INTERACTIONS BETWEEN THE COURTS IN KENYA AND MINORITIES
# Table of Contents

Chapter 1 .............................................................................................................................................. 6

The legal framework regulating minority rights in Kenya ........................................................................ 6

1. Who are the minorities? .................................................................................................................... 6

2. Domestic laws ................................................................................................................................... 7

3. Regional treaties ............................................................................................................................... 8

4. International treaties ....................................................................................................................... 8

5. Sustainable development goals ...................................................................................................... 9

6. Global trends in cases involving minorities .................................................................................. 10

Indigenous people ................................................................................................................................ 10

LGBTI .................................................................................................................................................. 11

1. Enforcement of minority rights by courts in Kenya ................................................................. 13

LGBTI .................................................................................................................................................. 13

Women ................................................................................................................................................ 15

Gender equity case ............................................................................................................................. 15

People living with HIV and AIDS ....................................................................................................... 16

Chapter 2 ............................................................................................................................................... 19

Structure of the Kenyan Court System and how courts have handled cases on minority rights ...... 19

Situation analysis of how courts have handled cases on minority rights in Kenya ......................... 20

Case study 1 – Mombasa County ....................................................................................................... 21

Case study 2 – Nairobi County ............................................................................................................ 24

1. Lack of enabling legislation ........................................................................................................... 24

2. Lack of co-operation ..................................................................................................................... 25

3. Lack of information and legal representation ............................................................................. 25

Chapter 3 ............................................................................................................................................... 27
Overview of the hotspots for discrimination and abuse of rights of minorities by courts ................................................................. 27

Complaint ............................................................................................................................................................................. 27

Arrest .................................................................................................................................................................................. 28

Charge, plea-taking, bail terms ......................................................................................................................................... 28

Trial .................................................................................................................................................................................... 29

Judgment and sentencing .................................................................................................................................................. 30

Appeals and reviews .......................................................................................................................................................... 31

Chapter 4 ............................................................................................................................................................................ 32

Conclusion and recommendations ........................................................................................................................................... 32

1. Courts ........................................................................................................................................................................... 32

2. Chief Justice ................................................................................................................................................................. 32

3. Office of the Director of Public Prosecutions ........................................................................................................... 33

4. The Office of the Attorney General and the Parliamentary Committee on Justice ......................................................... 33

5. National Police Service .................................................................................................................................................. 34

6. Office of the Ombudsman ............................................................................................................................................. 34

7. County Governments of Mombasa and Nairobi ......................................................................................................... 35

8. Media ............................................................................................................................................................................. 35

9. Civil Society .................................................................................................................................................................. 35

10. Development Partners ................................................................................................................................................. 36

11. The people of Kenya ...................................................................................................................................................... 36
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Executive summary

The report critically examines the relationship between the courts and the minority groups, centering on women, youth, people living with disability, Muslims and Lesbians, Gays, bisexuals, Transgender, Intersexual (LGBTIQ), focusing majorly on their interaction with the aim to foster dialogue on non-discrimination and respect for human rights for this groups in Mombasa and Nairobi Counties.

This research brings out the areas and reasons that lead to discrimination against and abuse of the rights of minorities within the Kenyan judicial system. Further the report Once such aims to brings out critical policy and administrative issues that goes ahead to significantly reduce discrimination and dwindling respect for human rights, especially rights of minorities.

The report elaborates on the legal framework that regulates the rights of minorities in Kenya. It discusses the national and international legal instruments that regulate such rights. The Chapter also has a few cases indicating how local courts have implemented both the national and international legal instruments that Kenya is part of as a member of the international community of nations.

We attempt to elaborate on the structure of the Kenyan court system and undertake a basic situational analysis of how courts have handled cases on minority rights and how new UN Sustainable Development Goals can be integrated to strengthen the relationship between courts and the minority groups.

ICPC also provides a general overview of the criminal procedure and exposure of areas that were found to be hotspots for discrimination and abuse of the rights of the minorities including a review of some high profile cases on minority rights that have been decided by courts locally and internationally, the lessons learnt and best practices.

The report recommendations are a starting point in pushing for policy and administrative reforms in the judiciary that is geared towards increased enjoyment of human rights and good governance by the target minority groups.
Chapter 1

The legal framework regulating minority rights in Kenya

1. Who are the minorities?

Article 260 of the Constitution of Kenya (hereinafter, “Constitution”) defines “marginalised group” as a group of people who, because of laws or practices before, on, or after the effective date, were or are disadvantaged by discrimination on one or more of the grounds in Article 27 (4).

Article 27 (4) provides that the State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth. Thus, marginalized group is a group of people who have been, or continue to be discriminated against on account of their race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth among others.

In 1966, the United Nations (UN) Special Rapporteur, Francesco Capotorti, proposed the following definition of minorities in the context of Article 27 of the International Covenant on Civil and Political Rights (ICCPR):

‘A group numerically inferior to the rest of the population of a State, and in a non-dominant position, whose members – being nationals of the State – possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religions and language.”¹

Protection of minority rights in Kenya is afforded by various laws. These can be classified into three:

1. Domestic laws
2. Regional treaties
3. International treaties

All these laws are interdependent but they are all guided by the Constitution.

2. Domestic laws

Article 27 (4) and (5) of the Constitution prohibits any form of discrimination against the marginalized groups; this is besides the Constitution stating that every person has is equal before the law and has the right to equal protection and equal benefit of the law. Further, article 28 thereof states that every person has inherent dignity and the right to have that dignity respected and protected.

Article 2 (5) and (6) of the Constitution incorporate the general rules of international law as well as treaties and conventions ratified by Kenya as part of the laws of Kenya. This means that any treaty and convention on minority rights that has been ratified by Kenya forms part and parcel of the Kenyan law.

