[4]

However, the exercise of this power, although entrenched in the Constitution, is characterized by notable judicial reluctance. This hesitancy arises from the Court's need to balance its oversight role and the fundamental distinction between a supervisory review and a merits-based appeal.

Structurally, this paper will identify the general overview and application of supervisory jurisdiction, the reluctance of courts to apply this power and the procedural corrective of Review under Order 45 of the Civil Procedure Rules, which serves a distinct, self-corrective function within the same court.

The general overview application

The hallmark of supervisory jurisdiction is that it is essentially a power of superintendence. Its primary purpose is to keep subordinate courts within the bounds of their authority and ensure they act according to established legal principles and procedures.

To invoke supervisory jurisdiction, the court can do so on its own motion or on being moved by any person including parties to the suit. In the case of ***Republic v Chief Magistrate, Mombasa & 3 others; Sega Ventures Limited & another (Interested Parties)***,[5] Justice Sila was of the opinion that the court ought to be slow to invoke its supervisory jurisdiction under Article 165 (6) of the Constitution where there are other specifically provided mechanisms for redress.

In such an instance, the court ought to decline the invitation to invoke its supervisory jurisdiction and instead guide the parties to move the court within the provided mechanisms. As earlier stated, it is a jurisdiction that ought to be sparingly invoked and this will not be the case if the court utilizes it for every infraction, even where there are provided mechanisms for redress.[6]

Judicial restraint in the application of supervisory powers

Kenyan courts have increasingly recognized that supervisory jurisdiction must be exercised with caution and restraint. In the case of ***Republic v Chief Magistrate, Mombasa & 3 others***, Court held that supervisory jurisdiction is one that should be used sparingly and it ought to be invoked where the court identifies serious misdirection or error by the subordinate

[3]This was seen in the case of Republic versus Magistrates Court, Mombasa; Absin Synegy Limited (interested party), Judicial Review E033 of 2021 (2022) KEHC 10 (KLR), Mativo J.
[4]See the case of DPP vs Perry Mansukh Kansagara & 8 Others, High Court at Naivasha, Criminal Revision No. 4 of 2020, (2020) eKLR (ruling of Mwongo J of 9 April 2020).
[5]Kirima (Ex parte) (Judicial Review Application 1 of 2022) [2023] KEELC 180 (KLR) (24 January 2023) (Judgment).
[6]See para 57.

court which leads to a gross injustice for which the superior court must intervene so that justice is done. The court further went on state that the it ought to be slow to invoke its supervisory jurisdiction under Article 165 (6) of the Constitution where there are other specifically provided mechanisms for redress and decline invitation to invoke its supervisory jurisdiction, and instead guide the parties to move the court within the provided mechanisms.[7]

The classical formulation of this principle was articulated by Harries C.J. in ***Dalmia Jain Airways Ltd v Sukumar Mukherjee***,[8] where the Court observed that the power of superintendence is to be exercised most sparingly and only in appropriate cases for the purpose of keeping subordinate courts within the bounds of their authority and not for correcting mere errors.

The Supreme Court of India similarly observed in ***D.N. Banerji v P.R. Mukherjee***[9] that unless there exists a grave miscarriage of justice or flagrant violation of law warranting intervention, supervisory jurisdiction ought not to be invoked. The High Court has repeatedly warned against attempts to bypass statutory appeal procedures by framing ordinary disputes as constitutional questions stating that such practice undermines procedural order and risks overwhelming constitutional courts with matters better suited for appellate determination.[10]

One of the principal justifications for judicial reluctance in the exercise of supervisory jurisdiction lies in the distinction between supervision and appeal. Kenyan courts have increasingly resisted attempts by litigants to invoke Article 165(6) as an appellate mechanism merely because they are dissatisfied with the correctness of a decision, the interpretation of evidence or the outcome reached by a subordinate court or tribunal.

The supervisory jurisdiction of the High Court is not intended to provide litigants with a second opportunity to relitigate the merits of disputes already determined within lawful jurisdiction. Rather, the jurisdiction exists to ensure that inferior courts and tribunals remain within the legal bounds of their authority and observe the minimum standards of legality, rationality, procedural fairness and constitutional propriety. This distinction is central to understanding why courts exercise supervisory powers sparingly.

The distinction was further refined in ***Anisminic Ltd v Foreign Compensation Commission***.[11] a decision that profoundly clarified the threshold upon which supervisory jurisdiction may properly be invoked. The decision established that not every error warrants intervention, rather, the impugned conduct must transcend ordinary error and enter the realm of jurisdictional illegality or fundamental procedural injustice.

The highlighted principle aligns with Lord Sumner's earlier formulation in ***R v Nat Bell Liquors Ltd***,[12] where he emphasized that the supervisory jurisdiction of a superior

[7]See Republic v Chief Magistrate, Mombasa & 3 others; Sega Ventures Limited & another (Interested Parties); Kirima (Exparte) (Judicial Review Application 1 of 2022) [2023] KEELC 180 (KLR) (24 January 2023) (Judgment)
[8]AIR 1951 Cal. 193
[9]1953 SC 58.
[10]Ibid n 7
[11][1969] 2 AC 147
[12]1922 All ER 335 AT 351

court exists to ensure that inferior tribunals do not exceed their jurisdiction and that they observe the law in the exercise of their powers. Crucially, Lord Sumner cautioned that the superior court must itself refrain from interfering with matters properly falling within the inferior tribunal's lawful jurisdiction, lest the supervisory court exceed its own constitutional mandate.

The jurisprudence emerging under Article 165(6) therefore imposes a heightened burden upon Advocates to carefully distinguish between appealable error and jurisdictional illegality. It is no longer sufficient merely to demonstrate that a tribunal reached an incorrect conclusion. Rather, to establish that the impugned conduct falls outside the permissible boundaries of lawful adjudication itself.

In this respect, judicial reluctance of the application of supervisory jurisdiction serves an essential constitutional function. It preserves the autonomy and expertise of subordinate courts and specialized tribunals while ensuring that supervisory jurisdiction remains confined to its proper constitutional purpose: safeguarding legality, procedural justice, and the rule of law.

Supervisory jurisdiction versus revisionary jurisdiction

Perhaps the greatest source of procedural confusion lies in the mistaken assumption that revisional jurisdiction and supervisory jurisdiction are one and the same. The confusion is not entirely surprising. In practice, litigants frequently invoke revisionary powers while framing the dispute in constitutional supervisory language.

The Constitution of Kenya, 2010 has expressly vested the High Court with supervisory authority over subordinate courts and quasi-judicial bodies under Article 165(6) and (7). Alongside this constitutional authority exists the Court's revisionary jurisdiction under sections 362–367 of the Criminal Procedure Code, which empowers the High Court to review criminal proceedings from subordinate courts. Although these jurisdictions often intersect in practice, they differ significantly in origin, scope, and application.

The supervisory jurisdiction of the High Court emerges in the constitutional architecture as a distinct head of jurisdiction separate from both its ordinary original and appellate competences. Section 5 of the High Court (Organisation and Administration) Act[13] makes this explicit by requiring the Court to exercise the powers set out in Article 165(3) and (6), alongside any other original or appellate jurisdiction created by legislation thereby locating supervision within a wider but not undifferentiated jurisdictional framework. Read together, these provisions affirm that supervisory jurisdiction is not a mere procedural incident of appeal or revision but an autonomous constitutional power through which the High Court polices legality and procedural fairness within the judicial hierarchy.

Section 12(3) of the same Act and Rule 20 of the High Court (Organisation and Administration) (General) Rules[14] then operationalise this jurisdiction along territorial and administrative lines. They direct that appeals, bail applications and references from subordinate courts, tribunals and other bodies are to be

[13]High Court (Organisation and Administration) Act (No 27 of 2015) s 5.
[14]ibid; High Court (Organisation and Administration) (General) Rules 2016, r 20.

filed in the High Court station that bears supervisory responsibility for the designated region according to judicial administrative regions set out in the Schedule and any Practice Directions issued by the Chief Justice.[15] While this structure responds to concerns of docket management and institutional organisation, it risks entrenching a rigid geography of supervision that may complicate litigants' access to the High Court's supervisory remedies particularly where urgent intervention is required beyond administrative boundaries. Significantly, Rule 20(2) itself concedes this tension by affirming that, notwithstanding the administrative scheme, the Court's supervisory power over subordinate courts and other judicial or quasi-judicial bodies is not limited and that the High Court may call for records and issue directions to secure the fair administration of justice. The Rules thus shift between an administrative centralisation of supervisory work and a constitutional insistence on the flexibility of supervisory authority.

By contrast, revisionary jurisdiction is not grounded directly in Article 165 but is conferred by the Criminal Procedure Code in sections 362–367[16] and is directed to ordinary statutory criminal revision. Section 362 authorises the High Court to call for and examine the record of any criminal proceedings before a subordinate court in order to satisfy itself as to the correctness, legality or propriety of any finding, sentence or order, and the regularity of those proceedings. Section 364 in turn limits this jurisdiction by, among other things, precluding revision at the instance of a party where an appeal lay and was not pursued. The Code therefore contemplates a narrower statute-bound power of superintendence over criminal proceedings that is tightly constrained by appeal structures and legislative limits.

The distinction between supervision and revision has long been recognised in comparative jurisprudence. The Indian Supreme Court in ***Sriraja Lakshmi Dyeing Works v Pangaswamy Chettiar***[17] described revisional jurisdiction as a mechanism for keeping subordinate tribunals within the bounds of their authority thus ensuring fidelity to the law, procedure and established principles of justice. In its view, revisional power is generally limited within appellate jurisdiction, though the converse does not hold and the scope of either jurisdiction depends on the statutory language employed. Crucially, the Court linked the phrase "*to satisfy itself*" in the relevant provision (analogous to section 362 of the Kenyan Criminal Procedure Code) to a power of superintendence, signalling that revision is concerned with the legality and propriety of the challenged decision and not with a wholesale re-hearing on the merits. That account resonates with the Kenyan position insofar as it underscores the supervisory logic embedded in revision even as our Code imposes clear substantive and procedural limits.

Drawing a distinction between appellate, supervisory and revisionary jurisdiction, Prof Tan argues that supervisory jurisdiction extends to the whole range of administrative interests while revision is confined to subordinate courts.[18] He opines that supervision typically depends on party initiative while revision may be invoked on the court's own motion and that supervision

[15]ibid.
[16]Criminal Procedure Code (Cap 75) ss 362–367.
[17](1980) 4 SCC 259.
[18]Kok Keng Tan, 'Appellate, Supervisory and Revisionary Jurisdiction' in Walter Woon (ed), *The Singapore Legal System* (Longman 1989) 233.

addresses unlawfulness in a broad, mostly procedural, as opposed to errors of law and fact on the merits and that supervision is historically effected through prerogative remedies in contrast to the greater remedial flexibility characteristic of revision.[19] Taken together, these features confirm that supervision and revision, although related, serve different constitutional and procedural functions, and that conflating them obscures the High Court's role as a constitutional court of superintendence rather than merely a court of criminal correction.

The recent decision of the Supreme Court in ***Wade Cox & 2 Others v George Odhiambo Okello***[20] provides an important occasion to interrogate this relationship in the Kenyan context. The Court was invited to determine, first, whether the High Court had correctly exercised its supervisory jurisdiction under Article 165(6) and (7) and its revisionary powers under sections 362 and 364(1)(b) of the Criminal Procedure Code when it declined to overturn an acquittal entered under section 202 of the Code and second, whether sections 364(1)(b) and (4) are constitutionally inconsistent with Article 165 to the extent that they bar the High Court from reversing an acquittal when acting in supervision. In their application before the High Court, the appellants had expressly framed their challenge as invoking both the constitutional supervisory jurisdiction under Article 165(6) and (7) and the statutory revisional jurisdiction under section 362 thereby placing squarely before the courts the question whether the two heads of jurisdiction are conceptually and practically distinct.

In analysing this question, the Supreme Court drew significantly on the High Court's earlier reasoning in ***DPP v Perry Mansukh Kansagara & 8 Others***,[21] a criminal revision arising from acquittals under section 210 of the Code following the collapse of a manslaughter prosecution after a dam burst. In that case, the Director of Public Prosecutions had initially sought revision under sections 362–367 but later amended the application to invoke Article 165, in a bid to circumvent the statutory bar on revising acquittals. Mwongo J rejected the attempt to collapse the two regimes, insisting that revision under section 364 is distinct from supervisory jurisdiction under Article 165 and cautioning against the widespread assumption that the latter is merely operationalised through the former. On his account, constitutional supervision cannot simply be equated with or exhausted by the statutory revisionary framework.

The Court of Appeal broadly endorsed this stance, holding that the application before the High Court had in substance been grounded in section 364 and that the appellants' constitutional framing amounted to an attempt to evade the clear statutory limits on revising acquittals. By the time the matter reached the Supreme Court in ***Wade Cox***,[22] there was therefore already a judicial trajectory treating supervisory jurisdiction as conceptually separate from and potentially broader than revision while at the same time resisting efforts to use Article 165 as a backdoor appeal against acquittals.

The Supreme Court in the ***Wade Cox*** decision seized the opportunity to clarify the constitutional contours of Article 165

[19] ibid.
[20] [2021] eKLR.
[21] [2018] eKLR.
[22] [2021] eKLR.

in this respect particularly where litigants invoke it alongside section 364 of the Criminal Procedure Code.[23] It affirmed that the supervisory power of the High Court is broad and may be exercised through various procedural vehicles including appeal and revision, but emphasised that there is a clear distinction between supervision on appeal and supervision in revision proceedings. In endorsing earlier authority such as ***Republic v Samuel Gathuo Kamau***,[24] where the Court reiterated that supervisory jurisdiction, though exercised as may be provided by law, does not authorise the High Court to make decisions in place of subordinate courts but rather to review convictions, sentences, acquittals, findings, orders and procedural regularity through the channels prescribed by statute. The Court ultimately confirmed that, in the specific context of criminal revision, the supervisory power is constrained by section 364(1), including the prohibition on reversing orders of acquittal.

From a doctrinal standpoint, ***Wade Cox*** therefore performs a delicate balancing act. On the one hand, it recognises supervisory jurisdiction as a wide constitutional power that is not conceptually reducible to revision and that can, in principle, be invoked in diverse procedural settings. On the other hand, it insists that where Parliament has provided a specific statutory framework such as revision under sections 362–367, the High Court's exercise of supervisory power within that framework is subject to the legislature's express limitations, even where those limits curtail the Court's ability to revisit acquittals. The decision thus highlights the central tension running through Kenya's post-2010 jurisprudence on Article 165 on whether supervisory jurisdiction should be understood as an overriding constitutional guarantee of legality capable of displacing restrictive procedural codes or as a broad but ultimately channelled power whose exercise is mediated and sometimes narrowed, by ordinary legislation.

Therefore, it is clear that the supervisory jurisdiction of the High Court under Article 165(6) and (7) of the Constitution is a distinct constitutional mandate that exists independently from the Court's statutory revisionary jurisdiction under sections 362–367 of the Criminal Procedure Code. While both jurisdictions serve the broader objective of ensuring legality, procedural propriety and the fair administration of justice, they differ fundamentally in scope, source, and application. Supervisory jurisdiction derives directly from the Constitution and confers broad powers of oversight over subordinate courts and quasi-judicial bodies, whereas revisionary jurisdiction is a narrower statutory mechanism limited by the express provisions of the Criminal Procedure Code.

The jurisprudence discussed, particularly the decisions in ***DPP v Perry Mansukh Kansagara & 8 Others and Wade Cox & 2 Others v George Odhiambo Okello***, underscores the importance of maintaining a clear distinction between these two jurisdictions. The courts have emphasized that constitutional supervisory powers cannot be used to circumvent statutory limitations imposed on revision proceedings, especially regarding orders of acquittal. Consequently, although the High Court possesses extensive supervisory authority, the exercise of that authority in criminal revision matters remains constrained by

[23] ibid.
[24] [2016] eKLR.

section 364 of the Criminal Procedure Code.

Supervisory jurisdiction and courts of equal status

One of the most intellectually contested questions arising from Article 165 (6) (7) of the Constitution concerns whether courts of equal status to the High Court particularly the Environment and Land Court (ELC) and the Employment and Labour Relations Court (ELRC) possess supervisory jurisdiction over subordinate courts and tribunals falling within their specialized mandates.

The controversy intensified with the enactment of the **Environment and Land Court Act 2011**,[25] whose original section 13(5) purported to confer on the ELC a supervisory jurisdiction over subordinate courts, local tribunals and other authorities in accordance with Article 165(6) of the Constitution. By attempting, through ordinary legislation, to transplant a power that the Constitution expressly vests in the High Court to a court of equal status, this provision unsettled the carefully drawn constitutional allocation of supervisory authority and became a primary source of the doctrinal uncertainty that followed.

However, the **Statute Law (Miscellaneous Amendments) Act, 2012**[26] subsequently deleted section 13(5), thereby removing the express statutory basis for the ELC's supervisory powers. This legislative deletion triggered significant jurisprudential uncertainty.

The Court of Appeal in ***Chimweli Jangaa Mangale v Hamisi Mohamed Mwawasaa & 15 Others***[27] observed that the Constitution created a specific court, with equal status to the High Court and conferred on it the jurisdiction to hear and determine disputes relating to, among others, use, occupation, title to land and any other dispute relating to land.

In ***Joyce Mutindi Muthama & Another v Josephat Kyololo Wambua & 2 Others***,[28] the Court reasoned that if the ELC exercises appellate jurisdiction over subordinate courts and tribunals in land and environment matters, it necessarily follows that it possesses supervisory powers over those adjudicative bodies. Similarly, in ***National Social Security Fund v Sokomania Ltd & Another***,[29] the ELC held that declining supervisory intervention where justice demanded it would undermine the proper administration of justice and effectively disable the Court from controlling subordinate adjudicative bodies operating within its constitutionally assigned sphere.

Perhaps the strongest justification for extending supervisory powers to specialized courts lies in the avoidance of constitutional absurdity that if the ELC lacked supervisory jurisdiction over magistrates' courts exercising land jurisdiction, several irrational consequences would arise.

However, the recognition of supervisory powers within specialised courts does not diminish the doctrine of judicial restraint discussed earlier. Specialised courts have increasingly declined invitations to intervene where parties seek to reframe ordinary grievances, evidentiary disputes,

[25]Environment and Land Court Act (No 19 of 2011).
[26]Statute Law (Miscellaneous Amendments) Act 2012.
[27][2016] KECA 413 (KLR)
[28][2018] KEELC 3762 (KLR)
[29][2021] KEELC 1639 (KLR)

or dissatisfaction with outcomes as constitutional or supervisory questions.

There however remains no unanimity of judicial thought as to whether specialised superior courts possess supervisory jurisdiction over subordinate courts and tribunals within their respective mandates. The jurisprudence remains divided.

In ***Sabina Moraa Swanya v Everlyn Kemunto Ontiri & Another***,[30] the Court, while confronted with a similar question, held that the Environment and Land Court does not possess supervisory jurisdiction and that its role is confined to hearing appeals from subordinate courts. The decision adopted a stricter textual interpretation of Article 165(6), emphasizing that the Constitution expressly vests supervisory authority in the High Court and does not expressly extend the same to courts of equal status.

Also in ***Musembi v Mwetu; Mbunzi (Interested Party)***[31], the court held that the jurisdiction was once there but was removed and it does not abide in court by dint of its rank or status or simply because the High Court has it. In ***Lariak Properties Limited v Metro Pharmaceuticals Limited***[32], the Environment and Land Court charted a markedly different course, relying on a purposive and functional reading of the Constitution to claim supervisory jurisdiction notwithstanding the express allocation of that power to the High Court in Article 165(6). Treating its equal constitutional status in environment and land matters as a sufficient basis, the Court reasoned that it would be absurd to deny it supervisory powers and effectively imported the High Court's supervisory mandate mutatis mutandis into the ELC's subject-matter domain. This move, however, blurs the line between constitutional status and jurisdiction, assumes without textual support that equality of rank entails equality of powers, and, in substance comes close to judicially amending Article 165 by re-creating through interpretation the very form of supervisory authority that Parliament had first attempted to confer by statute and then withdrawn.

The divergence between these decisions illustrates the continuing constitutional tension between textualism and purposive interpretation in the development of Kenya's supervisory jurisdiction jurisprudence. The increasing emphasis on exhaustion of alternative remedies further illustrates this judicial reluctance. Courts have consistently held that where litigants possess adequate appellate, review, or statutory remedies, supervisory jurisdiction should not be invoked prematurely.

In this respect, the doctrine of exhaustion has become an important safeguard against misuse of constitutional supervision. This position has been reaffirmed in many cases and in ***National Social Security Fund v Sokomania Ltd & Chief Magistrate's Court Milimani***, where the Court held that supervisory powers ought not to be exercised where an alternative remedy exists and has not been pursued. The Court observed that the threshold for supervisory intervention had not been met because the applicant remained at liberty to utilize other available legal remedies. Consequently, in ***Wandoe v Nato***[33] the court stated that applicant had alternative remedies which

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[30](2021) eKLR

[31](Environment and Land Miscellaneous Case E014 of 2024) [2026] KEELC 1740 (KLR) (12 March 2026) (Ruling)

[32][2026] KEHC 2769 (KLR)

[33](Miscellaneous Application E353 of 2025) [2026] KEHC 1801 (KLR)

she was at liberty to utilize and in that case the threshold for the exercise of supervisory jurisdiction was not met.

These decisions therefore reflect a growing judicial insistence that supervisory jurisdiction must remain a remedy of last resort rather than one of procedural convenience. What remains for advocates is that the invocation of supervisory jurisdiction now demands not only demonstration of jurisdictional or procedural illegality, but also justification for departing from ordinary remedial mechanisms provided by statute or procedure.

Supervisory jurisdiction and review

An equally important, though often misunderstood distinction in Kenyan procedural jurisprudence is the relationship between supervisory jurisdiction under Article 165(6) of the Constitution and the statutory power of review under Order 45 of the Civil Procedure Rules.

In practice, litigants frequently invoke supervisory jurisdiction where the complaint properly falls within the narrower procedural framework of review. This conflation has contributed significantly to the judiciary's growing reluctance to exercise constitutional supervisory powers where adequate statutory remedies remain available.

Review under Order 45[34] is a creature of statute and procedure. It permits a court to revisit its own decision in limited and clearly defined circumstances. The jurisdiction is confined to situations involving discovery of new and important evidence which could not, with due diligence, have been produced earlier; error apparent on the face of the record; or other sufficient reason.

Unlike supervisory jurisdiction, review does not derive from the Constitution nor does it concern the legality of proceedings before inferior courts or tribunals. Rather, it is a limited procedural mechanism enabling a court to correct obvious errors or reconsider a decision in narrowly prescribed circumstances.

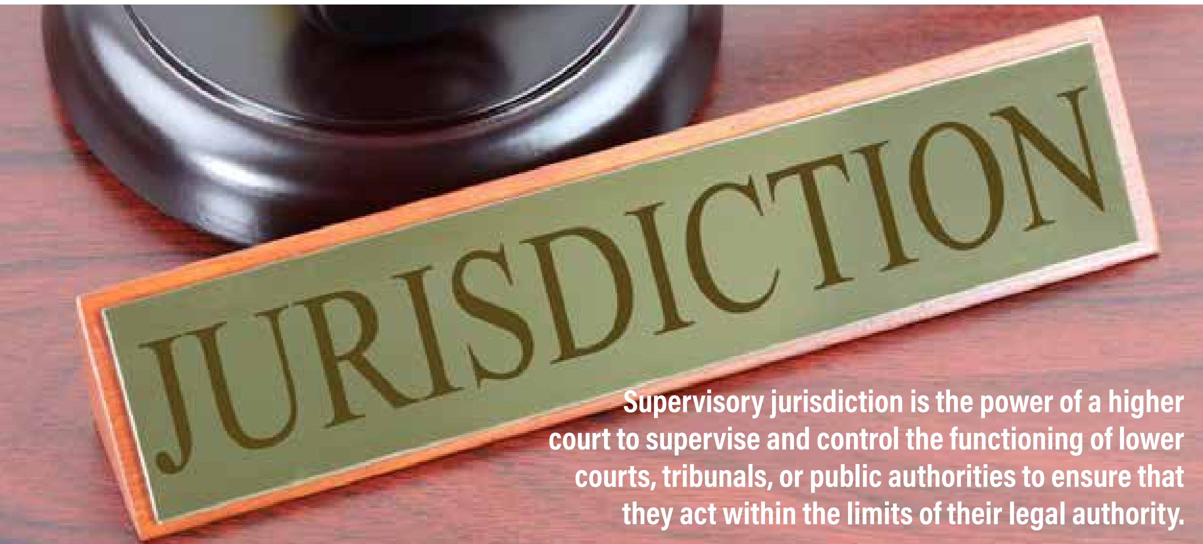
Review is a narrow procedural jurisdiction intended for correction of self-evident errors and limited reconsideration while supervisory jurisdiction by contrast remains an exceptional constitutional safeguard aimed at controlling jurisdictional illegality and preserving procedural justice. Therefore, the better approach is not to substitute review for supervisory jurisdiction but to carefully diagnose where the proper remedy lies.

Should parties then simply appeal instead of invoking supervisory jurisdiction?

The judicial reluctance surrounding supervisory jurisdiction appears to invite a straightforward answer. If courts are increasingly hesitant to exercise supervisory powers under Article 165(6), should litigants simply pursue appeals instead?

Perhaps the most important justification for judicial restraint is the need to preserve the conceptual distinction between supervisory jurisdiction and appeal. Appeals and supervisory jurisdiction serve two different purposes. An appeal fundamentally concerns the correctness of a decision and it is merit-oriented. Further, there is no automatic right of appeal in respect of decisions from certain orders.[35]

[34]Civil Procedure Rules 2010.
[35]Section 75(1) of the Civil Procedure Act.



Supervisory jurisdiction is the power of a higher court to supervise and control the functioning of lower courts, tribunals, or public authorities to ensure that they act within the limits of their legal authority.

Although the distinction is theoretically clear, it is frequently blurred in practice. Many litigants seek to challenge factual findings, evidentiary conclusions or statutory interpretation under the guise of supervisory review.

The advocate's task in this case ought to be diagnostic rather than strategic avoidance. Advocates must resist the temptation to treat appeals, review and supervisory jurisdiction as interchangeable procedural tools. The future of effective constitutional litigation lies not in procedural creativity alone but in accurately identifying the true nature of the legal defect in question.

Conclusion

In conclusion, the jurisprudence emerging from Article 165(6) and (7) of the Constitution reveals that supervisory jurisdiction remains one of the most important yet carefully guarded constitutional powers within Kenya's adjudicative framework. Although the Constitution vested the High Court with broad supervisory authority over subordinate courts and quasi-judicial bodies, the courts have consistently resisted transforming that mandate into an unrestricted appellate jurisdiction.

The judicial reluctance is therefore neither accidental nor merely procedural. It is a deliberate constitutional philosophy grounded upon institutional restraint, procedural hierarchy, finality in litigation, respect for specialized adjudicative bodies and preservation of the distinction between review and appellate jurisdiction.

The courts have emphasized that supervisory jurisdiction is exceptional, residual and legality-focused and that it is not intended to cure every erroneous decision, re-evaluate evidence or provide litigants with a constitutional fallback whenever appellate or review mechanisms become inconvenient, unavailable, or unsuccessful.

At the same time, the jurisprudence demonstrates that supervisory jurisdiction remains constitutionally indispensable. Appeal and review cannot replace supervisory intervention because certain defects transcend ordinary adjudicative error and strike at the legality of the exercise of power itself.

