



NGEC
National Gender and
Equality Commission



THE JUDICIARY
Justice be our Shield and Defender

The Judiciary Gender Audit 2019



IDLO
Creating a Culture of Justice
International Development Law Organization



The Judiciary Gender Audit 2019



CONTENTS

ACRONYMS	ii
ACKNOWLEDGEMENTS	1
EXECUTIVE SUMMARY	2
1.0 PROJECT OVERVIEW	8
1.1 Background	8
1.2 Project Description	9
1.3 Consultants' Approach	11
1.4 How to Read This Report	12
2.0 JUDICIARY GENDER AUDIT STANDARD OF REVIEW	14
2.1 Standard of Review Explained	14
2.2 Beyond the Numbers:	14
2.3 Constitutional Legal Obligations	15
2.4 Other Domestic Legal Obligations	16
2.5 INTERNATIONAL LEGAL OBLIGATIONS	17
3.0 RESEARCH METHODOLOGY	20
3.1 Background Research	20
3.2 Overview of Activities	22
3.3 Methods And Tools	23
3.5 Data Analysis	29
3.6 Challenges and Limitations	30
4.0 FINDINGS OF THE JUDICIARY GENDER AUDIT: INTERNAL	33
4.1 Organizational Culture	33
4.2 Equal Opportunity	42
4.3 Gender Representation in Leadership	51



4.4 Training on Gender Equality, Sensitivity and Inclusion	61
4.5 Workplace Accommodation and Affirmative Action	68
4.6 Sexual Harassment	75
5.0 FINDINGS OF THE JUDICIARY GENDER AUDIT: EXTERNAL	87
5.1 Equal Treatment in Court Processes	87
5.2 Public Perception of Gender in the Judiciary	94
5.3 Access to Justice	103
5.4 Alternative Justice Systems	115
5.5 Judiciary Equipped to Enforce Equality	124
6.0 RECOMMENDATIONS	154
6.1 Strategy and Organizational Priorities	154
6.2 Human Resources	155
6.3 Data Collection	156
6.4 Training	156
6.5 Case Management	157
6.6 Public Outreach	158
6.7 Jurisprudence	158
APPENDICES	161
Glossary	161
Appendix	165



ACRONYMS

ADR	Alternative Dispute Resolution
AJS	Alternative Justice Systems
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CEO	Chief Executive Officer
CJ	Chief Justice
Constitution	Constitution of Kenya, 2010
CUC	Court User Committee
DCJ	Deputy Chief Justice
DCRT	Daily Court Return Templates
FGD	Focus Group Discussion
HR	Human Resources
IDI	In-Depth Interview
IDLO	International Development Law Organization
ILO	International Labour Organization
JSC	Judicial Services Commission
JTI	Judiciary Training Institute
KCSE	Kenya Certificate of Secondary Education
KNEC	Kenya National Examination Council
IAWJ KC	International Association of Women Judges-Kenya Chapter
LMT	Leadership Management Team
M&E	Monitoring and Evaluation
NCAJ	National Council on the Administration of Justice
NCLR	National Council of Law Reporting
NGEC	National Gender and Equality Commission
NGO	Non-Governmental Organization
PWD	Persons with Disability
Rep.	Representative
GAD	Gender and Development
WID	Women in Development Approach
SAQ	Self-Administered Questionnaire
UNIFEM	United Nations Development Fund for Women



ACKNOWLEDGEMENTS

The National Gender and Equality Commission and the International Association of Women Judges -Kenya Chapter extends appreciation to partners at both the international, national and county level who have coordinated the completion of the judiciary gender audit. The gender audit of the judiciary would not have been possible without the support of IDLO whose technical and financial support made it possible to undertake the whole exercise. Special thanks to Shiro Mogeni for her technical input into the process. We sincerely appreciate and are indebted to the staff of the judiciary to their endless dedication to the audit.

With utmost gratitude, we humbly appreciate the lead consultants , Catherine Mumma and Heidi Evelyne who conducted the audit.



EXECUTIVE SUMMARY

The National Gender and Equality Commission (NGEC) in collaboration with the International Association of Women Judges-Kenya Chapter and with support from the International Development Law Organization (IDLO) have facilitated an introspective institutional audit of the Judiciary on the principles of gender and inclusion as key constitutional imperatives. This is the Judiciary Gender Audit report prepared by consultants whom they commissioned to carry out this task. The Gender Audit sought to analyze the gender sensitivity and responsiveness of the Judiciary as a whole in its internal operations and delivery on its external mandate. This involved looking both at how the Judiciary managed its workforce and how it delivered justice to its constituents.

International Development Law Organization (IDLO) is an intergovernmental organization exclusively devoted to promoting the rule of law. IDLO has over 34 years of experience in improving the capacity of formal and informal justice systems worldwide, particularly in countries with transition economics, to dispense fair and efficient justice through programming that includes legal training and technical assistance on substantive and procedural issues related to access to justice and equality. IDLO Kenya has been providing critical support to the Judiciary since 2011 towards the implementation of the Judiciary Transformation Framework, the Strategic Plan 2014-2018, as well as the Sustaining Judiciary Transformation: A Service Delivery Agenda (2017-2021).

The International Association of Women Judges Kenya Chapter (IAWJ KC) formerly the Kenya Women Judges Association (KWJA) is a non-profit, non-partisan organization registered under the Societies Act, Cap 108 Laws of Kenya. The Association has been in existence for over 20 years and has spearheaded advocacy in the advancement and promotion of the rights of women and children and increasing the opportunities available to them. For more information visit <https://www.judiciary.go.ke/associations/>

The National Gender and Equality Commission (NGEC) was established by the National Gender and Equality Commission Act, 2011 pursuant to Article 59 (4) of the Constitution of Kenya. It is one of the three (3) successor commissions, NGEC, Commission on Administrative Justice and Kenya National Commission on Human Rights), to the Kenya National Human Rights and Equality Commission (KNHREC) established in Article 59 of the Constitution of Kenya 2010. NGEC's mandate is informed by Section 8 of the National Gender and Equality Commission Act 2011. NGEC focuses on Special Interest Groups, which include women, youth, persons with disabilities (PWDs), children, the older members of society, minorities and marginalized groups

The Judiciary's Constitutional Obligations on Gender Equality

Article 27 of the Constitution's Bill of Rights outlines Kenya's commitment to equality, including the prohibition of discrimination. It provides guidance to the State on the implementation of equality measures including the use of affirmative action measures to ensure gender diversity and the representation of marginalized groups. In addition, the principles of equality, equity, gender diversity and inclusiveness are some of the national values and principles of governance that must be applied to all state functions.¹ The Judiciary, as one of the three main arms of government, therefore, has a specific duty to uphold these principles as it carries out its core business and in its own institutional operations. In fact, the Judiciary is specifically charged with protecting and promoting the spirit and principles of the Constitution in its delivery of justice.² In addition, the Judiciary must also actively develop the common law in order to ensure that effect is given to the rights and fundamental freedoms outlined in the Bill of Rights³ and interpret them in a manner that promotes "the values that underlie an open and democratic society based on human dignity, equality, equity and freedom"⁴.

1 Article 10 of the *Constitution of Kenya, 2010* [hereinafter Constitution].

2 See Subarticle 159(2)(e) of the Constitution.

3 See Subarticle 20(3) of the Constitution.

4 Subarticle 20(4)(a) of the Constitution.



Operationally, Subarticle 27 (8) sets the constitutional minimum ratio for either gender at one third for all appointed and elected positions. Furthermore, the Judicial Services Commission (JSC) is responsible for the Human Resources (HR) functions of the Judiciary which include an express obligation to promote gender equality.⁵

Field Work

This report provides the process and findings of the assessment made of the Judiciary's performance on these constitutional obligations. It begins with the description of the terms of reference as provided to the consultants, an explanation of the standard of review, the methodology agreed upon, the activities undertaken and the findings of the audit. The Judiciary's operational frameworks and processes were reviewed against the set standard of review, informed by the provisions of the Constitution and applicable international treaties. Opinions of judges, judicial officers, judiciary staff and stakeholders were then sought through the 68 in-depth interviews (IDIs), 4 focus group discussions (FGDs) and 385 self-administered questionnaires (SAQs). In addition, there was a desk review of Judiciary documents and a case review of 20 decisions.

The audit was conducted in four (4) geographical regions including a marginalized region. The stations include Turkana (Lodwar and Kakuma law courts), Kisumu (Kisumu, Winam, Maseno, Nyando, Tamu law courts and the Kadhi's Court), Mombasa (Mombasa, Tononoka, Shanzu and the County Law Courts and the Kadhi's court) and Nairobi (Court of Appeal, City Court, Milimani Court, Kadhi's Court, Kibera court, Makadara and JKIA). The Nairobi region also included the National Staff Cluster which covered the top management and staff of offices/institutions that serve the entire Judiciary (JSC, Supreme Court, Offices of the CJ and DCJ, CRJ, JTI, Registrars of the different Courts and the directorates and departmental staff that contribute to the Judiciary's national services). Judiciary stakeholders were included in focus group discussions (FGDs) held with a Court Users' Committee in each region.

Data Collected

The findings were grouped into twelve thematic areas, six internal and six external, each of which are discussed in detail in the report. Internally, the consultants looked at the organizational culture of the Judiciary and how it impacts on gender issues. Next, the concept of equal opportunity, regardless of gender, was examined and the corresponding constitutional standard, the two-thirds gender rule. Gender representation in leadership was also delved into with hypotheses presented as to why a glass ceiling appears to be evident in the upper most echelons of power. The Judiciary's history of training its workforce on gender sensitivity, equality and inclusion was also explored. In addition, the Judiciary's use of accommodation of employees who face challenges and affirmative action was also documented and analysed. Finally, the Judiciary's track record on sexual harassment in the workplace was considered.

Externally, the consultants looked at how gender affects treatment in court processes. The public's perception of gender in the Judiciary was also explored as a theme. Access to justice and its connection to gender was considered next. Attention was also given to Alternative Justice Systems, including Alternative Dispute Resolution and any corresponding gender issues. The Judiciary's readiness to enforce equality and whether it is properly equipped to do so was also examined. And a review of purposively selected case law was also completed in order to gauge the Judiciary's performance on promoting and protecting gender equality in its jurisprudence.

5

See generally Article 172 of the Constitution.



Key Findings

The following areas were found to be supportive of gender equality:

1. Judiciary personnel report that working conditions were extremely challenging and gender issues were not considered by management prior to the Judiciary Transformation. Since then, there has been improvement as some gender based issues faced by employees have been acknowledged by management.
2. Managers are interested in finding out more about how to promote gender equality and multiple Judiciary employees already employ practices of their own initiative to bolster gender equality where they work.
3. Voluntary agreements amongst the judges in the High Court and the Employment and Labour Relations Court were made so that the Principle Judge would alternate between a male and a female. Therefore, because the first Principle Judge in each of these courts was male, female Principle Judges were elected this time.
4. Performance management targets have influenced the behavior of the workforce such as encouraging management personnel to discuss previously taboo issues like sexual harassment with employees.
5. Multiple Judiciary employees report learning from discussing gender issues with peers.
6. Court User Committees have raised and attempted to address gender based issues court users have with the courts.
7. A body of constitutional jurisprudence on gender equality has started to develop which recognizes the historical gender discrimination that has disadvantaged women in Kenya. This is the necessary first step in applying a purposive approach to interpreting gender equality rights and realizing substantive equality for both women and men.
8. With taskforces studying Alternative Justice Systems (AJS) and Alternative Dispute Resolution (ADR) and the newly implemented Court Annexed Mediation, the Judiciary is gathering important research and attempting to promote ADR and AJS.