Other than the Constitution, other domestic laws protect specific minority groups. For example, the Children Act was enacted to among other things foster the care and protection of children. The Persons with Disabilities Act provides for the rights and rehabilitation of persons with disabilities, and to achieve equalisation of opportunities for persons with disabilities. Further, the Employment Act 2007, has very clear provisions against discrimination of any person on

\[\text{Footnotes:}\]

2 Article 27 (1) of the Constitution of Kenya, 2010

3 Chapter 141 of the Laws of Kenya. As at the date of publication, there was a Children Act (Amendment) Bill 2014 which seeks to amend the Children Act to bring it into consonance with the Constitution.

4 As at the date of publication, there was a Person with Disabilities Bill 2015 which seeks to repeal and replace the Persons with Disabilities Act 2003 so as to bring it into consonance with the Constitution.

5 As at the date of publication, there was a draft Employment Act (Amendment) Bill 2015 seeking to amend the Employment Act 2007.

6 Section 5 (3) (a) of the Employment Act 2007.
account of the person’s race, colour, sex, language, religion, political or other opinion, nationality, ethnic or social origin, disability, pregnancy, mental status or HIV status. More specifically, the Employment Act protects the rights of women and children at the workplace.

3. **Regional treaties**
Regionally, Kenya has ratified the African Charter on Human and Peoples’ Rights, and the African Charter on the Rights and Welfare of the Child. Both Charters emphasize that all persons are equal and should enjoy all the freedoms set out in the charters.

4. **International treaties**
Internationally, several treaties and conventions have been passed to protect the rights of minorities. Chief among these instruments is the Universal Declaration of Human Rights (“UDHR”) adopted by the United Nations General Assembly in 1948. Articles 1, 2 and 7 of the UDHR affirms that every person is born free and equal in dignity and rights, is equal before the law and is entitled without any discrimination to equal protection of the law, and without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Article 2 (1) of the International Covenant on Civil and Political Rights (“ICCPR”) restates that each member state must undertake to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Article 26 of the ICCPR also states that all persons are equal before the law and are entitled without any discrimination to the equal protection of the law; that the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Kenya has also ratified the Convention on the Rights of the Child. Article 2 of the Convention enjoins State Parties to respect and ensure the rights in Convention to each child within their
jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.

Further, Kenya is also a party to the Convention on the Elimination of All Forms of Discrimination against Women, 1979 (“CEDAW”) which prohibits all forms of discrimination and violence against women.

Additionally, Article 5 of the Convention on the Rights of Persons with Disabilities reaffirms the principles of equality and non-discrimination of people with disability. Kenya has ratified the treaty.

Finally, minority rights are further emboldened by the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities. Article 1 of the Declaration urges states and the international community to promote and protect the rights of persons belonging to national or ethnic, religious and linguistic minorities.

5. Sustainable development goals

At the turn of the millennium in the year 2000, the United Nations – of which Kenya is a member - adopted the Millennium Development Goals (MDGs), eight anti-poverty targets that the world committed to achieving by 2015. Even though Kenya made some progress on the MDGs e.g. by providing universal primary education, a majority of her population still lives below the poverty line.

At the United Nations Sustainable Development Summit on 25 September 2015, world leaders adopted the 2030 Agenda for Sustainable Development, which includes a set of 17 Sustainable Development Goals (SDGs) to end poverty, fight inequality and injustice, and tackle climate change by 2030. The Sustainable Development Goals build on the Millennium Development
Goals (MDGs). The SDGs seek to address the root causes of poverty and the universal need for development that works for all people.\footnote{http://www.undp.org/content/undp/en/home/mdgoverview/post-2015-development-agenda.html (as accessed on 25 November 2015)}

All the SDGs are important in reducing poverty and enhancing the democratic governance in Kenya. Some important SDGs to foster dialogue on non discrimination and respect for human rights and rule of law are:

a. SDG 4: Ensure inclusive and quality education for all and promote lifelong learning,
b. SDG 5: Achieve gender equality and empower all women and girls,
c. SDG 16: Promote just, peaceful and inclusive societies,

By striving to achieve these SDGs, we will be eliminating the issues identified in this research on courts which rotate on the themes of police harassment, lack of information, knowledge, legal representation, and enabling legislation.

6. **Global trends in cases involving minorities**

In the recent past, regional and international Courts, as well as Commissions, have made high profile decisions concerning various minorities and marginalized groups.

**Indigenous people**

The African Charter on Human and Peoples’ Rights was recently applied concerning rights of minorities and indigenous people living in Kenya. This was in the case of Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya, 276/2003\footnote{The decision as well as a summary of the case can be found at https://www.escr-net.org/docs/i/1216218 (Last accessed on 6 December 2015)} which was heard and determined by the African Commission on Human and People’s Rights. The complaint was filed against Kenyan government alleging violations under the African Charter on Human and Peoples’ Rights, the Constitution of Kenya and international law, for the forced removal of the Endorois peoples from
their ancestral lands and violation of their rights. The violations happened in the 1970s when the Kenyan government evicted hundreds of Endorois families from their ancestral land around the Lake Bogoria area in the Rift Valley to create a game reserve for tourism. These violations, in addition to lack of compensation by the Government, disrupted the pastoralist way of the life of the Endorois. The complaints were filed after domestic legal efforts and action failed to yield any effective remedy for the Endorois. The Commission found that the Kenyan Government had violated the Endorois' rights to religious practice, to property, to culture, to the free disposition of natural resources, and to development, under the African Charter. For these violations, the Commission recommended that the Kenyan government recognizes rights of ownership, restitute to the Endorois' their ancestral lands, compensate their losses, and ensure the Endorois benefit from the royalties and employment opportunities within the game reserve.

**LGBTI**

In June 2015, the Supreme Court of the United States (“SCOTUS”) in *Obergefell v. Hodges* 576 U.S. ___ (2015) held that the fundamental right to marry is guaranteed to same-sex couples by both the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. In its majority decision, the SCOTUS held that a person had the “liberty that includes certain specific rights that allow persons, within a lawful realm, to define and express their identity.”

The court listed four reasons why the fundamental right to marry applies to same-sex couples. These are:

1. The right to personal choice regarding marriage is inherent in the concept of individual autonomy.

2. The right to marry is fundamental because it supports a two-person union unlike any other in its importance to the committed individuals, a principle applying equally to same-sex couples.
3. The fundamental right to marry safeguards children and families and thus draws meaning from related rights of childrearing, procreation, and education”; as same-sex couples have children and families, they are deserving of this safeguard.