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A judicial missile to the torrens system: Rethinking indefeasibility of title and bona fide purchaser protection in Kenya

By Sarafin Cherono

Abstract

Land in Kenya is more than a property. It is connected to identity, heritage, livelihood and belonging. The Constitution of Kenya, 2010 is the supreme legal authority governing land relations. Article 40 guarantees the right to property as a fundamental human entitlement. However, the realization of this right is inextricably tied to the acquisition of a valid and legally recognized title through Kenya's land registration systems, which are designed to confer security of tenure, ensure transparency and uphold the doctrine of indefeasibility of title. This paper examines the doctrines of indefeasibility of title and bona fide purchaser protection within Kenya's Torrens and Deed Registration systems. It draws from a trilogy of judicial decisions; ***Dina Management Limited v County Government of Mombasa & Others, Torino Enterprises Limited v Attorney General and Harcharon Singh Sehmi & another v Tarabana Company Ltd & 5 Others***. The paper argues that although these doctrines were designed to promote certainty and protect property rights, their application has increasingly exposed innocent purchasers to fraud, historical land injustices and failures within land administration. Moreover, the paper argues that the prevailing legal interpretation and application of these doctrines shifts disproportionate burdens onto innocent purchasers, thereby eroding confidence in the Kenyan land tenure system. Ultimately, the paper advances a case for a more coherent, just and context-focused reconfiguration of Kenya's land law framework, one that harmonizes the protection of property rights with the imperatives of equity, historical justice and institutional integrity.

Keywords: Bona fide purchaser for value; Doctrine of indefeasibility of title; Torrens system; Deed Registration System; Land Law.

I. Introduction

"The poorest man may in his cottage bid defiance to all forces of the Crown. It may be frail - its roof may shake - the wind may blow through it - the storm may enter - the rain may enter - but the King of England cannot enter." - ***William Pitt, 1st Earl of Chatham.***

'Society and land are inseparable...therefore a land tenure system is not just an isolated aspect of the economy of a society but its basis.' - ***Mborio Mwashenga***.[1]

[1]Mborio Mwashenga, 'Land reform in Taita: A study of socio-economic underdevelopment in a Kenya District' (BA Dissertation, University of Nairobi) (1977). See also Celestine Musembi and 2 others, 'Kasighau: Will Constitutional Recognition of Community Land Rights Reverse a History of Extraction and Marginalization?' in Collins Odote and Patricia Kameri-Mbote (Eds), *Breaking the Mould: Lessons for Implementing Community Land Rights in Kenya*' (Strathmore University Press 2016) 27.

These two quotes capture the deep connection between land, property and human existence. Land in Kenya is not just a legal asset. As Justice Ouko opines, the attachment to land is passionate, emotional, and almost fanatical.[2] Nations, neighbours, siblings, spouses and even strangers fight over land.[3] In some instances, the disputes degenerate into bloodshed and death.[4] Land, no doubt, is not only the most important factor of production but also a very emotive issue in Kenya.[5] Land remains the most notable source of frequent conflicts between persons and communities.[6] It is tied to memory, belonging, cultural identity and history.[7] It is a source of livelihood and economic security. As a result of this, it is one of the most contested resources in the country, shaped by long-standing struggles over ownership.

It is for this reason that most constitutions guarantee the right to property. Nuisance and trespass laws give every property owner the right to use and enjoy his or her property reasonably, without unreasonable interference by others.[8] Not even the Government can interfere with that right and the Bill of Rights guarantees that protection.[9] Just as the sanctity of a person's property in the English common law was recognised in the famous dictum that **"an Englishman's home (or occasionally, house) is his castle and fortress",** the Constitution and land laws in Kenya protect, as fundamental, the right to acquire and own property of any description and in any part of Kenya.[10]

As H.W.O. Okoth-Ogendo opines, Kenya's land question cannot be understood outside the country's historical experience of colonial land dispossession and the enduring structures of state power that followed.[11] In that sense, land is not simply governed by the Constitution, Statutes and laws. Rather, it is shaped by history.

Building on that historical and socio-cultural foundation, Kenya's legal framework attempts to regulate land through constitutional and statutory rules. At the centre of this framework is the Constitution of Kenya, 2010, which guarantees the right to property.[12] Article 67(1) of the Constitution establishes the National Land commission. The role of this commission is to conduct oversight over public land, and to make inquiries into present and historical land injustices.[13] Moreover, the parliament has enacted several statutes, the Land Act and the Land Registration Act (LRA).[14] These statutes set out the rules governing ownership, transfer, administration and protection of land rights in Kenya.

Section 26 of the LRA provides that a certificate of title is to be held as conclusive evidence of proprietorship. It

[2]*Elizabeth Wambui Githinji & 29 Others v Kenya Urban Roads Authority* Civil Appeal No. 156 of 2013.
[3]ibid.
[4]ibid.
[5]*Gitamaiyu Trading Company Ltd v Nyakinyua Kiiambaa Co. Ltd & 11 Others* Civil Appeal No. 84 of 2013.
[6]ibid.
[7]B.D. Ogolla and J. Mugabe, 'Land Tenure Systems and Natural Resource Management' in JB Ojwang and C Juma (Eds), *In Land We Trust: Environment, Private Property and Constitutional Change* (Initiative Publishers, Nairoobi and Zed Books, London) (1996) 85-116, page 95.
[8]*Elizabeth Wambui Githinji & 29 Others v Kenya Urban Roads Authority* Civil Appeal No. 156 of 2013 (Judgement of Ouko J).
[9]ibid.
[10]ibid.
[11]HWO Okoth-Ogendo, *Tenants of the Crown: Evolution of agrarian law and institutions in Kenya* (African Centre for Technology Studies Press, Nairobi, 1991).
[12]Constitution of Kenya, 2010 art. 40.
[13]National Land Commission Act, 2012 (No. 5 of 2012).
[14]The Land Act, 2012 (No. 6 of 2012); Land Registration Act, (2012 No. 3 of 2012).

is *prima facie* evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to encumbrances, easements, restrictions and conditions contained or endorsed in the certificate.[15] The certificate of title is not subject to challenge, except on grounds of fraud or misrepresentation to which the proprietor is proved to be a party, or where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.[16] This position was upheld by the High Court in ***David Peterson Kiengo and 2 others v Kariuki Thuo***, where it was held that a *bona fide purchaser for value*, was not required to do anything more than a search at the official register to establish the ownership of land.[17] In light of the foregoing, the land acquisition system was meant, previously, to ensure that once someone acquires land legally and has title to it, their ownership over the land is secure.[18] At least, this was the position initially when the statutes, including the Land Registration Act, came into being.[19]

However, in practice, land registration has not always delivered that certainty.[20] This is evident in several Court of Appeal and Supreme Court decisions that have produced differing and at times conflicting interpretations on the security of title and the protection of *bona fide* and innocent purchasers. Courts have been engaged in the difficult task of balancing the rights of a *bona fide purchaser without notice* against the need to address persistent land grabbing and flawed registry transactions that have plagued Kenya's land administration system for decades.

On the one hand, the Court of Appeal in ***Charles Kiarie v Administrators of the Estate of John Wallace Mathare***, in rejecting the applicant's application for leave to appeal to the Supreme Court, found that even where it is shown that past registrations were obtained illegally, the title to the last *bona fide purchaser for value* was indefeasible under Section 23(1) of the Registration of Titles Act (1920), Cap. 281 (now repealed).[21] Similarly, in Tarabana Company Limited v Sehmi & 7 others (2021), the Court of Appeal determined the appellant to be a bona fide purchaser as the title to the property, however acquired illegally, was indefeasible and acquired before the appellant came into the picture.[22]

Similarly, in the case of ***Elizabeth Wambui Githinji & 29 Others v Kenya Urban Roads Authority***, the Court of Appeal, in a majority decision, found that the appellants were *bona fide purchasers for value* owing to their reliance on the accuracy of registry documentation.[23] The Appellants had discharged the burden of proof by conducting due diligence on the property, which revealed no encumbrances.

On the other hand, a contrasting line of authority has taken a stricter approach, prioritising the integrity of the root of title and the need to prevent fraud in the chain of title, even where this affects subsequent *bona fide purchasers for value*. The Court

[15] The Land Registration Act, 2012 (No. 3 of 2012), s. 26.
[16] ibid.
[17] [2012] para. 13.
[18] Hassan Asaria, 'Under RTA Title Can Never be Nullity *Ab Initio* & Interpretation of Constitution' Kenya Law (Kenya Law) https://kenyalaw.org/kl/index.php?id=1905 accessed 05 May 2026.
[19] The Land Registration Act, 2012 (No. 3 of 2012).
[20] McPhee P, 'Fraud and Indefeasibility of Title' (McPhee Kelshaw Solicitors, March 2016).
[21] *Charles Karathe Kiarie and others v Administrators of the Estate of John Wallace Mathare and others* [2013] KECA 12 (KLR).
[22] Civil Appeal 263 of 2019, Judgement of the Court of Appeal, 8 October 2021 [eKLR].
[23] Civil Appeal No. 156 of 2013.

of Appeal in ***Arthi Highway Developers Limited v West End Butchery Limited & 6 others (2015)***, held that the appellant was not a *bona fide purchaser*. It reasoned that the appellant's documents of share transfer were marred with forgeries and never bound the respondents in any way. These documents were subsequently used by fraudsters to sell the suit property to the appellant who then sub-divided it into different parcels. The Court held that no valid title passed to the appellant since it was irredeemably fake, noting that titles acquired by subsequent purchasers of the subdivisions were also null and void.

Similarly, the Court of Appeal in ***Funzi Development Ltd & Others v County Council of Kwale*** held that a registered proprietor acquires an absolute and indefeasible title if and only if the allocation was legal, proper and regular. A court of law cannot, on the basis of indefeasibility, sanction an illegality or give its seal of approval to an illegal or irregularly obtained title."

Prof. Odek, J.A, in his dissenting opinion, in ***Elizabeth Wambui Githinji & 29 Others v Kenya Urban Roads Authority***, argued that the sanctity of private title cannot override the state's interest in land that has been lawfully acquired for public purposes. He emphasized that it is entitlement to property that gives rise to title to property; it is not title that gives rise to entitlement. While citing Section 30 of the Registered Land Act (Repealed), he stated that compulsory acquisition is an "Overriding Interest."[25]

Therefore, this contrasting jurisprudence departs from the traditional assumptions of the Torrens System, particularly the principle of indefeasibility of title. It requires one to be a title archaeologist, excavating decades or even centuries of prior allocations and irregularities to ensure the land one owns is truly secure. This author argues that these conflicting decisions create a paradox in which the integrity of official search from the land of registry is upheld in one case, while in another, the purchasers are expected to look beyond its confines.[26]
On one hand, the courts assume that the Kenyan land registries are flawless and devoid of fraud and corruption, however, on the other hand, the court remains vigilant to the illicit practices during land transactions within the registry.[27]

It is against this backdrop that this paper turns to a trilogy of Supreme Court decisions, comprising ***Harcharon Singh Sehmi & Another v Tarabana Company Ltd & 5 Others [2023], Dina Management Limited v County Government of Mombasa [2021] and Torino Enterprises Limited v Attorney General [2022].*** These decisions are a potential turning point that reconciles the divergent strands of jurisprudence within the Appellate Courts and the High Court. However, this article critiques these decisions' interpretation of the doctrine of *bona fide purchaser for value*, arguing that it overlooked the pivotal distinction between the Torrens system and the deeds registration systems and their respective search protocols, which are central to the operation of the *bona fide purchaser for value* doctrine. The paper also examines whether the Supreme Court's interpretation of the requirement to trace the root of title in these cases, is consistent with

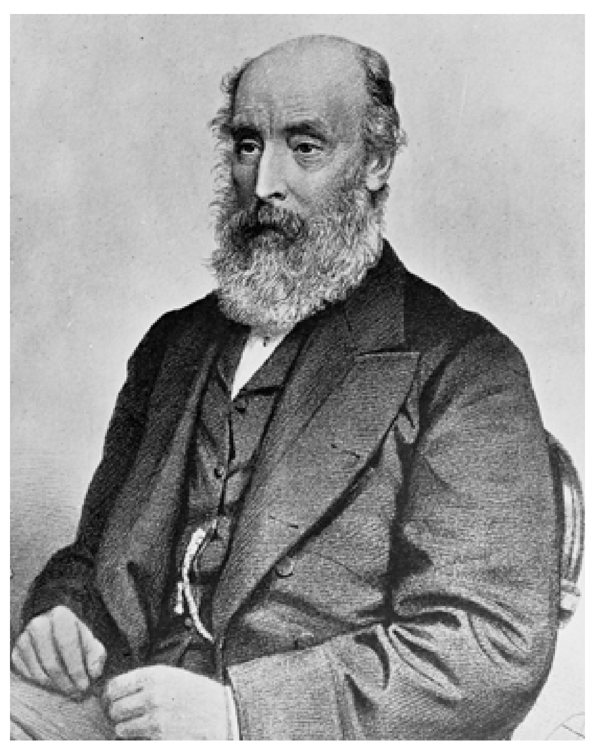
[24] *Funzi Development Ltd & 2 Others v County Council of Kwale*, Civil Appeal 252 of 2005, Judgement of the Court of Appeal, 27 February 2014, [eKLR].
[25] Civil Appeal No. 156 of 2013.
[26] Austine Ouma, 'Good Faith, Bad Fate: A Critique of the Dina Management Decision on the Limits of Constitutional Property Rights Protections in Kenya' (2025) 10/1 Strathmore Law Review (SLR) 104.
[27] ibid.Law Review (SLR) 104.

the broader constitutional commitment to justice in land disputes, particularly in the effort to balance historical land injustices with legal and equitable principles.

II. Conceptualising the torrens system

The word 'Torrens' is derived from Sir Robert Torrens, the third Premier of South Australia and pioneer and author of a simplified system of land transfer which he introduced in 1858.[28] This is a system that emphasizes on the accuracy of the land register which must mirror all currently active registrable interests that affect a particular parcel of land.[29] The government, as the keeper of the master record of all land and their owners, guarantees indefeasibility of all rights and interests shown in the land register against the entire world and in case of loss arising from an error in registration the person affected is guaranteed Government compensation.[30]

This statutory presumption of indefeasibility and conclusiveness of title under the Torrens system can be rebutted only by proof of fraud or misrepresentation in which the buyer is himself involved. The object of this philosophy was summarized in the classic Privy Council decision in ***Gibbs v Messer [1891]*** as follows: ***"... The object is to save persons dealing with registered proprietors from the trouble and expense of going behind the register, in order to investigate the history of their author's title, and to satisfy themselves of its validity. That end is accomplished by providing that everyone who purchases,***



Sir Robert Torrens

in bona fide and for value, from a registered proprietor, and enters his deed of transfer or mortgage on the register, shall thereby acquire an indefeasible right, notwithstanding the infirmity of his author's title."[31]

Prior to the development of the Torrens System, the common law system demanded a keen tracing of the history of title, as far back as the Crown grant.[32] This system was known as the Deed Registration System. Under the deed registration system, the government assumes no responsibility regarding the accuracy of the register or legal guarantee for its contents.[33] It is up to the potential purchaser of the land to investigate every deed in the chain of

[28]*Charles Karathe Kiarie and others v Administrators of the Estate of John Wallace Mathare and others* [2013] KECA 12 (KLR).
[29]ibid.
[30]ibid.
[31]*Gibbs v Messer* [1891] A C 247 P.C. pg 254.
[32]Low K, 'The nature of Torrens indefeasibility: Understanding the limits of personal equities' 33(1) *Melbourne University Law Review*, 2009, 205-234. Butt P, *Land law*, 5th Ed, Pyrmont, Thomson Reuters, 2006.
[33]Tom Ojienda, Principles of Conveyancing in Kenya: A Practical Approach (LawAfrica Publishing 2008)135.

title back to the grant before making the purchase.[34]

However, the system faced inherent criticism for being financially burdensome as conveyancers had to meticulously investigate the deed's historical sequence to ensure its title was valid.[35] The system was inherently insecure and thus discouraged the development of the land in question, as the ownership could be challenged, resulting in high dispute resolution costs.[36] Therefore, the primary objective behind transitioning from deed registration system to the Torrens System was to remove the hassle and cost of investigating the register to elicit the history of an owner's title and verify its authenticity.[37]

The Torrens System operates based on the concept of 'title by registration,' ensuring a robust indefeasibility to registered ownership.[38] This implies that there is no necessity to establish the origin of the title. Thus, the Torrens System is premised on the doctrine of indefeasibility of title, which is defined by three principles: the mirror, curtain and insurance principles.[39] The mirror principle guarantees that the register perfectly reflects the true and exact state of the title on the ground.[40] Under this principle, the register is intended to operate as a 'mirror,' reflecting accurately and incontrovertibly the totality of estates and interests affecting the registered land.[41]

The curtain principle assures that there is no need to peer behind the register, as any lurking interests or hidden claims are, by design, irrelevant. A potential purchaser does not need to be concerned about what is not recorded in the register. This principle, therefore, implies that the register is or should be the source of all information pertaining to the title and that the registered title is deemed final and absolute.[42] And as Ouma notes, remains unaffected and immune from common law, equitable claims or contingent conditions.[43]

The insurance or indemnity principle places the risk of clerical or administrative errors squarely on the State, which guarantees the register's accuracy.[44] Therefore, the government, as the custodian originator and guarantor of the register, assumes responsibility for errors, omissions or fraudulent entries.[45] Parties who are

[34]E.G. Bowman and E.L.G. Taylor, The Elements of Conveyancing (Sweet & Maxwell 1972) 121–122. See also Ernest Keith Phillips, 'Differences Between the Systems: Property, Law of Real' (Registrar-General of Lands, Wellington) https://teara.govt.nz/en/1966/24436/print accessed 15 April 2026.

[35]Austine Ouma, 'Good Faith, Bad Fate: A Critique of the Dina Management Decision on the Limits of Constitutional Property Rights Protections in Kenya' (2025) 10/1 Strathmore Law Review (SLR) 104.

[36]ibid. See also AfriCOG, Mission Impossible? Analysis of the Ndung'u Report on Illegal and Irregular Allocation of Public Land (AfriCOG)20 <https:africog.org/reports/Mission%20Impossible%20-%20Analysis%20of%20the%20Ndung.pdf>

[37]Low K, 'The nature of Torrens indefeasibility: Understanding the limits of personal equities' 33(1) Melbourne University Law Review, 2009, 205-234. See also Austine Ouma, 'Good Faith, Bad Fate: A Critique of the Dina Management Decision on the Limits of Constitutional Property Rights Protections in Kenya' (2025) 10/1 Strathmore Law Review (SLR) 104.

[38]Land Registration Act 2012, s 81, 82, 83, 84. See also Austine Ouma, 'Good Faith, Bad Fate: A Critique of the Dina Management Decision on the Limits of Constitutional Property Rights Protections in Kenya' (2025) 10/1 Strathmore Law Review (SLR) 104.

[39]Sussie Mutahi, 'Indefeasibility of Title and Adverse Possession in Kenya: An Uneasy Relationship?' (2023) 7(1) Strathmore Law Journal 84, citing McPhee P, 'Fraud and Indefeasibility of Title' (McPhee Kelshaw Solicitors, March 2016) http://www.mcpheekelshaw.com.au/wp-content/ uploads/2016/03/Indefeasibility-of-Title-Paper-PMM.pdf accessed 5th April 2026.

[40]Sharon Buyanzi and Others, 'The Poisoned Root Doctrine: Supreme Court Intervention and the Recalibration of Land Title Protections in Kenya' Mohamed Muigai LLP https://www.linkedin.com/posts/mohammed-muigai-llp_the-poisoned-root-doctrine-27032026-activity-7443163213514297344-mWTn/ accessed 10 April 2026.

[41]Tom Ojienda, Principles of Conveyancing in Kenya: A Practical Approach (LawAfrica Publishing 2008)135.

[42]Austine Ouma, 'Good Faith, Bad Fate: A Critique of the Dina Management Decision on the Limits of Constitutional Property Rights Protections in Kenya' (2025) 10/1 Strathmore Law Review (SLR) 104.

[43]ibid.

[44]Theodore BF Ruoff, *An Englishman Looks at the Torrens system* (Sydney: The Law Book Co of Australasia Pty Ltd, 1957) 28.

[45]Tom Ojienda, *Principles of Conveyancing in Kenya: A Practical Approach* (LawAfrica Publishing 2008)135. See also G Dworkin, 'Registered Land Reform' (1961) 24/2 Modern Law Review 136 ; Barbara Bogusz and Roger Sexton, 'Registration of Title—the Basic Principles' in Land Law (Oxford University Press 2022) 1035.

misled by a register that the law holds out as absolute and foolproof are, in principle, entitled to be indemnified by the State.[46] This is in line with the principle of presumption of legality which holds that all acts done by a public official has lawfully been done and that all procedures have been duly followed unless proven otherwise.[47] In the case of ***Republic v The Chief Land Registrar [2022]***, the Environment and Land Court, applying the mirror principle, concluded that since the land registers did not mirror the true state and ownership of the land, the titles in question were not defeasible.[48] The Court then went ahead to invoke the indemnity principle in suggesting that the officials who were responsible for the errors should compensate those who suffered the loss.[49]

Section 23 of the Registration of Titles Act, which is now repealed, provided that a certificate of title was 'conclusive evidence' of ownership.[50] Section 26 of the Land Registration Act introduced an ancillary clause that diminishes this status by stipulating that once the certificate of title is issued by the registrar, whether upon initial registration or subsequent transfer or transmission, it shall be regarded by courts as *prima facie* evidence, that the individual named therein as the proprietor of the land is the absolute and indefeasible owner thereof.[51] Nonetheless, Section 26(1)(a) and (b) of the same LRA, provide circumstances upon which the doctrine may be negated. Fraud or misrepresentation, involving the participation of the registered owner on the one hand and situations where the title was acquired illegally, unprocedurally or by means of a corrupt scheme.[52] Whether or not the present registered owner was a party, has been flagged.[53]

In light of the foregoing, a purchaser obtains title solely on the registry and alleviates the concerns of prior records or equitable claims, ensuring the security of titles and supremacy over other laws.[54] The Common Law Doctrine of *nemo dat non quad non habet*, is inapplicable.[55] This is because the bona fide purchaser for value can acquire an indefeasible title even if the vendor's title had a defect, was void or was forged. As long as the title fulfilled his/her obligations under the caveat emptor doctrine, a void or forged instrument is valid.[56]

However, as will be demonstrated in this paper, the application of this doctrine in Kenya has not always been consistent, particularly in cases involving fraud, competing claims and interests such as adverse possession, which challenge the finality of a registered title. It is, therefore, within this context that the Supreme Court has been called upon to clarify the scope and limits of these principles.

III. *Bona fide* purchaser for value without notice

The term *Bona fide* is a Latin term that means 'in good faith' or 'in sincere

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[46]Land Registration Act 2012, s, 81, 82, 83, 84, Registration of Titles Act (Cap 230, 1920) (repealed), s 24.
[47]*Chief Land Registrar & 4 others v Nathan Tirop Koech & 4 others* [2018] KECA 27 (KLR), Civ App Nos 51 & 58 of 2016 (CA Eldoret), para 86.
[48]Judicial Review No. 2 of 2022.
[49]ibid.
[50]The Registration of Titles Act, Cap 281, Revised Edition 2010 (1982) s 23 (Kenya National Council for Law Reporting, with the authority of the Attorney General).
[51]Land Registration Act, 2012 (Act No. 3 of 2012), Kenya.
[52]Sussie Mutahi, 'Indefeasibility of Title and Adverse Possession in Kenya: An Uneasy Relationship?' (2023) 7/1 Strathmore Law Journal pp. 73-88.
[53]*Arthi Highway Developers Limited v West End Butchery Limited & Others* (2013) eKLR.
[54]Land Registration Act 2012, s 81, 82, 83, 84.
[55]Hassan Asaria, 'Detailed Exposition of Torrens System as Incorporated in RTA and LRA' (Kenya Law Review, 25 August 2014).
[56]Hassan Asaria, 'Detailed Exposition of Torrens System as Incorporated in RTA and LRA' (Kenya Law Review, 25 August 2014).

intention.'[57] The Supreme Court of Uganda in ***Lwanga v Mubiru and Others [2024]***, defined a *bona fide purchaser for value without notice* as a purchaser who paid a stated price for the property without knowledge of existing or prior claims or prior equitable interest.[58] Once their name is entered into the register of lands, this would serve as conclusive evidence of proprietorship and they would acquire an indefeasible title to the land.[59]

The Supreme Court in the ***Dina Management Case*** cited with approval the decision of the Court of Appeal of Uganda in ***Katende v Haridar & Company Ltd [2008]***, which defined a bona fide purchaser for value as follows:[60]

'For the purposes of this appeal, it suffices to describe a bona fide purchaser as a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly. For a purchaser to successfully rely on the bona fide doctrine, he must prove that:

i. He holds a certificate of title;
ii. He purchased the property in good faith;
iii. He had no knowledge of fraud;
iv. He purchased for valuable consideration;
v. The vendors had apparent valid title;
vi. He purchased without notice of any fraud; and
vii. He was not a party to the fraud.'[61]

The origin of this doctrine is linked to the general rule within English common law, which held that a buyer could not possess a better title than the seller had.[62] This doctrine applies in Kenya by virtue of Section 3(1)(c) of the Judicature Act, which stipulates that it is permissible to apply the doctrines of equity, statutes of general application in force on 12 August 1897, as well as the procedures and practices observed in English courts at that time, when courts exercise their jurisdiction. This principle was referred to as the '*Nemo dat quod non-habet'* rule and cast a shadow over a marketplace, establishing that nobody should bestow what they do not possess.[63]

The element of innocence means that the purchaser must act in good faith.[64] His conduct must not raise any doubt as to whether indeed, he did not have any notice or knowledge as to the existence of a rival interest in the suit land.[65] If for example, it comes to light that during the process of purchase, the claimant engaged in conduct

[57]*Black's Law Dictionary* (9th edn, West 2009) 199. See also *Dina Management Limited v County Government of Mombasa & 5 Others* 2021 eKLR, para. 90.
[58](Civil Appeal 18 of 2022) [2024] UGSC 7. See also *Said v Shume & 2 Others* (Civil Appeal E050 OF 2023) [2024] KECA 866 (KLR) 26 July, para. 27; *Dina Management Limited v County Government of Mombasa & 5 Others* 2021 eKLR, para. 90.
[59]Ibid. See also *Sehmis & another v Tarabana Company Limited & 5 Others* [2025] KESC 21 (KLR), para. 58.
[60]Roger Smith, *Property Law* (9th edn, Pearson 2017) 227.
[61]*Dina Management Limited vs. County Government of Mombasa & 5 Others* 2021 eKLR, Para 92. See also Austine Ouma, 'Good Faith, Bad Fate: A Critique of the Dina Management Decision on the Limits of Constitutional Property Rights Protections in Kenya' (2025) 10/1 Strathmore Law Review (SLR) 104 ; Roger Smith, Property Law (9th edn, Pearson 2017) 227 ; G.C. Cheshire and J.B. Butterworth, The Modern Law of Real Property, 9th edn (London: Butterworths, 1962) 227; Black's Law Dictionary (8th edn, West 2004) 1271; Said v Shume & 2 others (Civil Appeal E050 of 2023) [2024] KECA 866 (KLR) 27 ; Lwanga v Mubiru and Others (Civil Appeal 18 of 2022) [2024] UGSC 7 (Uganda SC) cited in Said v Shume & 2 others (Civil Appeal E050 of 2023) [2024] KECA 866 (KLR) 26 July, para. 27 ; Kevin Gray and Susan Gray, Land Law (7th edn, OUP 2011) 475 ; *Samuel Kamere v Lands Registrar Kajiado* [2015] eKLR.
[62]Austine Ouma, 'Good Faith, Bad Fate: A Critique of the Dina Management Decision on the Limits of Constitutional Property Rights Protections in Kenya' (2025) 10/1 Strathmore Law Review (SLR) 98.
[63]ibid. R Ahdar, 'The Buyer in Possession Exception to the Nemo Dat Rule Revisited' (1989) 4 Canterbury L Rev 149 Available at http://www.nzlii.org/nz/journals/CanterLawRw/1989/9.pdf Accessed April 23rd 2026.
[64]*Sehmis & another v Tarabana Company Limited & 5 Others* [2025] KESC 21 (KLR), para. 59.
[65]*Sehmis & another v Tarabana Company Limited & 5 Others* [2025] KESC 21 (KLR), para. 59.

that was unconscionable in the eyes of equity, such conduct would weaken his claim of innocence as to the existence of a rival interest.[66] The element of innocence also connotes the exercise of diligence expected of any reasonable purchaser.[67] The claimant must demonstrate that he acted diligently and conducted a reasonable inquiry into the status of the estate or land that he sought to purchase.