The following key issues of concern were identified by the audit:

1. The Judiciary has yet to finalise the operational policies that would guide the integration of gender equality in its operations. For the most part, Judiciary employees have not consciously considered how the duty to promote gender equality affects their work.
2. The Judiciary strategy does not include any reference or resource allocation to gender equality.
3. The Judiciary Training Institute does not provide for training on gender equality and how to apply it in service delivery and the workplace; Discrimination is largely understood to only encompass direct discrimination based on formal equality.
4. The Judiciary lacks any formal plan on how to achieve gender parity in its senior leadership positions. Furthermore, multiple female leaders report they are treated with less respect than male leaders and some have faced physical intimidation.
5. The Judiciary does not have a policy addressing the use of affirmative action so that it may be consistently applied when warranted.
6. Judiciary employees report bullying and sexual harassment in significant numbers but complaints are rarely filed. The draft sexual harassment policy was never fully approved or implemented even though employees are aware they can report sexual harassment to any one of a number of their superiors.



7. Gender-based accommodation for litigants is largely employee initiated and not consistently practiced across all courts.
8. The Judiciary does not collate and analyze any meaningful gender disaggregated data on who is using the courts and the type of services they are using.
9. The Judiciary does not have a comprehensive support structure to support quality legal research for judges and judicial officers.
10. Court processes and case management, including Court Annexed Mediation programs are often not viewed through from a gender perspective.
11. Even in court decisions discussing constitutional principles, the language sometimes lacks gender sensitivity.
12. Women appear to participate less as litigants in the formal justice sector.

Recommendations

The following recommendations have been made following the Audit:

Strategy and Organizational Priorities

- Adopt a comprehensive gender policy
- Integrate gender in the next judiciary strategic plan
- Allocate resources to a gender equality budget
- Implement a “New Beginning” sexual harassment policy
- Employ a gender resource person

Human Resources

- Make a concerted effort to increase the number of women in senior leadership roles
- Develop an affirmative action policy
- Formalize policies on practices that provide flexibility to employees with young families
- Adequately support employees via an employee assistance program

Data Collection

- Collect and analyse gender disaggregated data
- Integrate gender equity parameters in performance management targets
- Consider utilizing in-house expertise for further research projects

Training

- Develop and deliver a gender sensitivity and inclusion training curriculum for all employees
- Design and implement a discrimination and equality jurisprudence training module for judges and judicial officers

Case Management

- Put safeguards in place to ensure fairness in court annexed mediation



- Target assistance to most vulnerable parties
- Encourage alternatives to traditional litigation
- Discourage all forms of gender stereotyping in bias claims from litigants against judges or magistrates

Public Outreach

- Use simple education materials on equality and non-discrimination to educate the public
- Start a training program for AJS providers including chiefs
- Initiate formal consultation with the muslim community on female kadhis

Jurisprudence

- Develop the judiciary's quality legal research ability
- Ensure magistrates have jurisdiction to apply the bill of rights through jurisprudential exploration of the issue
- Consider reporting kadhi decisions to encourage kadhis to explicitly consider how the constitution affects Kenyan sharia law
- Develop strategic links with judiciaries in other jurisdictions to promote the use of international human rights law

Other Judiciary Structures

- IAWJ KC should consider admitting tribunal members to the association
- Aid CUCs in rural or marginalized areas to ensure their membership is compliant with the two-thirds gender rule

It is hoped that the detailed findings of this seminal Judiciary Gender Audit will help the Judiciary better understand the status of gender equality in the institution and associated challenges. The recommendations are an attempt to help the Judiciary follow a path towards fulfilling its constitutional obligations to uphold and promote gender equality, equity and inclusion.

Dr. Joyce M. Mutinda, PhD

Chairperson,
National Gender and Equality Commission

Hon. David Kenani Maraga,

Chief Justice/President,
Supreme Court of Kenya





1.0 PROJECT OVERVIEW

This section gives an overview of the Judiciary Gender Audit including the historical background in Kenya that inspired it. The initial terms of reference are explained as well as the approach taken by the consultants. The various stages of the project are reviewed with an accounting of the significant challenges that were encountered. Finally, a brief guide on how to read the report explains the format and how best to navigate it.

1.1 BACKGROUND

In much of Kenya's pre-colonial, colonial and independence history, women were only able to participate minimally in formal social and political spheres. This history is not unique to Kenya or Africa and traditional gender roles continue to pose challenges to female advancement in the global context. Nevertheless, the practical and lasting effects of structural gender discrimination have only been given societal attention in Kenya over the last two decades. Notably, the national government's first Ministry of Gender, Sports, Culture and Social Services and the National Commission on Gender and Development were introduced in 2004.⁶ One symbol of the national importance of gender equality is the strong recognition it is afforded in the country's new transformative constitution and the progressive tools provided therein which attempt to correct society's structural gender inequities. Real and effective gender equality and minority inclusion were contentious issues in the years spent producing a draft constitution and remain priority areas of concern in governance today, more than eight years after its promulgation.

Given the continued systemic and ingrained disadvantage faced by Kenyan women, it is encouraging that widespread acceptance of this gender discrimination is growing, even if practical strategies to eradicate it are still illusive. It is hoped that the burgeoning public dialogue on gender issues will spawn a greater understanding of gender issues on a national level. This greater awareness may even lead to the realization that the concept of gender equality may also be used to alleviate discrimination against men, or minorities who for various reasons may subscribe to a non-binary gender identity, which is not limited to the traditional thinking that gender is exclusively male or female.

Article 159 of the 2010 Constitution provides for judicial authority which is vested in the courts and tribunals. The Judiciary is an independent arm of government comprising of the Supreme Court as the apex court, the Court of Appeal, the High Court, the Magistrates Courts, the Kadhi's Courts and tribunals established in line with the Constitution. The primary mandate of the Judiciary is to dispense justice to all irrespective of status and to protect and promote the purpose and principles of the Constitution.⁷ The courts have express constitutional mandates on matters relating to human rights, particularly in determining whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened.⁸ Article 27 of the Constitution's Bill of Rights outlines Kenya's commitment to equality, including the prohibition of discrimination and the mandate to use affirmative action to ensure gender diversity and the representation of marginalized groups. The principles of equality, equity, gender diversity and inclusiveness are national values and principles of governance that must be applied to all state functions.⁹

Additionally, Kenya has ratified over twenty international and regional human rights and labour treaties that now form part of the laws of Kenya in accordance with Subarticle 2(6) of the Constitution. All these human rights treaties require equality and prohibit discrimination on various grounds, including sex, in their different contexts. The ***Convention on the Elimination of All Forms of Discrimination Against Women***¹⁰ (CEDAW) was adopted to guide states in the implementation of the principle of equality on the basis of sex. It requires state parties to "establish legal protection of the rights of women on an equal basis with men and to ensure through competent tribunals and other public institutions, the

6 See Overseas Development Institution, *Women and Power: Shaping the Development of Kenya's 2010 Constitution* (London, 2016) at p. 25.

7 See Subarticle 159(2)(e) of the Constitution.

8 Subarticle 165(3)(b) of the Constitution.

9 Article 10 of the Constitution.

10 *Convention on the Elimination of All Forms of Discrimination Against Women*, 1979 [hereinafter CEDAW].



effective protection of women against any act of discrimination”¹¹. Because gender equality and minority rights are entrenched in the Constitution and these ratified treaties, the Judiciary plays a vital role in implementing and interpreting these rights.

Separate from the responsibility to develop the law on human rights through jurisprudence, the Judiciary, like all other state organs, has a responsibility to observe, respect, protect, promote and fulfil the rights and fundamental freedoms enumerated under the Bill of Rights.¹² The Judiciary must also apply the national values and principles, including equality and inclusiveness, in its internal policies and processes like all other state entities. The Judicial Service Commission (JSC) in particular has a responsibility in performing its human resources related functions to promote gender equality.¹³

With this background in mind and in an effort to find pragmatic solutions to enable the full implementation of the Constitution, the National Gender and Equality Commission (NGEC) in collaboration with the International Association of Women Judges-Kenya Chapter and with support from the International Development Law Organization (IDLO) have facilitated an introspective institutional audit of one of the government institutions on the frontlines of enforcing the constitutional incarnation of gender equality. It is approaching a decade since the Constitution was promulgated in 2010 and an audit is the natural first step in taking account of how one key actor charged with protecting and promoting the new constitutional paradigm, the Judiciary, is fairing. In order to assess the Judiciary’s performance on upholding the principles of gender equality, equity and inclusion as key constitutional imperatives, NGEC, IAWJ KC and IDLO have commissioned the consultants, Catherine Muyeka Mumma and Heidi Evelyn, assisted by Gabriel Oguda, to carry out the Judiciary Gender Audit. The Audit seeks to assess the gender sensitivity and responsiveness of the Judiciary as an organization and in the delivery of justice, summarize its findings and make overarching recommendations for improvement.

1.2 PROJECT DESCRIPTION

The overall objective of the Judiciary Gender Audit is to determine whether the Judiciary’s legal, policy and institutional framework promotes gender inclusion, equity and equality and conforms to the relevant constitutional standards. These standards relate to both its employees and its consumers and therefore must be considered from the point of view of each of these constituencies. The constitutional guidelines employ quantitative minimum thresholds as well as legal concepts that invoke qualitative measures based on a body of international human rights doctrine. As a result, the Audit must examine whether the Judiciary has taken action, whether current practices are fair and whether the desired gender equity, equality and inclusion results are being quantitatively and qualitatively achieved.

The Judiciary Gender Audit is primarily a study with the ultimate goal being to describe the research findings in a manner that is useful to the Judiciary in its strategic planning. This goal means that the explanation of the Audit’s findings will include identification of best practices and challenges. The Judiciary Gender Audit is the first audit of its kind performed on the Judiciary and the findings will also serve as a benchmark for any future gender audits.

The terms of reference for this project were extremely broad and in some ways vague.

They included the following aims:

- To determine whether the internal practice and related support systems of the Judiciary are gender inclusive.
- To review whether the jurisprudence produced by the Judiciary is gender sensitive.
- To identify critical gaps and challenges that gender mainstreaming faces in the Judiciary.
- To document best practices and recommend ways of improving areas that are lacking.

11 Subarticle 2(c) of CEDAW, *ibid*.

12 Subarticle 21(1) of the Constitution.

13 See Article 172 of the Constitution generally.



- To assess the progress of the integration and mainstreaming of access to justice that is sensitive to gender equality and inclusion of special interest groups across the institution.
- To interrogate the Judiciary's standards, policy documents and guidelines for gender and inclusion responsiveness and rate them against their constitutional mandate.
- To assess the Judiciary's overall performance in promoting gender equality and inclusion.
- To investigate the availability of gender disaggregated data in M&E mechanisms or case management information.
- To perform a limited review of jurisprudence for language, stereotyping, progressive legal interpretation and overall outcomes in order to assess and make recommendations on including principles of gender sensitivity, equality and inclusion in decision-making.
- To review the representation of special interest groups within the Judiciary such as women, youth, persons with disabilities, ethnic minorities and marginalized communities.
- To assess JTI's trainings on issues of gender equality and inclusion.
- To analyze whether the Judiciary's gender mainstreaming efforts are effective and whether they are being followed.
- To determine the extent to which the Judiciary has effectively institutionalized gender equality in programs, policies, organizational structure, proceedings and decision-making processes.

In order to focus the Audit's research, these aims were distilled into the following key questions which were considered in the design of the research project:

- Is the principle of gender equality effectively institutionalized in the Judiciary and its workforce?
- Are the Judiciary's internal practices and organizational culture sensitive to gender equality and inclusion?
- Have the frameworks that guide operations and service delivery in the Judiciary effectively mainstreamed the constitutional principles of gender equality and inclusion?
- Has the Judiciary employed a gender perspective in its efforts to discharge its constitutional duties to increase access to justice and promote alternative justice systems?
- Does the Judiciary's jurisprudence on matters related to gender, conform to the principle of equality and the responsibility to respect, protect, promote and fulfil rights?
- Are there gaps and challenges to gender and minority mainstreaming within the Judiciary and its systems?
- What recommendations can be tried for improving the situation if there are gaps?