4. Marriage is a keystone of their social order and there is no difference between same- and opposite-sex couples with respect to this principle; consequently, preventing same-sex couples from marrying puts them at odds with society, denies them countless benefits of marriage, and introduces instability into their relationships for no justifiable reason.

In the dissenting opinion, the court held that marriage has always had the universal definition of the union of a man and a woman with the intended purpose of successful childrearing.

The dissenting opinions are noteworthy for they seem to uphold the traditional view of marriage as a union between a man and a woman. This is a view that still holds, even though held by the minority, in the developed world to wit, the United States of America.

In a recent case in the European Union, the rights of same-sex couples wishing to enter into marriage were analyzed. The European Court of Human Rights (ECtHR) in the case of Oliari and others v Italy (Applications Nos. 18766/11 and 36030/11)⁹, the court analyzed the status of same-sex couples wishing to marry or enter into a legally recognized partnership. The Court held that the absence of a legal framework recognizing homosexual relationships in Italy violates the right to respect for private and family life, as provided by the European Convention of Human Rights (ECHR) in Article 8. While the decision is binding on Italy, it recognizes a positive obligation upon European States to implement a general legal framework regulating same-sex relationships, regardless of the timing when such institution should be enacted or if civil unions already exist for different-sex couples.

In Latin America, the Inter-American Court of Human Rights will soon decide on a case that could overturn the legal definition of marriage. The case of Ángel Alberto Duque v.

⁹ [http://hudoc.echr.coe.int/eng?i=001-156265#/%22itemid%22:%22001-156265%22] (Last accessed on 5 December 2015). The judgment was delivered on 27 July 2015.
Colombia\textsuperscript{10} as stated by the Inter-American Commission on Human Rights is to contribute to the development of jurisprudence in the matter of discrimination due to sexual orientation.”

In Kenya, Article 45 (2) of the Constitution is clear that same-sex marriages are not allowed. The Article provides that every adult has the right to marry a person of the opposite sex, based on the free consent of the parties. Any change to that Article would require a referendum as stated at Article 255 of the Constitution.

1. Enforcement of minority rights by courts in Kenya

Since the promulgation of the Constitution in 2010, courts in Kenya through their proceedings and decisions seem to be fostering the respect for rights of minorities. Various decisions by the High Court, especially the Constitutional and Human Rights Division of the High Court, attests to such respect. Articles 162 (2) and 165 of the Constitution vest the High Court with jurisdiction to hear and determine matters of enforcement of fundamental rights and freedoms.

Cursory glances at the various decisions show that the High Court and the appeals court do not shy away from applying the law in international treaties and norms to decisions on rights of minorities that they make. Deep analyses of select cases reveal the fact that Kenyan Courts do consider the various international and regional treaties which have been ratified by Kenya in cases involving minorities. The Courts decisions are at foremost guided by the Constitution.

LGBTI

In Eric Gitari v. Non-Governmental Organizations Co-ordination Board & 4 others [2015] eKLR, the petitioner, Eric Gitari, sought to register a non-governmental organization with the names the Gay and Lesbian Human Rights Council, Gay and Lesbian Human Rights

\textsuperscript{10} Case 123-05, Report No. 150/11, Inter-Am.C.H.R. (2011). The oral arguments were made on September 2015 and the decision of the court is awaited.
Observancy, or Gay and Lesbian Human Rights Organization. The proposed NGO sought among others to address the violence and human rights abuses suffered by gay and lesbian people. The Non-Governmental Organizations Board (“Board”) rejected the application arguing that the Penal Code at sections 162, 163 and 165 criminalized gay and lesbian liaisons as they go against the order of nature; and that therefore any NGO with the said names or objectives could not be registered. The petitioner filed the petition at the High Court alleging discrimination and violation of his right to association, and equality before the law.

In its decision, the High Court noted that Article 36 of the Constitution grants every person the right to form an association of any kind. That the application to form an association can only be denied on reasonable grounds, and that no one can be compelled to join an association. The court also noted that the freedom of association is protected by various covenants to which a Kenya is a party. These are the UDHR, the ICCPR and the African Charter on Human and Peoples’ Rights. The court held that the right of association is to be enjoyed by all individuals and that there is nothing to indicate that sexual orientation is a matter that removes one from the ambit of protection by the Constitution. The court also held that in a representative democracy, the State is restricted from determining which convictions and moral judgments are tolerable. Further, that the Constitution and the right to associate are not selective and that the right to associate is a right that is guaranteed to, and applies, to everyone.

While interpreting sections 162, 163 and 165 of the Penal Code, the court held as follows,

“A reading of the above provisions indicates that the Penal Code does not criminalise homosexuality, or the state of being homosexual, but only certain sexual acts “against the order of nature.”. That the State does not set out to prosecute people who confess to be lesbians and homosexuals in this country is a clear manifestation that such sexual orientation is not necessarily criminalised. What is deemed to be criminal under the above provision of the Penal Code is certain sexual conduct “against the order of nature”, but the provision does not define what the “order of nature” is.”

The court found that the Board had violated the petitioner’s right to non-discrimination by refusing to accept the names proposed on the basis that the proposed NGO sought to advocate for
the rights of persons who are not socially accepted. The Board was ordered to exercise its constitutional duties in accordance with the Constitution and the Non-Governmental Organizations Co-ordination Act. The court also expressly stated that the matter raised issues of great public interest and that it impacted on a minority and vulnerable group. It ordered each party to bear its own costs of the petition.

Women

Gender equity case

A case that impacted on the rights of women was Centre for Rights Education & Awareness (CREAW) v Attorney General & another [2015] eKLR. The case was a build up from the advisory opinion given by the Supreme Court of Kenya in Advisory Opinion No. 2 of 2012 In the matter of Gender Representation in the National Assembly and the Senate. In the Advisory Opinion, the Supreme Court had held that legislative measures for giving effect to the one-third-to-two-thirds gender principle, under Article 81(b) of the Constitution and in relation to the National Assembly and Senate, should be taken by 27 August, 2015. Going by the said holding, the petitioner in the CREAW case filed a petition in the High Court alleging a failure on the part of the respondents to abide by the Advisory Opinion and take the requisite measures for the realization of the gender equity rule.