IV. The Supreme Court trilogy on indefeasibility of title

This section examines a trilogy of Supreme Court decisions comprising ***Harcharon Singh Sehmi & Another v Tarabana Company Ltd & 5 Others [2023], Dina Management Limited v County Government of Mombasa [2021] and Torino Enterprises Limited v Attorney General [2022]*** and considers how the Court has approached the tension between the doctrine of indefeasibility of title and the need to address illegality in the acquisition of land, as well as to remedy historical land injustices.

A. Harcharon Singh Sehmi & Another v Tarabana Company Limited & 5 Others SC Petition No. E033 of 2023

i. Brief facts and history of the case

The central issue in this case was whether *bona fide* purchasers for value without notice could rely on a registered title where defects existed in the root or chain of the title.

In 1968, the Sehmis purchased a leasehold property known as L.R. No. 209/2759/9, I.R. 6477 situated in Ngara area of Nairobi (hereinafter referred to as the "suit property"). They acquired the suit property from Elizabeth Ann Maria Estreta Rodrigues for a consideration of Kshs. 25,000/- and were duly registered as tenants in common. The tenure of the property was a leasehold for a term of fifty-nine (59) years, commencing on October 1, 1942 and was scheduled to expire on October 1, 2001.[69] 3 months before the expiry of the lease, the Sehmis applied for an extension. The Director of Physical Planning and the Director of Survey issued no objection letters and recommended the extension of the approval. Nonetheless, the Commissioner of Lands did not issue the extension. The Appellants remained on the land, continuing to pay land rates and rents.[70]

In 2009, the Commissioner of Lands allocated the land to Rospatech Limited. Rospatech Limited sold the land to Tarabana Company Limited. In 2014, Tarabana Co. Ltd moved in with bulldozers and forcibly evicted the Sehmis, claiming that they were the registered owners, with a clean title deed, bearing a new IR number, LR No 209/2759/9 (IR 12263).[71]

The Sehmis (Appellant) moved to the Environment and Land Court ("ELC"). The ELC allowed the Appellants' claim, nullifying the allocation of the suit property to Rospatech Ltd and its subsequent transfer to Tarabana Co. Ltd.[72] Dissatisfied by the ELC's decision, Tarabana Co. Ltd filed a

[66] *Sehmis & another v Tarabana Company Limited & 5 Others* [2025] KESC 21 (KLR), para. 59.
[67] *Sehmis & another v Tarabana Company Limited & 5 Others* [2025] KESC 21 (KLR), para. 59.
[68] *Sehmis & another v Tarabana Company Limited & 5 Others* [2025] KESC 21 (KLR), para. 2.
[69] *Sehmis & another v Tarabana Company Limited & 5 Others* [2025] KESC 21 (KLR), para. 2.
[70] *Sehmis & another v Tarabana Company Limited & 5 Others* [2025] KESC 21 (KLR), para. 2.
[71] *Sehmis & another v Tarabana Company Limited & 5 Others* [2025] KESC 21 (KLR).
[72] *Sehmis & another v Tarabana Company Limited & 5 Others* [2025] KESC 21 (KLR), para. 3.

Civil Appeal. The Court of Appeal held in favour of Tarabana Co. Ltd, stating that by the time the suit property was being allocated to Tarabana, the lease to the Sehmis had already expired.[73] The Sehmis then filed an appeal to the Supreme Court, upon certification by the Court of Appeal of the matter as that of general public importance.[74]

ii. Summary of Supreme Court findings

Before the Supreme Court, the Respondents maintained that the Sehmi Lease had expired without formal renewal and that, upon expiry, the property reverted to the government, rendering the subsequent allocation to the Rospactech lawful.[75] They maintained that, as registered proprietors, they were entitled to the protection afforded to *bona fide* purchasers for value without notice.

The Supreme Court traced the matter to the root of title. While it accepted that the lease had expired and that the land had reverted to the State, it held that the Sehmis, as the immediate former lessees who had applied for renewal prior to expiry and remained in possession, enjoyed a right of first allocation. The allocation to Rospatech, having been made without according to the Sehmis that priority, was therefore impugned. The Court further held that the status of a bona fide purchaser for value without notice cannot exist independently of the historical integrity of the title itself. Where illegality or irregularity is found at the root or anywhere within the chain, the innocence of the current proprietor is incapable of curing it. Conclusively, the Court held that title deeds are prima facie (initial) evidence of land ownership but not conclusive proof of ownership.

B. Torino Enterprises Limited v Attorney General (Petition No. 5 E006 of 2022)

i. Brief facts and summary of the case.

In 1964, Kayole Estates Ltd was the owner of a piece of land in Embakasi known as LR No. 113 XX. In 1971, it sold the land to Nairobi City Council (NCC), which subdivided it, creating LR No. 22524.[76] In 1986, the Department of Defence occupied the parcel with the Council's permission to set up a military installation. Despite this physical occupation, the Commissioner of Lands issued a letter of allotment to Renton Company Limited in 1999. In 2001, Renton Company Limited transferred the property to Torino Enterprises Ltd for Kshs. 12 Million, and Torino obtained a Certificate of Title.[77]

By 2011, the Department of Defence remained in occupation without a formal title. Torino enterprises sought to evict them, filing a constitutional petition for the return of the land or, in the alternative, compensation of Kshs. 1.5 Billion.[78] The Department of Defence challenged Torino's title, not in defence of its own ownership, but by exposing the irregularities in Torino's chain of title.

ii. Summary of Supreme Court's findings

The Supreme Court identified two key defects, not at the root of the title, but within

[73] *Sehmis & another v Tarabana Company Limited & 5 Others* [2025] KESC 21 (KLR), para. 19.
[74] *Sehmis & another v Tarabana Company Limited & 5 Others* [2025] KESC 21 (KLR), para. 28.
[75] *Sehmis & another v Tarabana Company Limited & 5 Others* [2025] KESC 21 (KLR), para. 29.
[76] *Torino Enterprises Limited v Attorney General* [2022] eKLR.
[77] *Torino Enterprises Limited v Attorney General* [2022] eKLR para 3.
[78] *Torino Enterprises Limited v Attorney General* [2022] eKLR para 4.

the chain through which title was said to pass to Torino:

1). Renton's failure to perfect and register the letter of allotment, meaning that the title never legally moved from the NCC to Renton;[79]
2). The conspicuous military occupation imposed a duty of inquiry upon Torino as to the true status of the land.[80]

The Supreme Court held that an allotment letter was incapable of conferring interest in land, being nothing more than an offer, awaiting the fulfilment of the conditions stipulated.[81] Therefore, an allottee could not pass title to a third party, unless and until he acquired title to the land through registration. It was the act of registration that conferred a transferrable title to the registered proprietor and not the possession of an allotment letter.[82] An innocent purchaser for value denotes one who was aware of what they were purchasing by inspecting the suit premises.[83] The fact that the suit land was occupied must have sounded a warning of *"buyer beware"* to the Appellant.[84]

Placing reliance on the case of ***Arthi Highway Developers Limited v West End Butchery Limited & 6 Others***, the Court held that the appellant had an obligation to carry out due diligence by looking at the history of the suit property before purchasing the same.[85] On that basis, the Supreme Court dismissed the appeal and affirmed the Court of Appeal's determination that Torino's title was a nullity. Therefore, Torino lost the land.

C. *Dina Management Limited vs. County Government of Mombasa & 5 Others* 2021 eKLR

i. Brief facts of the case

The dispute in this case concerned the ownership of Plot No. *MN/1/6053 in Nyali* Beach, Mombasa County. The suit property was initially allocated and freehold title was granted to its first registered owner (H.E Daniel T. Arap Moi) by the Commissioner of Lands in 1989.40 The applicable law was the repealed Government Land Act (GLA). The property was sold to a new buyer (Bawazir & Company (1993) Ltd) and subsequently sold to the appellant. The dispute was instigated in 2017 when the County Government of Mombasa (the 1st respondent) forcefully and without prior notice entered the appellant's property at Nyali Beach in Mombasa County. The 1st respondent demolished a perimeter wall on the beachfront and then demolished the property itself, asserting that the entry and the subsequent demolitions were an enforcement action to create a thoroughfare to the beach on the stated grounds that the property was public, not private land.

The appellant petitioned the ELC, asserting its ownership and alleging violations of constitutional rights under Articles 27(1) & (2) and 47(1) & (2) of the Constitution. The 1st respondent, in their contention, made a rejoinder that the land had been designated as an 'open space' in 1971, rendering any conversion to private ownership illegal and contravening Article 62 of the Constitution.

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[79] *Torino Enterprises Limited v Attorney General* [2022] eKLR para 67.
[80] *Torino Enterprises Limited v Attorney General* [2022] eKLR para 65, 66 & 67.
[81] ibid.
[82] *Dr. Joseph NK Arap Ngok v Justice Moijo Ole Keiyua & 4 Others* CA 60/1997 [Unreported]. See also *Gladys Wanjiru Ngacha v Teresa Chepsaat & 4 Others* HC Civil Case No. 182 of 1992 [2008] eKLR.
[83] *Torino Enterprises Limited v Attorney General* [2022] eKLR para
[84] *Torino Enterprises Limited v Attorney General* [2022] eKLR para
[85] Civil Appeal No. 246 of 2013 [2015] eKLR; *National Land Commission v Afrison Import Limited & 10 Others* ELC Reference 1 of 2008 [2019] eKLR.

The 1st respondent further asserted that the acquisition of the land, initially allocated in 1989 and transferred through multiple sales before reaching the appellant in 2006, was invalid. They sought orders to revoke the title by the Chief Land Registrar, expunging of survey records and eviction of the appellant.

ELC found that the alienation of the property to President Moi in 1989 had been unprocedural and unlawful because of the lack of an approved Part Development Plan from the Director of Physical Planning in compliance with the provisions of the Land Planning Act. There existed an access road through the open space to the sea, which was later blocked by the allocation of the property in disregard of the provisions of Section 85 of the Government Lands Act, which provided that reserved roads could only be closed by a competent authority. In the ELC's contention, the county government acted within the law by removing the wall that blocked the access road. The respondent, aggrieved by the ELC's court judgment, moved to the Court of Appeal. The two crucial issues for determination before the Court of Appeal relevant to this analysis were whether the title to the suit property was lawfully acquired and whether the appellant was an innocent purchaser for value without notice.

The Court of Appeal opined that the appellant could not invoke the protection under the doctrine of an innocent purchaser and underscored that, in circumstances where the title has been obtained through unlawful procedures, it could not be deemed indefeasible. The Court of Appeal found out that the suit property was designated as public land and earmarked for public utility purposes and that there was a road for the public to access the beach through 'an open space.' In light of these findings, the Court of Appeal opined that the property retained its status as a public utility and could not generate private proprietary rights warranting judicial protection.

ii. Summary of Supreme Court findings

Before the Supreme Court, the appellant maintained that the Appellate Court had erred in interpreting the doctrine of *bona fide purchaser for value* without notice of defect, thereby infringing upon their constitutional right to property as stipulated under Article 40. The Supreme Court concurred with the ruling of both the trial court and the Court of Appeal that the appellant had to investigate the root of the title of the property before proceeding with the acquisition. While placing reliance on the ***Munyu Maina v Hiram Gathiha Maina* [2013]**, the Court held that where the registered proprietor's root title is under challenge, it is not enough to dangle the instrument of title as proof of ownership.[86]

The Court held that it is the instrument that is in challenge and therefore, the registered proprietor must go beyond the instrument and prove the legality of the title and show that the acquisition was legal, formal and free from any encumbrance including interests which would not be noted in the register.[87] The Supreme Court emphasised that while Article 40 of the Constitution of Kenya establishes a property right, however, this right is subject to the limitations outlined within the same provision. Specifically, the right does not extend to the property adjudged to be unlawfully

[86]Civil Appeal No. 329 of 2009 [2013] eKLR. *Dina Management Limited v County Government of Mombasa & 5 Others* 2021 eKLR, para. 93.
[87]*Dina Management Limited v County Government of Mombasa & 5 Others* 2021 eKLR, para. 93.

acquired. In light of the determination that the initial allocation was irregular, the appellant's subsequent ownership could not be protected under Article 40.

The Court ultimately dismissed the appellant's contention and pronounced itself thus:

'Indeed, the title or lease is an end product of a process. If the process that was followed prior to the issuance of the title did not comply with the law, then such a title cannot be held as indefeasible. The first allocation having been irregularly obtained, H.E. Daniel Arap Moi had no valid legal interest which he could pass to Bawazir & Co. (1993) Ltd, who in turn could pass to the Appellant.'

V. Critical analysis of the Supreme Court trilogy and its impact on the torrens system

The Supreme Court trilogy represents an important attempt to clarify the law on indefeasibility of title and the protection of *bona fide* purchasers in Kenya. In all the three afore-discussed instances, the parties who eventually lost their land were *bona fide purchasers for value without notice*, pursuant to the Torrens System. Therefore, the Supreme Court now seeks that we should return to the deeds registration system. However, a deeper analysis reveals a tension between doctrinal inconsistencies and the Supreme Court's broader objective of addressing illegality and historical land injustices.

i. The doctrinal and institutional consequences of the expanded due diligence obligations

A key issue arising from the trilogy is the Supreme Court's approach to the scope of due diligence expected from a purchaser. Due diligence is the process of carefully investigating and verifying all aspects of a land transaction to ensure that one is making an informed and secure investment.[88] It is the most fundamental process in acquiring land as a prospective buyer needs to ascertain the ownership of land. As regards land transactions, the norm has always been that for one to fulfil their due diligence obligations, one needs to conduct a search at the official register to establish the ownership of land.[90]

The Supreme Court in the ***Dina Management Case*** and the ***Torino Case***, sought to expand this requirement deeper. It added the following criteria that ought to be met for one to rely on principle of bona fide purchaser for value:

1. The purchaser must have done a historical search to find out the previous owners of the parcel of land; and
2. The purchaser must have visited the property and found out which person(s) were in occupation of land.

This expansion raises several difficulties. This article posits that this requirement imposes undue burdens on *bona fide*

[88]Elsy Jemutai, 'Reconciling the due diligence obligation before and after the Dina Management decision in light of the Mavoko demolitions' [2024] Kabarak Law Review Blog, Property Law. See also Elvis Abenga, 'Due Diligence Procedures in Land Transactions in Kenya: Five Steps' [2020] https://www.begislaw.com/due-diligence-procedures-in-land-transactions-in-kenya-five-steps/ accessed 15 April 2026.
[89]ibid. See also CR Advocates, 'Comprehensive Due Diligence on Land Transactions in Kenya: A Buyer's Guide,' [2023] https://www.cradvocatesllp.com/comprehensive-due-diligence-on-land-transactions-in-kenya-a-buyers-guide/#:~:text=First%20and%20foremost%2C%20it's%20crucial,details%20with%20the%20relevant%20authorities accessed 15 April 2026.
[90]*David Peterson Kiengo and 2 Others v Kariuki Thuo*, High Court [2012], para. 15. See also Barnley *Conveyancing Law and Practice* (4th edn, 1996) 265-331.

purchasers, who are made to bear the brunt of historical land injustices and flawed registry practices under the guise of the sanctity of titles.

In the ***Dina Management Case***, the Supreme Court required the Dina management Ltd to go to the root of title, right from the first ever allotment of the land in question. This is the 1989 allotment to H.E. Daniel T. Arap Moi. In 1994, President Moi sold the land to Bawazir and Company Limited. In 2010, Bawazir then sold the land to Dina Management. Therefore, the Dina Management Ltd was required to go two (2) steps down the chain of title. Here, the illegality lied at the root of the title, thus Dina Management lost the land. The Supreme Court, citing with approval Maraga J's reasoning in ***Waa Ship Garbage Collector***,[91] ruled that the bona fide purchaser doctrine does not apply in instances where the third-party purchaser has acquired irregular or illegally allocated public land.[92]

In the ***Torino Enterprises Ltd Case***, the Torino Enterprises was required, pursuant to the Supreme Court decision, to go one(1) step down the chain of title; that is where the illegality lies. Here, the illegality lied along the chain of the title, thus Torino lost the land. The Supreme Court primarily addressed the fraud committed by the initial owner, overlooking the plight of the subsequent bona fide purchaser, who acquired the property and paid a valuable consideration. In ***The Sehmis Case***, the Tarabana Company Ltd was required to go two (2) steps down the chain of title; that is where there was an illegal allocation. Tarabana failed to go down that chain and thus lost the land.

In all of the three cases, the Court did not delve into a determination as to whether Tarabana Company Ltd was in any way engaged in fraud or illegal activity during the acquisition of the suit property. **Section 2 of the Registration of Titles Act (Repealed)**, provided that The fraud should be on 'the part of a person obtaining registration and includes a proven knowledge of the existence of an unregistered interest on the part of some other person, whose interest he knowingly and wrongfully defeats by that registration.'[93] It is a cardinal principle of the civil process that he who alleges must prove.[94] The burden of proof of fraud rests on who alleges it. Fraud cannot be inferred from the facts.[95] The standard of proof in this context is more than a mere balance of probability.[96] In all the three cases, there was no fraud or misrepresentation alleged on the part of the parties who lost the land. The parties conducted their due diligence and relied on the accuracy of the search from the Lands Registry.

While this article does not argue against the Supreme Court's decisions, it argues that there is an inconsistency as to how far one should go down the chain of the title to establish its validity. The Supreme Court, in the three decisions, does not

[91]*Republic v Minister for Transport & Communication & 5 others ex parte Waa Ship Garbage Collector & 15 others* (2004) 1 KLR (E&L) [2004] KEHC 10 (KLR).
[92]Dina Management Limited vs. County Government of Mombasa & 5 Others 2021 eKLR, Para 111.
[93]Registration of Titles Act (Cap 230) (repealed), s 2.
[94]Evidence Act Cap 80 , s 107; *Mary Nyambura Kangara alias Mary Nyambura Paul v Paul Ogari Mayaka* Petition No. 9 of 2021; *Abdul v Mokua* (Civil Appeal E077 of 2023) [2025] KEHC 4105 (KLR).
[95]Austine Ouma, 'Good Faith, Bad Fate: A Critique of the Dina Management Decision on the Limits of Constitutional Property Rights Protections in Kenya' (2025) 10/1 Strathmore Law Review (SLR) 98.
[96]*Charles Karathe Kiarie & 2 others v Administrators of the Estate of John Wallace Mathare (Deceased) & 5 others* [2013] eKLR, Civil Appeal (Sup) No 12 of 2013 (CA); Marteve Guest House Limited v Njenga & 3 others [2022] KECA 539 (KLR), Civil Appeal No 400 of 2018, para 32 (CA).

define what exactly constitutes the root of title. The question then is, Should one go down to a certain level or to the ultimate root of the title? This is because one may, in fact, exercise his/her due diligence to level eight (8) of the chain of the title, only to find out that the infirmity lied in level nine(9) of the title. And in any case, whose duty is it to go down that chain of title to establish its validity? Is it the individual or is it the Land Registrar, to whom the duty of allocating titles to land is vested, by the Land Registration Act?

Another defect is as opined by Ouma[97], Manji and Ghai.[98] Although the three individuals make their arguments in relation to the ***Dina Management case***, it is still applicable in the trilogy of decisions that this article analyses. They opine that though the Supreme Court affirmed that doctrine of indefeasibility does not shield purchasers of illegally acquired public land, it failed to expressly distinguish this from other defects shielded by the doctrine and that it did not openly state that this represented a departure from prior interpretations of doctrine of indefeasibility.[99] In their opinion, while the decision still considers that certain defects can still benefit from the innocent purchaser doctrine, it does not explicitly mention the category, making the rationale of the court on this doctrine uncertain, loosely substantiated and resulting in a sort of discrimination among innocent victims. The ruling, therefore, sidestepped the doctrine and focused more on procedural aspects, public interest considerations and historical land grabbing and injustice, in finding that the doctrine does not apply to illegally or irregularly acquired public land.[100]

Furthermore, the logical consequence of this approach is that the land register can no longer be treated as a complete and reliable record of title. **Section 12 of the Land Registration Act** provides for the appointment of the Chief Land Registrar and other Land Registrars, who are mandated to maintain the integrity of the land register and oversee the registration process.[101] If a purchaser must look beyond the register, contrary to the mirror principle, to verify historical allocations, then the register ceases to perform its central function as the definitive source of property rights. It becomes, instead, a preliminary indicator; one that must be independently verified through external inquiry.

Closely related to this is the Court's treatment of risk allocation. In all the three afore-discussed decisions, the loss occasioned by defective title is ultimately borne by the purchaser. This is notwithstanding their status as *bona fide purchasers for value without notice*. In fact, the Land Registrars from whom the bona fide purchasers acquired the title from, are left to go scot-free. This, in and by itself, signifies a departure from the insurance principle, which provides that errors within the registration system should not prejudice innocent purchasers who rely on it. The burden is transferred to private innocent purchasers, who are neither equipped nor

[97]Austine Ouma, 'Good Faith, Bad Fate: A Critique of the Dina Management Decision on the Limits of Constitutional Property Rights Protections in Kenya' (2025) 10/1 Strathmore Law Review (SLR) 98.
[98]Ambreena Manji and Jill Cottrell Ghai, 'The Long Shadow of Land Grabbing – Analysing the Decision of the Kenya Supreme Court in Petition 8 of 2021' (Constitutional Law and Philosophy, 29 June 2023) https://indconlawphil.wordpress.com/2023/06/29/the-long-shadow-of-landgrabbing- analysing-the-decision-of-the-kenya-supreme-court-in-petition-8-of-2021/ accessed 16 April 2026.
[99]ibid.
[100]Austine Ouma, 'Good Faith, Bad Fate: A Critique of the Dina Management Decision on the Limits of Constitutional Property Rights Protections in Kenya' (2025) 10/1 Strathmore Law Review (SLR) 98.
[101]Land Registration Act No. 3 of 2012, s 12.

institutionally empowered to verify the legality of historical allocations of land.

ii. The systemic consequence of the Supreme Court's jurisprudence

As the retired Supreme Court Judge, Jackton Ojwang posits, the designation 'Supreme Court' denotes the apex adjudicatory organ within a nation's judicial system, holding ultimate authority in interpreting and applying the law.[102] Justice Njoki Ndungu SCJ, in her concurring opinion in ***Evans Kidero & 5 Others v Waititu and Others* [2014]**, held that the principle of stare decisis in Kenya, unlike in other jurisdictions, is a constitutional requirement aimed at enhancing certainty and predictability.[103] The key utility of precedent is to ensure the protection of the fundamental utility in uniformity.[104]

Pursuant to **Article 163(7) of the Constitution of Kenya**, all Courts, other than the Supreme Court, are bound by the decisions of the Supreme Court.[105] The constitutional contours of Article 163(4)(7) oblige the Supreme Court to settle complex issues of constitutional and legal controversy and to give jurisprudential guidance to the lower Courts.[106] Therefore, the Supreme Court decisions should be reached after meticulous deliberation and rigorous scrutiny of the case.[107]

Consequently, the principles articulated in the ***Dina Management Case, Torino Enterprises Case and The Sehmis Case***, are not confined to the specific facts and parties of those cases, rather, they constitute authoritative and binding precedent that must be applied by lower courts in subsequent land disputes. The Supreme Court, in this trilogy of decisions, had a valuable opportunity to thoroughly investigate and definitively resolve the ambiguity regarding the conclusiveness of an official search, as well as to examine whether the title of a *bona fide* land purchaser for value without notice remains indefeasible despite any infirmity associated with the titles of preceding registered proprietors.[108]

The practical consequences of this principle, is the entrenchment of legal uncertainty and doctrinal inconsistencies within the land registration system. As afore-discussed in the previous sub-section, the Supreme Court did not clarify how far down the chain of title a purchaser should go, so as to establish its validity. The Court did not also clarify which types of defects are capable of defeating a registered title and by extension, the doctrine of indefeasibility of title. Furthermore, the Court's interpretation in the three cases, of the doctrine of *bona fide purchaser for value* overlooked the

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[102] Jackton Ojwang, 'Judicial Review of Service Matters in Kenya and India: A Blessing or a Curse? Supreme Court of Kenya: Insider's Perspective on the Emerging Groundwork' (2007) 1(1) Kenya Law Review 1.

[103] *Evans Kidero & 5 Others v Waititu and Others* [2014] eKLR (SC), Petition No 18 of 2014 (consolidated with Petition No 20 of 2014), concurring opinion of Njoki Ndungu SCJ, para 236.

[104] Sir Frederick Pollock, *Essays in Jurisprudence and Ethics* (Macmillan Company, 1882) 237. See also Neil Duxbury, *The Nature and Authority of Precedent* (Cambridge University Press 2008) 103.

[105] *Evans Kidero & 5 Others v Waititu and Others* [2014] eKLR (SC), Petition No 18 of 2014 (consolidated with Petition No 20 of 2014), concurring opinion of Njoki Ndungu SCJ, para. 237 & 238.

[106] *Jasbir Singh Rai & 3 Others v Tarlochan Singh Rai and 4 Others* Sup Ct Petition No 4 of 2012, para. 39, 40, 42, 50 and 60; *George Mike Wanjohi v Steven Kariuki & Others* Petition No. 2A of 2014, para. 79, 82, 83 and 86; *Frederick Otieno Outa v Jared Odoyo Okello & 3 Others* Sup Ct. Petition 10 of 2014, para. 57; *Zacharia Okoth Obado v Edward Akong'o Oyugi & 2 Others*, Sup Ct. Petition No. 4 of 2014, para. 122; *Evans Kidero & 5 Others v Waititu and Others* [2014] eKLR (SC), Petition No 18 of 2014 (consolidated with Petition No 20 of 2014), concurring opinion of Njoki Ndungu SCJ, para. 237.

[107] Austine Ouma, 'Good Faith, Bad Fate: A Critique of the Dina Management Decision on the Limits of Constitutional Property Rights Protections in Kenya' (2025) 10/1 Strathmore Law Review (SLR) 98.

[108] ibid.

pivotal distinction between Kenya's dual land registration systems (the Torrens and deeds registration) and their respective search protocols, which informs the *bona fide purchasers* doctrine.[109] As a result, lower courts are left with wide discretion. This is likely to lead to inconsistent decisions, depending on how each court interprets these obligations.