1.3 CONSULTANTS' APPROACH

A bifurcated approach was used, where the Judiciary's **internal** organizational processes affecting Judiciary employees were considered separately from its **external** service delivery processes affecting the public it serves. Even though the technical team and the consultants agreed that the Judiciary Gender Audit was an introspective look at the Judiciary (and not a survey of the public), a dual perspective addressing both internal and external operations was necessary in order to cover the broad key questions being researched. In summary, all data was collected from the Judiciary yet this introspective review did include speaking with Court User Committees (CUCs), which are for the most part made up of actors who are not Judiciary employees, because they have become an integral part of the Judiciary's operating structures. Therefore, the CUCs provided a window to some views of the Judiciary's consumers. The case review of selected jurisprudence and the desk review of two recent national surveys of justice consumers provided also provided information about their experiences. Without gender disaggregated data on litigants and their experiences readily available from the Judiciary, almost all of the quantitative data regarding service delivery was not collected by the consultants' themselves. Nevertheless, it was helpful in triangulating the qualitative data collected from the CUCs and Judiciary employees.

While some of the Judiciary's operations affect both employees and the public, it was important to describe the effect on each separately to ensure that they were both considered especially in relation to any recommendations made. Moreover, different analytical tools were applicable in that an organizational behavior approach was primarily used to analyze the Judiciary's internal systems while a practical legal approach was used to analyze the Judiciary's external systems.

It is also important to note that a judiciary's ability to facilitate external justice on gender issues is interdependent with how well it mainstreams institutional gender and minority inclusion, equality and equity internally. For example, it is more difficult to deliver gender equality in judicial decisions if both genders are not adequately represented on the bench. External service delivery and judgements are expressions of decision-maker and staff attitudes, which are at least partly affected by the organization's culture and priorities within which these employees operate. Plus, the Judiciary's jurisprudence affects the interpretation and meaning of the constitutional guidelines that its management must implement as an organization.

In order to go beyond merely identifying areas of progress or problems, the Judiciary Gender Audit researched a number of targeted parameters to gauge the Judiciary's performance on an internal and external basis. These parameters were developed after reviewing all the legal obligations in relation to gender equality, equity and inclusion the state or the Judiciary is charged with, either explicitly in the Constitution or implicitly via Subarticle 2(6) that deems international treaties ratified by Kenya to be domestic law. Each parameter addresses a thematic area relevant to these legal obligations.

The internal workings of the Judiciary affecting its employees are addressed by the following thematic parameters:

- Organizational Culture
- Equal Opportunity
- Gender Representation in Leadership
- Training on Gender Equality, Sensitivity and Inclusion
- Workplace Accommodation and Affirmative Action
- Sexual Harassment



The external workings of the Judiciary affecting the public are addressed by the following thematic parameters:

- Equal Treatment in Court Processes
- Public Perception of Gender in the Judiciary
- Access to Justice
- Alternative Justice Systems
- Judiciary Equipped to Enforce Equality
- Jurisprudence

The Audit's research methodology described in Part 3 below was based on inquiring into these twelve thematic parameters. The findings are discussed in detail under each theme where causes and possible solutions are considered. While the findings sometimes overlap between areas, addressing each topic separately helped ensure that all questions in the terms of reference were covered. Through this analysis, the Judiciary Gender Audit identifies challenges and pinpoints areas where additional effort is needed. Overarching and recurring problems were collated to create a list of targeted recommendations. It is hoped that the Judiciary Gender Audit findings will provide a reference point for the Judiciary's strategic planning and the recommendations will be considered in allocating its workforce and budget.

1.4 HOW TO READ THIS REPORT

This section provides a basic understanding of the Judiciary Gender Audit as a project, but it would not be complete without some tips on how to navigate this report given its length. First, the report uses some technical and legal terms and therefore a glossary of relevant terminology is provided in Appendix 2. It may be helpful to refer to it when reading the report for clarification on these specific terms.

Part 2 of the report explains the legal reference points for the Audit and the standard of review used to assess the Judiciary. This section is also a good reference for all the applicable legal obligations relating to gender especially within the justice sector. A chart summary of these legal obligations can be found in Appendix 1.

Part 3 describes the methodology of the research that was conducted including the various methods used to collect the data. Additionally, the separate Process Report provides further information about how the Audit was conducted and the consultants' experiences.

The bulk of the report describes the Audit's findings which are split into two parts. Part 4 explains the findings which address the Judiciary's internal systems affecting how it treats and develops its employees. Part 5 explains the findings which address the Judiciary's external systems affecting how it delivers justice to its consumers. The selective jurisprudence review is found in the external section and provides a broad overview of post-2010 decisions relating to gender equity, equality and inclusion. To pinpoint various themes in either the internal or external findings, consult the table of contents. Each thematic area is broken down into subtopics with a conclusion. It is best to read the whole section on each thematic area as possible corrective actions are suggested, however, the table of contents may provide reference points for specific subtopics.

Finally, Part 6 of the report describes overall suggested recommendations and implementation ideas. These recommendations are grouped and listed according to various functions performed by the Judiciary.





2.0 JUDICIARY GENDER AUDIT STANDARD OF REVIEW

This section sets out the legal standards utilized to assess the Judiciary's internal and external processes. Both quantitative and qualitative standards were used in the Audit. Challenges to gender equity, equality and inclusion were identified against the backdrop of the constitutional, domestic and international legal obligations described below.

2.1 STANDARD OF REVIEW EXPLAINED

An audit, whether it is a financial, risk or gender based audit, scrutinizes an entity and compares it to a set of prescribed standards to measure the entity's performance and provide a detailed assessment. This particular set of prescribed standards forms the standard of review for the audit. The Judiciary Gender Audit consultants are charged with carrying out an institutional audit on the principles of gender equality, equity and inclusion as key constitutional imperatives. Therefore the gender and inclusion standards that form the standard of review for the Judiciary Gender Audit are not arbitrary but firmly rooted in the Constitution.

In order to have a comprehensive summary of all the applicable guidelines that speak to gender equity, equality and inclusion, the consultants combed through the Constitution and other relevant statutes, listing all the relevant Articles. In addition to these domestically created standards, by virtue of Subarticle 2(6) of the Constitution, any treaty or convention that has been ratified by Kenya becomes part of the law of Kenya. It follows that these international treaties, which most often lack enforcement mechanisms, are now enforceable by the domestic courts. This constitutional pronouncement therefore means that all relevant and ratified international treaties that concern gender also form part of the constitutional basis of the Audit. Therefore, all ratified international treaties were also combed through for relevant sections and added to the list of gender and inclusion standards. A table of these standards is captured in the Standard of Review Chart found in Appendix 1.

These provisions set out a very detailed standard of review covering many areas relevant to the Judiciary. Accordingly, the Judiciary Gender Audit standard of review informed the research parameters being measured and ultimately the thematic areas that were addressed in auditing the Judiciary's internal and external processes. Most of the applicable standards are qualitative in nature and consequently the research findings in these areas are more subjectively assessed.

2.2 BEYOND THE NUMBERS:

Incorporating both quantitative and qualitative measures of gender equality

Unfortunately, legal professionals and gender specialists have fixated on the gender numerical requirements in the Constitution and largely ignored the qualitative prescriptions relating to gender equity, equality and inclusion. The emphasis put on the quantitative two-thirds gender rule may be partly due to the fact that many government bodies have not met this obligation, sometimes even in the face of court orders, more than eight years after the promulgation of the Constitution. The affirmative action measure states that not more than two-thirds of any elective or appointive body should be of the same gender.¹⁴ This principle is known as the two-thirds gender rule and it applies to the Judiciary. By prescribing a minimum ratio for gender diversity, the provision aims to not only increase the number of women in elective and appointive positions, but make decision-making bodies more representative of society. It is hoped that these representative bodies will then affect the way things are done, have an impact on the outcomes achieved, be an inspiration to other women to get involved and allow everyone to become accustomed to the idea of women



participating in high level decision-making. The two-thirds gender rule is a powerful tool that should be used, but there are many other constitutional provisions that dictate gender equity, equality and inclusion that should also be put into action.

These qualitative measures can also be effective tools to promote and enforce gender equality and inclusion even if they may not appear as straightforward. In fact, in other jurisdictions, prohibition of gender discrimination and other similar concepts have proven fruitful in enforcing the rights of those who have been hampered by traditional gender roles. These provisions have also been used to set out legal tests to help decision-makers make practical determinations on whether discrimination occurred. One wonders if this avenue of developing gender rights may have progressed further if less time was spent discussing (and avoiding) the implementation of the two-thirds gender rule.

Furthering the understanding of discrimination analysis and what fairness looks like when substantive equality, as opposed to formal equality, is adopted is a prerequisite to developing non-discrimination doctrine. The Judiciary will have to lead the way with its decisions which will explain these concepts and define the requirements of the Constitution's qualitative prescriptions of gender equality for the justice sector and the public at large. Furthermore, there are many international treaties ratified by Kenya that also provide specific goals and suggestions on how the Judiciary can live up to its gender equality obligations. Once these qualitative measures are further explored through the Judiciary's jurisprudence, their purpose and meaning will be more evident as well as the urgent need to implement them. The Judiciary Gender Audit examines the Judiciary on many qualitative gender equality parameters in addition to the two-thirds gender rule and it is hoped that this report will be a guide for other parties to do the same.

2.3 CONSTITUTIONAL LEGAL OBLIGATIONS

The following provisions apply to the Judiciary's internal and external processes. Although gender discrimination can negatively affect men or women, it must be remembered that the Constitution was drafted against the backdrop of historical structural discrimination and marginalization of women throughout Kenya's history. As a result, women are often expressly identified as a vulnerable group in its provisions. One such example is Subarticle 21(3) which charges all state organs and public officers with addressing the needs of vulnerable groups within society including women. The principle of equality is outlined in Article 27 of the Constitution, including the prohibition of discrimination and the mandate to use affirmative action to ensure gender diversity and the representation of marginalized groups. This Article recognizes every person as being equal before the law with the right to equal protection and benefit of the law including full enjoyment of all rights and freedoms as well as equal treatment and opportunities. It ensures the inclusion of men and women by setting a constitutional minimum ratio of gender representation. By way of context, Subarticle 19(2) explains the purpose of promoting and enforcing human rights and freedoms as being to support human dignity, social justice and the ability of all individuals to realize their potential. In addition, the principles of equality, equity, gender diversity and inclusiveness are national values and principles of governance that must be applied to all state functions.¹⁵

As part of its external mandate to deliver justice, when applying a provision of the Bill of Rights, courts are required to "develop the law to the extent that it does not give effect to a right or fundamental freedom ...[by adopting] the interpretation that most favours the enforcement of a right or fundamental freedom"¹⁶. Overall, in exercising its judicial authority, the Judiciary is charged with protecting and promoting the spirit and principles of the Constitution.¹⁷ Further, the courts are obliged to interpret the Bill of Rights in a manner that promotes equality, equity and the Bill's spirit and purpose.¹⁸ The Constitution also speaks to specific areas of the law such as when it states that gender discrimination must be eliminated from land law, customs or practices¹⁹. In so far as the courts are involved with giving orders to detain people, children

15 Article 10 of the Constitution.

16 Article 20(3) of the Constitution.

17 See Subarticle 159(2)(e) of the Constitution.

18 See Subarticle 20(4) of the Constitution.

19 See Subarticle 60(10)(f) of the Constitution.



should not be detained with adults and their gender should also be taken into account.²⁰

The Judiciary must attempt to ensure that all people have access to justice and any fee required is reasonable and does not compromise this right.²¹ Also contributing to access to justice, court proceedings relating to the enforcement of the rights and freedoms contained in the Bill of Rights cannot be overly formal or legalistic.²² The Judiciary is given further guidance on access to justice through the principles it must abide by including that justice shall be done to all; justice shall not be delayed; alternative dispute resolution and traditional justice systems shall be promoted; and procedural technicalities should not be overly emphasized.²³ Notably, traditional justice systems cannot be used to contravene the Bill of Rights, produce results repugnant to justice or morality or cause inconsistencies with the Constitution or another written law.²⁴ Moreover, any law, even a customary, and consequently unwritten, law that is inconsistent with the Constitution, or its articulated values, including gender equality, is void to the extent of the inconsistency.²⁵

Internally, within the organization, the public service values include affording adequate and equal opportunities for men and women in the Judiciary.²⁶ As mentioned above, Subarticle 27(8) requires the state to take action to implement the principle that not more than two-thirds of the members of any elective or appointive body shall be one gender. Article 171 sets out the specific membership of the Judiciary Services Commission (JSC) with some positions even denoting the gender of the occupant, which help the JSC to meet the two-thirds gender rule. The JSC is responsible for the human resources functions of the Judiciary which includes an express obligation to promote gender equality.²⁷

2.4 OTHER DOMESTIC LEGAL OBLIGATIONS

Again, some obligations relate to both the Judiciary’s internal and external processes. The JSC and the Judiciary must promote gender equity and be guided by it in order to remove historical discrimination in their internal affairs and the discharge of their mandate.²⁸ The Environment and Land Court shall consider the elimination of gender discrimination in land law, equity, inclusiveness, equality, non-discrimination and protection of the marginalized in its decisions while providing equitable services and adequate and equal opportunities for both men and women.²⁹

In its external service delivery, the Chief Justice may issue practice directions aimed at judges and judicial officers to ensure that constitutional values and principles are applied in their decision-making.³⁰ More specifically, equity, inclusiveness, equality, non-discrimination and protection of the marginalized are to be considered when making judicial decisions in the High Court.³¹ In the kadhi courts, there cannot be any gender discrimination against witnesses.³² This provision appears to make one aspect of Kenyan sharia law, that the evidence of one man is equal to that of two women, compliant with the Constitution’s gender equality provisions.