The petitioner contended that from the date of the Advisory Opinion on 11th December 2012, and indeed from the date of promulgation of the Constitution on 27th August 2010, the respondents were yet to prepare the relevant Bill for tabling before Parliament for implementation of Articles 27(8) and 81(b) of the Constitution, which action was a threat of violation of the Constitution. The respondents replied that the 27 August 2015 was yet to arrive, and that Parliament has the mandate to extend the time for enacting any legislation required under the Constitution.

In its decision, the court commenced by appreciating that it was bound by the Advisory Opinion of the Supreme Court on the question of gender representation in the national Assembly and Senate. The court also held that a person does not have to wait until a right or fundamental has been violated, or for a violation of the Constitution to occur, before approaching the court. The court held that by failing to originate Bills on the two thirds gender rule, there was a threat or
likelihood of violation of the Constitution. In allowing the petition, the court ordered the Attorney General and the Commission on the Implementation of the Constitution to prepare the relevant Bills in the next forty days from then.\textsuperscript{11}

\textbf{In Rose Wangui Mambo \\ & 2 others v. Limuru Country Club \\ & 17 others [2014] eKLR\textsuperscript{12}.} In the case, various directors of Limuru Country Club made a by-law which led to the exclusion of the lady golf members from participating in a Golf General Meeting Election. The court noted that principle of equality and non-discrimination has its underpinnings in various International conventions which are now Kenyan laws by dint of Article 2 (5) and 2 (6) of the Constitution. Further, the court extensively set out the provisions of equality and non-discrimination found in the UDHR, CEDAW and ACHPR. The court concluded that,

\begin{quote}
“\text{It is thus evident that both under the Constitution of Kenya and international and regional treaties to which Kenya is a party, the principle of equality of the sexes are recognized, and discrimination on any basis prohibited.”}
\end{quote}

The court went on to hold that the by-law contravened article 27 of the Constitution for it sought to treat female members differently from the male members, which was discriminatory.

\textbf{People living with HIV and AIDS}

The High Court has applied international and regional treaties which have been ratified by Kenya in cases involving people living with HIV and AIDS. In \textit{Aids Law Project v. Attorney General \\ & 3 others [2015] eKLR}, the petitioner moved the High Court to declare section 24 of the HIV and AIDS Prevention and Control Act, No. 14 of 2006 as unconstitutional. The said section required any person, who is infected with, or carries, HIV, to disclose such information to every person whom he or she was about to have sexual contact with. Where such a person failed to disclose such information, the section empowered a medical practitioner to do so. The petitioner

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\textsuperscript{11} The offices of the Attorney General and the Commission on the Implementation of the Constitution have since published The Two-Third Gender Rule Laws (Amendment) Bill 2015 which is undergoing deliberations in the National Assembly.

\textsuperscript{12} The case has been appealed against and as at 5 December 2015, the appeal was yet to be fixed for hearing.
argued that section 24 was not only unconstitutional but also that it violated the rights guaranteed under Article 9 of the ICCPR, incorporated into the Constitution by Article 27 thereof. The court is holding section 24 unconstitutional held that whereas those who suffer from HIV/AIDS were legally required to disclose their status to sexual contacts, the said sexual contacts were not under any duty to keep such information confidential. Further, the court held that section 24 failed to define what sexual contact is and as such it was vague.

In industrial relations, the judicial mechanism of review on enforcement of minority rights lies with the Employment and Labour Relations Court. This Court is established under the Employment and Labour Relations Court Act, 2011 and its mandate is to hear and determine disputes relating to employment and labour relations and for connected purposes. Further, the court has the jurisdiction to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights. Thus, the court is competent to handle any case on discrimination and abuse against minorities which arise from employment and labour relations.

The Environment and Land Court deals with disputes relating to land and environment. It is also vested with the jurisdiction to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights in matters related to land and environment. Therefore, any discrimination or abuse against minorities in matters related to land and environment are well handled by the Environment and Land Court.

It is important to note that the High Court, Employment and Labour Relations Court and Environment and Land Court are the superior courts in Kenya. Yet, not all disputes in Kenya meet the threshold for cases at the superior courts; most cases are heard and determined by the subordinate courts. Many cases in which minorities would be entitled to apply for violation of

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13 *United States International University (USIU) v. Attorney General [2012] eKLR; Prof. Daniel N. Mugendi –Versus- Kenyatta University and 3 Others, Civil Appeal No. 6 of 2012*

14 *Established under the Environment and Land Act, Chapter 12A of the Laws of Kenya*
their freedoms and rights are handled by the subordinate courts. Subordinate courts do not have jurisdiction to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights. The lack of jurisdiction is because Parliament is yet to pass the enabling legislation to give effect to such original jurisdiction.

In conclusion, there exist judicial avenues in Kenya to stave off discrimination and abuse of the rights of minorities. However, subordinate courts lack jurisdiction to hear and determine such cases yet such courts handle the most cases where discrimination and abuse of minorities occur.
Chapter 2

Structure of the Kenyan Court System and how courts have handled cases on minority rights

Chapter 10 of the Constitution provides for among others the structure and authority of courts in Kenya. All the courts derive their authority from Article 159 (1) of the Constitution. The article provides that judicial authority is derived from the people and vests in, and shall be exercised by, the courts and tribunals established by or under the Constitution.

Article 159 (2) of the Constitution is key in prevention of discrimination and abuse against minorities. The article provides for the principles that should guide courts and tribunals when exercising the judicial authority provided for under article 159 (1). These principles are:

a) Justice shall be done to all, irrespective of status;
b) Justice shall not be delayed;
c) Alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted. The traditional dispute resolution mechanisms are to be promoted so long as they do not contravene the Bill of Rights, they are not repugnant to morality and justice, and are not inconsistent with the Constitution or written law;
d) Justice shall be administered without undue regard to technicalities; and
e) The purposes and principles of the Constitution shall be protected and promoted.