This article posits that while addressing historical land injustices and land grabbing is important, the approach taken by the Court creates new risks for individuals who acquire land in good faith. Because these decisions are binding, these risks are now built into the system and will continue to affect how land disputes are resolved unless the Supreme Court provides further clarification.

VI. Towards a coherent and certain land registration framework: A permanent solution

This section offers recommendations that are vital in streamlining both legal and practical realisation of the doctrine of indefeasibility in Kenya.

i). Vesting the obligation to investigate the root of the title in the Land Registrar

Article 67(2)(e) of the Constitution of Kenya, 2010 mandates the National Land Commission (NLC) to initiate investigations, on its own initiative or on a complaint, into present or historical land injustices and to recommend appropriate redress. In fact, there are regulations established to that effect.[110] This article agrees that this is a significant mandate. However, it is not without limitation. The regulations and mandate restrict the temporal scope of such claims to historical injustices occurring between the 15th June, 1985 and the 27th August, 2010.[111] 15 June 1895 marks the date when Kenya formally became the British East Africa Protectorate. It was the beginning of colonial administration and the commencement of large scale alienation of African-land by the colonial government. 27 August 2010 is the date the current constitution was promulgated. Disputes arising after this date are generally expected to be addressed through ordinary legal and administrative mechanisms.

However, this author's critique remains valid because certain injustices occurring outside or beyond the practical reach of this framework may still remain unresolved despite fitting the broader moral and social understanding of "historical land injustices." It excludes irregularities that may have occurred prior to 1985, albeit the fact that they still fall under the scope of 'historical land injustices'. This is despite the fact that, as demonstrated in the Supreme Court trilogy, defects in title do not neatly fall within these timelines. Some originate in earlier allocations, while others arise from recent administrative failures, unlawful allocations or procedural irregularities within the land registration system.

Furthermore, the NLC's mandate is primarily remedial and investigative in the context of land injustice claims. It is not designed to operate as a routine verification body within everyday land transactions. Its processes are mostly complaint-driven, although it may also act *suo moto*. This is evident from the dispute concerning Kakuzi PLC in

[109] Ouma (n 81) 97.

[110] The National Land Commission (Investigation of Historical Land Injustices) Regulations No. 258 of 2017.

[111] National Land Commission Act 2012 Cap. 281 Laws of Kenya, s 15(2) ; The National Land Commission (Investigation of Historical Land Injustices) Regulations No. 258 of 2017, s 2; *Gathoni Park Farm Limited v National Land Commission & 7 others* [2019] eKLR.

Murang'a County, who termed the NLC's decisions as merely recommendatory and that in fact, it did not have jurisdiction to adjudicate upon that land dispute. This raises an important question: who then bears the responsibility for interrogating defects in titles that fall outside the NLC's temporal and functional scope? More specifically, should the obligation to investigate the root of title in relation to historical, be placed on the Land Registrar?

This article answers that question in the affirmative, but with an important qualification. The Land Registrar should not be expected to duplicate the NLC'S role in investigating historical land injustices as a matter of adjudication or redress. Rather, the Land Registrar's role should be one of preventive verification, exercised at the point of registration. This would involve scrutinising the chain of title to ensure that the process leading to registration complies with the law, and that there are no apparent irregularities that would render the title defective. Where contested questions of historical land injustice arise, particularly those requiring fact-intensive inquiry or remedies, the matter can then properly fall within the mandate of the NLC.

Once the obligation to investigate the root of title is placed on the Land Registrar, it becomes untenable to continue placing the risk of defective title on the bona fide purchaser for value without notice.

This recommendation ties back to the Torrens system. The insurance principle requires the State to compensate individuals who suffer loss as a result of errors in the registry.[112] The rationale is straight forward: where the State holds itself out as maintaining an accurate and reliable register, it must stand behind it.[113] This position also finds grounding in the ***Social Contract Theory***, which explains the relationship between the State and its citizens, as one based on mutual trust and reciprocal obligations. In the context of land registration, individuals relinquish the burden of independently tracing and verifying the entire history of title and instead rely on a State Land Register. In return, the State assumes responsibility for the accuracy and integrity of that register.

The Supreme Court trilogy departs from this logic by allowing innocent purchasers to lose land without any corresponding mechanism for compensation. Moreover, the Land Registrar, with whom the obligation of ensuring the Land register is clean and without defect, does not bear the brunt.[114] This, therefore, creates a gap in the system, the register is no longer fully reliable, yet no institutional safeguard exists to absorb the risk created by that unreliability.

The question then is: What happens where the Land Registrar, upon examining the chain of title, discovers an illegality or irregularity? What happens to the current *bona fide* purchaser, who in the current situation, holds a defective title? What happens to the previous land owner who has the valid title to this land? This article posits that in such circumstances the title

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[112] Tom O Ojienda, *Principles of Conveyancing in Kenya: A Practical Approach* (LawAfrica Publishing 2008)135. See also G Dworkin, 'Registered Land Reform' (1961) Modern Law Review 24(2) 136 https:// onlinelibrary.wiley.com/doi/pdf/10.1111/j.1468-2230.1961.tb01058.x accessed accessed 17 April 2026; Barbara Bogusz and Roger Sexton, *Registration of Title—the Basic Principles in Land Law* (Oxford University Press 2022) 1035; Theodore BF Ruoff, An Englishman Looks at the Torrens system (Sydney: The Law Book Co of Australasia Pty Ltd, 1957) 28 ; Land Registration Act 2012, s, 81, 82, 83, 84, Registration of Titles Act (Cap 230, 1920) (repealed), s 24.

[113] Tom O Ojienda, Conveyancing: Principles & Practice (LawAfrica Publishing 2007) 137.

[114] Wilson Mwihuri, 'The Illusionary Right to Protection of Property Under Article 40 of the Constitution: An Essay on Recent Jurisprudence Regarding Indefeasibility of Title in Kenya' [2023] The Law Society of Kenya Journal Vol. 17, 34.

Strengthening Kenya's land registration system through digitisation and institutional integration is essential for improving transparency, reducing fraud, accelerating service delivery, and enhancing public trust in land administration.

may still be impeached. However, the loss should not fall on the innocent purchaser. Instead, the purchaser should have a direct and enforceable claim or cause of action against the State, through the Office of the Land Registrar.

This approach would complement the earlier proposal vesting investigative responsibility in the Land Registrar. If the Registrar is to interrogate the root of title, then the Land Registrar must also bear the legal consequences of failing to detect defects. The Land Registrars may be held personally liable, especially where there is fraud, bad faith, abuse of office, corruption or deliberate illegality. Reliance could be placed on the litigation cases against Sammy Mwaita. Many of the suits against him were not merely against the government, but against him personally for abuse of office, fraudulent allocations and unlawful alienation of public land. Therefore, where disputes arise from institutional failure or registry error, compensation should ordinarily come from the State under the Torrens insurance principle. But where the defect arises from fraud, collusion, corruption, or abuse of office by a land official, the individual officer should face personal, civil, criminal and administrative liability.

iii). Strengthening the land registration system through digitisation and institutional integration

A key problem that comes out of the Supreme Court trilogy is the condition of land records and how difficult it is, in practice, to verify the history of the title. The Supreme Court now requires purchasers to go beyond the register and interrogate the root of title. However, the systems needed to support that process are still fragmented, incomplete and at times inaccessible. The result is that the burden placed on purchasers becomes unfair and confidence in the land registration system is weakened.

Ardhi Sasa is Kenya's National Land Information Management System (NLIMS), introduced by the Ministry of Lands to digitise land administration and improve access to land services.

Article 35 of the Constitution guarantees the right to access to information. **Section 9 of the Land Registration Act of 2012** requires that land registers and relevant documents be properly maintained , reliable and accessible, including in electronic form. **Section 44(3A)** provides for electronic document execution.[115] Furthermore, the amendments to the Land Regulations in 2020 also incorporate electronic mechanisms to manage land inventories, issue licences, process orders, convert tenure and facilitate adjustments in land use.

Initiatives such as *Ardhi Sasa* are a step in the right direction, particularly in improving transparency and efficiency.[116] It seeks to find viable solutions to navigate diverse legal regimes and, therefore, necessitates the efforts to harmonise and reconcile various legal regimes such as freehold, leasehold and absolute tenure under GLA and RTA statutes to prevent digitisation hurdles.[117] This article posits that their scope is still limited. Most importantly, historical land records, such as letters of allotment, Part Development Plan, survey records and earlier grant documents, are not fully digitised and therefore, not easily accessible. This makes it difficult and in some cases, impossible, to properly trace the root of title. As a result, the process becomes slow, uncertain and often inconclusive.

Therefore, what is needed is a more practical and coordinated approach. Digitisation, through *Ardhi Sasa*, should not be limited to current records. It should extend to historical documents that form the basis of title. These documents include Original Letters of Allotment, Part Development Plans (PDPs) and their approval stamps, survey records, grant documents and gazette notices related to land alienation or acquisition.[118] At the same time, this system should allow for a clear and traceable chain of title, where one can follow ownership from the initial allocation to the present holder.[119] This should be supported by access to underlying documents, simple verification tools to show whether legal requirements were met at each stage and alerts where there are gaps or inconsistencies.

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[115]Land Registration Act 2012, s 9.

[116]Ardhisasa, *Ardhisasa Online Platform* https://ardhisasa.lands.go.ke/ accessed 17 April 2026. See also Collins Omulo ' 'NLC's new plan to curb grabbing of public land' (Nation, 12 August 2024) <https:// nation.africa/kenya/business/nlc-s-new-plan-to-curb-grabbing-of-public-land-4723180> 17 April 2026.

[117]Ardhisasa, Ardhisasa Online Platform https://ardhisasa.lands.go.ke/ accessed 17 April 2026. See also Austine Ouma, 'Good Faith, Bad Fate: A Critique of the Dina Management Decision on the Limits of Constitutional Property Rights Protections in Kenya' (2025) 10/1 Strathmore Law Review (SLR) 98.

[118]ibid 122.

[119]Low 'Opportunities for Fraud in an Electronic Land Registration System: Fact or Fiction' 2006 13 eLaw Journal 225. Tenure Security Reform and Electronic Registration: Exploring Insights from English Law' 2011 14 Potchefstroom Electronic LJ 85; Peterson 'Two Faces: Demystifying the Mortgage Electronic Registration System's Land Title Theory' 2011 53 William & Mary LR 111.

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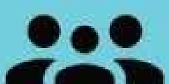
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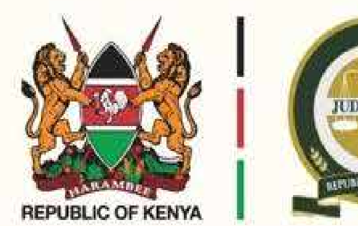

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Thou shalt not replace humanity: A commentary on Pope Leo XIV's encyclical on AI and the digital age

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Pope Leo XIV

Abstract

On 15 May 2026, Pope Leo XIV issued his inaugural encyclical, Magnifica Humanitas ("The Grandeur of Humanity"), subtitled On Safeguarding the Human Person in the Time of Artificial Intelligence. The encyclical addresses a broad range of issues arising from technological transformation, including digital ethics, the changing nature of work, surveillance, information integrity, democratic participation, and the commodification of the human person in the digital economy. This commentary examines Magnifica Humanitas as an interdisciplinary text within the convergence of Catholic social teaching, philosophy of technology, and contemporary debates on technology governance. Rather than approaching the encyclical solely as a theological or pastoral document, the paper considers it as a normative intervention in ongoing discussions concerning the governance of emerging technologies and the preservation of human agency under conditions of rapid technological change. It argues that Magnifica Humanitas advances a coherent framework for understanding the ethical and social implications of artificial intelligence, offering perspectives that extend beyond religious discourse and engage broader legal and policy concerns. In this respect, the encyclical constitutes a noteworthy contribution to contemporary debates on regulation, accountability, and the institutional conditions necessary for human flourishing in the digital age.

I. Introduction

When the conclave elected Robert Prevost as Pope Leo XIV in May 2025, few anticipated that his first encyclical letter would arrive so quickly, or that it would engage so directly with a subject more commonly associated with Silicon Valley boardrooms than Vatican corridors. Yet *Magnifica Humanitas (hereinafter the Encyclical)*, issued on 15 May 2026, is precisely that.[3] A theologically grounded but intellectually wide-ranging engagement with artificial intelligence (AI) as one of the most consequential transformations in human history.

The encyclical consciously positions itself within the 135-year tradition of Catholic Social Teaching inaugurated by Leo XIII's *Rerum Novarum* in 1891.[4] It is a document that speaks to governance architects, legislators, technologists, and ethicists who may share none of the Pope's theological commitments but who share his alarm at the speed and opacity of AI's penetration into the structures of human life.

The *Magnifica Humanitus* opens with a metaphorical framing.

> ***"Humanity, created by God in all its grandeur, is today facing a pivotal choice: either to construct a new Tower of Babel or to build the city in which God and humanity dwell together."***[5]

The Tower of Babel was humanity's attempt to build a single towering city and monument reaching the heavens, unified by one language and one ambition.[6] The project ultimately collapsed into confusion and fragmentation.[7] The Tower of Babel metaphor runs through the entire document as a diagnostic of what AI development, if left ungoverned, threatens to become. Simply, a civilization organized around centralized technological power and control that eventually fractures under its own excesses. Against this model, the Pope offers the image of Nehemiah rebuilding the walls of Jerusalem[8]. This is a collaborative, distributed, and participatory reconstruction achieved not through domination but through shared responsibility. He in the end frames two competing visions of technological governance: centralized technocratic control versus subsidiarity, democratic participation, and accountability.

The timing of *Magnifica Humanitas* is itself significant. It arrives in a moment of acute global anxiety about AI. The European Union's AI Act entered into force in 2024, establishing the first comprehensive legal framework for AI regulation.[9] UNESCO had earlier adopted its Recommendation on the Ethics of AI.[10] The United States, China, and other major powers are engaged in what

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[3]Pope Leo XIV, *Magnifica Humanitas: On Safeguarding the Human Person in the Time of Artificial Intelligence* (Encyclical Letter, 15 May 2026) https://www.vatican.va/content/leo-xiv/en/encyclicals/documents/20260515-magnifica-humanitas.html accessed 27 May 2026.

[4]Santiago Schnell, 'AI and the Worker: *Rerum Novarum's 135-Year-Old Warning' National Catholic Register* (14 May 2026) https://ewtnvatican.com/articles/ai-worker-rerum-novarum-warning accessed 27 May 2026. Pope Leo XIII's encyclical, Rerum Novarum (1891), was about the rights and duties of capital and labor during the height of the Industrial Revolution. See, Pope Leo XIII, *Rerum Novarum: On Capital and Labour* (Encyclical Letter, 15 May 1891) https://www.vatican.va/content/leo-xiii/en/encyclicals/documents/hf_l-xiii_enc_15051891_rerum-novarum.html accessed 27 May 2026.

[5]Pope Leo XIV, *Magnifica Humanitas* (n 1), para. 1

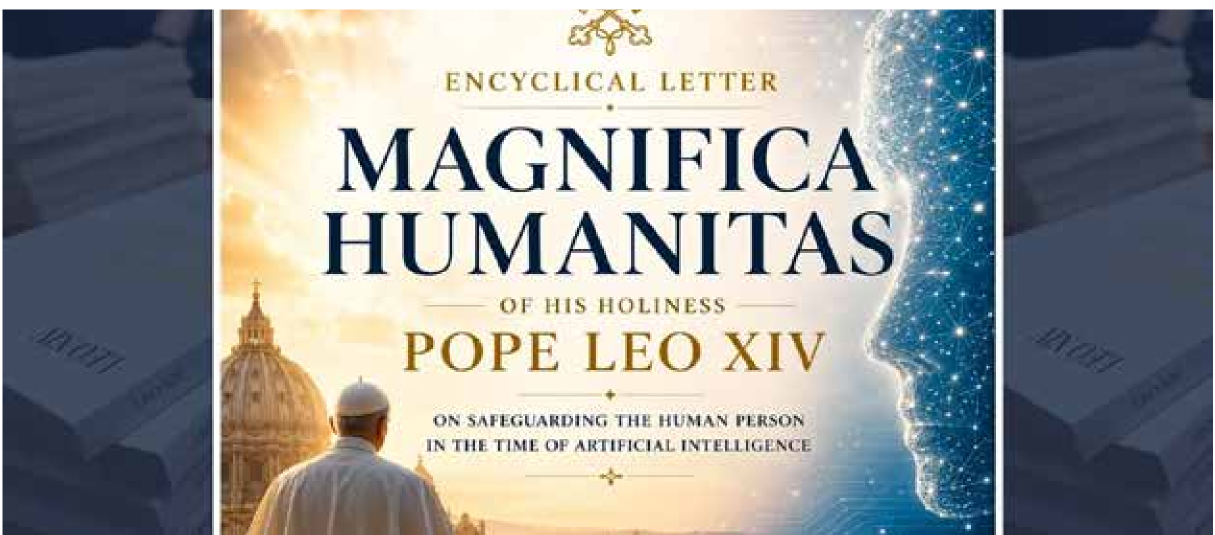
[6]'Tower of Babel | Story, Summary, Meaning, & Facts | Britannica' *Encyclopaedia Britannica* https://www.britannica.com/topic/Tower-of-Babel accessed 27 May 2026.

[7]ibid

[8]Pope Leo XIV, *Magnifica Humanitas* (n 1), para 2.

[9]European Commission, 'AI Act enters into force' (1 August 2024) https://commission.europa.eu/news-and-media/news/ai-act-enters-force-2024-08-01_en accessed 27 May 2026.

[10]UNESCO, *Recommendation on the Ethics of Artificial Intelligence* (2021) https://www.unesco.org/en/articles/recommendation-ethics-artificial-intelligence accessed 27 May 2026. (unesco.org)



The central argument of Magnifica Humanitas is that humanity stands at a crossroads: AI can either become a tool that promotes dignity, justice, and solidarity, or a force that concentrates power, erodes freedom, and dehumanizes society.

Leo XIV himself characterizes as a "race for ever more powerful algorithms and larger datasets, driven by the desire to secure geopolitical or commercial dominance."[11] The Vatican's intervention therefore represents a centuries-old institution with a global moral authority spanning 1.4 billion Catholics and wide influence beyond, entering a conversation where moral authority is urgently needed and frequently absent. As the philosopher Luciano Floridi has argued, what the AI debate most lacks is not technical expertise but ethical imagination grounded in a coherent vision of the human person.[12] *Magnifica Humanitas* offers precisely such a vision.

This commentary proceeds in the following manner. It begins by situating the encyclical within its historical and ecclesial context, then traces the Pope's conceptual treatment of AI and technology. It proceeds to examine the governance and legal dimensions of the document in depth, comparing its prescriptions with existing frameworks such as the EU AI Act and UNESCO's guidelines. Ultimately, the commentary argues that *Magnifica Humanitas* is not a theological curiosity but a serious socio-legal document whose argument about the relationship between AI, power, human dignity, and governance is both timely and substantially correct and whose framework of subsidiarity, solidarity, and the common good offers resources that are genuinely useful to legal and policy discourse, independent of their theological origins.

II. Historical context and ecclesial stakes and the tradition of res novae

To understand *Magnifica Humanitas* is first to understand the tradition it inherits. Catholic Social Teaching (CST) is not a fixed dogma but a living intellectual tradition of engagement with social, economic, and political questions in light of the Church's moral vision. Its modern form was inaugurated in 1891 when Leo XIII, reigning pontiff during the first industrial revolution,

[11] Pope Leo XIV, *Magnifica Humanitas* (n 1), para 110.

[12] Luciano Floridi, 'AI as Agency without Intelligence: On Artificial Intelligence as a New Form of Artificial Agency and the Multiple Realisability of Agency Thesis' (2025) 38 *Philosophy & Technology* 30 https://doi.org/10.1007/s13347-025-00858-9 accessed 27 May 2026.

issued *Rerum Novarum* (On New Things)[13]. The Latin phrase res novae denoted the upheavals of industrialization and the attendant degradation of workers. In that document, Leo XIII insisted, against those who argued the Church should confine itself to eternal verities, that the Gospel cannot overlook the concrete lives of people.[14]

His successor Leo XIV, whose choice of the name Leo is itself a deliberate signal of continuity seemingly adopts the same posture. "While Leo XIII spoke in his time of 'new things'," he writes, "today we cannot limit ourselves simply to repeating his insightful teachings. Instead, we must ask God for the wisdom to interpret the great trends of our time, particularly technological advances."[15]

The intervening 135 years have seen CST develop substantially with subsequent encyclicals. Pius XI's *Quadragesimo Anno* (1931)[16] addressed industrial capitalism and corporatism. John XXIII's *Mater et Magistra* (1961)[17] and *Pacem in Terris* (1963)[18] introduced international human rights language into CST. Paul VI's *Populorum Progressio* (1967)[19] and *Octogesima Adveniens* (1971)[20] addressed development, inequality, and new social questions. John Paul II's *Laborem Exercens* (1981)[21] and *Centesimus Annus* (1991)[22] engaged capitalism and the rights of workers. Benedict XVI's *Caritas in Veritate* (2009)[23] addressed globalisation, solidarity, and the technocratic paradigm. And most recently, Francis's *Laudato Si'* (2015)[24] and *Laudate Deum* (2023)[25] introduced ecological ethics and a sustained critique of the "technocratic paradigm" the belief that humanity can solve all problems through technical means without moral or spiritual discernment.

Leo XIV explicitly positions *Magnifica Humanitas* in this lineage, describing CST as "a legacy of wisdom, where we find principles for thought, criteria for discernment and judgment, and concrete guidelines for action"[26]. AI, he notes, is not simply another technological advance to be assessed with familiar tools. It is "interwoven into the fabric of daily life, shaping decision-making processes and deeply affecting the collective imagination:

[13]Pope Leo XIII, *Rerum Novarum: On Capital and Labour* (Encyclical Letter, 15 May 1891) https://www.vatican.va/content/leo-xiii/en/encyclicals/documents/hf_l-xiii_enc_15051891_rerum-novarum.html accessed 27 May 2026.
[14]ibid
[15]Pope Leo XIV, *Magnifica Humanitas* (n 1), para 4.
[16]Pope Pius XI, *Quadragesimo Anno: On Reconstruction of the Social Order* (Encyclical Letter, 15 May 1931) https://www.vatican.va/content/pius-xi/en/encyclicals/documents/hf_p-xi_enc_19310515_quadragesimo-anno.html accessed 27 May 2026.
[17]Pope John XXIII, *Mater et Magistra: Christianity and Social Progress* (Encyclical Letter, 15 May 1961) https://www.vatican.va/content/john-xxiii/en/encyclicals/documents/hf_j-xxiii_enc_15051961_mater.html accessed 27 May 2026
[18]Pope John XXIII, *Pacem in Terris: On Establishing Universal Peace in Truth, Justice, Charity, and Liberty* (Encyclical Letter, 11 April 1963) https://www.vatican.va/content/john-xxiii/en/encyclicals/documents/hf_j-xxiii_enc_11041963_pacem.html accessed 27 May 2026.
[19]Pope Paul VI, *Populorum Progressio: On the Development of Peoples* (Encyclical Letter, 26 March 1967) https://www.vatican.va/content/paul-vi/en/encyclicals/documents/hf_p-vi_enc_26031967_populorum.html accessed 27 May 2026.
[20]Pope Paul VI, *Octogesima Adveniens: Apostolic Letter on the Eightieth Anniversary of Rerum Novarum* (14 May 1971) https://www.vatican.va/content/paul-vi/en/apost_letters/documents/hf_p-vi_apl_19710514_octogesima-adveniens.html accessed 27 May 2026.
[21]Pope John Paul II, *Laborem Exercens: On Human Work* (Encyclical Letter, 14 September 1981) https://www.vatican.va/content/john-paul-ii/en/encyclicals/documents/hf_jp-ii_enc_14091981_laborem-exercens.html accessed 27 May 2026.
[22]Pope John Paul II, Centesimus Annus: On the Hundredth Anniversary of Rerum Novarum (Encyclical Letter, 1 May 1991) https://www.vatican.va/content/john-paul-ii/en/encyclicals/documents/hf_jp-ii_enc_01051991_centesimus-annus.html accessed 27 May 2026.
[23]Pope Benedict XVI, *Caritas in Veritate: On Integral Human Development in Charity and Truth* (Encyclical Letter, 29 June 2009) https://www.vatican.va/content/benedict-xvi/en/encyclicals/documents/hf_ben-xvi_enc_20090629_caritas-in-veritate.html accessed 27 May 2026.
[24]Pope Francis, *Laudato Si': On Care for Our Common Home* (Encyclical Letter, 24 May 2015, Libreria Editrice Vaticana) https://www.vatican.va/content/francesco/en/encyclicals/documents/papa-francesco_20150524_enciclica-laudato-si.html accessed 27 May 2026.
[25]Pope Francis, *Laudate Deum: Apostolic Exhortation on the Climate Crisis* (4 October 2023) https://www.vatican.va/content/francesco/en/apost_exhortations/documents/20231004-laudate-deum.html accessed 27 May 2026.
[26]Pope Leo XIV, *Magnifica Humanitas* (n 1), para 3.

'Never has humanity had such power over itself'".[27]

The encyclical's significance in the context of global AI discourse should not be underestimated. When Leo XIV argues that "it is necessary to establish adequate regulatory tools capable of upholding justice and curbing the distorting effects of technological power", he is speaking the language not of medieval theology but of contemporary regulatory governance.[28] And when he warns that "the main drivers of development are private, often transnational, parties that are endowed with resources and the capacity to intervene that surpass those of many Governments", he is articulating a concern that lies at the heart of AI regulation debates from Washington to Brussels to Nairobi.[29]

III. How Pope Leo XIV Understands Artificial Intelligence

One of the notable features of *Magnifica Humanitas* is its epistemic seriousness about AI. The Pope explicitly disclaims any ambition to provide a comprehensive technical account:

"It is not my intention here to offer a comprehensive treatment of artificial intelligence, nor to give an overview of the extensive relevant literature".[30]

What he offers instead is a morally and anthropologically grounded account of what AI is, what it is not, and why that distinction matters for how we govern it. He in that regard then chooses to engage AI from the perspective of what the philosopher Luciano Floridi calls the "information ethics" lens: understanding AI as a social and political phenomenon, not merely a technical one.[31]

Leo XIV insists on distinguishing AI from human intelligence at the level of what matters morally. In paragraph 99, he writes:

"It is not possible to provide a single, comprehensive definition of AI. What can be stated, however, is that we must avoid the misconception of equating this type of 'intelligence' with that of human beings. These systems merely imitate certain functions of human intelligence... Yet this power remains entirely tied to data processing. So-called artificial intelligences do not undergo experiences, do not possess a body, do not feel joy or pain, do not mature through relationships and do not know from within what love, work, friendship or responsibility mean. Nor do they have a moral conscience, since they do not judge good and evil, grasp the ultimate meaning of situations, or bear responsibility for consequences."

This passage advances three arguments: first, against anthropomorphizing AI; second, against treating AI systems as moral agents; and third, against deferring

[27]Pope Leo XIV, *Magnifica Humanitas* (n 1), para 4.

[28]Pope Leo XIV, *Magnifica Humanitas* (n 1), para 5; See the same position by, Hans-W. Micklitz, Oreste Pollicino, Amnon Reichman, Andrea Simoncini, Giovanni Sartor and Giovanni De Gregorio, 'Algorithms, Freedom, and Fundamental Rights' in Giovanni De Gregorio (ed), *Constitutional Challenges in the Algorithmic Society* (Cambridge University Press 2021) p. 25-128.