In relation to the Judiciary’s internal organization of its workforce, regulations may provide for the mainstreaming of gender equity within the Judiciary.³³ Additionally, not more than two-thirds of the National Council on the Administration of Justice (NCAJ) membership shall be of one gender and this

20 See Subarticle 53(f)(ii) of the Constitution.

21 See Article 48 of the Constitution.

22 See Subarticle 22(3)(b) of the Constitution.

23 See Subarticle 159(2) of the Constitution.

24 See Subarticle 159(3) of the Constitution.

25 See Subarticle 2(4) of the Constitution.

26 See Subarticle 232(1)(i)(i) of the Constitution.

27 See Subarticle 172(2) of the Constitution.

28 See subsections 3(j) and (k) of the Judicial Service Commission Act, 2017.

29 See subsections 19(b), (d) and (e) of the *Environment and Land Court Act*, 2015.

30 See subsection 16(a) of the *High Court (Organization & Administration) Act*, 2015 [hereinafter the High Court Act].

31 See subsection 3(1)(a), *ibid.*

32 See subsection 6(1) of the *Khadis’ Court Act*, CAP 11.

33 See subsection 47(2)(i) of the *Judicial Service Act*, 2017 [hereinafter Judicial Service Act].



requirement must be met from the very first meeting.³⁴ Categorically, gender diversity shall be taken into account when appointing judges.³⁵ And finally, when considering promotions within the Judiciary, gender diversity shall also be taken into account.³⁶

2.5 INTERNATIONAL LEGAL OBLIGATIONS

Because Subarticle 2(6) of the Constitution makes any ratified treaty part of the domestic body of law, there are many provisions of international legal instruments that relate to gender equality and inclusion that can be enforced under the Constitution. Many echo the Constitution and speak to both the Judiciary’s internal and external processes. For instance, public authorities and institutions will not themselves discriminate against women.³⁷ What’s more, the state shall ensure there is no discrimination against women and protect the rights of women.³⁸ Further still, the state is obligated to combat all forms of discrimination against women by integrating a gender perspective in all activities and use corrective action where discrimination against women continues to exist.³⁹ In its own operations and when resolving disputes, the state shall enforce legislative or other measures to ensure equal work opportunities for women, equal pay, transparency in the recruitment, promotion and dismissal of women as well as punishment for workplace sexual harassment.⁴⁰ In recognition that women and girls with disabilities are subjected to multiple angles of discrimination, the state shall also take measures to ensure their full human rights and freedoms and the full development and empowerment of women.⁴¹

International obligations specific to the Judiciary include that women and men are equal before the law and the state shall take steps to ensure women’s effective access to judicial services. The state must also take action to establish equal representation (presumably 50%) between women and men in the Judiciary. Furthermore, it must see to it that the Judiciary is equipped to effectively interpret and enforce gender equality rights and reform existing discriminatory laws and practices so as to promote women’s rights.⁴² Moreover, discrimination can be direct or indirect and indirect discrimination requires particular scrutiny by the Judiciary. Substantive, not just formal, equality is important and affirmative action can be used if necessary.⁴³

In providing justice to the public, the state shall provide appropriate remedies to any women whose rights or freedoms have been violated and the Judiciary must be competent to do so.⁴⁴ Judges have a duty to be familiar with international human rights jurisprudence, particularly regarding women.⁴⁵ It may be helpful to consider closer links and cooperation between various countries’ judiciaries on human rights law toward this end.⁴⁶ Overall, the Judiciary should be guided by the CEDAW⁴⁷ when interpreting and applying law, including common law, customary law and making decisions.⁴⁸ Economic and social rights are also universal human rights and may be more important to women and should be considered accordingly.⁴⁹ Finally, the state often fails to act against violations of human rights in the private sphere – including the family – and cognizance should be taken of this lack of protection which encourages a structure where private violations occur too frequently.⁵⁰

34 See subsection 34(5), *ibid*.

35 See First Schedule subsection 14(1) of the Judicial Service Act.

36 See Third Schedule subsection 10(2) of the Judicial Service Act.

37 See Subarticle 2(d) of CEDAW, *supra*, note 10.

38 Subarticle 18(3) of the *African (Banjul) Charter on Human and Peoples’ Rights*, 1986.

39 Subarticle 2(1)(c) and (d) of the *Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa*, 2003 [hereinafter *Maputo Protocol*].

40 Subarticles 13(b) and (c) of the *Maputo Protocol*, *ibid*.

41 Article 6 of the *Convention on the Rights of Persons with Disabilities*, 2006.

42 Subarticles 8(a), (b), (d), (e) and (f) of the *Maputo Protocol*, *supra*, note 39.

43 See the *Victoria Falls Declaration of Principles for the Promotion of the Human Rights of Women*, 1994 [hereinafter *Victoria Falls Declaration*] at Principle 5.

44 Article 25 of the *Maputo Protocol*, *supra*, note 39.

45 See *Victoria Falls Declaration*, *supra*, note 43 at Principle 22.

46 *Ibid* at Principle 23.

47 CEDAW, *supra*, note 10.

48 See *Victoria Falls Declaration*, *supra*, note 43 at Principle 11.

49 See *ibid* at Principle 2.

50 See *ibid* at Principle 3.



Community justice customs or traditional dispute resolution mechanisms shall be respected and can be considered by the courts as long as they are compatible with the legal system and international human rights.⁵¹ When imposing penalties on community members, their economic, social and cultural characteristics should be considered and preference given to non-prison punishments.⁵² Communities shall be able to institute legal individual and group legal proceedings and use interpretation services if necessary.⁵³ Specifically when considering persons with disabilities, the state shall ensure effective access to justice for these persons including accommodation and facilitation of their role as direct or indirect participants (such as witnesses) in legal proceedings. This obligation includes promoting appropriate training for the Judiciary’s workforce.⁵⁴ The state must also take appropriate measures to ensure persons with disabilities can exercise their full legal capacity.⁵⁵

As an organization, internally, the Judiciary must take cognizance of the many international legal instruments that call for equal pay for equal work, regardless of gender.⁵⁶ Furthermore, the state must take measures to prevent discrimination against women on the basis of marriage or maternity and encourage the provision of services to enable parents to combine family obligations with work responsibilities and participation in public life.⁵⁷ In doing this, it is important to recognize that motherhood is entitled to special care and assistance.⁵⁸ For example, minimum maternity benefits are prescribed,⁵⁹ however, these are met by section 29 of the Employment Act⁶⁰. After a woman gives birth, she shall have one or more daily breaks or a reduction in working hours to breastfeed her child. These nursing breaks or reduction in hours shall be counted and remunerated as working time.⁶¹ Finally, in creating equality between men and women workers, the state shall aim to provide work without discrimination or conflict between professional and family responsibilities.⁶² The state will also aim to enable workers with family responsibilities to have free choice of employment and take their needs into account in setting employment conditions.⁶³

51 *Indigenous and Tribal Peoples Convention*, 1989 at Article 9.

52 *Ibid* at Article 10.

53 *Ibid* at Article 12.

54 *Convention on the Rights of Persons with Disabilities*, 2006 at Article 13.

55 *Ibid* at subarticles 12(3) and (4).

56 See Subarticle 23(2) of the *Universal Declaration of Human Rights*, 1948; Article 15 of the *African (Banjul) Charter on Human and Peoples’ Rights*, 1986; Subarticle 2(1) of the *Equal Remuneration Convention*, 1951.

57 See subarticles 11(1)(d) and (2)(c) of the CEDAW, *supra*, note 10.

58 Subarticle 25(2) of the *Universal Declaration of Human Rights*, 1948.

59 See subarticles 4(1) as well as 6(1) and (3) of the *C183 Maternity Protection Convention*, 2000.

60 *Employment Act*, 2012 (CAP 226).

61 Article 10 of the *C183 Maternity Protection Convention*, 2000.

62 Subarticle 3(1) of the *Workers with Family Responsibilities Convention*, 1981.

63 *Ibid* at Article 4.



10

0100110

011100

01010

000101

011010

10101

10010

110010

0010110

0101101

1010101

10011010

01101010

010011

10111

0101101010

01010111010

0110101001110

1010100001011

10100110101101

101010111010101

101010110010011

01010011100101

01101010000

101100



3.0 RESEARCH METHODOLOGY

The Judiciary Gender Audit examines the Judiciary's legal, policy and institutional framework to assess whether they promote the constitutional requirements of gender inclusion, equity and equality. It takes a bifurcated approach, looking both at the Judiciary's external and internal processes and measures them against the standards described in Part 2 of this report. This section explains the research methodology used in the Audit, including the research methods selected, background research and preparation, data collection as well as data analysis.

3.1 BACKGROUND RESEARCH

Before undertaking the assessment, the consultants had to ensure they were familiar with Judiciary structures including the Judicial Service Commission (JSC) which acts as the employer for Judiciary employees, the Judiciary Training Institute (JTI) which is an in-house research and training body and the National Council on the Administration of Justice (NCAJ) which coordinates justice actors and policy at a national level. The Judiciary's courts include the Supreme Court, the Court of Appeal, the High Court, the Employment and Labour Relations Court and the Environment and Land Court. The subordinate courts include the magistrate courts (which make up the bulk of the Judiciary's cases), the kadhis courts and the tribunals. The kadhi courts apply sharia law in family law matters, but are also subject to the Constitution. There is little data on the tribunals as a group as they are still in the process of being brought within the Judiciary's reporting structures, however, there are ongoing efforts to complete the transfer of responsibility for tribunals from the ministries of the national government to the Judiciary.

The technical team, along with point persons within the Judiciary, provided background information on the many relevant courts including divisions within the High Court, Court-Annexed Mediation units and specialized courts at the magistrate level such as the Children's Court. They also detailed the contrasts in the context and functions of different court stations across the country affected by the great variance in economic and social conditions between individual counties. While there are 39 High Courts across Kenya, a number of counties are still without. And though more than 90% of counties have a magistrate court, some counties still lack even this level of justice.

The Judiciary encompasses eight directorates that perform the staff functions of this large state organization such as Finance, Accounting, Human Resources, Communications, Performance Management, Information Communications Technology, Supply Chain Management and Building Services. The consultants met with Human Resources officials to obtain a complete picture of the various cadres and overall number of employees to aid in the research design. The Judiciary is a large public service entity with a workforce made up of 5735 employees. It is important to note that the vast majority of the Judiciary's workforce is made up of staff personnel who have no legal training or technical understanding of the obligations placed on the Judiciary in the 2010 Constitution.