The Supreme Court of Kenya is at the apex of the court system. The Supreme Court is established under Article 163 of the Constitution. It comprises of the Chief Justice, who is the President of the Court, the Deputy Chief Justice, who is the deputy to the Chief Justice and the vice-president of the Supreme Court, and five other judges. The Supreme Court is the final arbiter in disputes and its decisions are binding on all other courts.

http://www.judiciary.go.ke/portal/page/about-the-judiciary (as accessed on 24 November 2015)
Below the Supreme Court is the Court of Appeal which is established under Article 164 of the Constitution. It is headed by a President of the Court of Appeal who is elected from and by the judges of the Court of Appeal. The Court of Appeal hears appeals from the High Court, Employment and Labour Relations Court, Environment and Land Court, and any other court and tribunal that may be prescribed by an Act of Parliament.

The High Court is established under Article 165 of the Constitution. It is headed by a Principal Judge of the High Court who is elected from and by the judges of the High Court. The High Court has unlimited original jurisdiction in criminal and civil matters, jurisdiction to determine whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened, supervisory jurisdiction over all the lower and subordinate courts. Appeals from the High Court lie at the Court of Appeal unless in some certified cases where the appeal may be heard by the Supreme Court.

By virtue of Article 162 (2) of the Constitution and the appropriate legislation, there are courts with the status of the High Court that hear and determine disputes relating to employment and labour relations, and the environment, and the use, and occupation of, and title to land. These courts are the Employment and Labour Relations Court, and the Environment and Land Court.

Subordinate courts are established under Article 169 of the Constitution. They are the Magistrates courts, the Kadhis’ Courts, the Court Martial and any other court or local tribunal as may be established by an Act of Parliament. Appeals from the subordinate courts lie at the High court, the Employment and Labour Relations Court or the Environment and Land Court.

**Situation analysis of how courts have handled cases on minority rights in Kenya**

In this section of the study, we present two case studies – in Mombasa and Nairobi counties – on how courts have handled cases on minority rights. Analyses of the case studies reveal that the minorities do not mainly get their rights violated inside the court room but rather outside. For
many minorities, their first point of contact with the criminal justice system is with the police where most violations of their rights happen. Thus, many times courts are denied chances through which to address such violations as the cases do not even get to them. This blockage also applies to administrative bodies which are enjoined to help in settling such violations such as the Ombudsman and the Independent Policing Authority.

Case study 1 – Mombasa County

Mombasa County is one of the 47 counties in Kenya. Mombasa is the capital city of the county where most of the administrative offices and courts are found. Several courts are located at Mombasa. These are: the Court of Appeal, the High Court, the Employment and Labour Relations Court, the Environment and Land Court, and the subordinate courts of Magistrates Court and Kadhis’ Courts.

In Mombasa, we carried out 5 focus group discussions of 8 participants each and a key informant interview of persons with disabilities. The focus group discussions were with women, LGBTI persons, commercial sex workers, and members of the Muslim community. We found these to be the predominant minority groups that are found in Mombasa.

From the onset, the participants were very candid that their rights are most likely violated before they get to court i.e. during the arrest. For this they cited constant harassment by police officers, county askaris, and even members of the public in some cases. For example, Peter* (not his real name) who is gay and a commercial sex worker stated that he had been arrested at Pirates beach for a charge that he was not informed of, taken to police where he was sexually assaulted by two police officers, and then released. He stated that he feared reporting the incident to the Officer Commanding Police Station he thought they were colluding. Such incidences of harassment by police officers were a common theme in the discussions.
Another example is that of Jane* (not her real name) who reported her husband as having raped their child. On following up the case with the police, she was taken in circles and by the time the husband was charged in court, she had no energy to follow up on the case and attend the court proceedings. The case was dismissed for lack of sufficient evidence. Of important note is that Jane was assisted to a great deal in preparing for the case by a locally based Non-Government Organization. The assistance was in collecting and preserving evidence, and counseling of both the mother and the child. The women participants particularly praised the said NGO as they felt that it helped women and children in accessing justice, and settling disputes.

Muslims also face the brunt of police harassment and discrimination. A participant told of forced disappearances especially of high school boys who are Muslims. One of such boys was kidnapped by unidentified people, suspected to be police officers, and taken to the neighbouring Kilifi County where he was interrogated on allegations of being a member of Al Shabab. The boy was later returned to his family in Mombasa but he was emotionally and physically scarred. The family stated that it did not know of the office of the Ombudsman or Independent Police Oversight Authority where they could report such cases should the police fail to take them up.

Such incidents highlight the need for courts, prosecutors and defence advocates to interrogate the whole process of arrest before the suspects are charged in court. In many cases in which minorities are involved, their constitutional rights have already been disregarded during arrest. Once such violations start before they get to court, it is a little wonders why there are very few cases involving minorities in court.

The participants were in agreement that they rarely face any discrimination from the judges, state counsel or defence counsels. The participants stated that they never felt that they were treated differently from other people because of their circumstances. Nevertheless, they raised several issues which they usually encountered in court: These were:
1. Delays in conclusion of their cases

The participants stated that they encountered so many delays in conclusion of their cases such that most of them end up giving up on following the cases. For example, Martha* (not her real name), who suffers from physical disability, told of her case where she has sued someone for encroaching on her land. She stated that the case has been going on for the last 4 years with appeals and counter-appeals slowing down the matter.

Further, the participants stated that they did not understand why their cases kept on getting adjourned which leads to delay. That they are not sufficiently informed of the reasons for the adjournment.

2. Bail and bond procedures and terms

Many participants also stated that they did not know of the procedures that are followed when courts are giving bail or bond. They stated that some terms that are set out for bail and bond are unclear and seem to be plucked from the air. For example, *Hussein (not his real name) stated that on a charge of common assault he had been granted bail of KShs. 50,000 which he could not afford. Then, he did not know that he could apply for review of the bail terms, but he stated that even if he knew he could not apply for review as it involved expending more money.