[29]Pope Leo XIV, *Magnifica Humanitas* (n 1), para 5. See a similar position on the limits of private actor conduct governance, Thomas Conzelmann and Klaus Dieter Wolf, 'The Potential and Limits of Governance by Private Codes of Conduct: A Normative Perspective' in Jean-Christophe Graz and Andreas Nölke (eds), *Transnational Private Governance and its Limits* (Routledge 2012) 98–114.

[30]Pope Leo XIV, *Magnifica Humanitas* (n 1), para 97

[31]Luciano Floridi, 'AI as Agency without Intelligence: On Artificial Intelligence as a New Form of Artificial Agency and the Multiple Realisability of Agency Thesis' (2025) 38 *Philosophy & Technology* 30.

to AI outputs as if they possessed the kind of understanding that justifies unchecked reliance.

Questions about AI moral and legal personhood have proliferated in recent years. Scholars have debated whether AI systems should be granted some form of legal standing.[32] The Pope's joins the debate by positing that AI may imitate language, behavior and analytical skills, or even simulate empathy and understanding, but they do not understand what they produce".[33] His argument is that the appearance of understanding is not understanding; the simulation of empathy is not empathy; and a legal or governance system that treats these as equivalent will misattribute responsibility in ways that are dangerous to human dignity.

> ***"Even when these tools are described as capable of 'learning,' their way of doing so is different from that of a human person... Rather, it is a form of statistical adaptation based on data and feedback, which can be very effective, but does not imply inner growth".[34]***

Beyond the definitional question, the encyclical identifies several specific risks associated with AI that track closely with concerns in legal and governance scholarship. The first is the risk of algorithmic opacity and the erosion of accountability. In paragraph 103, Leo XIV writes:

> ***"Entrusting an algorithm in practice with the power to select who is worthy or not, without anyone bearing responsibility for that judgment, is to hand over the task of redefining the boundaries of human possibilities. In this process, political responsibility is also lost, not just empathy toward those excluded."[35]***

This is precisely the concern that animates the EU AI Act's requirements for human oversight in high-risk AI systems, and the broader principle in administrative law that consequential decisions affecting individuals must be explainable, contestable, and attributable to responsible agents.[36]

The Pope's further contextualises the treatment of AI and surveillance, what Shoshana Zuboff famously theorized as "surveillance capitalism".[37] Paragraph 171 observes:

> ***"A further risk, less visible but no less serious, is that of social control made possible by the massive collection of data and use of algorithmic systems. When every action, movements, purchases, relationships and preferences, leaves a trace, a new***

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[32]See similar arguments by Dr. Michael and Russman on intellectual property standing of AI. Michael Goodyear, 'Artificial Infringement' (18 March 2025) *UC Law Journal* (forthcoming) https://ssrn.com/abstract=5184405 accessed 27 May 2026. Russ Pearlman, 'Recognizing Artificial Intelligence (AI) as Authors and Inventors Under U.S. Intellectual Property Law' (2018) 24 *Richmond Journal of Law and Technology* no 2 https://jolt.richmond.edu/recognizing-artificial-intelligence-ai-as-authors-and-inventors-under-u-s-intellectual-property-law/ accessed 27 May 202

[33]Pope Leo XIV, *Magnifica Humanitas* (n 1), para 99

[34]ibid

[35]Pope Leo XIV, *Magnifica Humanitas* (n 1), para 103.

[36]Asress Adimi Gikay, 'Risks, Innovation, and Adaptability in the UK's Incrementalism versus the European Union's Comprehensive Artificial Intelligence Regulation' (2024) 32 *International Journal of Law and Information Technology* https://doi.org/10.1093/ijlit/eaae013 accessed 27 May 2026. See, a similar argument of opacity in the context of Artificial Intelligence in Refugee Status Determination, Ayaga Max Liambilah, 'Bots at the Border: Assessing the Legality of AI-Based Algorithmic Refugee Status Determination Under International Human Rights and Data Protection Law' (5 March 2026) *SSRN Electronic Journal* https://ssrn.com/abstract=6458579 or https://doi.org/10.2139/ssrn.6458579 accessed 27 May 2026, p. 19.

[37]Shoshana Zuboff, *The Age of Surveillance Capitalism: The Fight for a Human Future at the New Frontier of Power* (Harvard Business School Faculty & Research) https://www.hbs.edu/faculty/Pages/item.aspx?num=56791 accessed 27 May 2026

form of power emerges, namely the power to profile, predict and influence behavior, often without individuals being fully aware of it."[38]

Zuboff's makes a similar argument: that the behavioral surplus extracted from human experience constitutes a new form of raw material for prediction products sold to advertisers and others, with the result that human freedom is instrumentalized and constrained by systems individuals neither understand nor consented to.[39] The Pope reaches the same diagnosis from a different methodological starting point, and concludes that freedom in the digital age is not merely a matter of interiority but also a public concern that requires "clear rules, transparency, the possibility of recourse and proportionate limits."[40]

Leo XIV also grapples with what might be called the power concentration problem in AI. In paragraph 95, he observes:

> ***"In many cases within the digital context, control over platforms, infrastructure, data and computing power does not rest with States, but with major economic and technological actors. These entities effectively set the conditions for access, determine the rules of visibility and shape the very possibilities for participation."***

This observation, that a small number of private, transnational corporations control the infrastructure of the information age, is shared by scholars across.[41] The Pope does not name specific companies, but raises the concern of when power is concentrated in this way, it "tends to become opaque and evade public oversight, increasing the risk of distorted forms of development that give rise to new dependencies, exclusions, manipulations and inequalities". [42]

IV. The Governance Architecture of Magnifica Humanitas

The most directly actionable dimension of *Magnifica Humanitas* for policymakers is its sustained argument about how AI ought to be governed. Leo XIV is not content with abstract moral exhortation; he outlines, with some specificity, the principles and structures that should govern the development and deployment of AI. While these proposals are grounded in CST, they translate readily into the vocabulary of administrative law, regulatory theory, and international governance.

> ***"It is not enough to invoke ethics in the abstract; robust legal frameworks, independent oversight, informed users and a political system that does not abdicate its responsibility are required. Otherwise, change will be governed only by technocratic thinking and presented as necessary and inevitable, ultimately imposing rules shaped by those who control data, infrastructure and computing power."***[43]

This passage reads almost as a brief for the legislative approach taken by the EU AI Act, which precisely aims to establish

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[38]Pope Leo XIV, Magnifica Humanitas (n 1), para 171.

[39]Shoshana Zuboff, *The Age of Surveillance Capitalism: The Fight for a Human Future at the New Frontier of Power* (Harvard Business School Faculty & Research)

[40]Pope Leo XIV, *Magnifica Humanitas* (n 1), para 171.

[41]See a similar argument in, Artur Ishkhanyan, 'Governing AI across borders: corporate power, state sovereignty and global regulation' (2025) Digital Policy, *Regulation and Governance* https://doi.org/10.1108/DPRG-03-2025-0057 accessed 27 May 2026.

[42]Pope Leo XIV, *Magnifica Humanitas* (n 1), para 95

[43]Pope Leo XIV, *Magnifica Humanitas* (n 1), para 106

"robust legal frameworks" and "independent oversight" bodies for AI systems classified as high-risk. But the Pope goes further than the EU Act in one important respect: he insists that governance must be genuinely democratic and participatory, not merely technical.

"A more moral AI is not enough," he writes in paragraph 107, "if that morality is determined by a few. What is needed is a more active political involvement that is capable of slowing things down when everything is accelerating, and of protecting the opportunities for communities still to be able to participate and ask questions."[45]

This argument about the political economy of AI governance resonates with a body of scholarship in regulatory theory. Julie Cohen's *Between Truth and Power* (2019) argues that law has historically struggled to constrain the informational infrastructures that powerful private actors build, because those infrastructures shape the very conditions under which law operates.[46] Kate Crawford's *Atlas of AI* (2021) documents the ways in which AI systems embed the interests of those who design and fund them, and argues that "auditing" such systems is insufficient without structural changes in who controls them.[47]

The encyclical's advances a different case on accountability. Paragraph 105 notes:

> ***"For AI to respect human dignity and truly serve the common good, responsibility must be clearly defined at every stage: from those who design and develop these systems to those who use them and rely on them for concrete decisions. In many cases, however, the internal processes leading to a result remain opaque, making it harder to assign responsibility and correct errors. This is where accountability becomes crucial: the possibility of identifying who must 'account' for decisions, justify them, monitor them, and, when necessary, challenge them and remedy any harm caused."***

When an algorithm denies a person credit, denies them housing, or flags them as a security risk, the question of who is legally responsible, the programmer, the trainer, the deploying institution, the data source, is notoriously difficult.[48]

Leo XIV also addresses the specific problem of algorithmic bias. He argues:

> ***"We cannot consider AI to be morally neutral. In reality, every technical tool embodies choices and priorities through what it measures, ignores and optimizes, and how it classifies people and situations. If a system is designed or used in a way that treats some lives as less worthy, or excludes them without the possibility of appeal, then it is not merely a tool 'to be used well,' since it has already introduced criteria that contradict the inalienable***

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[44]See, Asress Adimi Gikay, 'Risks, Innovation, and Adaptability in the UK's Incrementalism versus the European Union's Comprehensive Artificial Intelligence Regulation' (2024) 32.

[45]Pope Leo XIV, *Magnifica Humanitas* (n 1), para 107.

[46]Julie E Cohen, *Between Truth and Power: The Legal Constructions of Informational Capitalism* (Oxford University Press 2019) https://doi.org/10.1093/oso/9780190246693.001.0001 accessed 27 May 2026, p. 78-85.

[47]The Atlas of AI, *The Atlas of AI: Power, Politics, and the Planetary Costs of Artificial Intelligence* (Yale University Press 2021) 10–17.

[48]See a similar concern by Cecil Abungu on accountability for legal harms, 'Closely connected to the black box problem, technical AI autonomy is the other idea that plays an outsize role in scholarly debates about legal accountability for harms caused by AI." Cecil Abungu, 'Foreseeing the Unforeseeable: How U.S. Negligence Law Should Address the Foreseeability of Harms Caused by Autonomous AI Agents' (2026) 19 *Journal of Tort Law* 1–41 https://doi.org/10.1515/jtl-2025-0027 accessed 27 May 2026, p. 25.

dignity of the human person."[49]

It is the basis upon which scholars such as Ruha Benjamin and Safiya Umoja Noble have argued that "neutral" algorithms can perpetuate and amplify structural racism.[50] Safiya notes;

> ***"While we often think ofterms such as "big data" and "algorithms" as being benign, neutral, or objective, they are anything but. The people who make these decisions hold all types of values, many of which openly promote racism, sexism, and false notions of meritocracy, which is well documented in studies of Silicon Valley and other tech corridors."***[51]

It grounds the argument, increasingly influential in discrimination law, that disparate impact should be a sufficient basis for legal liability even absent discriminatory intent, because the system itself, not merely its misuse, may be the source of the wrong.[52]

The encyclical's governance framework also extends to transparency and explainability requirements. It advances the argument that when data and algorithms influence credit distribution, personnel selection or access to services and opportunities, it is necessary that decisions be understandable, contestable and subject to oversight, so that individuals are not reduced to mere profiles.[53] This maps directly onto Article 13 of the EU AI Act, which requires providers of high-risk AI systems to ensure their systems are "sufficiently transparent" to enable deployers to interpret output, and Article 86, which grants individuals a right to explanation when subjected to decisions made by high-risk AI systems.[54] The Pope argues that the purpose of transparency is to prevent the reduction of persons to mere data profiles and that transparency is not primarily a consumer information measure but a safeguard of human dignity.[55]

One area where *Magnifica Humanitas* goes beyond existing regulatory frameworks is its treatment of AI and democracy. In paragraph 108, the Pope warns that AI "tends to amplify the power of those who already possess economic resources, expertise and access to data" and that "small but highly influential groups can shape information and consumption patterns, influence democratic processes and steer economic dynamics to their own advantage."[56] This is a concern that existing AI regulation has been slow to address directly. Neither the EU AI Act nor UNESCO's AI Ethics Recommendation contains robust provisions for the democratic governance of AI-mediated information environments. The Pope's identification of this as a structural threat represents a contribution to the regulatory conversation that legislators should take seriously. The question of who controls the informational infrastructure of democracy is, at bottom, a constitutional question, and *Magnifica Humanitas* identifies it as such.

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[49]Pope Leo XIV, *Magnifica Humanitas* (n 1), para 104.
[50]Safiya Umoja Noble, Algorithms of Oppression: How Search Engines Reinforce Racism (New York University Press 2018)Ruha Benjamin, *Race After Technology: Abolitionist Tools for the New Jim Code* (Polity Press 2019).
[51]Ibid, p. 1-2
[52]Ayaga Max Liambilah, 'Bots at the Border: Assessing the Legality of AI-Based Algorithmic Refugee Status Determination Under International Human Rights and Data Protection Law' (5 March 2026) SSRN *Electronic Journal* https://ssrn.com/abstract=6458579 or https://doi.org/10.2139/ssrn.6458579 accessed 27 May 2026, p. 19-25.
[53]Pope Leo XIV, *Magnifica Humanitas* (n 1), para 164.
[54]Regulation (EU) 2024/1689 of the European Parliament and of the Council laying down harmonised rules on artificial intelligence [2024] OJ L 1689/1, art 13, 86.
[55]Pope Leo XIV, *Magnifica Humanitas* (n 1), para 164.
[56]Pope Leo XIV, *Magnifica Humanitas* (n 1), para 108.

V. Human Dignity, Labor, and the New Forms of Servitude

Leo XIV devotes extensive attention to what he calls the "new forms of slavery" generated by the digital economy.

> ***"Nothing in the world of AI is immaterial or magical. Every seemingly immediate and flawless response is the result of a long chain of mediation, involving vast networks of natural resources, energy infrastructure and, above all, people. A significant part of the digital economy's functioning relies on the silent work of millions of people engaged in essential yet largely unseen activities, such as data labeling, model training and content moderation, often involving disturbing material.***
>
> ***In many cases, these workers are young people, predominantly women, working under demanding conditions for minimal wages. Added to this invisible labor is the even harsher work of extracting the resources required for the production of the devices and microprocessors on which AI depends. In some regions of the world, children and adolescents work in dangerous conditions, crushing the materials from which rare earth elements are extracted. The bodies of these people are scarred, injured and worn down so that computational flow may continue uninterruptedly."***

This passage is is an empirical description of a global labor reality that has been documented by researchers including Mary Gray and Siddharth Suri in *Ghost Work* (2019)[57], Adrienne Williams, Milagros Miceli, and Timnit Gebru in their studies of data annotation labor in the Global South[58], and the investigative journalism of Motherboard and TIME[59], which exposed the conditions of OpenAI's content moderation workers in Kenya, workers paid $2 per hour to review traumatizing content.

The Pope's decision to name this reality explicitly, in a papal encyclical, constitutes a significant moral reckoning. He connects it directly to the tradition of Leo XIII during the industrialization, asserting that the fight against new forms of slavery is a decisive test for the ethical discernment of AI and digital transformation and that technology which promises emancipation, yet produces new forms of global subordination, stands in contradiction to the fundamental principle of human dignity.[60]

On the question of labor more broadly, *Magnifica Humanitas* engages the automation debate with nuance. It avoids both the technophobic dismissal of automation and the naive optimism of those who promise that AI will create as many jobs as it destroys. Instead, he offers a more measured assessment:

> ***"While AI promises to boost productivity by taking over mundane tasks, it frequently forces workers to adapt to the speed and demands of***

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[57]Mary L. Gray and Siddharth Suri, *Ghost Work: How to Stop Silicon Valley from Building a New Global Underclass* (2019) https://www.its.caltech.edu/~haugen/Ghost-Work-reading.pdf accessed 27 May 2026.

[58]Adrienne Williams, Milagros Miceli and Timnit Gebru, 'The Exploited Labor Behind Artificial Intelligence' (13 October 2022) *Noema Magazine* https://www.noemamag.com/the-exploited-labor-behind-artificial-intelligence/ accessed 27 May 2026.

[59]Billy Perrigo, 'Exclusive: OpenAI Used Kenyan Workers on Less Than $2 Per Hour to Make ChatGPT Less Toxic' (18 January 2023) *TIME* https://time.com/6247678/openai-chatgpt-kenya-workers/ accessed 27 May 2026.

[60]Pope Leo XIV, *Magnifica Humanitas* (n 1), para 173-174.

machines, rather than machines being designed to support those who work. As a result, contrary to the advertised benefits of AI, current approaches to technology can paradoxically de-skill workers, subject them to automated surveillance and relegate them to rigid and repetitive tasks. The need to keep up with the pace of technology can erode workers' sense of agency and stifle the innovative abilities they are expected to bring to their work."[61]

This description of algorithmic management, in which workers are not liberated by automation but subordinated to its rhythms, is well supported by industrial sociology research, including the critic by Alex Rosenblat on Uber drivers.[62]

The encyclical provides a structural reform. The Pope specifies that governing AI in an economy respectful of human dignity requires three sets of measures: transparency and accountability when algorithms influence consequential decisions; inclusion and access, ensuring that the benefits of innovation are not captured exclusively by the already advantaged; and equity measures, "taxation, social protection and industrial policies" to correct the concentration of wealth generated by AI.[63] This is recognizably a social democratic governance agenda, and it aligns with proposals advanced by economists such as Daron Acemoglu, who has argued that current AI investment strategies are generating excessive labor displacement relative to their productivity benefits, and that tax policy should be redesigned to correct this bias.[64]

The Pope eventually draws attention to the threat of digital dependency and attentional capture. He observes that the "digital attention economy" exploits human vulnerabilities, particularly those of young people, in ways that weaken inner freedom.[65] Business models that "thrive on human weakness" treat persons "as a means rather than as an end," and those who design or finance such systems "bear a moral responsibility that cannot be ignored."[66]

This point is relevant to the emerging debate about whether platforms that deliberately exploit behavioral biases, through dark patterns, infinite scroll, dopaminergic notification architectures, should face liability analogous to that imposed on manufacturers of addictive products. The Pope does not use this legal vocabulary, but his moral analysis maps precisely onto it: deliberate exploitation of human vulnerability for profit, at the expense of autonomy, is not a neutral business practice but a form of harm that calls for legal remedy.[67]

VI. Critical evaluation: Strengths, limitations and productive tensions

Several productive tensions in the document, however, merit critical attention. The first concerns the relationship between

[61]Pope Leo XIV, *Magnifica Humanitas* (n 1), para 150.
[62]Alex Rosenblat and Luke Stark, 'Algorithmic Labor and Information Asymmetries: A Case Study of Uber's Drivers' (2016) 10 *International Journal of Communication* 3758–3784 https://ijoc.org/index.php/ijoc/article/view/4892 accessed 27 May 2026.
[63]Pope Leo XIV, *Magnifica Humanitas* (n 1), para 164.
[64]See, Daron Acemoglu, *The Simple Macroeconomics of AI* (NBER Working Paper No 32487, 2024) https://www.nber.org/system/files/working_papers/w32487/w32487.pdf accessed 27 May 2026.
[65]Pope Leo XIV, *Magnifica Humanitas* (n 1), para 170
[66]ibid
[67]ibid

the Pope's anthropological commitments and the governance conclusions he draws from them. His insistence on the irreducible dignity and moral uniqueness of the human person is grounded in the theological claim that human beings are made in the image of God (*imago Dei*). For readers who do not share this theological premise, the question arises whether the governance prescriptions remain independently defensible. The answer, this commentary argues, is largely yes. The case for transparency, accountability, participatory governance, and structural equity in AI development can be made on purely secular grounds, from Kantian dignity theory, contractualist reasoning, or democratic theory. The theological foundation enriches the argument but is not load-bearing for its governance conclusions. This makes the encyclical more, not less, useful for a pluralistic governance conversation.

A second tension concerns the encyclical's treatment of private technological power. Leo XIV is deeply concerned about the concentration of power in the hands of private AI companies. His prescriptions, public regulation, data commons, participatory oversight, are directed primarily at restraining that power. He is less explicit, however, about the risks of state concentration of AI power, particularly in the context of authoritarian governance. AI-enabled surveillance and social control by states, of the kind documented in China's Social Credit System and elsewhere, is a central global concern that the encyclical addresses only obliquely.[68] His focus on private actors is historically understandable, given CST's primary interlocutors, but a governance framework adequate to the AI age must address state power with equal rigor. This is a gap that future magisterial development should address.

A third tension concerns the encyclical's approach to the pace of AI development. Leo XIV urges *"a slower pace in adopting AI" as "an exercise of responsible care"*, and he emphasizes the importance of maintaining space for communities to deliberate and ask questions before technological change is irreversibly embedded.[69] This is a form of the precautionary principle, and it is a reasonable response to the genuine risks of moving faster than our capacity to understand consequences.[70] But critics might argue that the same reasoning could be used to block beneficial AI applications, in medical diagnosis, climate modeling, or access to education, that could alleviate substantial human suffering.[71] Leo XIV is not opposed to beneficial applications of AI; he explicitly acknowledges that "AI can be a valuable tool" and describes it as "a valuable tool that requires vigilance."[72] But building up on the encyclical it would benefit a more explicit account of how to identify which applications merit slower adoption and which deserve active acceleration.

Finally, it is worth noting what the encyclical does not address in depth: the specific governance institutions and international bodies through which its

[68]See the analysis by Dr. Suter in Viktor Suter, 'Algorithmic Panopticon: State Surveillance and Transparency in China's Social Credit System' (2020) EGOSE 2020: *Electronic Governance and Open Society* 42–59 https://www.researchgate.net/publication/348286871_Algorithmic_Panopticon_State_Surveillance_and_Transparency_in_China's_Social_Credit_System accessed 27 May 2026.
[69]Pope Leo XIV, *Magnifica Humanitas* (n 1), para 106.
[70]The precautionary principle states that if an action or policy has a suspected risk of causing severe or irreversible harm to the public or the environment, protective measures should be taken even without definitive scientific proof establishing a causal link. See, World Commission on the Ethics of Scientific Knowledge and Technology (COMEST), The Precautionary Principle (UNESCO, 2005), p. 6-8.
[71]See, Ciro Mennella, Umberto Maniscalco, Giuseppe De Pietro and Massimo Esposito, 'Ethical and Regulatory Challenges of AI Technologies in Healthcare: A Narrative Review' (2024) 10 *Heliyon* e26297 https://doi.org/10.1016/j.heliyon.2024.e26297 accessed 27 May 2026.
[72]Pope Leo XIV, *Magnifica Humanitas* (n 1), para 100.

vision might be realized. Leo XIV calls for "international governance capable of defining common strategies" and "effective oversight, grounded in participation and subsidiarity" , but the encyclical does not engage with existing institutions, the United Nations, the Council of Europe, the International Telecommunication Union, the Global Partnership on AI, or make specific proposals about how they should be reformed or augmented.[73] Given the deep fragmentation of international AI governance, this is a significant lacuna. The document's moral authority would be strengthened by a more specific engagement with institutional questions. This, too, is work for future documents and for the scholars and advocates who take the encyclical's framework seriously.

VII. Comparative analysis: Situating magnifica humanitas in the governance landscape

It is instructive to compare *Magnifica Humanitas* with the principal secular AI ethics and governance frameworks that have emerged in recent years. Three are particularly relevant: the EU AI Act, UNESCO's Recommendation on the Ethics of AI, and the OECD Principles on AI. Each reflects different institutional logics and political economies, and placing the Pope's encyclical alongside them reveals both convergences and distinctive contributions.

The EU AI Act, which entered into force in August 2024, is the world's first comprehensive binding legal framework for AI.[74] It adopts a risk-based approach, classifying AI systems as unacceptable risk (prohibited), high-risk (subject to conformity assessment, transparency, human oversight, and accuracy requirements), or lower risk (subject only to transparency obligations).[75] Its underlying philosophy is managing risks to fundamental rights without prohibiting beneficial innovation.

Magnifica Humanitas and the EU AI Act converge significantly on the need for transparency, accountability, human oversight, and conformity assessment for high-risk applications. But Leo XIV's framework is philosophically deeper: where the AI Act focuses on risk management, the encyclical focuses on anthropological integrity. The Pope is concerned not only with preventing specific harms but with preventing the normalization of a technocratic vision of the human person as an object of optimization.[76] This is a more foundational concern, and it suggests regulatory requirements that the AI Act does not capture, including, for example, requirements that AI systems used in public services must be designed to protect relational and communal values, not merely to avoid discriminatory outcomes.

UNESCO's Recommendation on the Ethics of AI (2021) is broader and more aspirationa.[77] It addresses issues including gender equality, cultural diversity, environmental sustainability, and the right to privacy.[78] It emphasizes human rights and human dignity as foundational values similar with the Magnifica Humanitas. But UNESCO's document is a recommendation, not a binding instrument, and its implementation depends on voluntary member state action. The Pope's insistence

[73]Pope Leo XIV, *Magnifica Humanitas* (n 1), para 108, 163.
[74]Regulation (EU) 2024/1689 of the European Parliament and of the Council laying down harmonised rules on artificial intelligence [2024] OJ L 1689/1.
[75]ibid
[76]Pope Leo XIV, *Magnifica Humanitas* (n 1) para 100 - 108
[77]UNESCO, *Recommendation on the Ethics of Artificial Intelligence* (2021) https://unesdoc.unesco.org/ark:/48223/pf0000381137 accessed 27 May 2026.
[78]ibid

on binding "robust legal frameworks" as a necessary call to action: ethics alone, he argues, is insufficient governance[79]. He adds,

> ***"We cannot be satisfied with merely calling for the moralization of machines, the so-called 'alignment' of AI with human values, without also having the courage to insist on a further condition: the possibility of openly discussing the ethical frameworks involved and subjecting them to shared standards of social justice"***.[80]

AI "alignment" as currently practiced is largely a private, technical process conducted by the companies themselves.[81] Leo XIV argues that the values to which AI should be aligned must be publicly deliberated and democratically determined.

The comparison with his immediate predecessors' documents is also revealing. Francis's *Laudato Si'* (2015) introduced the concept of the "technocratic paradigm" the belief that technological progress is inherently linear and that all problems can be solved by more sophisticated technical means.[82] Leo XIV explicitly inherits and extends this concept (§ 112), applying it specifically to AI. The "pervasive technocratic paradigm," he argues, threatens to normalize an anti-human vision in which efficiency becomes the ultimate measure of value.[83] But where Francis concentrated his critique on the interaction of technology and ecology, Leo XIV applies the same diagnostic to governance, democracy, and the workplace.

Benedict XVI's *Caritas in Veritate* (2009) anticipated some of *Magnifica Humanitas*' concerns when it warned of the dangers of technology development "guided only by profit and ... not oriented toward the common good."[84] Leo XIV cites Benedict's emphasis on "the link between development, justice and responsibility toward future generations" and extends it to digital infrastructure:

> ***"Like the natural environment, the 'digital ecosystem' can be preserved or exploited, shared or monopolized. Solidarity demands that decisions regarding data, algorithms, platforms and artificial intelligence take into account not only the immediate benefit for a few, but also the impact on all peoples and on future generations."***[85]

The intergenerational dimension of AI governance, the recognition that AI systems deployed today will shape the options available to future societies, is a contribution that has been relatively neglected in existing regulatory frameworks, which tend to focus on immediate harms. The Pope's introduction of this temporal dimension enriches the governance conversation.