CUCs have become an established part of the Judiciary's organizational structure in its efforts to become more service oriented. CUC members as well as Judiciary employees view them as helpful resources and a catalyst for local problem-solving in the justice sector. The NCAJ is responsible for the administration of the CUCs across the country, however, CUCs are very much local entities and naturally exhibit different attributes and varied organisation methods from station to station. The CUCs meet regularly to discuss issues that arise at their particular court station and propose and implement solutions which often involve actions being taken both on the part of the Judiciary and the organizations represented by the members. The membership of the CUCs are meant to mirror the NCAJ and can have any of the following persons as members:

- The Resident Judge or Head of Division and in the case of Magistrates, the Head of a Station appointed as such who shall serve as the Chairperson of the Court Users Committee;
- Other Judges and or Magistrates



- Probation and Aftercare Service
- Kenya Prisons Service
- Children’s Department;
- Office of the Director of Public Prosecution;
- Attorney General’s representative
- National Police Service – Station Commanders and Divisional Commanders including specialized units within the Police Service;
- Other agencies with prosecutorial powers within the stations; e.g. Labour, Environment, Municipal Councils etc.
- Witness Protection Agency
- National Legal Aid Programme
- Superintendent of the local hospital
- Law Society of Kenya or local Bar Representatives;
- A representative of the County Executive in the case of the station CUCs
- Two Representatives of relevant Civil Society Organizations dealing with the administration of justice;
- Community Leaders (two) including Youth and Women representatives;
- Three Representatives of Faith-Based Organizations
- A representative of Court Bailiffs, Court Brokers and Auctioneers;
- The Executive Officer or the Deputy Registrar in the case of High Court.
- A representative of the Provincial Administration as currently constituted
- A representative of the Paralegal Support Network
- Two persons representing Special Interest Groups⁶⁴

This list is not exhaustive and the CUCs can include any other person whose work or position in society is relevant to the Committee’s work.

64 NCAJ, “Guidelines for Courts User Committees (CUCs)”, National Council on the Administration of Justice Strategic Plan 2012-2016, the Judiciary (Nairobi) 2012 [hereinafter CUC Guidelines] at p. 44.



3.2 OVERVIEW OF ACTIVITIES

The Judiciary Gender Audit was extremely time consuming given the large scope of research required. Many of the major activities undertaken required revisiting along the way.

Planning

The planning stage included obtaining clarifications and additional information from the partner organizations as well as ongoing consultation with contacts within the Judiciary to obtain basic background information on the organization. This stage included the drafting of the Inception Report, the Work Plan plus engagement in relevant consultation meetings with partner organizations to determine the different components of the project. It should be noted that given the complexity of this audit, as the consultants' learned more about the Judiciary's structures and received feedback from the technical team, the work plan continued to be refined.

Desk Review and Developing the Standard of Review

The desk review included a review of relevant laws and international human rights instruments to inform the standard of review of the audit from the outset. A standard of review document was produced highlighting all of Kenya's relevant responsibilities regarding gender and the Judiciary under local and international law. These standards were then categorized as internal obligations to employees or external obligations to the public in order to focus on how best to measure the Judiciary's compliance with each. The standard of review document was also key in developing the numerous thematic areas to be examined. The Audit's standard of review is explained in Part 2 of this report and the standard of review in chart form can be found in Appendix 2. The consultants also reviewed the Judiciary's internal and external formal policies, draft policies, guidelines and strategic plans which also informed the audit findings.

Design of Measurement Tools

The measurement tools included an anonymous SAQ, various IDI guides and a FGD guide. Each tool addressed various thematic areas and were subdivided into sections accordingly. It should also be noted that some of the IDI guides for the Judiciary's top management were developed later in the project's timeline in order to garner reactions to some of the data collected.

Field Visits

The field visits were carried out following the development of the measurement tools. Four regions were covered in disparate parts of the country, including both urban and rural areas; in the Nairobi, Kisumu, Coast and Turkana regions. The opinions of the Judiciary's national leaders were also captured. The Audit was explained to each region's managing staff who then provided assistance in ensuring that all relevant courts or entities in each region were covered. The field visits were the primary source of information for the Audit.

Compilation and Analysis of Data

The consultants derived statistically valid quantitative data through the anonymous SAQ. Some of this data was disaggregated by gender. There was also a multitude of qualitative data from the IDIs, FGDs, desk review and case review. The data was collated and compiled by thematic area, allowing triangulation between the various sources of information.

Case Review

IDI participants and technical advisers to the consultants were asked to suggest cases that show a positive or negative view of gender equality either through the language, analysis or outcome of a decision. A selection of these decisions were then reviewed from a gender perspective. Decisions were grouped by the issues dealt with and related to the qualitative findings of the audit where appropriate.



Report Writing

The draft report was developed to convey the information from all the data collected under each of the twelve thematic areas. After summarizing and explaining the results of the Audit, specific issues and problems were identified and explained with consideration given to the key players involved and possible causes of problems. Conclusions were drawn for each thematic parameter and possible recommendations suggested. Based on these twelve summaries, overarching recommendations were formulated with feasibility in mind. Operational recommendations were grouped by Judiciary functions. A separate Process Report was also drafted detailing the work plans, measurement tools and consultant's experiences and challenges in carrying out the Audit.

Stakeholder Consultation and Validation

The finalized main draft report was reviewed by the technical team at a meeting held on 8 March 2019 in Nairobi where comments were received. The draft was revised accordingly. A stakeholder validation workshop was then held on 24 May 2019 in Nairobi where further input was received. Revisions to the main draft report were then made based on the feedback.

3.3 METHODS AND TOOLS

Five research methods were selected to conduct the Judiciary Gender Audit:

- Desk Review of a range of primarily Judiciary documents
- SAQs completed by 385 respondents
- IDIs with 68 interviewees
- FGDs with 4 Court User Committees (CUCs) and 38 CUC members
- Case Review analysing 20 judgements

Both quantitative and qualitative data were required to comprehensively assess the Judiciary's performance against the applicable standard of review.⁶⁵ It was also important to employ a participatory approach to encourage Judiciary employees to consider the Judiciary's obligations and their role in fulfilling them. Because most Judiciary policies, with few exceptions, did not address gender concerns, it was necessary to increase the reliance on IDIs to gather information about how gender issues are dealt with internally and externally in practice. A large number of IDIs were also needed to cover all the different types of courts where gender issues could come into play. A FGD was the most effective way to collect information from the CUCs because the Committee members work as a group and are individuals with extremely varied roles. Furthermore, their collective experiences were relevant and it was advantageous to expose as many CUC members to the Judiciary Gender Audit as possible, thereby increasing the effect of the study's participatory approach. There was a great deal of innuendo about sexual harassment within the Judiciary that emerged in the consultant's background research but very few official records speaking to this important issue. It was therefore important to have a tool that could reach the full range of the workforce in order to collect their views on sexual harassment as well as other issues that cut across all cadres such as organizational culture. Finally, a selection of decisions to be reviewed to capture the end product of the Judiciary's service delivery.

The desk review was completed at the start of the project and along the way as new documents became available, often through the IDIs. Each document was reviewed for relevance to gender equality, equity and inclusion and assessed against the standard of review set out in Part 2 of this report. The IDIs were conducted with Judiciary employees in management, judicial officer, judge or top management roles. Each IDI guides asked approximately 20 open ended questions of each interviewee covering both the Judiciary's internal and external processes.

65

For a discussion of the applicable Standard of Review of the Judiciary Gender Audit, see Part 2 of this report.



Respondents were advised that no answers would be attributed to them directly. A range of thematic areas relevant to each role were addressed and each tool was broken down into corresponding sections. The FGDs were conducted with members of CUCs who were justice sector actors and community leaders. The FGD guide posed 15 open ended questions covering how CUCs operate, their organizational culture as well as many of the thematic areas being examined in the Judiciary's external processes. The IDI guides and the FGD guide were piloted in Turkana, the first region to be visited, and after further comments from the technical team, they were reviewed (and the number of questions reduced) based on that experience.

The SAQ was an anonymous survey used to capture the views of sampled Judiciary employees. It was comprised of 50 questions, mostly multiple choice with a few opportunities to provide open ended answers. Respondents were advised to complete it alone and told their participation would be kept confidential. This anonymity was important in order to collect genuine results surrounding sensitive issues such as sexual harassment. The SAQ was divided into three sections, the first mapping out the socio-demographic characteristics of the study respondents, the second covering internal Judiciary processes and the third addressing external service delivery processes. Most of the questions centred on internal processes and covered each of the six thematic areas being examined in the Judiciary's internal processes. There were also three questions exploring the comparative experiences of men and women as consumers of justice. The SAQ was pre-tested at the Machakos courthouse, an hour outside Nairobi. The results from this pre-test were reviewed and the tool was amended accordingly. The data from Machakos was not included in the Judiciary Gender Audit data set. The Case Review examined judicial decisions from a gender perspective especially looking at the language used by the Court, references to stereotypes or traditional gender roles, constitutional analysis and jurisprudential outcomes. Decisions were therefore reviewed in a more holistic manner and not solely judged on a case's particular holding. As a result, there was no specific case review tool developed. It was the last portion of the Audit to be completed as some cases were suggested by IDI interviewees who held roles related to the judicial function. The findings within the jurisprudence thematic area (under the Judiciary's external processes evaluation) were almost exclusively arrived at via this qualitative case review.

3.4 DATA COLLECTION

The desk review was completed at the start of the project in January and February 2018 and throughout the Audit as new documents became available. A purposive sampling method was used as any documents that were considered broadly relevant were reviewed including strategic framework guides, policies, circulars and Judiciary reports. Inquiries were made with contacts in the Judiciary for relevant documents and the technical team also reviewed the proposed list of documents and made suggestions. Additional documents that came up in the IDIs were also obtained. The consultants collected quantitative data regarding a point in time gender breakdown of the Judiciary's workforce as well as those in leadership positions. Human Resources provided an employee list based on the March 2018 payroll run, although clarifications on specific positions were sought afterwards. A recent national survey of Kenyans on their justice needs and satisfaction, along with the Judiciary's 2018 Court User Satisfaction Survey was also reviewed to provide additional information about the Judiciary's service delivery. Because there were few gender concerns or meaningful disaggregated data captured in these documents, more emphasis was placed on field research.

The field research was carried out in four operational regions of the Judiciary. The selection of these four regions was purposive based on a set of predetermined parameters informed by the terms of reference and the technical committee. These parameters included geography, population, social factors and overall marginalization, defined as economically depressed areas with low levels of development, in order to obtain a diverse sample of regions where the Judiciary operated. The four regions chosen were Turkana, Kisumu, Mombasa and Nairobi. The Nairobi region was further split into two categories in order to differentiate between staff who solely serve the Nairobi region and those whose have a national responsibility extending to all regions where the Judiciary operates. An example of the Judiciary's national personnel would include those who work with the Judicial Training Institute or the Supreme Court. Consequently, there were a total of five regions including the initial four and the National region. The study was explained to all participants and consent was obtained prior to administering all IDIs, FGDs and SAQs. There was no overlap between the IDI, FGD and SAQ participants because all IDIs were conducted with Judiciary employees, FGDs were conducted with Judiciary stakeholder members of the CUC and any randomly selected SAQ subjects were



disqualified if they were an IDI interviewee. The following table shows how the field research participants were chosen per region.