3. Evidence

Most of the participants stated that they were unaware as to why some pieces of evidence were excluded during hearing. The many instances were cited were situations involving hearsay.

However, the women participants were aware of the evidence that is required to mount a successful trial on rape, defilement, and indecent assault. This was so because they had been taught by the locan NGOs of the requirements to visit a doctor as soon as the act has happened.
Case study 2 – Nairobi County

Nairobi County is one of the 47 counties in Kenya. Nairobi is the capital city of the county as well as of the country. The city hosts the seat of the Kenyan central government as well as related administrative offices. All the courts found in the Kenyan court structure have their seat in Nairobi. These are: the Supreme Court of Kenya, the Court of Appeal, the High Court, the Employment and Labour Relations Court, the Environment and Land Court, and the subordinate courts of Magistrates Court and Kadhis’ Courts.

In Nairobi, we carried out key informant interviews with a state counsel at the office of the Director of Public Prosecutions, a Muslim leader, a police officer and a social worker. The interviews revealed that the issues faced at Mombasa County were similarly faced in the courts at Nairobi County. However, there were additional issues in Nairobi that the interviews brought out. These were:

1. Lack of enabling legislation

Derrick* (not his real name), who is a State Counsel based in Nairobi, stated that there are some instances where rights of the minorities have been infringed but the magistrate’s court’s hand were tied. This was because the magistrate’s court does not have the jurisdiction to determine whether freedoms and rights in the Constitution have been violated, denied or infringed; that is the reserve of the High Court. That is despite the fact that Article 23 (2) of the Constitution mandates Parliament to enact legislation enabling such original jurisdiction.

Derrick added that such lack of jurisdiction affects other rights. He gave the example of Article 50 (4) of the constitution provides that evidence that is obtained in a manner that violates any right or fundamental freedom in the Bill of Rights shall be excluded if the admission of that evidence would render the trial unfair, or would otherwise be detrimental to the administration of
justice. He stated that only the High court can determine whether a right or freedom has been violated in the obtaining of evidence. Thus an accused would have to approach the High Court for such a determination before proceeding with the case in the magistrate’s courts.

He also added that sometimes people in the minority groups do not show interest in their cases which leads to their dismissal. This was so especially in cases involving commercial sex workers, members of the LGBTI community and to some extent children cases. Sometimes even though such minorities may have strong cases the same are dismissed for non-attendance of the key witnesses.

2. Lack of co-operation
Many times cases are dismissed for lack of sufficient evidence due to lack of co-operation by the victim and also the potential witnesses. Derrick raised this issue noting that he handled many cases where the victims of a crime failed to turn up in court and generally refused to co-operate with the office of the DPP so as to successfully secure a criminal conviction. Jackson* (not his real name), who is a police officer attached at the Central Police Station, Nairobi, also noted that in many cases the victim and the witnesses are unwilling to co-operate with the security agencies during investigations. He noted that this may be borne out of fear but hasted to add that a crime is a crime whether committed against persons who are usually discriminated against or not.

3. Lack of information and legal representation
Issa* (not his real name), an official of a local CBO operating from the Pumwani area, stated that some young Islam faithfults lack information as to their rights whether in court or at the police stations. Though he stated that he has never experienced any discrimination against such youth, he stated that many of them did not understand court procedures or requirements. Thus, the youth could not tell whether their rights were being trampled on or not. Issa was full of praise for the Legal Aid Clinics that are organized by the Law Society of Kenya together with the Judiciary. He stated that they were informative sessions where he has learnt and raised many
issues which are addressed. Issa also praised legal aid clinics that are hosted by the Kenya Human Rights Commission where he stated that they get valuable legal advice on their cases.

Alice* (not her real name), a social worker with a local NGO, also noted that most cases involving children are prosecuted by mothers by themselves. This was so because the women were too poor to hire a lawyer, or they thought that legal services were very expensive even without doing any research. She stated that in such cases the woman has to be the mother and the prosecutor in her own case which added to the emotional toll that she suffers. Nevertheless, she noted that the magistrates at the Children court at Milimani always listen to such cases keenly and do not wish away such cases for lack of legal representation. However, Alice stated that such cases would be concluded in a fast, fair and just way if women had legal advice and representation. She further stated that the Legal Aid Bill 2015 ought to be fast tracked for it will be the only source of reprieve for the poor women who have to litigate by themselves.
Chapter 3

Overview of the hotspots for discrimination and abuse of rights of minorities by courts

Discrimination and abuse of the rights of the minorities appeared to occur mainly in criminal cases than in civil cases. Almost all the participants and the interviewees had complaints on how criminal cases were handled right from the arrest up to sentencing and appeal. It would seem that every stage of a criminal trial is a hotspot for discrimination and abuse of the rights of the minorities. The criminal procedure followed in Kenya is laid out in the Constitution and the Criminal Procedure Code.\(^{16}\)

Complaint

A criminal process commences with a person alleging the commission of a crime making a complaint to a police station. Such a complainant writes a statement, identifies the relevant witnesses, who also record statements. If an offence has been established, the suspect is arrested and charged in a court of law. Should the police feel the need for more investigations before arraigning the suspect in court, the same is done.

Many of the LGBTI and commercial sex workers participants raised the issue that police officers do not record their complaints, and if they do it is done half-heartedly after being tossed from one officer to the other. The participants also stated that some police officers do not seem to care about the crimes that have been committed against such people; and they sometimes are thrown out of police stations where they had gone to report. Such derelictions of duties and bad attitudes by the police officers effectively mean that the criminal process would not start despite the crimes that have been committed against such people.