VIII. The relevance of magnifica humanitas for lawyers, policymakers and technologists

The question might reasonably be asked: why should a lawyer, a policymaker, or a technologist, who may share none of Pope

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[79]Pope Leo XIV, *Magnifica Humanitas* (n 1) para 106
[80]Pope Leo XIV, *Magnifica Humanitas* (n 1) para 107
[81]Jianfeng Cao, 'From Principle to Practice: Value Alignment in AI Ethics and Governance' (2025) 26 *German Law Journal* 1117–1148 https://doi.org/10.1017/glj.2026.10185 accessed 27 May 2026.
[82]Pope Francis, *Laudato Si': On Care for Our Common Home* (Encyclical Letter, 24 May 2015, Libreria Editrice Vaticana).
[83]Pope Leo XIV, *Magnifica Humanitas* (n 1) para 112
[84]Pope Benedict XVI, *Caritas in Veritate: On Integral Human Development in Charity and Truth* (Encyclical Letter, 29 June 2009)
[85]Pope Leo XIV, *Magnifica Humanitas* (n 1) para 107

Leo XIV's theological commitments, take serious notice of this encyclical? Several reasons suggest themselves, beyond the obvious (*maybe not*) point that any document addressing 1.4 billion Catholics and widely engaging the global public deserves attention.

First, *Magnifica Humanitas* offers a philosophically coherent account of why AI governance matters that is largely absent from technical regulatory frameworks. Legal instruments like the EU AI Act are important, but they are largely silent on the deeper question of why AI presents distinctive governance challenges, what it is about AI, specifically, that calls for regulatory attention beyond that afforded to prior technologies.

Second, the encyclical's framework of subsidiarity, the principle that decisions should be made at the lowest level of social organization capable of addressing them, offers a distinctive approach to the multi-level governance problem in AI regulation. AI development and deployment spans local, national, regional, and global levels, and existing governance struggles to coordinate effectively across these levels. The subsidiarity principle, as Leo XIV applies it, does not simply mean local control; it means that higher levels of governance should act only where lower levels are inadequate, and should actively support rather than undermine local capacity. Applied to AI, this suggests governance designs that protect community capacity for AI deliberation and oversight, rather than simply imposing top-down regulatory standards that may be designed for very different social contexts. For African lawyers and policymakers, where a significant proportion of the hidden AI workforce is located, is among the countries most directly affected by the dynamics the Pope describes. This principle of subsidiarity may offer resources for articulating governance claims that center African experiences and priorities.

Third, the encyclical's treatment of data as a common good "the product of many contributors" that "should not be treated as something to be sold off or entrusted to a select few"[86] offers legal theorists a framework for rethinking the property-like treatment of data that currently predominates in both regulatory and commercial law. The concept of a "data commons" governed by fiduciary duties, public interest obligations, and participatory oversight is gaining traction in legal scholarship.[87]

Finally, the encyclical's concept of "disarming AI" which Leo XIV describes as: *"freeing technology from the mentality of 'armed' competition... discrediting the assumption that technical power automatically confers the right to govern... freeing technology from monopolistic control and opening it to discussion and debate, therefore making it human-friendly and restoring it to the plurality of human cultures and ways of life"* is a genuinely novel governance vision that deserves serious engagement.[88] It does not mean prohibiting AI development; it means ensuring that AI development is not driven exclusively by geopolitical and commercial competition but is subject to democratic deliberation about what kinds of AI serve human flourishing. This is a vision and recognition that what is at stake in the AI debate is not

[86]Pope Leo XIV, *Magnifica Humanitas* (n 1) para 108.
[87]See, for example, the work of Salomé Viljoen on "data as a social relation" Viljoen, Salomé. "A Relational Theory of Data Governance." *Yale Law Journal* 131 (2021): 573-654.
[88]Pope Leo XIV, *Magnifica Humanitas* (n 1) para 110

Leo XIV argues that technological progress is valuable only when it enhances human dignity, relationships, freedom, and the common good. He warns against viewing human limitations as flaws to be engineered away.

merely risk management but the kind of civilization we are building.

IX. Conclusion

Leo XIV concludes his encyclical with an appeal that translates readily across religious and secular registers: let us "work together to make the City of God a safe place for returning exiles" that is, to build digital environments and AI governance frameworks that include rather than exclude, that protect rather than exploit, and that recognize in every person, however processed by data and profiled by algorithms, a face rather than merely a function. "The quality of a civilization," he writes, "is measured not by the power of its means, but by the care it is able to offer, by its ability to recognize the other as a face not merely as a function."[89] For policymakers, that is a design specification for the kind of AI governance the world urgently needs.

Whether *Magnifica Humanitas* will prove historically significant depends, in large part, on whether its framework is taken up by the communities that can translate moral argument into institutional design. The encyclical is not a piece of legislation; it cannot compel any particular regulatory outcome. But it represents the entrance of a major moral and intellectual tradition into a debate that has been too often confined to technical and economic registers. At a time when governing AI requires not only technical expertise but also moral imagination; and not only risk management but a clear vision of human flourishing, that entrance is not a luxury. It is a necessity.

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[89]Pope Leo XIV, *Magnifica Humanitas* (n 1) para 114

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Article 26(4) of the Kenyan constitution and the carceral reality of penal administration: The factual and procedural trajectory of PAK

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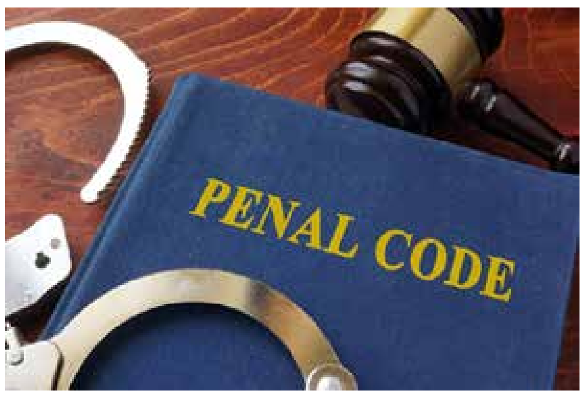

Penal administration refers to the system and processes through which a state manages the punishment, custody, rehabilitation, and supervision of individuals who have been convicted of crimes.

Abstract

The litigation in PAK is too easily read as an abortion case. That reading is correct but incomplete. The deeper problem is how constitutional permission is defeated by penal administration. Article 26(4) of the Constitution of Kenya permits abortion in limited medical circumstances, including where emergency treatment is needed or where the life or health of the mother is in danger. The Penal code in its current structure can convert that permission into a fragile defense, available only after arrest, seizure of records, forced examination, detention and prosecution. We argue that the High Court read Article 26(4) more faithfully than the Court of Appeal because it treated reproductive healthcare as a constitutional practice that must be usable in clinics, police stations and hospitals. The Court of Appeal's approach is now the binding appellate position, but it risks making constitutional protection dependent on surviving the criminal process. PAK therefore exposes a constitutional paradox. A legal order that may formally permit care and still govern it through fear and centuries old practice of control over Women Bodily autonomy. The task after PAK is not to turn Article 26(4) into abortion on demand. It is to ensure that constitutional permission is not swallowed by colonial penal language, prosecutorial discretion and institutional suspicion.

Keywords: *Article 26(4), PAK, reproductive healthcare, post-abortion care, dignity, privacy, criminalisation, feminist constitutionalism, Kenya.*

Introduction

A constitutional order reveals itself most honestly when vulnerability meets organised state power. In PAK, that meeting took place in a clinic. A minor experienced pain and bleeding after pregnancy complications, sought medical help and was treated by a clinical officer who understood the case as spontaneous pregnancy loss. Police then entered the medical space, seized confidential treatment records, arrested the patient and clinician and turned care into criminal accusation.[1] The facts are legally important because they show how quickly reproductive distress can move from medicine into suspicion. A bleeding patient becomes a suspect. A treatment note becomes an exhibit. A clinician's judgment becomes a possible criminal act.

This paper reads PAK as a case about constitutional care under penal pressure. The issue is not whether Kenya recognises abortion on demand but a test of Article 26(4) against the penal code sections 158 to 160.[2] The harder question is what that exemption and permission to conduct emergency care where the life or health of the mother is in danger means before criminal law has already acted. Does it protect the patient and clinician at the hospital door, or does it wait in the courtroom as a defence to be raised after arrest?

The High Court chose the first answer. It treated Article 26(4) as a constitutional rule that must shape police conduct, prosecutorial judgment, medical confidentiality and access to reproductive healthcare.[3] That is why the judgment remains important despite its imperfect language. Its strongest point was not the broad declaration that abortion is a fundamental right. Its deeper contribution was the insistence that a constitutional exception must operate in the very places where rights are lost before courts can name them.

The Court of Appeal chose a more restrained path. It held that abortion is not a fundamental constitutional right and that criminal proceedings were the proper forum for testing whether the conduct fell within or outside the law.[4] That reasoning has formal force. Prosecutors ordinarily decide whether to charge. Trial courts ordinarily assess evidence. Constitutional courts ordinarily avoid premature interference with criminal proceedings. Yet reproductive healthcare presents a harder problem. The criminal process can itself become the constitutional harm. Arrest, forced examination, exposure of intimate records, stigma, remand and delay may injure dignity, privacy and health before conviction is ever reached.

Our claim is therefore narrow but firm. PAK should not be reduced to a culture-war case, pro-life or pro-choice reasoning about abortion.[5] It is a case about how constitutional permission is administered under a criminal code that carries an older moral imagination. The Penal Code speaks

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[1] *PAK & another v Attorney General & 3 others* (Constitutional Petition E009 of 2020) [2022] KEHC 262 (KLR) (High Court at Malindi, 24 March 2022) paras 3-11, Kenya Law accessed 17 May 2026; Harvard Law Review Editors, 'Reproductive Rights, Kenyan Law, Constitutional Law, PAK v Attorney General' (2022) 136 Harvard Law Review 733, 734-735.

[2] Constitution of Kenya 2010, art 26(4); Penal Code, Cap 63 Laws of Kenya, ss 158-160.

[3] *PAK & another v Attorney General & 3 others* (Constitutional Petition E009 of 2020) [2022] KEHC 262 (KLR) (High Court at Malindi, 24 March 2022) paras 113-121 and 287-295, Kenya Law accessed 17 May 2026.

[4] *Kenya Christian Professionals Forum & 3 others v PAK & 9 others; State Law Office and others v PAK and others* (Civil Appeals E029 and E030 of 2022) [2026] KECA 778 (KLR) (Court of Appeal at Malindi, 24 April 2026) paras 42, 54-58, Kenya Law accessed 17 May 2026.

[5] Sylvia Tamale, 'If Sexuality were a human being' (Pambazuka News, 11 May 2011) https://www.pambazuka.org/if-sexuality-were-human-being accessed 23 May 2026.

in the language of unlawful procurement. The Constitution speaks in the language of health, dignity, privacy, emergency treatment and professional judgment. PAK asks which language governs first when a young patient is bleeding and a clinician must decide whether to treat.[6]

Article 26(4) should be read as a working guarantee rather than ornamental compromise. Its text does not abolish criminal regulation. It creates a protected medical space inside a restrictive framework. That space is narrow, but it is real. A permission that cannot be used until after detention is not a meaningful constitutional protection. It is a promise postponed until the State has already acted. The distinctive feature of Article 26(4) is its allocation of initial interpretive authority. The Constitution does not place the first judgment in the hands of police, clergy, prosecutors or political actors. It refers to the opinion of a trained health professional.[7] That phrase has doctrinal weight. It means medical judgment is not a mere factual item to be tested at trial. It is part of the constitutional condition under which lawful care may arise. The clinician is therefore not a presumptive criminal who may later be excused. The clinician is one of the institutional actors through whom the Constitution becomes operational.

The High Court understood this point with unusual clarity. It did not hold that the Penal Code provisions were wholly dead. It held, more carefully, that enforcement must now be filtered through the Constitution and that sections 158, 159 and 160 cannot be applied as though Article 26(4) did not exist.[8] That is the correct starting point. Pre-2010 penal language may remain part of the legal order, but it cannot retain its old authority untouched by constitutional supremacy. The Court of Appeal saw the matter differently. It treated the Penal Code offences as alive and the Article 26(4) exceptions as matters to be tested in the criminal process.[9] That approach protects prosecutorial authority, but it weakens the practical force of constitutional permission. If legality is clarified only after arrest, the constitutional exception becomes procedurally backward. It asks the patient and clinician to endure the process that the Constitution should have disciplined at the threshold.

This is where the language of rights can mislead. PAK is not only about whether abortion is a right. It is about whether a constitutional exception can be institutionally usable. A legal system may formally permit certain reproductive interventions while making clinicians too afraid to provide them. It may recognise emergency care while teaching police to read every post-abortion complication as crime. It may protect health in text while making treatment depend on whether a patient can withstand interrogation. The Harvard Law Review case note captures this problem through statutory vagueness. It observes that the gap between the Penal Code and the 2010 Constitution enabled criminalisation of patients and providers.[10] The point is not merely technical. Vagueness does not fall evenly. It is borne by the young,

[6] Health Act No 21 of 2017, ss 6 and 8; Constitution of Kenya 2010, arts 26(4), 28, 31 and 43(1)(a); Penal Code, Cap 63 Laws of Kenya, ss 158-160.

[7] Constitution of Kenya 2010, art 26(4); *PAK & another v Attorney General & 3 others* (Constitutional Petition E009 of 2020) [2022] KEHC 262 (KLR) (High Court at Malindi, 24 March 2022) paras 287-295, Kenya Law accessed 17 May 2026.

[8] *PAK & another v Attorney General & 3 others* (Constitutional Petition E009 of 2020) [2022] KEHC 262 (KLR) (High Court at Malindi, 24 March 2022) paras 113-121, 305-307 and 360-364, Kenya Law accessed 17 May 2026.

[9] *Kenya Christian Professionals Forum & 3 others v PAK & 9 others; State Law Office and others v PAK and others* (Civil Appeals E029 and E030 of 2022) [2026] KECA 778 (KLR) (Court of Appeal at Malindi, 24 April 2026) paras 42, 54-58, Kenya Law accessed 17 May 2026.

[10] Harvard Law Review Editors, 'Reproductive Rights, Kenyan Law, Constitutional Law, PAK v Attorney General' (2022) 136 Harvard Law Review 733, 733 and 738-740.

the poor, rural patients, women without private doctors and clinicians who work without institutional protection. In their lives, uncertainty is not a jurisprudential puzzle. It is the distance between treatment and fear.

Criminal law does not govern only through punishment after conviction. It governs through threat. It changes behaviour before a trial begins. In reproductive healthcare, that pre-trial force can be decisive. A patient may avoid hospital care because she fears arrest. A clinician may delay treatment because the facts are unclear. A police officer may seize medical records because pain and bleeding look suspicious. The law has already acted even if no court has yet convicted anyone. This is why the Court of Appeal's confidence in the criminal process is constitutionally incomplete. It assumes that trial is the natural place to separate lawful care from unlawful conduct.[11] That may be true in ordinary criminal litigation. It is less persuasive where the subject matter is emergency healthcare, bodily privacy and adolescent vulnerability. In such cases, prosecution is not a neutral holding space. It may be the mechanism through which constitutional harm is completed. The facts in PAK illustrate this, the minor was treated as a suspect in circumstances that required care. Her medical records were taken. She underwent a forced medical examination. She was charged and held in remand because she could not immediately raise bail.[12] To say that she could vindicate her rights later in the criminal process understates the injury. The problem was not merely the risk of conviction. It was the State's transformation of a child patient into criminal evidence.

This insight matters beyond the parties. Unsafe abortion has long been a public health problem in Kenya, not merely a moral dispute.[13] The Population Council's studies on unsafe abortion recorded concern among service providers who treated women suffering from incomplete and septic abortion and stressed the need for reliable evidence to guide legal, policy and health responses.[14] The same point appears in Ngwena's African human-rights analysis. Highly restrictive abortion regimes do not end abortion. They shift it into unsafe, clandestine and unequal spaces.[15]

The law's pre-conviction force also explains why medical guidelines matter. In *FIDA-Kenya*, the High Court treated the withdrawal of safe abortion standards and training materials as an administrative act with constitutional consequences. The court reasoned that disabling guidance for lawful care disabled the efficacy of Article 26(4) itself.[16] That point should have mattered in PAK. A constitutional exception without institutional guidance invites precisely the behaviour seen in the case. Police are left guessing, Clinicians hesitate, Patients suffer and Prosecutors then ask the trial court to sort out the wreckage.

A stronger post-PAK doctrine must therefore ask what the State must know before it converts reproductive care into crime. The

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[11]*Kenya Christian Professionals Forum & 3 others v PAK & 9 others; State Law Office and others v PAK and others* (Civil Appeals E029 and E030 of 2022) [2026] KECA 778 (KLR) (Court of Appeal at Malindi, 24 April 2026) paras 42 and 54-58, Kenya Law accessed 17 May 2026.

[12]*PAK & another v Attorney General & 3 others* (Constitutional Petition E009 of 2020) [2022] KEHC 262 (KLR) (High Court at Malindi, 24 March 2022) paras 3-11, Kenya Law accessed 17 May 2026; Harvard Law Review Editors, 'Reproductive Rights, Kenyan Law, Constitutional Law, PAK v Attorney General' (2022) 136 Harvard Law Review 733, 734-735.

[13]Sylvia Tamale, 'If Sexuality were a human being' (Pambazuka News, 11 May 2011) https://www.pambazuka.org/if-sexuality-were-human-being accessed 23 May 2026.

[14]Khama Rogo and Ann Leonard (eds), *Unsafe Abortion in Kenya, Findings from Eight Studies* (Population Council 1996) v-vi.

[15]Charles Ngwena, 'Access to Safe Abortion as a Human Right in the African Region, Lessons from Emerging Jurisprudence of UN Treaty-Monitoring Bodies' (2013) 29 South African Journal on Human Rights 399, 399-400 and 410.

[16]*Federation of Women Lawyers (FIDA-Kenya) & 3 others v Attorney General & 2 others* (Petition 266 of 2015) [2019] eKLR paras 398-402; Judiciary of Kenya, 'Press Summary, Petition 266 of 2015' Judiciary of Kenya accessed 17 May 2026.

State may investigate genuinely unlawful procurement of abortion. But where the facts show emergency treatment, pregnancy complications, post-abortion care or a trained health professional's medical judgment, criminal process should not begin from suspicion alone. The State should bear a threshold obligation to show why Article 26(4) is not plausibly engaged. Without that threshold, the exception is placed in the wrong procedural location.

Dignity, privacy and the body as evidence

The most disturbing feature of PAK is the conversion of the body into evidence. PAK was a minor and a patient before she was an accused person. The State approached her through seizure, detention and forced medical examination. That sequence matters because reproductive policing often begins before trial. It begins when pain is treated as proof and medical records become instruments of accusation.[17]

Dignity does different work in this setting from ordinary legality. It protects the person from being reduced to an object of investigation. It asks whether the State has responded to vulnerability with care or coercion. In reproductive health cases, dignity must include bodily integrity, sexual privacy, emotional security and freedom from state-made shame.[18] A forced examination of a minor for the purpose of building an abortion charge is not merely a procedural irregularity. It is a constitutional invasion of personhood and the minors' rights.[19]

The High Court placed medical confidentiality at the centre of constitutional care. Confidentiality is not a technical privilege owned by doctors. It is the condition under which patients trust health institutions. If police can casually seize treatment notes and convert them into prosecution material, the hospital ceases to be a place of care. It becomes an antechamber of criminal investigation.[20]

This point is sharpened by Article 31 of the Constitution. Privacy in reproductive healthcare is not a luxury for respectable patients. It protects the intimate facts through which a person's social standing, family relations, schooling, mental health and bodily autonomy can be destroyed.[21] For a minor in a rural community, exposure may injure long after the charge sheet has faded. The constitutional injury is not only that information was taken. It is that the State made her reproductive distress available to institutional judgment, public stigma and criminal shame.

The Court of Appeal did not give this bodily invasion enough weight. Its focus on the trial forum made the coercive path to trial appear ordinary.[22] Yet in this setting the path is the injury. A girl may be acquitted later, but the forced examination, humiliation, missed school and public suspicion are not

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[17] *PAK & another v Attorney General & 3 others* (Constitutional Petition E009 of 2020) [2022] KEHC 262 (KLR) (High Court at Malindi, 24 March 2022) paras 3-11 and 346-358, Kenya Law accessed 17 May 2026.

[18] Constitution of Kenya 2010, arts 25(a), 28, 29 and 31; *PAK & another v Attorney General & 3 others* (Constitutional Petition E009 of 2020) [2022] KEHC 262 (KLR) (High Court at Malindi, 24 March 2022) paras 346-358, Kenya Law accessed 17 May 2026.

[19] Constitution of Kenya 2010, arts 53; Children's act of Kenya 2022 article 22 and 27; Beijing Rules

[20] *PAK & another v Attorney General & 3 others* (Constitutional Petition E009 of 2020) [2022] KEHC 262 (KLR) (High Court at Malindi, 24 March 2022) paras 352-358, Kenya Law accessed 17 May 2026; Health Act No 21 of 2017, ss 6 and 8.

[21] Constitution of Kenya 2010, art 31; *PAK & another v Attorney General & 3 others* (Constitutional Petition E009 of 2020) [2022] KEHC 262 (KLR) (High Court at Malindi, 24 March 2022) paras 352-358, Kenya Law accessed 17 May 2026.

[22] *Kenya Christian Professionals Forum & 3 others v PAK & 9 others; State Law Office and others v PAK and others* (Civil Appeals E029 and E030 of 2022) [2026] KECA 778 (KLR) (Court of Appeal at Malindi, 24 April 2026) paras 54-58, Kenya Law accessed 17 May 2026.

undone by acquittal. A rights analysis that waits for trial may therefore be too late for the body it claims to protect.

Girlhood, vulnerability and reproductive equality

The child-rights dimension makes the High Court's intervention more persuasive. PAK was not an abstract rights-bearer. She was a minor. That fact should have reorganised the State's first response. Article 53(2) does not disappear because police suspect an offence. It requires every official decision concerning the child to be tested against her best interests.[23] Arrest, forced examination, detention and public criminal accusation do not merely gather evidence. They reorganise the child's life.

The Population Council studies help explain why this matters. They record that adolescent pregnancy was surrounded by severe social consequences and that teenage pregnancy, unwanted pregnancy, unsafe abortion and school disruption are connected public-health and social questions.[24] That evidence is old, but its constitutional significance remains sharp. It reminds lawyers that adolescent reproductive cases rarely concern isolated medical events. They involve poverty, schooling, shame, parental authority, sexual vulnerability, health risk and institutional neglect. *PAK* also shows why constitutional law must resist turning children into symbols. In public debate, the pregnant girl easily disappears behind larger claims about morality, culture, religion or public order.[25] Yet Article 53 insists on the child's concrete life. The question is not whether the State may ever investigate reproductive offences involving minors. It may. The question is whether it can investigate by violating the child's dignity, privacy, health and best interests. The High Court rightly said no.[26]

This is where reproductive equality becomes more than a slogan. A legal regime that makes girls fear hospitals does not treat them as equal constitutional subjects. It leaves them to manage pregnancy, pain, shame and criminal suspicion in institutions designed without their vulnerability in mind. Ngwena's account is useful here because he links reproductive autonomy to equal citizenship and treats unsafe abortion as part of a wider structure of gender inequality.[27] The point is not that childhood erases legality. It is that legality must be administered through child-sensitive constitutional judgment. In PAK, the charge sheet arrived too quickly. The child came too late. The equality problem is also distributive. Wealthier women can access private doctors, private transport, confidential advice and legal representation. Poor girls encounter dispensaries, police posts, public hospitals and criminal files. Formal permission under Article 26(4) means little if its safe use depends on class. That is why this case is not only about interpretive doctrine. It is about the classed and gendered administration of constitutional medicine.

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[23] Constitution of Kenya 2010, art 53(2); *PAK & another v Attorney General & 3 others* (Constitutional Petition E009 of 2020) [2022] KEHC 262 (KLR) (High Court at Malindi, 24 March 2022) paras 10-12, Kenya Law accessed 17 May 2026.

[24] Khama Rogo and Ann Leonard (eds), *Unsafe Abortion in Kenya, Findings from Eight Studies* (Population Council 1996) 2-4 and 20-22.

[25] Rosebell Kagumire, 'Between Taboos and Freedom: Reproductive Justice at the Centre of Pan-African Resistance' (African Feminism, 31 July 2022) https://africanfeminism.com/between-taboos-and-freedom-reproductive-justice-at-the-centre-of-pan-african-resistance/ accessed 23 May 2026.

[26] *PAK & another v Attorney General & 3 others* (Constitutional Petition E009 of 2020) [2022] KEHC 262 (KLR) (High Court at Malindi, 24 March 2022) paras 10-12 and 346-358, Kenya Law accessed 17 May 2026.

[27] Charles Ngwena, 'Access to Safe Abortion as a Human Right in the African Region, Lessons from Emerging Jurisprudence of UN Treaty-Monitoring Bodies' (2013) 29 South African Journal on Human Rights 399, 400 and 424-425; Reva B Siegel, 'Sex Equality Arguments for Reproductive Rights, Their Critical Basis and Evolving Constitutional Expression' (2007) 56 Emory Law Journal 815, 818.

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Colonial penality and decolonial feminist constitutionalism

The Penal Code enters *PAK* as more than a set of technical provisions. It carries an older imagination of reproductive governance. In that imagination, the woman's body is not first a site of dignity or health. It is a possible scene of moral breach. The clinic is not first a place of treatment. It is a possible source of evidence. That is why a decolonial feminist reading adds value. It asks how imported penal forms continue to organise African bodies long after constitutional transformation.[28]

We do not claim that colonial origin alone makes a law unconstitutional. That would be too easy. The stronger point is that inherited criminal provisions must be re-read after constitutional transformation. The 2010 Constitution did not merely add new rights to old legal habits. It required old habits to justify themselves before dignity, equality, health and constitutional supremacy.[29] Sections 158, 159 and 160 of the Penal Code therefore cannot operate as though Article 26(4) were a marginal footnote to crime. They must be read through it. Sylvia Tamale's work helps sharpen this point. Her account of decolonisation and Afro-feminism links law, gender, sexuality, coloniality and social power. She treats gender as a historical and political category rather than a neutral description of bodies.[30] Her analysis of legal pluralism also challenges legal centralism, the belief that the state is the sole mother of law, while showing how colonial legality professionalised and naturalised state law as superior.[31] In PAK, the state's criminal imagination claims that superiority at the very moment when local clinical care is happening.

Tamale's discussion of the regulation of women's sexuality is equally important. She shows how heteropatriarchal legal systems control women's sexuality and reproductive capacity through law, family, morality and economic dependence.[32] The Kenyan Penal Code provisions should be read in that longer history. They do not merely punish unlawful acts. They discipline reproductive behaviour through fear. They mark female sexuality as a public object of surveillance. A decolonial feminist reading does not romanticise culture or dismiss the State's interest in unborn life. It asks a different question. What happens when criminal law treats reproductive vulnerability as a threat to public order before it treats it as a need for care? That question is loyal to the Constitution. Article 26 protects life from conception, but Article 26(4) also recognises medical circumstances in which care is lawful. A faithful reading must hold both commitments without letting the older penal script swallow the newer constitutional text. This is also why comparative analysis must be used carefully. United States abortion debates can obscure more than they illuminate. The better frame is African constitutionalism, public health, the Maputo Protocol and regional human-rights interpretation. Article 14(2)(c) of the Protocol to the African Charter on the Rights of Women in Africa requires States to authorise medical abortion in cases of sexual assault, rape, incest and

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[28] Sylvia Tamale, *Decolonization and Afro-Feminism* (Daraja Press 2020) xiii-xv, 1-2 and 132-134.