Research Participants by Region

Research Participants	Turkana	Kisumu	Mombasa	Nairobi	National
IDIs					
1 Court of Appeal Judge	N/A	18	1	1	1 (President of CA)
1 Presiding Judge	N/A	1	1	1	3 (Principle Judges)
2 High Court (or equivalent) Judges	1	2	2	6	2 (SCK Judges: CJ & DCJ)
1 Head of Station	Unavailable	1	1	1	1 (CRJ)
3 Magistrates	2	3	7	5	5 (National Registrars (magistrates))
1 Kadhi	1	1	1	1	1 (Chief Kadhi)
1 HR Assistant Director	1	1	1	1	1 (Director)
Additional IDIs:				1 Registrar, Family Court Annexed Mediation	1 JSC Member
				1 Tribunal Member	1 JTI Judge
				1 Tribunal Administrator	1 NCAJ Member
					1 AJS Taskforce Member
					1 Performance Management Director
					1 Deputy Registrar, Tribunals
FGDs					
1 Court User Committee	1	1	1	1	N/A
SAQs					
Judiciary Employees	11	53	48	180	93

The IDIs were carried out between February and July 2018 with Judiciary employees in the roles set out in the chart above. Where there was more than one occupant of a role in a region, a local manager provided assistance in identifying specific people in each role while trying to balance between gender, court and experience. Availability was more of a factor in the regions as the consultants were limited by the duration of the field visits. The national personnel had countrywide responsibilities similar to those at the regional level. A total of 20 IDIs were completed in the National region because it was important to obtain the views of those in the Judiciary's top management. Nairobi also featured 19 IDIs as it is where the largest number of Judiciary employees are located in the country. The number of IDIs compared to the number of Judiciary employees for each region is summarized in the table below.



Regional Employee Populations and IDI Participation

Region	Judiciary Employees		IDI Targeted	IDI Completed	
Turkana	47	2.4%	7	5	7.4%
Kisumu	248	12.6%	10	10	14.7%
Mombasa	208	10.5%	10	14	20.6%
Nairobi	994	50.4%	13	19	27.9%
National	477	24.2%	16	20	29.4%
Total	1974	100%	56	68	100%

Unfortunately, it was not possible to complete all planned interviews in the Turkana region. This and other challenges faced in the field research are detailed in the Challenges and Limitations section below. Additional magistrates were interviewed in the Mombasa region in order to get a perspective outside Mombasa city, particularly in Malindi and Lamu where social issues related to gender are prevalent. In Nairobi, additional magistrates were interviewed in order to ensure coverage of all the court stations within Nairobi. Overall, two magistrates presiding over a Children’s Court and one in a Commercial Court were also interviewed. Two magistrates with experience with a mobile court serving extremely marginalized areas were also interviewed. Across all regions, High Court judges were sampled to ensure coverage of the High Court and those courts of the same status, the Environment and Land Court as well as the Employment and Labour Relations Court. Additional judges were sampled in Nairobi to ensure coverage of relevant divisions within the High Court such as the Judicial Review Division, Human Rights and Constitutional Division, Family Division and the Criminal Division. The Supreme Court was covered under the category for judges in the National region. The Rent Restriction Tribunal was chosen for IDIs because it serves many women in particular, in addition to men, and has operations in various regions. Tribunal interviewees were selected from the Nairobi office and grouped with the Nairobi region. The Deputy Registrar of Tribunals, in contrast, has responsibility over all the Tribunals currently within the Judiciary’s purview and was consequently part of the National region.

Attention was paid to the gender balance of interviewees, although this was sometimes difficult as the consultants were limited by the gender of individual role occupants. For example, there is only one Chief Registrar and she is a woman. This limited choice was especially a problem with those in top management positions in the National region. Nevertheless, of the 68 interviewees, 31 (45.6%) were women and 37 (54.4%) were men.

The FGDs with the CUCs were carried out from February to May 2018. CUCs are set up differently in various parts of the country; Kisumu and Nairobi have CUCs dedicated to various divisions while Lodwar, as a small station, had only one CUC. Mombasa had a separate CUC for the kadhi courts. In order to cover a variety of matters, the consultants conducted FGDs with CUCs that dealt with general High Court matters, criminal matters, family and children’s matters and matters before the kadhi courts. All FGDs involved between 8 to 12 CUC members with a total of 38 participants in the four FGDs conducted. Although participants were limited by availability, each FGD involved multiple persons of each gender, as shown in the table below. Only one person per stakeholder organization took part and a diversity of roles within the justice sector were represented in each FGD. CUCs are local entities and the only national equivalent would be the NCAJ, however, the Council involves many high ranking government officials who would not be readily available, thus an IDI with the NCAJ Chair was deemed sufficient to cover this constituency within the Judiciary.



Court User Committee FDG Participants By Region and Gender

Region	FGD Participants	Males		Females	
Turkana	8	5	62.5%	3	37.5%
Kisumu	8	4	50.0%	4	50.0%
Mombasa	12	4	33.3%	8	66.7%
Nairobi	10	4	40.0%	6	60.0%
Total	38	17	44.7%	21	55.3%

The SAQ was administered to Judiciary employees between April and August 2018. The entire Judiciary workforce of 5735 employees was represented by the five regions as discussed above (namely Turkana, Kisumu, Mombasa, Nairobi and National). The target was 384 SAQs and the consultants oversampled by 10% in order to allow for unforeseen circumstances, aiming to collect 423 completed SAQs overall. However, due to the challenges faced in collecting questionnaires in Nairobi in particular (including the Nairobi and National regions), it was not possible to reach the target. The bulk of the Judiciary's staff is located in Nairobi yet this is where difficulties administering the SAQs posed a problem. These challenges are detailed in the Challenges and Limitations section below. The target numbers for each region were based on the numerical strength of the employee count in each region as per the employee list provided by the Judiciary's Human Resources department. This information along with the number of targeted SAQs and completed SAQs by region is summarized below.

Regional Employee Populations and SAQ Collection

Region	Judiciary Employees		SAQs Targeted	SAQs Collected	
Turkana	47	2.4%	10	11	2.9%
Kisumu	248	12.6%	53	53	13.8%
Mombasa	208	10.5%	45	48	12.5%
Nairobi	994	50.4%	213	180	46.8%
National	477	24.2%	102	93	24.2%
Total	1974		423	385	

The last level of sampling was the random identification of study respondents at the regional level. A computerized random number generator was used to randomly sample the identities of the study respondents from the employee list provided by Human Resources. If any respondents were already selected for an IDI, they were not given an SAQ and an additional name was randomly selected as a replacement. Once a person who was randomly selected was located, the study was explained and the person was asked to sign the consent form and provided with the SAQ. A time to pick up the completed form was arranged. Only results with a completed consent form were used. If a person was not able to be located or a SAQ was not able to be collected from a region, an additional name was randomly selected from that region in an attempt to approximate the regional target numbers.

The randomized selection used at the last stage of sampling for the SAQ participants meant that the respondents held a variety of positions within the Judiciary. A total of 369 (of the possible 385) respondents answered the position category question and the results are summarized in the following table. The remaining respondents left this question blank.



Positions Held by SAQ Respondents⁶⁶

Position/Role within the Judiciary	Number of Employees	Percentage of Employees	Number of Respondents	Percentage of SAQs Collected
Legal Researcher/Law Clerk	77	1.3%	15	3.9%
Executive Officer/Executive Assistant	343	6.0%	17	4.4%
HR/ICT/Performance Management/Communications Officer/Assistant	183	3.2%	45	11.7%
Accountant/Accounts Assistant/Finance Officer/Auditor	235	4.1%	18	4.7%
Supply Chain Officer/Manager/Storekeeper	101	1.8%	15	3.9%
Librarian/Archivist/Library or Archivist Assistant	147	2.6%	17	4.4%
Legal Officer/Program Officer	9	0.2%	3	0.8%
Clerical Officer	2330	40.6%	122	31.7%
Process Servers/Court Bailiffs	132	2.3%	5	1.3%
Secretary/Secretarial Assistant/Telephone Operator	533	9.3%	31	8.1%
Architect/Superintendent of Works/Building Technician/Artisan	13	0.2%	4	1.0%
Driver	160	2.8%	8	2.1%
Security Guard/Warden	143	2.5%	6	1.6%
Support Staff/Supervisors/Messengers	629	11.0%	37	9.6%

In Mombasa, a total of three court stations were visited, namely Shanzu, Tononoka and Mombasa Law Courts. In Kisumu, SAQs were administered in five court stations, namely Maseno, Winam, Tamu, Nyando, and the Kisumu Law Courts. Sampling in Turkana involved both the Lodwar and Kakuma court stations. Because it was not logistically possible to travel to Kakuma to interview the sampled respondents, arrangements were made to have them complete the SAQs in Lodwar. In Nairobi, SAQs were dispensed in the court stations in Makadara, Kibera, JKIA, Milimani Commercial, Milimani, Kadhi’s Court and City Court. Respondents were also sampled in the Nairobi Library. The collection took a considerably longer time due to some of the challenges highlighted below. Distribution and collection of SAQs in the National region ran concurrently with the Nairobi region. Respondents in the National category were sampled from the Supreme Court, Office of the Chief Justice, Office of the Chief Registrar of the Judiciary, Directorates of ICT, HRM and Admin, Public Relations and Information, Performance Management, Internal Audit and Risk, the Building Unit, Procurement and Accounts, Transport and Protocol, Judicial Service Commission, Judiciary Library and the Tribunals. This region also suffered the same difficulties that were faced in the Nairobi region.

The case review was the last portion of the research to be completed after the field research was concluded and compiled. Because magistrate decisions are not reported and the Kenyan law reporting service has limited search capabilities, advice was sought on selecting decisions. A purposive sampling method was used where experts including IDI interviewees who held judicial roles and technical advisers, including the technical committee, were asked to suggest cases that showed a positive or negative treatment of gender equality either through the language, analysis or outcome of a decision. In addition, during the analysis, the cases were grouped by subject area and if it was apparent that a significant case was missing from one of the subject area groupings, it was also added. Because the Audit’s standard of review was primarily based on the new Constitution, only cases that were decided after its advent were examined. Due to this very specific sampling method, there was no regard for the region where the case originated.

66 The percentages for total employees or total SAQs collected do not add to 100% because there was item non-response in this question so some categories (such as judges and judicial officers) do not show up in this table even though a small amount were sampled. The table does still give an idea of how representative the sample was though.



The vast majority of constitutional matters are decided in Nairobi as there are divisions which specifically deal with these types of cases and as a result most of these cases were filed there. Nevertheless, there are some cases from outside Nairobi that were examined, though because most cases in Turkana are completed by magistrates and are therefore unreported, there is no case from this region. Approximately 40 cases were reviewed and half of these, 20, were found noteworthy enough to be discussed in the Jurisprudence thematic area findings.

3.5 DATA ANALYSIS

The large amount of qualitative information was from the IDIs with Judiciary employees and FGDs with CUCs was sorted by thematic area. Additional information from the desk review and SAQ analysis were also sorted by thematic area. Under each theme, the quantitative and qualitative data was triangulated and summarized.

Even though 385 SAQs were completed and collected, a large number of respondents left some questions blank including some questions that applied to everyone. This challenge is discussed further in the Challenges and Limitations section below. Nevertheless, there were at least 325 responses for all the questions analysed. With the overall population of the Judiciary workforce being 5735, this means that a sample size of 325 provides data from the SAQ at a 95% confidence level with a confidence interval of 5.28.⁶⁷ In the body of the report, the percentages are expressed as found for each individual question but can be extrapolated to the whole Judiciary workforce with a 95% confidence level that the true percentages are within the range of plus or minus 5.28 percentage points from the percentage identified. However, it is hard to compare results from each question directly because of this method of dealing with the missing data.

The first part of the SAQ attempted to map out the socio-demographic characteristics of the study respondents. Of those who answered the gender question, approximate gender parity appears to have been achieved in that 50.3% were female and 49.1% male. Two of the respondents in the survey (0.6%) declined to identify themselves as either male or female, choosing the “other” option. This could be because they identify as a non-binary gender or because they were afraid that revealing their gender, especially in smaller stations and departments would make them easily identifiable.

The SAQ results show that the Kenyan Judiciary has a youthful workforce. More than two-thirds (70.3%) of the Judiciary’s employees are aged 40 years and below. And 42.6% of Judiciary employees are actually between 31 and 40 years (the remaining 27.7% are 30 or under). Almost one-fifth (18.4%) of employees are between 41-50 years with the remaining employees (11.1%) between 51-60 years of age. Only 0.3% of employees are above the civil service mandatory retirement age of 60 years.