On complaints, an issue was raised with some members of police who do not record statements by members of public, especially Muslims, who are deemed to be terrorists or terrorist-

\(^{16}\) Chapter 75 of the Laws of Kenya
sympathizers. Such members of public also fear reporting to police for fear of recriminations and attracting unwanted interest to themselves. In her Report entitled “Effective promotion of the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities”\textsuperscript{17}, the The UN Special Rapporteur on Minority Rights correctly notes as follows,

\begin{quote}
“Increased general surveillance of members of a particular religious faith, solely on the basis that some believers have engaged in terrorist or other crimes, would raise similar concerns [of violating international human rights law].”
\end{quote}

\textbf{Arrest}

After a complaint has been made, the police arrest the suspect that has been named. Sometimes, this may involve investigations on the whereabouts of the suspect. Further, sometimes it is possible for the complaint and the arrest to happen at the same time e.g. when a police officer arrests a person who has assaulted another person. It is also possible for a civilian to arrest any person who has committed an offence and take the suspect to the nearest police station.

Many of the participants were of the view that the arrests that are carried out by police in the name of “swoops” are not legally done. This is because the suspects are never told of their charges beforehand; they are all hounded into a police vehicle and taken to the police station for processing. It is at the police station that they get to know of their charges many of which are fabricated with the most common fabricated charges being loitering in a public space, hawking and touting.

\textbf{Charge, plea-taking, bail terms}

After the arrest, the accused is taken to court where the magistrate reads out the charges against the suspect. The suspect is supposed to plead guilty or not guilty. If he remains silent, a charge of

\textsuperscript{17} Available at \url{http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N15/237/76/PDF/N1523776.pdf?OpenElement} (last accessed on 7\textsuperscript{th} December 2015)
not guilty is entered. Should he plead guilty, the particulars of the charges are read out to him and if he still maintains that he is guilty he is convicted on his own plea of guilty. Then the case is reserved for sentencing.

If the accused pleads not guilty, a date is set for hearing. The accused then may apply for bail if the same has not been automatically granted by the court. The general rule is that an accused person is entitled to be released on bond or bail, on reasonable conditions, unless there are compelling reasons not to be released.\(^{18}\) The High Court has the power to review the bail and bond terms set by the Magistrate’s courts.

Many participants were unaware of the considerations that courts take into account before granting bail. Some stated that the terms set by courts were very high and not commensurate with the offences e.g. a group of hawkers who were arrested for holding an unauthorized demonstration who were given a cash bail of KShs. 300,000 each by the Magistrate’s Court but it was later reduced to an affordable KShs. 1,000 by the High Court. Others were totally unaware of their right to bail and bond.

**Trial**

The prosecution commences the conduct of the criminal trial by laying out all the evidence that they have collected against the accused. The complainant and all the other witnesses are called to testify in court. The rule is that the prosecution has to prove its case beyond reasonable doubt. The production of the evidence is guided by the Constitution and the Evidence Act.\(^{19}\) Some rules found in the Constitution and the Evidence Act mean that some pieces of evidence are inadmissible in a criminal trial e.g. evidence obtained in a manner that violated the Bill of Rights and which if admitted would make the criminal trial a farce, hearsay evidence, and opinions not coming from experts.

\(^{18}\) Article 49 (1) (h) of the Constitution.

\(^{19}\) Chapter 80 of the Laws of Kenya
Once the prosecution finishes its case, the court determines whether it has made a case to answer against the accused. If not, the accused is acquitted. If the prosecution has made a case to answer, the accused is put to his defence. During defence, the accused person is at liberty to call witnesses. All witnesses are required by the law to either be sworn or be affirmed. Thereafter, the defence closes his case.

One constant issue with the trial that came up was that of planted evidence. Many participants and interviewees stated that some cases relied on planted evidence especially bhang, or fabricated evidence. Such evidence coupled with lack of knowledge and legal representation meant that innocent people were convicted of wrongs that they did not commit. However, Derrick, the State Counsel and Jackson, the police officer, discounted these averments stating that such evidence would not even make it to court, and if it did, the evidence would not withstand rigorous cross-examination.

**Judgment and sentencing**

After the close of the defence case, the court writes down its judgment. If the accused is found not guilty, he or she is discharged. If the accused is found guilty, the prosecution is required to produce record of the convict e.g. previous offences. The accused is then given a chance to mitigate. The primary victim of the crime is also making a statement saying how the offence has affected them. This is usually in cases where there is violence and injury.

The court considers all that has happened after judgment to be able to determine what kind of sentence to award. In Kenya, some offences attract the death penalty and in such cases the court’s hands are tied. In other cases, the court has a range of sentencing options such as community service, fines, and borstal institutions.
Appeals and reviews

Cases from the subordinate courts may be appealed to the High Court within 14 days, and further to the Court of Appeal. The first appeal may be on matters of law and fact. The second appeal is on matters of law only unless there are special circumstances. A person convicted on his or her own plea of guilty can only appeal as to the extent and legality of the sentence.

The High Court also has powers on its own motion call for and examine the record of any criminal proceedings before a Subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed and as to the regularity of any proceedings of any such Subordinate court. These powers of reviews allow for the courts to internally correct mistakes without waiting for the accused or the state. It also allows for the High Court to exercise its supervisory powers over the Subordinate courts.
Chapter 4

Conclusion and recommendations

As noted in the previous chapters, courts have generally strived to respect the rights of minorities in their decisions. However, the processes leading to such decisions, the law applied, and sometimes the decisions themselves are discriminatory to the minorities. To assuage such discrimination, all the players in the justice system must spring into action and act on the recommendations below.

1. Chief Justice

As the head of the Judiciary in Kenya, the Chief Justice has enormous powers to foster dialogue and non-discrimination of the minorities. The Chief Justice has recently cracked the whip on magistrates who are absent from their workplaces, or who take a long time to finalize cases without plausible reasons. The Chief Justice has also issued a Circular of bail terms for traffic offences which are being well received. However, absenteeism of judges and magistrates, and postponement of court sittings without notice, is a problem that needs to be addressed.

- Together with the Judicial Service Commission, the Chief Justice should ensure that in case of postponement of court sittings, the court users are informed well in advance to avoid wastage of time and unnecessary expenses. Cracking down on absenteeism by some judges and magistrates will also reduce the delays in conclusions of cases.