[29] Constitution of Kenya 2010, arts 2, 20, 21 and 259; Karl E Klare, 'Legal Culture and Transformative Constitutionalism' (1998) 14 South African Journal on Human Rights 146, 150.

[30] Sylvia Tamale, *Decolonization and Afro-Feminism* (Daraja Press 2020) xiii-xv and 92-105.

[31] Sylvia Tamale, *Decolonization and Afro-Feminism* (Daraja Press 2020) 132-134.

[32] Sylvia Tamale, *Decolonization and Afro-Feminism* (Daraja Press 2020) 296-298.

where pregnancy endangers the mental or physical health of the mother or the life of the mother or foetus.[33] The African Commission's General Comment No 2 treats implementation, access and freedom from prosecution as central to reproductive rights protection.[34] Those materials do not erase Kenya's constitutional text. They help read its medical exception as a living guarantee rather than a paper exception. The Court of Appeal and the cost of restraint.

The court of appeal and the cost of restraint

The Court of Appeal's judgment deserves careful criticism rather than easy dismissal. It was concerned with separation of powers, prosecutorial independence and the ordinary rule that criminal liability should be tested at trial.[35] Those concerns are legitimate. Constitutional courts should not quash prosecutions merely because an accused person alleges rights violations. The Director of Public Prosecutions must retain room to act where evidence supports a charge and the public interest requires prosecution.[36]

The difficulty is that the Court treated the criminal process as if it were constitutionally neutral. It was not. In a reproductive healthcare case, prosecution may itself chill care, expose intimate records, stigmatise the patient and discourage clinicians from treating emergencies. The Court's insistence that unlawfulness could be tested at trial therefore missed the special character of the harm. Some constitutional injuries are not repaired by acquittal. They occur because the State required the person to stand trial in the first place. This matters most in Article 26(4) cases because the constitutional language is anticipatory. It is meant to guide action at the moment medical judgment is formed. The Court of Appeal's approach makes the exception defensive. The State may prosecute first and ask later whether the case fell within emergency treatment or risk to health. That order gives priority to criminal suspicion. It allows the Penal Code to set the tempo and leaves the Constitution to speak after damage has been done.

The Court was right to reject any unqualified claim that abortion is a general fundamental right under Kenyan law.[37] Article 26 protects unborn life while permitting abortion only in defined circumstances. A stronger defence of the High Court does not require denial of that structure. The better argument is more precise. Abortion is constitutionally protected where it falls within Article 26(4). That narrower claim preserves the restriction while making the exception real. The Court of Appeal also relied on the idea that the prosecution would have to prove unlawfulness under the Penal Code.[38] That is doctrinally correct, but practically thin. Burdens of proof matter at trial. They do less work at arrest, detention, examination

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[33] Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, adopted 11 July 2003, entered into force 25 November 2005, art 14(2)(c); Constitution of Kenya 2010, art 2(6).

[34] African Commission on Human and Peoples' Rights, *General Comment No 2 on Article 14(1)(a), (b), (c) and (f) and Article 14(2)(a) and (c) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa* (2014) paras 25, 55-59, African Commission accessed 17 May 2026.

[35] *Kenya Christian Professionals Forum & 3 others v PAK & 9 others; State Law Office and others v PAK and others* (Civil Appeals E029 and E030 of 2022) [2026] KECA 778 (KLR) (Court of Appeal at Malindi, 24 April 2026) paras 51-58, Kenya Law accessed 17 May 2026.

[36] Constitution of Kenya 2010, art 157; *Kenya Christian Professionals Forum & 3 others v PAK & 9 others; State Law Office and others v PAK and others* (Civil Appeals E029 and E030 of 2022) [2026] KECA 778 (KLR) (Court of Appeal at Malindi, 24 April 2026) paras 54-58, Kenya Law accessed 17 May 2026.

[37] *Kenya Christian Professionals Forum & 3 others v PAK & 9 others; State Law Office and others v PAK and others* (Civil Appeals E029 and E030 of 2022) [2026] KECA 778 (KLR) (Court of Appeal at Malindi, 24 April 2026) para 42, Kenya Law accessed 17 May 2026.

[38] *Kenya Christian Professionals Forum & 3 others v PAK & 9 others; State Law Office and others v PAK and others* (Civil Appeals E029 and E030 of 2022) [2026] KECA 778 (KLR) (Court of Appeal at Malindi, 24 April 2026) para 42, Kenya Law accessed 17 May 2026.

and charge. A patient whose body has been searched, whose records have been taken and whose schooling has been disrupted has not been protected merely because the prosecution later bears a burden. The constitutional question is anterior. What threshold must the State satisfy before criminal process may enter the clinic?

Here the High Court offered a better constitutional instinct. It saw that medical confidentiality, professional judgment and patient dignity were not collateral matters. They were part of the legality of the State's response.[39] The Court of Appeal's restraint may be doctrinally respectable, but it leaves too much to prosecutorial weather. In Article 26(4) cases, constitutional permission should not depend on the mercy, training or ideological posture of individual officers.

After PAK, disciplining penal administration

The path forward after PAK must avoid two false choices. The first is to pretend that Article 26(4) creates abortion on demand. It does not. The second is to treat Article 26(4) as a defence that becomes meaningful only after police action. That is too weak. A constitutional exception must organise state conduct before prosecution, not only argument after prosecution.

The first reform is statutory. Parliament should enact legislation that gives operational content to Article 26(4). That legislation should define emergency treatment, health, trained health professional, post-abortion care, confidentiality duties and evidentiary safeguards before medical records can be seized.[40] The High Court's call for a legislative and policy framework was sound even if its wider reasoning attracted appellate correction.[41] Rights become usable when officials know what they must do and what they must not do.

The second reform is administrative. Police, prosecutors and health workers need binding protocols for reproductive healthcare investigations. Those protocols should require consultation with qualified medical professionals before charges are approved in cases involving post-abortion care, miscarriage, emergency treatment or Article 26(4) circumstances. They should also prohibit forced medical examinations unless authorised through a rights-sensitive court process that considers age, consent, dignity, privacy and medical necessity.[42]

The third reform concerns confidentiality. Medical records should not be treated as ordinary investigative property. They are intimate records of bodily vulnerability. Any exception to confidentiality must be lawful, necessary, proportionate and supervised. Without that rule, the hospital becomes an evidence-gathering site and patients learn to avoid care. That outcome defeats Article 43 as much as Article 26(4).[43]

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[39] *PAK & another v Attorney General & 3 others* (Constitutional Petition E009 of 2020) [2022] KEHC 262 (KLR) (High Court at Malindi, 24 March 2022) paras 346-364, Kenya Law accessed 17 May 2026.

[40] Health Act No 21 of 2017, ss 6 and 8; Constitution of Kenya 2010, arts 21(1), 43(1)(a), 53(2) and 94(5).

[41] *PAK & another v Attorney General & 3 others* (Constitutional Petition E009 of 2020) [2022] KEHC 262 (KLR) (High Court at Malindi, 24 March 2022) paras 327-335, Kenya Law accessed 17 May 2026; *Kenya Christian Professionals Forum & 3 others v PAK & 9 others; State Law Office and others v PAK and others* (Civil Appeals E029 and E030 of 2022) [2026] KECA 778 (KLR) (Court of Appeal at Malindi, 24 April 2026) paras 54-58, Kenya Law accessed 17 May 2026.

[42] Constitution of Kenya 2010, arts 24, 25(a), 28, 29, 31 and 53(2); *PAK & another v Attorney General & 3 others* (Constitutional Petition E009 of 2020) [2022] KEHC 262 (KLR) (High Court at Malindi, 24 March 2022) paras 346-358, Kenya Law accessed 17 May 2026.

[43] Constitution of Kenya 2010, arts 31 and 43(1)(a); Health Act No 21 of 2017, ss 6 and 8; Harvard Law Review Editors, 'Reproductive Rights, Kenyan Law, Constitutional Law, PAK v Attorney General' (2022) 136 Harvard Law Review 733, 738-740.

The fourth reform is child-sensitive practice. When the patient is a minor, Article 53 must operate from the first official encounter. Police and children officers should be trained that pregnancy, miscarriage, sexual violence, post-abortion care and school attendance raise interconnected rights. The child's best interests should control the order of official action. Care first. Protection second. Investigation only under conditions that do not degrade the child.

The fifth reform is interpretive. Courts should adopt a threshold doctrine for Article 26(4) cases. Where reproductive medical care plausibly falls within Article 26(4), the State should demonstrate a concrete basis for treating the conduct as unlawful before arrest, invasive examination or prosecution is permitted. This would not immunise crime. It would simply prevent constitutional permission from being administered as criminal suspicion. It would also align Kenyan law with the African human-rights movement away from punitive reproductive governance and toward health-based regulation.[44]

Conclusion, constitutional care before criminal suspicion

PAK matters because it exposes a legal order speaking in two voices. One voice is constitutional. It recognises dignity, privacy, health, emergency treatment, reproductive healthcare, child protection and professional medical judgment. The other voice is penal. It suspects, seizes, examines, detains and prosecutes. The High Court heard the danger in that collision. The Court of Appeal restored doctrinal restraint but gave too little attention to the constitutional damage that may occur before trial.

The best reading of Article 26(4) is neither permissive romanticism nor penal absolutism. It is disciplined constitutional care. Abortion remains restricted. Yet where the Constitution permits medical intervention, that permission must be real before the charge sheet. It must guide police, prosecutors, clinicians, children officers and courts at the first point of contact. Otherwise Article 26(4) becomes a paper mercy, one that arrives only after the State has already transformed the patient into evidence.

The deeper lesson is therefore not about abortion alone. It is about how a transformative Constitution disciplines inherited criminal law. A constitution can promise health and dignity, but its promise is tested in the clinic, the police post, the hospital ward and the magistrate's court. In those places, rights are either made usable or lost in procedure. PAK should be remembered for that harder truth. Constitutional care must come before criminal suspicion where the body before the State is first a patient, a child and a person.

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[44]Charles Ngwena, 'Access to Safe Abortion as a Human Right in the African Region, Lessons from Emerging Jurisprudence of UN Treaty-Monitoring Bodies' (2013) 29 South African Journal on Human Rights 399, 410 and 421-425; African Commission on Human and Peoples' Rights, *General Comment No 2 on Article 14(1)(a), (b), (c) and (f) and Article 14(2)(a) and (c) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa* (2014) paras 25, 55-59, African Commission accessed 17 May 2026.

ABORTION RIGHTS

Judicial legislation or constitutional imperative? Abortion rights, democratic deficit and the counter-majoritarian dilemma in Kenya

By Derrick Wamalwa

Abstract

On 21st September 2019, police officers walked into a hospital in Kilifi County, and they arrested a 17-year-old girl from her bed. She had just received post abortion care. She was coerced to sign a confession, detained for two nights and eventually charged with procuring her own miscarriage. The Court of Appeal decision sparked a series of constitutional debates, precisely, who gets to decide what the law on abortion should be? Article 26(4) of the Constitution of Kenya 2010 addressed the issue of abortion and in what situations it is permissible. This paper examines the tension between judicial adjudication and democratic legitimacy in the context of abortion rights in Kenya, with particular reference to the High Court judgment in Petition No. E009 of 2020 and its subsequent appeal before the Court of Appeal. At the nucleus of this discourse Article 26(4) of the Constitution of Kenya 2010, which grants parliament a legislative mandate to enact law permitting abortion in defined circumstances, a mandate that has remained dormant for over fifteen years. Ergo, the paper seeks to interrogate whether courts, in intervening to protect the reproductive rights of women and girls in the absence of such legislation, engage in illegitimate judicial legislation that undermines democratic governance or whether they discharge a constitutionally necessary function that parliament has abdicated. Borrowing from Realism, Positivism and Dworkinian philosophy, the paper argues that the Counter-Majoritarian Critique tends to misdirect its censure at courts rather than at parliament sustained failure to exercise its constitutional mandate.

Abortion rights in Kenya are governed primarily by the Constitution of Kenya (2010), the Penal Code, and evolving case law. The legal position is often described as restrictive but not absolute prohibition.

It concludes that the protection of rights that are inherently incapable of attracting majority political support is not a democratic deficit but the very purpose of a justiciable Bill of Rights.

Keywords: *Article 26(4), abortion, counter-majoritarian dilemma, judicial legislation, legal realism, constitutional adjudication, Kenya.*

Introduction

The Constitution of Kenya 2010 has been hailed as one of the most progressive globally. Implemented fully as is currently formulated, the Constitution would address most of the challenges facing the country.[1] It has a robust bill of rights and is ultimately committed to constitutionalism explicitly.[2] Notwithstanding, fifteen years after the promulgation, a quiet constitutional paradox still persists at the intersection of reproductive rights and democratic governance. Article 26(4)[3] stipulates that: *"Abortion is not permitted unless, in the opinion of a trained health professional, there is need for emergency treatment, or the life or health of the mother is in danger, or if permitted by any other written law."* Extrapolating from that, the Constitution expressly permits parliament to enact legislation allowing abortion.[4] Courts have increasingly been drawn into this legislative silence. The High Court at Malindi, in Petition No. E009 of 2020,[5] and the Court of Appeal in Civil Appeals E029 and E030 of 2022,[6] were confronted with the case of PAK, a seventeen-year-old girl arrested from her hospital bed, charged with procuring her own miscarriage and detained at a juvenile remand home, all while receiving post-abortion care.[7] From the foregoing, the facts of the case required no elaboration. The constitutional questions were of immediate and pressing significance.

Ergo, this paper seeks to interrogate and address the following issue: when parliament is constitutionally empowered but politically unwilling to legislate on contested moral questions, and when rights-holders cannot wait indefinitely for a parliamentary majority that may never materialize, are courts that intervene engaged in illegitimate judicial legislation, or in the discharge of a constitutional imperative? The answer, this paper argues, turns not on whether courts make law (they inevitably do) but on whether in the specific circumstances of Kenya's abortion jurisprudence, they were left any other constitutionally defensible choice.

The constitutional framework: A legislative invitation declined

Article 26(4) of the Constitution provides that abortion is not permitted unless, in the opinion of a trained health professional, there is need for emergency treatment, or the life or health of the mother is in danger, or if permitted by any other written law.[8] *Permitted by any other Written Law*,

[1] Francis Kabutu, 'The Constitution of Kenya 2010: Panacea or nostrum' (Strathmore Law School, 2 October 2020) https://law.strathmore.edu/the-constitution-of-kenya-2010-panacea-or-nostrum/ accessed 11 May 2026.
[2] Elizabeth A O'Loughlin, 'Kenya's Constitution in a global context' (2017) 15(3) *International Journal of Constitutional Law* 839 https://doi.org/10.1093/icon/mox062 accessed 11 May 2026.
[3] Constitution of Kenya 2010, art 26(4).
[4] It should be noted that, this legislative invitation has never been acted upon.
[5] In *PAK and another v Attorney General and 3 others* [2022] KEHC 289 (KLR), the High Court affirmed that abortion is constitutionally protected under art 26(4) of the Constitution where conducted by a trained health professional, and held that the arrest and prosecution of persons seeking or providing emergency post-abortion care violated constitutional rights including dignity, health, privacy, and freedom from cruel, inhuman, and degrading treatment.
[6] *Kenya Christian Professionals' Forum and others v PAK and others* Civil Appeal Nos E029 & E030 of 2022 (Court of Appeal at Malindi).
[7] Ibid (n) 6
[8] Ibid.

is of significance, constitutionally, that is, in the sense that it offers a leeway (an express invitation) for the parliament to offer legislation on the said subject.[9] Article 26(4)[10] should be read together with Article 43(1)(a)[11] which states that *"Every Person has the right to the highest attainable standard of health, which includes the right to health care services, including reproductive health care,"* on the other limb, Article 28[12] stipulates that *"Every person has inherent dignity and the right to have that dignity respected and protected."* The constitution itself anticipates a legislative ecosystem that is yet to be actualized. Sections 158,[13] 159[14] and 160[15] of the Penal Code CAP 63 which criminalizes procurement of abortion, are still recognized in our statute books, notwithstanding its inconsistency with the 2010 Constitutional provisions.

From the foregoing, the major consequence of the legislative gap is so significant. Women and girls seeking reproductive health care and the health professionals attending to them, operate in a legally precarious space that is protected in principle by constitutional rights but exposed in practice to prosecution under unreformed penal provisions.[16] PAK's case is the most dramatic illustration of this precarity but it is not isolated.[17] The supporting affidavits of nurses Joseph Karisa Ngozi and Jonah Morori in the Malindi petition reveal a pattern of arrest and harassment of health workers providing post-abortion care, precisely, a pattern that Professor Joseph Gathuru Karanja, specialist in obstetrics and gynecology, testified was directly contributing to maternal mortality.[18]

The Malindi decisions: Facts, holdings and constitutional stakes

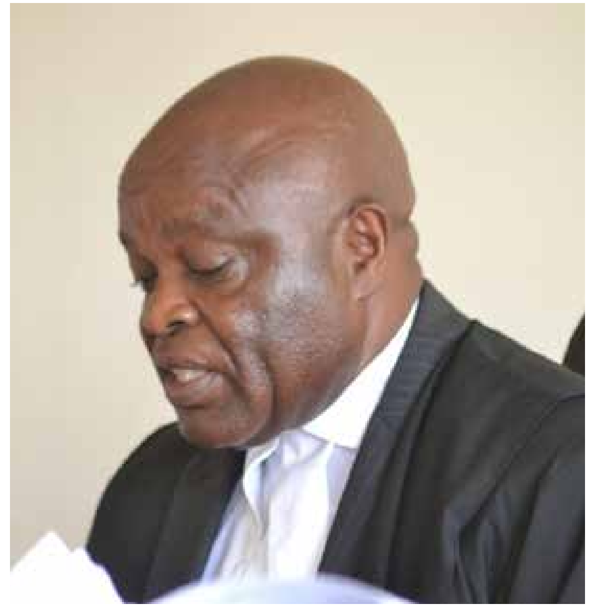
The facts from the Malindi Decisions (petitions) are essential here, precisely to any honest indulgent with the Counter-majoritarian Critique. PAK, a minor, became pregnant following sexual intercourse with a fellow student. On 19 September 2019, she presented at Chamalo Medical Clinic with severe abdominal pain, vaginal bleeding and dizziness. The attending clinical officer, Salim Mohamed (the second respondent) concluded that she had suffered an incomplete abortion and provided post-abortion care management. On 21 September 2019, police officers arrested PAK from her hospital bed, took her to Ganze Police Patrol Base and compelled her to sign a statement admitting she had procured an abortion.[19] She was charged under section 159 of the Penal Code with procuring her own miscarriage. Salim Mohamed was separately charged under section 158 with procuring abortion and, in the alternative, under

[9]Interpretation and General Provisions Act (Cap 2, Revised Edition 2012) < https://repository.ksl.ac.ke/bitstream/handle/ksl/593/InterpretationAndGeneralProvisionsAct39of1956%20%281%29.pdf?sequence=21&isAllowed=y > accessed 12 May 2026. For the purpose of this paper a written law" means—. (a) an Act of Parliament for the time being in force; (b) an applied law; or. (c) any subsidiary legislation for the time being in force.
[10]Constitution of Kenya 2010, art 26(4).
[11]Constitution of Kenya 2010, art 43(1)(a).
[12]Constitution of Kenya 2010, art 28.
[13]Penal Code (Cap 63), s 158: 'Any person who, with intent to procure miscarriage of a woman ... unlawfully administers to her ... any poison or other noxious thing ... is guilty of a felony and is liable to imprisonment for fourteen years.'
[14]Penal Code (Cap 63), s 159: 'Any woman who, being with child, with intent to procure her own miscarriage ... unlawfully administers to herself any poison or other noxious thing ... is guilty of a felony and is liable to imprisonment for seven years.'
[15]Penal Code (Cap 63), s 160: 'Any person who unlawfully supplies to or procures for any person anything whatever, knowing that it is intended to be unlawfully used to procure the miscarriage of a woman ... is guilty of a felony and is liable to imprisonment for three years.'
[16]Ibid.
[17]Affidavits of Joseph Karisa Ngozi and Jonah Morori, sworn 15 January 2021, filed in Petition No. E009 of 2020.
[18]PAK & Another v Kenya Christian Professionals' Forum & Others, Civil Appeal No. E029 & E030 of 2022 (Court of Appeal at Malindi); Petition No. E009 of 2020 (High Court at Malindi, Nyakundi J.).
[19]Affidavit of PAK, sworn 30 November 2020, Petition No. E009 of 2020, paras 4-9.

section 160 with supplying drugs to procure miscarriage. PAK was remanded at Malindi Juvenile Remand Home, denied access to treatment and education and subjected to what she described in her affidavit as stigmatization, isolation, and profound psychological harm.[20]

The High Court (Nyakundi J.) held that PAK's arrest from her hospital bed, the forced medical examination conducted on her, and her prosecution under section 159 of the Penal Code violated Articles 25(a), 28, 26(4), and 43(1)(a) of the Constitution.[21] The court issued, among other reliefs, an order of mandamus compelling the Attorney General to forward to the National Assembly, within ninety days, a bill amending the Penal Code to bring it into conformity with Article 26(4), the Health Act 2017 and the Sexual Offences Act 2006. The Court of Appeal, in consolidated Civil Appeals E029 and E030 of 2022, was tasked with determining whether the High Court had overstepped its constitutional function. The appellants' case rested substantially on two grounds: ***that the issues raised were premature and should have been resolved at trial, and that the High Court's orders, particularly the mandamus directing the Attorney General, amounted to judicial encroachment on the legislative domain.*** These grounds, stripped of their procedural framing, are the classic formulation of the counter-majoritarian objection.

The counter-majoritarian critique: Courts, legislatures and moral questions



Justice Reuben Nyakundi

The counter-majoritarian critique, precisely, doesn't deny that constitutional rights must be protected, rather it contends, that contested moral and social questions *(those on which reasonable citizens disagree along lines of value rather than fact)* belong, in a democratic polity,[22] to the legislature and ultimately to the people. The idea is that courts should not override decisions made by democratically elected bodies.[23] H.L.A. Hart's positivist framework, precisely, in his seminal jurisprudence. The concept of law, said that Law and Morality should be separated, and that legislative reform should take place whenever the law appears to be silent.[24] The solution should come from lawmakers, not judges rewriting the law, Moyn argued that judicial overreach has become an unwelcome global phenomenon that should be reexamined and curbed.[25]

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[20]Ibid.

[21]Petition No. E009 of 2020 (HC Malindi), judgment of Nyakundi J., 24 March 2022.

[22]James T. Gathii, Beyond Samuel Moyn's Counter-majoritarian Difficulty as a Model of Global Judicial Review, 52 *Vanderbilt Law Review* 1237 (2021) Available at: < https://scholarship.law.vanderbilt.edu/vjtl/vol52/iss5/4 > accessed 12th May 2026.

[23]Alexander M Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (2nd edn, Yale University Press 1986) < https://www.law.uh.edu/faculty/eberman/conlaw/Bickel.pdf > accessed 12 May 2026.

[24]H L A Hart, *The Concept of Law* (Clarendon Law Series, Oxford University Press 1961) < https://scispace.com/pdf/professor-h-l-a-hart-s-concept-of-law-4fcwqlqabu.pdf > accessed 12 May 2026.

[25]Ibid (n) 23.

John Hart Ely's process theory, developed in Democracy and Distrust, offers the most sympathetic version of this argument. Under Ely's scheme the Court's appropriate role is to serve two related functions. First, ***it is to police the political process by preventing existing holders of power from obstructing that process in service of the status quo***.[26] Second, ***because the risk of a tyranny of the majority is inherent in representative democracy, the Court is to prevent representative government from withholding from minorities the protection it affords the majority.***[27] Paul N. Cox in addressing Ely's Model stated that on the role of the Supreme Court in the American polity which, although commonplace, may serve at least as background to my view of Professor Ely's contribution' to that discourse. Second, ***the central dilemma posed by the institution of judicial review in a democracy is that the institution is undemocratic and, therefore, at least facially incongruous with the predominant political commitment. Second, legal realism's devastating attack upon the notion that judges "find" law permanently impaired the credibility of that notion as a basis for legitimizing the institution, at least in the sense that rule-skepticism, and particularly constitutional text-skepticism, has become generally obligatory for post-realist accounts of the institution.***' Third, legal scholarship, in the post-realist era, has been fixed, then, upon discovering bases for moderating the realists' attack and formulating alternative grounds for legitimacy.[28]

On abortion, a steelman of the counter-majoritarian position would argue that women in Kenya are not structurally excluded from political participation: they vote, they stand for election, they petition parliament. If Parliament fails to legislate under Article 26(4), that is seen as a political problem, in this sense, it's not something the courts should fix. It should be addressed by lawmakers through the political process, not through court cases. The mandamus order issued by the High Court crystallises the sharpest version of this concern. Courts directing parliament's legislative agenda, even where the constitutional mandate is clear (risk collapsing the separation of powers into a form of judicial supremacy that Kenya's constitutional design does not contemplate. The Constitution grants parliament primary legislative authority: the court's role is to adjudicate, not to prescribe legislative agendas. On this point, the appellants' objection had genuine constitutional force.

The realist and rights-based rejoinder: Why the critique misfires

Oliver Wendell Holmes and Karl Llewellyn the major Legal Realism proponents, the former hold the view that, particularly, with his prediction theory of law which stands for the idea that law should be defined as a prediction, most specifically, a prediction of how the courts behave based on realistic, even moral or biased, considerations. Holmes famously wrote in *The Common Law*[29] that ***"The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent***

[26]John Hart Ely, 'The Role of the Supreme Court in a Democratic Society' in *Democracy and Distrust: A Theory of Judicial Review* (Harvard University Press 1980).
[27]Ibid.
[28]Paul N. Cox, John Hart Ely, Democracy and Distrust: A Theory of Judicial Review, 15 Val. U. L. Rev. 637 (1981). Available at:< https://scholar.valpo.edu/vulr/vol15/iss3/6 > accessed 12th May 2026.
[29]Oliver Wendell Holmes Jr, *The Common Law* (Project Gutenberg, 2000) < https://www.gutenberg.org/files/2449/2449-h/2449-h.htm > accessed 12th May 2026.

moral and political theories, intuitions of public policy, avowed or unconscious, and even the prejudices which judges share with their fellowmen, have had a good deal more to do than the syllogism in determining the rules by which men should be governed."[30]

From the realist perspective, the observation that courts indeed make laws isn't a criticism, it's the main idea behind Realist Philosophy. This goes hand in hand with article 159 (1)[31] which states that ***"Judicial authority is derived from the people and vests in, and shall be exercised by, the courts and tribunals established by or under this Constitution."*** In interpreting the constitution, the courts should put into consideration article 259[32] the purposive and progressive contextual interpretation. The Constitution of Kenya, as the person whose argument this paper engages concedes, acknowledges as much. ***The relevant question is therefore not whether courts made law in the Malindi decisions but whether the law they made was constitutionally defensible.***

Ronald Dworkin's answer, drawn from his theory of law as integrity, is instructive. Integrity, Dworkin claims, is a distinct political ideal, that is, distinct from justice, fairness, equality, and such, but only in the framework of a non-ideal theory.[33] ***"Integrity would not be needed as a distinct political virtue in a utopian state"***[34] Dworkin says, because moral coherence would be guaranteed by full compliance with everything that is just and fair. In other words, an ideal theory of justice has no need for the value of integrity. Integrity is a political virtue only in the real world, where compliance with justice is far from complete, and partly because people actually disagree about what justice requires. We live in a world in which people have very different and often deeply conflicting conceptions of the good and the just. Thus, integrity comes into play directly confronting the fact of pluralism and political fragmentation.[35] Courts, Dworkin argued in Law's Empire, do not import external moral values into legal adjudication: they draw out principles already embedded in the legal order.[36] He distinguished two forms of integrity by listing two principles, ***Integrity in Legislation and Integrity in Adjudication*** (the former puts a restriction on what the lawmakers may properly do in expanding or changing our public standards. The latter, requires our judges, so far as this is possible, to treat our present system of public standards as expressing and respecting a coherent set of principles, and, to that end, to interpret these standards to find implicit standards between and beneath the explicit ones).[37] Articles 26(4), 43(1)(a), 28, and 25[38] of the Constitution of Kenya already contains the normative answer to PAK's situation. The right to health, the right to dignity, the prohibition on cruel and inhuman treatment, and the constitutional recognition of lawful abortion under Article 26(4)[39] collectively demand that a seventeen-year-old girl receiving

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[30]Ibid.
[31]Constitution of Kenya 2010, art 159(1)
[32]Constitution of Kenya 2010, art 259.
[33]R. M. Dworkin, Law's Empire, (Fontana Press London 1986).
[34]R. M. Dworkin, Law's Empire, (Fontana Press London 1986), Pg 177
[35]Ibid.
[36]Ronald Dworkin, Law's Empire (Belknap Press 1986) ch 6 < https://www.filosoficas.unam.mx/~cruzparc/empire.pdf > accessed 12 May 2026.
[37]Ibid.
[38]Constitution of Kenya 2010, arts 25, 26(4), 28, 43(1)(a).
[39]Ibid(n)38.

post-abortion care not be arrested from a hospital bed and prosecuted. The High Court did not create that answer. It read it.