The respondents were also asked to indicate their marital status at the time they completed the SAQ. Two-thirds (66.3%) of the respondents were married and 30.5% were single. Only 3.2% of the respondents were divorced, separated, or widowed.

46.6% of Judiciary employees surveyed have been at that same station for two years or less while 41.3% had been in the same station for between two and five years. Just 11.6% of Judiciary employees surveyed had been assigned to their station for six to ten years and a mere 0.6% had been stationed there for more than ten years. These results highlight how often most Judiciary employees change stations, which often involves them having to move themselves and/or their families as well.

Those who took part in the survey were also asked to indicate the number of years they have been employed with the Judiciary regardless of where they were stationed. One quarter (25.3%) of Judiciary employees surveyed have been working for the Judiciary for 2 years or less while another one fifth (20.3%) for between 2 and 5 years. Another one quarter (23.9%) have been with the Judiciary for 6 to 10 years and only 8.2% for 11 to 15 years. Only 12.6% had been employed by the Judiciary for 15 to 20 years and 9.7% for more than 20 years. These results show that nearly half of the Judiciary’s workforce joined within the last 5 years, after the Judiciary Transformation.

⁶⁷ Calculated with the Survey System Calculator found at <<https://www.surveysystem.com/sscalc.htm>>.



For the Case Review, decisions were grouped under various categories according to the subject matter of the case such as those dealing specifically with the implementation of the Constitution's two-thirds gender rule, sexual assault or equality case law concerning gender discrimination. Each of the 20 decisions were qualitatively analysed looking at the language used, legal and constitutional analysis of issues and outcome of the decision. These findings were related to the other qualitative findings of the audit where appropriate in order to triangulate the information collected and thereby improve reliability given the less structured approach to sampling cases. The results of the case review are contained in the Thematic Area 12 Jurisprudence section in Part 5 of this report.

3.6 CHALLENGES AND LIMITATIONS

There were a number of challenges that the Judiciary Gender Audit consultants faced throughout the project timeline. They are described here along with their impacts on the overall Audit.

The first challenge was the extremely large scope and correspondingly few consultant days. Though this incongruity was discussed during the initial phase, the only adjustment was the addition of a survey researcher to carry out the SAQ data collection and compilation. Further efforts were made to limit the scope such as focussing on data collection from the Judiciary and only planning for two IDIs at one selected tribunal. The problem this posed is that each tribunal functions independently with its own procedural rules and operating systems which vary greatly from one tribunal to the next as the Judiciary undergoes the long term process of bringing all tribunals within its organizational structure. The technical team also requested coverage of the various courts and divisions within the Judiciary as well as the kadhi courts. These requests greatly increased the number of IDIs needed to achieve this broad coverage. As a result, the project took considerably longer than anticipated to conduct research and compile the data.

Second, the terms of reference envisioned the Audit including an analysis of concerns related to the intersection of gender discrimination with other grounds of discrimination such as disability and age. However, in the first meeting held between the consultants and the technical team, in order to further limit the scope in response to the consultants' concerns, the team agreed that this analysis was incidental to the project's main objective and could be mentioned where they arose. Early versions of the consultants' IDI guides did ask about these subsets of gender discrimination but the information being received was not relevant to the question of gender and confused the interviewees about the issues being addressed; therefore this line of inquiry was dropped.

Third, even though the Judiciary transformation began after the appointment of the first Chief Justice of the Supreme Court in 2011, there are still few formal policies that have been approved and fully implemented. Many drafts are still being worked on and others such as the Gender Policy and Sexual Harassment Policy have never been approved and disseminated. Furthermore, the data collected by the Performance Management Directorate does not yet include any gender analysis for either the internal or external statistics they monitor. These limitations mean there is less readily available information to be audited and necessarily increases reliance on IDIs and FGDs for the Audit's research.

Due to unavoidable scheduling conflicts that arose at the last minute, the consultants were unable to interview a third magistrate and the Head of Station in Turkana and the Registrar of the High Court in the National region. Attempts to reschedule were unsuccessful. Although these are important opinion leaders because Turkana represented a marginalized community and the High Court is the largest court at this level, multiple other IDIs were completed with personnel with knowledge of both these constituencies. Therefore, while the coverage did not meet the planned targets, the consultants do not think the effect was significant.

The consultants often had to explain gender equality terms to research participants, especially how they related to the workplace or service delivery in ways other than purely numbers. This was the case with both IDI interviewees and FGD participants. Because many study participants had not seriously considered gender equality prior to the Judiciary Gender Audit, the quality of data obtained during IDIs may have been affected. The consultants aimed to provide consistent and thorough explanations in efforts to combat this



effect, however, this may be one reason why there was little information about how the Judiciary practices may indirectly discriminate against one gender or a person who is marginalized by more than one minority status.

The consultants also faced a great deal of difficulty in administering and collecting the SAQs in Nairobi, where the bulk of the Judiciary's staff is located. Human Resources lists were often extremely out of date but the effect was felt more in Nairobi where a higher number of employees were sampled. In addition, it was hard to find a reliable Judiciary contact in each department or section who could provide ongoing assistance in locating sampled employees. Supervisors often assigned junior staff to aid the consultants who were not able provide the assistance required. As a result, alternative ways of accessing sampled employees had to be explored. In the Nairobi and National regions, most stations were not aware of the Judiciary Gender Audit, nor prepared for the team's visit. These difficulties were further exacerbated by the very high workloads facing employees in Nairobi which also meant it was more difficult to get employees to complete the SAQ or they took longer to do so. Many employees did not complete them on time or were absent during collection rounds. This situation meant it took considerably longer than planned to complete the distribution and collection of the SAQs. The impact of these challenges was that only 385 completed SAQs were collected overall.

On top of these problems with the SAQ distribution, a common pattern emerged of respondents leaving some questions, even as simple as identifying their gender or position, unanswered. Many respondents said they feared that the SAQ responses would be traced back to them despite assurances that the survey results would only be analysed as anonymous data. In addition, some questions dealt with sensitive subject matter such as bullying or sexual harassment and as the results from both the SAQ and IDI data collection show, there is a lot of concern over retribution for reporting a superior's bad behaviour in the Judiciary. In addition, some respondents did not appear wholly confident in English and this may also be a reason for questions being left blank.

Regarding the data quality, the random sampling methodology employed in this survey drew Judiciary employees from all cadres who either had never participated in research studies before or did not use English as their daily language of communication. Quality assurance checks, therefore, began before handing out the SAQ. Respondents were briefed on the study in a language they were conversant with and immediately after the scripts were collected, they were checked in order to limit the number of spoiled SAQs.





4.0 FINDINGS OF THE JUDICIARY GENDER AUDIT: INTERNAL

Internal Organizational Gender Equality and Inclusion

This portion of the audit requires a review of the Judiciary’s internal operations and how it treats and develops its workforce. Such an internal review entails analysis of the Judiciary’s human resources policies, operational guidelines, structural systems and general work environment to determine whether they are gender and minority inclusive. In other words, it applies a gender lens to examine the Judiciary as an employer, the experience of its employees and the organizational norms. The internal workplace outcomes for each gender are assessed.

4.1 ORGANIZATIONAL CULTURE

Organizational Culture is a technical term used in behavioural sciences and human resources management. It refers to the “core values, beliefs, behaviour patterns, understandings, assumptions, norms, perceptions, emotions, and feelings that are widely shared by the members of the organization”.⁶⁸ It was



explained to participants in the study as the common expectations of how everyone in the organization will behave, dress, talk and do their work. Organizational culture is specific to an organization and is often more apparent when one compares an organization against another. It develops in an organic manner and though management policies can have an effect on organizational culture, it is really a function of how members of the organization behave, think and feel. The consultants’ view of the Judiciary’s organizational culture is primarily based on discussions with key informants across departments and regions.

Historical Perspective

Prior to the promulgation of the 2010 Constitution and the restructuring of the Judiciary in line with Chapter 10, the Judiciary was viewed as a closed institution that was predominantly male, arbitrary, slow, prone to corruption and overly technical, even using technicalities to deny justice. Like most government bodies, it was very formalistic and centralized with power invested in only the very most senior people. All financial, policy and human resources decisions, including transfers, were made at headquarters and communicated to judicial officers and staff to comply with. The organization was extremely hierarchical where most staff felt they were unable to even look at a judge in the eye, never mind interact with them other than to receive direct orders. The Judiciary had a poor communication policy and thus had the appearance of a secretive institution. There was no information or any communication strategy that related with the public.

Promotions were dependent on the occupant of the Office of the Registrar, which was almost exclusively held by men. The extortion of potential candidates by demanding sexual favours or “use of bottom” was commonplace. Not surprisingly, most women in the Judiciary were in the lower cadres with only a handful at the higher levels. For example, there were only three women judges. Becoming a judge was a political decision, thus women needed to be well-connected or have a well-connected spouse. Therefore, being a judge was a mark of privilege not merit. Because even three female judges was a fairly new concept, there were no bathrooms for female judges and they had to resort to going to nearby establishments to use the facilities there. Married women had to be on contract, were not eligible to be on permanent and pensionable terms and were not entitled to a house allowance. Anecdotally, extreme sexual harassment of female staff was blatant and pervasive with no attempt to hide it.

68 Schwind, Das, Werther & Davis, *Canadian Human Resource Management (Fourth Edition)*, McGraw-Hill Ryerson Limited (Toronto) 1995 at p. 639 [hereinafter *Canadian Human Resource Management*].



Judges and high ranking (almost exclusively male) employees enjoyed unfettered impunity to do what they wanted. For women and other junior level employees, the Judiciary was not an enjoyable place to work.

Judiciary Transformation

As the first Chief Justice appointed under the new Constitution, CJ Willy Mutunga, undertook a large scale Judiciary Transformation with one main objective being to change the Judiciary’s organizational culture to be compliant with the country’s new progressive constitution.⁶⁹ The 2010 Constitution sought to introduce independence, accountability and respect for the public to the Judiciary.⁷⁰ It also emphasized the duty of all state institutions to operate in accordance with the national values and principles including the rule of law, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised.⁷¹ In addition, the Constitution also promoted gender equality⁷² and access to justice⁷³.

Many Judiciary employees recall the introduction of a Judiciary wide sports day and Judiciary Transformation training sessions which included all cadres of employees right up to the CJ himself. The transformation training sessions often allowed staff to recall past injustices and recognize the problems with the way the Judiciary had operated as an organization. All employees interviewed feel these initiatives went a long way in breaking down the hierarchical barriers between levels of staff and especially between higher and lower ranked judicial officers. The Human Resources department was expanded where HR Regional Assistant Directors were hired and placed in the regions where the Judiciary operated. This meant that Human Resources greatly increased its interaction with Judiciary employees which enabled it to see them more as individual people. New policies were enacted to make the Judiciary more inclusive for employees and also open it up to the public it served. Accordingly, a customer service approach was adopted where outcomes were measured in relation to the court user. The communication policy is one of these policies, slowly dragging the Judiciary to an era of more openness. The Performance Management Directorate was also introduced in order to monitor and evaluate the Judiciary’s operations, including employee performance, making employees more accountable.

The Judiciary expanded its physical infrastructure, opening courts in nearly all 47 counties. At the same time, the Judiciary’s workforce was greatly enlarged. Court User Committees were also introduced to each court to allow local stakeholders to meet and discuss issues and try to solve them. Attempts were made to stamp out sexual harassment and though it may not be practiced as openly as prior to the Judiciary Transformation, it is still a fairly common problem. Sexual harassment is specifically examined as a separate thematic area (See Thematic Area 6 below).

Data

52.5% of Judiciary employees responding to the SAQ think that “the Judiciary’s culture (how employees usually behave) promotes equality between men and women”⁷⁴. While 21.2% of employees do not think that the Judiciary’s culture promotes gender equality, 26.7% think it promotes gender equality sometimes. There does not appear to be a significant difference between the genders regarding how the Judiciary’s culture is viewed. Most of the reasons given to back up their opinions refer to the general way that each gender is treated with most people thinking that men and women are treated fairly.