- The move by the Judiciary to clear 4,000 children cases at the Milimani Law Courts is laudable; however, this also needs to be spread to other court stations in the country where such backlogs lead to violation of the rights of children.

- During the Judicial Service Week, and such other initiatives, the Chief Justice should guide the judiciary to include a segment on highlighting the issues affecting the rights of minorities and how the Courts have, or are handling them.
Courts

- Courts should conduct a preliminary assessment of the evidence presented to determine that the police conducted the investigation thoroughly.
- Courts should also conduct assessment to determine whether those accused need legal representation or not.
- LGBTIQ are not part of the court users committee neither do they take part in judicial week or any other court vs citizens participatory initiatives, thus Court users committees should be strengthened by inclusion of a certain number of members from these minority groups. This will enable such people to raise the issues that are affecting them with the stakeholders of the justice system. In Mombasa and Nairobi these groups are more organized for action and possible consultation with the Judicial organs concerned.

For the work of the judiciary to be fruitful in working to improve access to justice for minority groups we recommend close working relationship and cooperation with the following institutions;

1. **Office of the Director of Public Prosecutions**

   Other than police officers, State counsels attached to the Office of the Director of Public Prosecutions are the main point of contact between minorities and the court. The main aim of State Counsels is to ensure justice is done.
   
   - Thus, they should reduce unnecessary adjournments of cases which kill the morale of the victims and witnesses to attend court.
   - Further, they should strive to explain the cases to the complainants in a language that the latter can understand, or seek the interpretative services of the court clerks to do so.

2. **The Office of the Attorney General and the Parliamentary Committee on Justice**

   Several Bills that are crucial to foster dialogue and non-discrimination are still being debated in Parliament despite being published a long time ago e.g. The Legal Aid Bill 2015, The Two-Third Gender Rule laws (Amendment) Bill, 2015.
   
   - These need to be fast tracked as their enactment will usher a new era for minorities’ rights.
Other Bills such as the Community Land Bill 2014, and the Evictions and Resettlement Bill 2014 also need to be fast tracked as they impact on the impact on the governance and management of community land in which most minorities reside.

Pursuant to Article 23 (2) of the Constitution, and given that Subordinate Courts handle very many cases where rights of minorities may be violated,

- There is also a need to pass legislation giving original jurisdiction in appropriate cases to subordinate courts to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.

3. **National Police Service**

Police are the key gate keepers in the Justice Chain. Getting Justice begins and ends with the police.

- Police officers need have Knowledge, skill and capacity to access and process cases of Minority.
- The National police Service needs to ensure that there are desks where the minorities can make complaints without fear or intimidation.
- Police officers need have Knowledge, skill and capacity to acquire and process evidence.
- The desks need to be manned by officers who are trained to handle such cases; in case of transfers, the incoming officers should be the ones who are trained to handle cases involving minorities.

4. **Office of the Ombudsman**

Citizens seemed to be unaware of the existence of the office of the Ombudsman. Whilst they are aware that they can report inefficiencies of police officers to the Independent Police Oversight Authority, they were not aware that they can approach the Ombudsman in case of any other failures, or denial of service, by public officers, state officers or Government Agencies.

- This calls for more sensitization programmes by the office of the Ombudsman on its mandate and activities.
5. County Governments of Mombasa and Nairobi
   - The County askaris should be sensitized on the fact that the rights of minorities are on equal footing with the rights of the other people.
   - County Governments should enhance their consultative meetings between the representatives of the minorities and of the County Governments to forestall the gross violations that usually occur in the respective counties e.g. harassment of hawkers, commercial sex workers and members of the LGBTI communities.

The provision of health services is now the jurisdiction of the counties.
   - The Counties should make policies enhancing the access to health of the minorities such as LGBTI and commercial sex workers. This is so especially because they work in very risky environments where they can contact diseases or be subjected to violence.

6. Media
The traditional media and also social media are powerful avenues through which information on the rights of minorities can be disseminated. The traditional media have the resources to mount powerful investigations into any abuses of the rights of minorities and to foster dialogue on the same. The social media has become one of the main sources of information especially among the youth. Organizations which are not on such platforms should join them so as to get their message across to as many people as possible.
   - However, the media need to enhance their sensitivity on the issues surrounding minorities. For example, it is a general rule that a picture of tender age should not be plastered all over the media in circumstances which are inimical to his or her interests.
   - Also, the media need to protect the identities of members of the LGBTI community and commercial sex workers as it is always destructive to reveal such identities.

7. Civil Society
   - Civil society should amplify their activities in pointing out the weaknesses in Government and offering solutions.
   - With the current Constitution, where a person can file a case on behalf of the other, the Civil Societies have opportunities to approach the High Court to seek redress of
violations or threats to the rights of minorities. This will lead to rich jurisprudence that eventually enhances the rule of law.

- Further, civil societies should enhance their advocacy work by holding various discussions with many stakeholders e.g. village elders, police, and other leaders.
- There is also need for further research on the methods of Alternative Dispute Resolution especially the ones that operate at the grassroots’ level e.g. Village elders, women groups and residential associations. This will aid in improving their efficiencies as they are usually the first ports of call in cases of violation of the rights of minorities.

8. **Development Partners**
The role played by Development Partners in empowering minorities cannot be underplayed. At Mombasa County, an NGO that was funded by a Development Partner has been able to produce women who are now understand their rights, and to a great extent that of their children, who in turn educate other women and sensitize them on their rights. This created a generation of knowledgeable women but the funding ran short a few years ago. Thus,

- Development Partners are valuable and they should assist in their thematic areas because on the ground the results are being experienced.

9. **The people of Kenya**

- The people of Kenya need to educate themselves especially on the provisions of the Constitution. For example, there is need to realize that disputes are not only settled through the court system. Indeed, the Constitution mandates the courts to promote alternative forms of dispute resolution.

These mechanisms include reconciliation, mediation, arbitration and traditional dispute resolution mechanisms. Thus, if a dispute can be settled by the participants at the Chief’s camp, police station, church, then that should be encouraged to avoid clogging the court system and also to foster good human relations.