The parliamentary failure argument operates at a different limb, but it attains the same conclusion. This paper asserts that Article 26(4) has been dormant for fifteen years, The paper contends that this is not by accident, but because leaders have avoided acting on it due to fear of political backlash, especially from strong religious and social opposition. No member of parliament has tabled a bill to give effect to constitutional permission. In situations like this, saying people must first persuade the public before their rights are protected is not real democracy. It just means their rights may never be recognised. Under Ely's theory, courts are actually allowed to step in here because the political process is failing. Women like PAK are not being protected by the law in practice, not because the law explicitly forbids it, but because there is no political will to make and enforce protective laws. This kind of failure in the political system is precisely the kind of process failure that justifies constitutional adjudication.

Conclusively, the argument from minority rights cuts to the constitutional core. The bill of rights should not only protect the popular rights but also the Majority rights. Article 25 of the Constitution stipulates that: Despite any other provision in this Constitution, the following rights and fundamental freedoms shall not be limited--(a) Freedom from torture and Cruel, inhuman or degrading treatment or punishment (b) Freedom from slavery or servitude;[40] its prudent to note that PAK's arrest from a hospital bed, forced medical examination, and detention at a juvenile remand home clearly amounted to such treatment. Regardless of the public opinion, political will and majority rule, article 25 rights should and must be protected.

Synthesis: Distinguishing legitimate adjudication from judicial legislation

The major counter-majoritarian critique of courts to either adjudicate or legislate is too blunt an instrument for the constitutional complexity the Malindi decisions present. A more useful distinction, drawn from the structure of Kenya's Constitution itself, is between courts protecting existing constitutional rights in the face of legislative silence (legitimate), and courts directing the content of future legislation (constitutionally contested).

In this framework, the Malindi decisions are internally divided. The declarations that PAK's arrest, detention, forced examination, and prosecution violated Articles 25(a), 28, and 43(1)(a) are unimpeachable constitutional adjudication. They do not make new laws. They apply existing constitutional rights to a specific factual matrix. The counter-majoritarian critique has no contention here: these are not contested moral questions; they are applications of non-derogable rights to uncontested facts.

The mandamus order directing the Attorney General to table a bill, however, is a different matter. Even granting the constitutional necessity of Penal Code reform, directing the executive to initiate specific legislation crosses the line between adjudication and prescription. The appropriate remedy, less constitutionally ambitious but more structurally sound, would have been a declaration of incompatibility between sections 158-160 of the Penal Code and the

[40]Constitution of Kenya 2010, art 25.

At its core, the paradox is this: Kenya's Constitution permits abortion in limited circumstances, but the legal and health systems around it are so restrictive and uncertain that safe access is often effectively blocked—pushing many women into unsafe procedures despite a constitutional right.

Constitution, coupled with a suspended order allowing parliament time to legislate. The counter-majoritarian critique, on this narrower point, lands.

Conclusion

The Malindi decisions are best understood not as evidence of judicial overreach but as symptoms of parliamentary failure. The counter-majoritarian critique articulates a genuine and important democratic principle: contested moral questions should, wherever possible, be resolved through legislative deliberation rather than judicial decree. But that principle presupposes a parliament willing to exercise its constitutional mandate. Where parliament has, for fifteen years, declined to enact the legislation that Article 26(4) expressly contemplates, and where rights-holders face criminal prosecution in the resulting vacuum, courts do not usurp democracy by acting, they vindicate it.

The enduring lesson of the Malindi decisions is not that courts should govern. It is that Article 26(4) must be activated. The proper resolution of Kenya's abortion rights paradox is legislative: a parliament with the political courage to translate a dormant constitutional permission into a living statutory guarantee. Until that happens, courts will continue to be asked to do work that belongs, in a healthy constitutional democracy, to the people and their elected representatives. That is not a failure of courts. It is a failure of parliament -- and, ultimately, of the political culture that sustains it.

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Tackling Gender Based Violence in Kenya through accountability mechanisms

By Annexia Wanjiku

Abstract

Gender Based Violence (GBV) remains one of the most pervasive human rights violations in Kenya despite a quite comprehensive legal framework, including the Constitution and Acts of Parliament aimed at addressing it. In recent years, there has been a rampant surge in reported cases of GBV, which include cases of domestic violence, sexual offences, femicide and harmful cultural practices, continuing to rise, exposing weaknesses in law enforcement and institutional responses. This article examines the legal framework governing GBV in Kenya. It analyses the challenges that undermine its effective implementation and proposes reforms to strengthen protection for victims and accountability for perpetrators. It argues that although Kenya has enacted progressive legislation, gaps in enforcement, cultural norms, and inadequate victim support systems continue to hinder meaningful progress in combating GBV. The arguments in this article are backed mostly by international human rights instruments, domestic legislation and empirical data. The article argues that law reform alone is insufficient: effective suppression of GBV requires collective reform of institutions, dismantling of patriarchal norms, and sustained resourcing of survivor-centred services.

Gender-Based Violence in Kenya is a widespread human rights and public safety crisis affecting women, girls, and to a lesser extent men. It includes physical, sexual, emotional, economic, and digital abuse, often occurring in homes, relationships, workplaces, and online spaces.

1. Introduction

Gender-based violence refers to harmful acts directed at individuals on the basis of gender and includes physical, sexual, emotional, psychological and economic

abuse.[1] In Kenya, women and girls are the most affected by GBV, especially in domestic settings and intimate relationships. The increasing rise of femicide and sexual violence in recent years calls for GBV to be identified as a national crisis and the need for government intervention, whose core mandate is to protect its citizens.

The Constitution of Kenya guarantees equality and freedom from discrimination under Article 27[2] and protects every person from violence under Article 29.[3] However, despite the existence of these rights clearly outlined in the most supreme law of the land, GBV continues to be a pressing issue due to the following: entrenched patriarchal norms, poverty, inadequate enforcement of laws and social stigma surrounding victims.[4] This article will also critically evaluate Kenya's legal and institutional framework in addressing GBV and examine whether current measures are sufficient to combat the crisis effectively, and if not, what reforms should be recommended.

2. The Constitutional and Legislative Framework

The Constitution of Kenya 2010 provides the foundational human rights framework for addressing GBV. Article 28 guarantees every person the right to dignity, while Article 29 protects individuals from torture, cruel, inhuman, or degrading treatment.[5] The Constitution mandates the State to enact laws through the parliament that prohibit all forms of violence against women.

The ***Sexual Offences Act No 3 of 2006*** was the first comprehensive statute criminalising sexually related offences, which include defilement, rape, and sexual assault.[6] The Act also provides punishment for the various sexual offences outlined by it. The ***Protection Against Domestic Violence Act No 2 of 2015*** (PADV Act) was a turning point.[7] For a prolonged period of time, Kenya lacked specific domestic violence legislation. The PADV Act introduced a broad definition of violence encompassing physical, sexual, economic and emotional abuse, virginity testing and stalking. The Act allows any person to report abuse on behalf of a victim, expanding access to justice, satisfying Article 48 of the Constitution of Kenya 2010.

3. The femicide lacuna and statistics without legal recognition

The numbers do not lie. There has been a spike in female murders in the past recent years, making femicide an ugly reality glaring at the lives of women and young girls. Although Kenya has recognised GBV and femicide as a national crisis, there has been no recognition of femicide as a distinct offence. The Presidential Technical Working Group on GBV, established by Kenya Gazette Notice No 3 of 10 January 2025 and chaired by former Deputy Chief Justice Nancy Baraza, identified this gap as a priority.[8] As Dr Baraza stated, *"We insist that*

[1] UN Women Training Centre, 'Glossary: Declaration on the Elimination of Violence against Women' *UN Women Training Centre eLearning Campus* https://trainingcentre.unwomen.org/mod/glossary/print.php?id=36&mode=&hook=ALL&sortkey=&sortorder=&offset=10 accessed 15 May 2026
[2] *Constitution of Kenya (2010)* art 27
[3] *Constitution of Kenya (2010)* art 29
[4] Immigration and Refugee Board of Canada, *Kenya: Gender-based violence (GBV), particularly domestic violence* [KEN202019.E](2024)para12 https://www.ecoi.net/en/document/2117461.html accessed 18 May 2026
[5] *Constitution of Kenya (2010)* art 28
[6] *Sexual Offences Act No 3 of 2006*
[7] *Protection Against Domestic Violence Act No 2 of 2015*
[8] Kenya Gazette Notice No 3 of 10 January 2025, Presidential Technical Working Group on Gender-Based Violence https://www.gender.go.ke/images/Gazette_Notice_No_3_-_Technical_Working_Group_on_GBV.pdf accessed 18 May 2026

femicide characterised by persistent gender discrimination and occurring overwhelmingly in domestic settings requires separate legal recognition."[9]

The United Nations Office on Drugs and Crime has, through its research of reported cases, documented 725 femicide cases in Kenya for 2024, with approximately 75% of killings committed by someone known to the victim, such as an intimate partner, relative, or friend.[10] A shocking 60% of femicides occur within domestic settings like homes, and most of the cases go unreported by the survivors due to social and victim-blaming.[11] Sadly, without a separate femicide statute, these gendered killings are prosecuted merely as homicide, thereby obscuring gender-based patterns and undermining accountability.

Kenyan courts have progressively outlined the state's requirement for preventing and responding to GBV in ***Wairimu Muthoni Wachirah & Centre for Rights Education and Awareness (CREAW) v Super Metro, the Attorney General & 9 Others.***[12] The facts of these are that the 1st petitioner (herein Wairimu Muthoni Wachirah) boarded a Super Metro Limited matatu operating on the Nairobi route. While on the bus, she was sexually harassed by the tout and the driver. The harassment involved unwanted touching, verbal abuse of a sexual nature, and intimidation that prevented her from alighting at her intended stop. When she protested, other passengers and the crew responded with hostility, and no action was taken to stop the conduct or remove her from the situation.

After the incident, Wairimu reported the matter to the police and sought assistance from the 2nd petitioner, the Centre for Rights Education and Awareness (CREAW), a non-governmental organization working on women's rights and gender-based violence. CREAW filed a public interest petition challenging the systemic failure to protect passengers from sexual and gender-based violence on public service vehicles. The petition named Super Metro Limited as the 1st respondent as the operator of the vehicle. The Attorney General, the National Police Service, the National Transport and Safety Authority (NTSA), the Kenya Bureau of Standards, and other state agencies were joined as respondents 2-10. The petitioners argued that the state and the private operator had failed in their constitutional and statutory duties to ensure public transport was safe, especially for women and girls.

The petitioners relied on Articles 27 on equality and non-discrimination, 28 on human dignity, 29(c) and (f) on freedom and security of the person, including the right not to be subjected to violence and to be free from torture, 39(1) on freedom of movement, and 46 on consumer rights. They contended that Super Metro failed to provide a safe environment, train staff on gender-based violence, and implement policies to prevent and respond to harassment. They also argued that state agencies failed to enforce existing laws and regulations governing public service vehicles, including the NTSA Act and Traffic Act provisions on passenger safety.

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[9]'Femicide is a national emergency, Barasa says' The Standard (13 May 2025) https://www.standardmedia.co.ke/article/2001518869/femicide-is-a-national-emergency-barasa-says accessed 18 May 2026

[10]'From perpetrators to allies: A new frontline in Kenya's war on femicide' *Daily Nation* (7 January 2025) https://nation.africa/kenya/news/gender/from-perpetrators-to-allies-a-new-frontline-in-kenya-s-war-on-femicide--4881676 accessed 18 May 2026

[11]Baraza (n 8)

[12]*Wairimu Muthoni Wachirah & Centre for Rights Education and Awareness (CREAW) v Super Metro, the Attorney General & 9 Others* (Constitutional Petition No E470 of 2023) [2025] KEHC 1234 (KLR) https://www.the-isla.org/state-due-diligence-obligations-for-violence-against-women-vaw/ accessed 18 May 2026

The respondents largely denied liability. Super Metro argued that the incident was an isolated act by rogue employees and that it could not be held vicariously liable. State respondents contended that they had regulations in place and that enforcement was a matter of individual police action. No evidence was presented to show that Super Metro had a functioning policy, complaints mechanism, or training program on sexual harassment prior to the incident.

The Milimani High Court held that the respondents violated the petitioner's rights under Articles 27, 28, 29(c), 29(f), 39(1), and 46 of the Constitution. It found Super Metro vicariously liable and the state agencies in breach of their duty to protect. The Court awarded Wairimu Kshs 420,000 in compensation and issued orders for policy reforms in the public transport sector.

The significance of this decision lies in its expansion of constitutional accountability for gender-based violence in public spaces, particularly public transport, at least in four ways. First, the decision established clear vicarious liability for private transport operators. The High Court held that the Super Metro was responsible for the sexual harassment committed by its driver and tout, rejecting the defense that the acts were those of "rogue employees." This set a precedent that Public Service Vehicle companies have a constitutional duty to provide safe services and cannot escape liability by disowning their staff. It shifted the burden to transport firms to institute policies, training, and accountability mechanisms to prevent harassment. Second, the ruling clarified the scope of the state's positive duty to protect rights under Articles 21 and 28 of the Constitution. The Court found the National Police Service, National Transport and Safety Authority, and other agencies in breach for failing to enforce existing laws and regulations on passenger safety. The decision from the court demonstrates the fact that the state's obligation goes beyond enacting laws, and it requires proactive enforcement mechanisms, oversight, and systemic measures to prevent violations. Third, the case integrated multiple constitutional rights into the analysis of sexual harassment. The Court held that the incident violated Articles 27 on equality and non-discrimination, 28 on human dignity, 29(c) and (f) on freedom and security of the person, 39(1) on freedom of movement, and 46 on consumer rights. This framing treats sexual harassment not merely as a criminal or tortious act, but as a constitutional violation with broader implications for equality and dignity.

Fourth, the decision had an immediate practical impact. It ordered compensation of Kshs 420,000 to the petitioner and directed Super Metro and state agencies to develop policies and mechanisms to prevent sexual and gender-based violence in public transport. The ruling became a catalyst for reforms, prompting NTSA and PSV operators to review safety standards and complaint procedures.

Generally, the case advanced Kenyan constitutional jurisprudence by linking safe public transport to constitutional rights, holding both private and public actors accountable, and reinforcing that women's right to use public spaces without fear of violence is enforceable.

The most significant State liability precedent remains ***Constitutional Petition No 122 of 2013 in the case of Mueni v Republic*** in which the High Court found the Kenyan government liable for failing to prevent and do a thorough investigation into sexual violence during the 2007/08 post-election violence. In July 2025 the government paid Kshs 16 million in compensation to four survivors the first time the State has

financially redressed victims of conflict-related sexual violence.[13] This was a progressive step in trying to redress victims of conflict-related sexual violence.[14]

Nevertheless, the Court of Appeal has subsequently faulted the government for failing to acknowledge and publicly apologise to SGBV victims and for failing to classify these crimes as crimes against humanity, a violation of Kenya's obligations under the Rome Statute.[15]

4. Emerging Challenges and Lack of Enforcement Mechanisms

Despite progressive laws, the enforcement of these laws remains a big challenge in the fight against GBV. Between 2023 and early 2025, over 7,100 GBV cases were reported, yet conviction rates remain low, and police responses are inconsistent.[16] The 47 County Gender Datasheets (2025) developed by the Kenya National Bureau of Statistics and UN Women reveal persistent gender inequalities and marked inter-county disparities in GBV service provision.[17]

Technology-facilitated GBV represents another form of it in the advanced technological era. UN Women Kenya has emphasized the need to address new forms of GBV, including cyber-harassment and non-consensual image sharing, within Kenya's legal approach.[18]

Unlike Kenya, Mexico has taken a progressive step by criminalizing femicide as a distinct crime under Article 325 of its Federal Penal Code where a killing is prosecuted as feminicide when it is committed for gender-related reasons such as signs of sexual violence or a history of intimate-partner abuse.[19] Kenya has experienced significant public outrage and mass protests where thousands marched across major cities chanting "Stop killing women!" demanding that the government declare femicide a national crisis and recognize it as an individual offense.[20] However, Kenya still lacks this specific distinction which then makes it difficult to understand the full magnitude of this crisis and provide adequate justice for survivors.[21] Enacting a distinct statute for femicide would be a major step forward in combating gender-based violence as it would ensure that these gender-motivated killings are recorded and prosecuted as such, moving beyond generic homicide charges and signaling a strong institutional commitment to protecting women and holding perpetrators fully accountable.

Additionally, out-of-court settlements for sexual offences where elders or community

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[13] *Mueni v Republic* (Constitutional Petition No 122 of 2013) [2020] eKLR

[14] 'State pays Sh16m to survivors of 2007/08 post-election sexual violence' *Daily Nation* (15 July 2025) https://nation.africa/kenya/news/state-pays-sh16m-to-survivors-5432100 accessed 18 May 2026

[15] *Attorney General v Mueni & 4 others* (Civil Appeal No 456 of 2021) [2025] KECA 789 (KLR

[16] 'Over 7,100 GBV cases reported in two years' The Star (10 February 2025) https://beta.the-star.co.ke/news/2025-02-10-over-7100-gbv-cases-reported-in-two-years accessed 18 May 2026

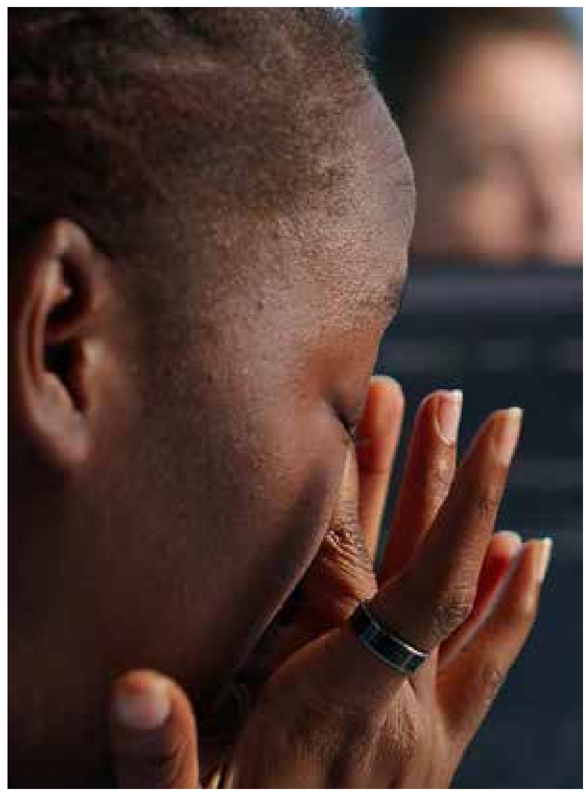
[17] Kenya National Bureau of Statistics and UN Women, *County Gender Datasheets 2025* (KNBS/UN Women, 2025) https://www.knbs.or.ke/reports/county-gender-datasheets-2025/ accessed 18 May 2026

[18] UN Women Kenya, 'Technology-facilitated gender-based violence: A new frontier for Kenya's legal response' (UN Women, 15 January 2026) https://kenya.unwomen.org/en/news-stories/2026/01/tfgbv-legal-response accessed 18 May 2026.

[19] Mexico, Código Penal Federal, Article 325 (as amended 25 April 2023) https://mexico.justia.com/federales/codigos/codigo-penal-federal/libro-segundo/titulo-decimonoveno/capitulo-v/ accessed 18 May 2026

[20] Brian Inganga, 'Thousands March against Femicide in Kenya following the January Slayings of at Least 14 Women' *Associated Press* (Nairobi, 27 January 2024) https://hosted.ap.org/theunion/article/2d90642f93e942d99c620a18057ada99/thousands-march-against-femicide-kenya-following-january accessed 18 May 2026

[21] 'Kenya National Commission on Human Rights, Submissions on Gender-Based Violence (GBV) Including Femicide in Kenya (8 April 2025) https://www.knchr.org/Our-Work/Policy-Review/Legislative-Review-and-Research accessed 18 May 2025



Gender-Based Violence in Kenya is not just a "private issue"—it is a national social, legal, and public health crisis driven by inequality, weak enforcement, and cultural norms.

leaders mediate rape cases have been declared unconstitutional yet continue illegally.[22] The National Gender and Equality Commission have backed the government's directive banning such mediation emphasising that by banning them, the state is enforcing its constitutional duty to protect the dignity and safety of minors.[23]

5. Recommendations

First, Parliament should enact a standalone femicide legislation that defines the offence in gendered terms, establishes harsher penalties and mandates specialised prosecution units for quality enforcement.[24] Second, the government must fully operationalize the PADV Act's provision for protection orders and ensure GBV shelters exist in all 47 counties, as committed under the Generation Equality Forum. Third, the State should allocate sustainable funding to GBV survivors' services, legal aid and police gender desks.[25] Fourth, Kenya must criminalise online-facilitated GBV and establish reporting mechanisms for online abuse. Fifth, the Office of the Director of Public Prosecutions should expand specialised SGBV training for prosecutors, building on its 78.5% conviction rate for sexual violence cases.[26]

6. Conclusion

Kenya possesses a constitutional and legislative framework capable of addressing GBV. What it lacks is the political will to implement, the resources to sustain, and the legal recognition, particularly of femicide, to hold perpetrators fully accountable. Each unreported case, each unprosecuted perpetrator, and each silenced survivor represent a failure not of law alone but of national conscience. Tackling GBV is ultimately a test of whether Kenya will honour the dignity promised to every citizen under its Constitution.

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[22] *IW & another v Omondi & 3 others* (Constitutional Petition E416 of 2021) [2023] KEHC 26907 (KLR)

[23] National Gender and Equality Commission, 'Press Statement on Banning of Out-of-Court Settlements for Sexual Offences' (NGEC, 22 April 2025) https://www.ngeckenya.org/Downloads/NGEC_Statement_Out_of_Court_Settlements.pdf accessed 18 May 2025

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BOOK REVIEW

Is seeing believing? The financial custodians dilemma

By Agnes Nthenya Waithera

Picture this, you are a CFO of an organization, and you join a virtual meeting with other senior executives to discuss a transaction requiring payment. Through the progress of the discussion, you gain approval to process the transaction. It is a video call and from the video and audio you can tell these are the same individuals you've interacted with in your line of duty, only to discover that you were speaking to cloned virtual individuals. A real case of executive deepfake fraud.

Or you are a bank relationship manager, and you receive payment instructions from your client. You call your client to confirm that the payment instructions are valid and from your call, they assure you they issued the instructions and grant go ahead in processing only to discover later this to be a voice cloned phone scam.

Or you work in a financial institution and use technology-assisted remote onboarding to open accounts. You open a number of accounts online and you can see the customers have attached the required KYC documents but upon further verification, it is discovered that these are not real people but rather synthetic identities.

This is the new age of financial crimes creating doubts into what we see and hear, what we have always considered reliable verification process, that's putting those considered custodians of companies or individual's financial assets at an increased risk of landing in the hands of cybercriminals.

Financial cybercrime is no longer "technical hacking" only—it is mostly social engineering + mobile money exploitation. In Kenya, the biggest risk is not weak systems, but human manipulation combined with mobile-first financial systems.

The evolution of AI in the financial space has progressed to such an extent that it is now possible to clone someone's voice and their face structure to produce realistic videos of them conveying information, with their realistic facial expressions, in as

little as 3 minutes. This is now being done so good that the cloned audio or visual is indistinguishable from a real one.

Financial cyber crimes are not new, but with AI assisted technologies these appear to have evolved into complex schemes that easily bypass legacy security protocols. How can one identify whether they are interacting with the real person or a clone when this becomes increasingly perfected?

Studies indicate that AI assisted fraud detection tools are there and some still under development but there are also reports where some of these tools still struggle to identify a real video/audio from deepfakes. Is it that the technology is relatively new making fraudsters gain an advantage or has it evolved to be so complex that developing effective counter measures remains a challenge?

Kenya's current Artificial Intelligence Bill 2026 proposes some provisions of offences one as such relating to deepfakes stating it an offence occurring in deployment, generation and distribution of AI content using a person's image, voice or likeness without their consent where such content would result to harm, misinformation defamation or infringement of privacy. Should this come to law it would result in stipulated fines, imprisonment or both.

While this is a great mitigation step, it does not explicitly translate to zero AI-assisted financial crimes just as the law has always been there to deter crime but does not entirely prevent occurrence. Highlighting the need to be proactive as financial custodians.

Governance and internal controls within an organization are still key in preventing instances such as fraud, however, this in itself may not be sufficient. Additional layers of defence are proving to be necessary, ones we can term as 'fighting fire with fire.' Continuously developing and use of AI assisted fraud detection technologies capable of detecting anomalies in transactions compared to historical data or in the case of identity clones, able to pick up on voice or facial imaging being AI generated.

What does the future outlook look like? AI assisted technology is evolving fast globally not just in the financial world, similarly regulations are also on the rise to control its use with each jurisdiction adopting different measures. It is therefore difficult to have a clearcut view of how the long-term trajectory will be. But one thing is for sure, organizations should adopt a proactive approach in learning and adopting these technologies rather than remain reactive.

Key questions still remain in the financial workspace: Are there covers for financial losses arising as a result of AI assisted fraud? is the work pool appropriately skilled to detect and respond to such risks? Are governance and internal controls measures actively enforced and monitored? And are regulations supporting growth of the technologies while meaningfully preventing its misuse?

While these are complex issues and it's easy to define what is needed to protect custodians or owners of financial assets, the truth is this is still a learning curve for custodians, innovators and regulators. One that will continuously require different stakeholders working in harmony to financial fraud protection and prevention.

Agnes Nthenya Waithera, ACCA, MBA is a strategic Finance Consultant driving sustainable growth through financial reporting excellence, strategic advisory, tax optimization, and ESG across multiple industries.

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