69 See generally Judiciary, *Judiciary Transformation Framework: 2012 - 2016* (Nairobi, 2012).

70 See Articles 159-160 of the Constitution.

71 See Subarticles 10(2)(a) and (b) of the Constitution.

72 See Subarticle 27(8) of the Constitution.

73 Article 28 of the Constitution.

74 See Question B15 of the Judiciary Gender Audit SAQ.



The SAQ also asked that respondents provide suggestions on “how the Judiciary can ensure a respectful work environment for both men and women”⁷⁵. The results include a multitude of thoughtful suggestions including the following:

- Equal opportunity manual
- Whistleblower policy
- Gender mainstreaming policy
- Make integrity a job requirement
- Teach ethical and constitutional values
- Counselling with third party counsellors
- Establishment of office to address the historical injustice and tackle gender issues/ operational gender office
- Frequent transformation workshops to be conducted
- HR to provide programs for enhancing healthy work relationships
- Clear indication where sexual harassment start and ends, avoiding ambiguity
- Functioning suggestion boxes
- Open concept working areas
- Improve employee motivation and recognition
- Defined and communicated expectations and be open to feedback
- Training on the disadvantages of improper relationships at work
- Training on emotional intelligence

There was a large number of new and innovative ideas (of which these are only some) which shows that Judiciary employees truly are overwhelmingly committed to developing a work environment based on respect for everyone. This is extremely encouraging and shows that if Judiciary management implemented initiatives aimed at gender equality, there may be extensive buy in from employees.

Post Transformation Judiciary

Recruitment in the Judiciary is generally described as open, non-discriminatory and giving consideration to the two thirds gender rule. There have been attempts to absorb women into positions previously only held by men, such as court assistants. Yet there is still concern from a large proportion of employees about the lack of females in very senior positions. Judiciary employees perceive terms and conditions of employment to be equal for men and women. Both genders are included in the formation of work groups. The Judiciary has strived to develop its infrastructure to adequately accommodate a multi-gender work environment by adding ablution blocks for female magistrates where previously this basic necessity did not exist. Even transfers have been done more equitably with women now being transferred to stations previously reserved for men (such as Isiolo, Marsabit, Garsen and Garissa). Staff led contributions are made equally to celebrate newborn babies of Judiciary employees, whether it’s for a female employee or the wife of a male employee.



“The organizational culture gives morale that everyone is equal. There is no gender that feels overlooked or favoured. They are all treated equally, equally considered based on the performance of their work.”

- Judiciary employee



As this employee notes, the data collected from the SAQ shows the majority of employees view the Judiciary’s organizational culture as positive but there are still some challenges.

Decentralization was a key feature of the Judiciary Transformation, where work processes were deliberately decentralised, allowing for a more consultative workplace. The Human Resources department solicits opinions broadly from court stations country-wide on a range of pertinent issues. Leadership Management Teams (LMT’s) are instrumental in this process but unfortunately appear to have more of an effect in smaller stations as opposed to larger ones. LMTs also lead on accommodating mothers with small children.

“Suddenly now other offices are asked to give opinions on the HR Manual etc. – it is an issue of inclusivity. Issues of gender such as annual leave approvals and offs for nursing mothers, started to be addressed more instead. We started using off forms based on an agreed amount of time off allowed without leave for nursing mothers. We started being more sensitive to the composition of committees in terms of gender in leadership and membership and even for sub-committees.”

- Judiciary employee



Sexual relationships between employees are discouraged, not pursuant to any formal policy, but rather as a matter of practicality because these relationships can easily affect the work productivity of both staff. Sexual relationships between persons in a supervisor-subordinate work relationship are especially discouraged due to the possible legal repercussions. Supervisors are required to conduct themselves with professionalism around their subordinates. Administrative reallocation of persons in a sexual relationship is used to keep the workplace professional and avoid the relationship affecting work. Some employees feel that the Judiciary is very attentive to potential breaches in appropriate conduct that could have negative gender under-tones and propagate demeaning stereotypes. The use of vulgar language is outlawed and workplace flirtation is scorned as unprofessional.



Some stations have a gender imbalance that heavily favours women especially at the level of magistrate. There appears to be great concern where women outnumber men and elevated concern if the number of men is less than half or one third, which does not correspond to the reaction when women are in a similar minority. This staffing disparity is a concern for affected Heads of Station, including female Heads of Station. Multiple employees perceive men to carry less attitude baggage to the workplace than their female counterparts. They feel men are more likely to have a positive attitude when they are assigned extra duties; and this affect amplifies the more women there are in the unit. There is the perception that some women overplay the female angle to gain sympathy and manipulate things. Multiple Judiciary employees also see females as more concerned with insignificant issues such as how people dress or how a colleagues’ comportment interferes with their ability to work together.



There are multiple complaints that too many women together inevitably leads to unprofessional tension and backbiting in the workplace. Employees feel that male staff readily accept female colleagues and do not refuse to work with them. In general, there are few generalizations made about men.

Inevitably, male and female Judiciary employees mention African culture as a reason to justify non-equitable behaviour such as different expectations of men and women or the preference for women to do the cooking, cleaning and making tea. Multiple female judicial officers and judges noted that they had been asked to arrange food or tea for meetings. Even if they did not like it, they often complied for a variety of reasons. Managers move staff around to acquiesce to requests to have their work align with traditional gender roles.

“The culture in the Judiciary is more male oriented – whenever they take pictures, there are more men. We may have the DCJ and the CRJ but these are the only women to be seen; this says a lot. They have reached, no one else should make any noise because we have these two.”

- Judiciary employee



“Women have been a little bit shy including myself. We tend to underestimate ourselves and we chicken out and think men will do better. It is related to how we are cultured. There has been some improvement in the Judiciary but it is not good enough. We could have more women coming out strongly. Exposure is very important; information can empower.”

- Judiciary employee



International Association of Women Judges-Kenya Chapter

The IAWJ KC includes magistrates but no kadhis are members. This may be why the consultants did not hear of any IAWJ KC initiatives involving the kadhi courts. There are two male judges that are members and other members describe them as ‘like us’ and very committed to working on women’s issues. These men benefit from the training sessions that IAWJ KC offers its members. IAWJ KC has collaborated with other organizations such as UNIFEM to organize the ‘Jurisprudence of Equality’ program which ran in the early 2000’s. Multiple employees who attended it feel it changed the way they look at things. Even male judges cite it as very useful. Judiciary employees also point out that the IAWJ KC’s advocacy led to the recruitment of a significant number of female judges and magistrates. Multiple male judicial officers also spoke positively of IAWJ KC and the work it has done on behalf of women.

“They have also asserted themselves through IAWJ KC and been a force in driving the agenda of women judges, in terms of advancing their cause and sensitization to the role of women in society. There is a liberation mood because they are coming out and they stand for elections. They are not intimidated by men. The elected president of the Kenya Magistrates and Judges Association (KMJA) is a lady. The Vice President is also a lady. They stood for elections. There is a sense of asserting themselves because of IAWJ KC.”

- Judiciary employee





It is also important to note that Tribunal Members, who are not strictly speaking magistrates or judges, but who do the same type of work, are not eligible to be members of the IAWJ KC. Now that many Tribunals are formally moving into the Judiciary, this may be something to consider.

“IAWJ KC – Tribunals are not included – they should be because they are doing the same job and they look at the challenges that women get. So I think the Tribunal judicial officers and even those who are not magistrates (some are employed as magistrates under the Judiciary), because it is the same job, would want that outlet. You should consider letting them join now that the Tribunals are coming on board; they should have a slot for Tribunals. As for KJMA, Tribunals have no association.”

- Judiciary employee



Judiciary Employee Initiatives

While multiple Judiciary employees, male and female, feel that the gender problem has been solved and that everything is equal, many others feel there is still more work to be done even if things have improved since the Judiciary Transformation. Multiple Judiciary employees describe their own initiatives to address gender equality in the workplace such as managers getting to know their employees as individuals and being proactive in creating a positive and non-discriminatory work environment. A very large proportion of interviewees acknowledge the importance of the Judiciary Gender Audit. Multiple Judiciary employees also have suggestions on what could be done to further enhance the Judiciary’s commitment to gender equality. Some want to use strategies they feel were successful such as the Judiciary Transformation workshops or JTI programs, but like it was seen with the SAQ, others were committed to trying something new. In essence, IAWJ KC initiatives, such as this Judiciary Gender Audit, are also employee led initiatives.

“First thing – you can never go wrong with ‘training training training’. Second – work with PMD to encourage a recognition system. When a court performs well on gender parameters, recognize them. When a judge writes a landmark decision, the Law Society must recognize him or her. This year it was the second annual Judiciary Awards. It has an effect; if we cannot achieve culture change by just training, achieve it by carrot.”

- Judiciary employee



“When given an opportunity and proper encouragement, staff do their best. This applies to both genders. We need to nurture the talent which everyone has; it is important for managers to identify the talent and nurture it, thinking of each individual at that level, personalizing it. It does benefit women. When they think that the responsibility is there, they want to show that it was not a favour.”

- Judiciary employee





Hierarchy

Organizations are often categorized as hierarchal or flat. The question of whether an organization is hierarchical is not categorical but a matter of degree. Multiple Judiciary employees think that because they went through the Judiciary Transformation and reformed what was an extreme example of a hierarchical organization that the current Judiciary is no longer hierarchical. Those who have had exposure to flatter organizational structures and more inclusive and democratic management styles, however, recognize that hierarchy still persists. One example of the pervasive hierarchy is the blanket ban on an employee not being able to question a judge, even on substantial accusations of corruption or sexual harassment. Judiciary employees at all levels accept this rule as a given and refuse to consider why this is the case and whether such an approach has a positive effect on behaviour. In other countries, political leaders and heads of government have been charged criminally yet no one in the Judiciary can accept that a magistrate, who may have additional qualifications for investigating senior officers, can investigate or even ask questions of a judge.

Another example is the insistence on promoting on the basis of seniority alone. By using seniority as the measure to award leadership positions, the Judiciary emphasizes that length of service is more important than merit, equity or inclusiveness. This practice hurts women as many of them joined later when recruiting practices were made more competitive and fair and consequently there are especially fewer women in the higher cadres. It also hurts capable and outstanding judges who are younger or joined the Judiciary later in their careers. In addition, by mostly promoting system people, the Judiciary reaffirms the status quo and discourages new outlooks on management.

Hierarchical organizations usually have a top down management style that makes them very resistant to change because senior employees do not want to relinquish control and junior employees become used to blindly following rules. Such organizations are rarely innovative which is why so many technology companies, who must be constantly innovating in order to survive, embrace flat, organic, inclusive and democratic organizational structures. A more innovative organization could better respond to gender related workplace and access to justice issues alike. An organizational culture that supports innovation, discourages groupthink and empowers employees makes for a more flexible and inclusive work environment.

“Magistrates are introverted. – people tend to carry themselves with aura of a superior person, superior to other professions. So there is not so much interaction even amongst ourselves. People of the same age group tend to be closer – there are groupings within that organisational structure because most juniors are fearing the seniors. Most people talk to those above with a lot of respect; they greet them and move aside. I would think that females who are lower may feel a bit inferior, a little timidity, not just myself but I have seen others like that. There is no free interaction; it would be good if we were more free with our colleagues of both genders.”

- Judiciary employee



Court User Committees (CUCs)

CUCs are a Judiciary initiative introduced during the Judiciary Transformation in order to encourage the courts to become more customer service oriented and focus on the end user.⁷⁶ In a short time, they have become a strong part of the Judiciary’s culture as they came up in the consultants’ in-depth interviews repeatedly. There appears to be a lot of respect for the CUC recommendations and initiatives. Unlike the rest of the Judiciary, the CUCs are extremely organic, even spontaneous and react quickly, sometimes even proactively, to solve problems. Not surprisingly, the NCAJ’s CUC Guidelines⁷⁷ are not strictly adhered to though CUCs still manage to make useful contributions to the courts they are attached to, on issues that are locally relevant. Some members feel that the CUC policy and having to report to the NCAJ are not

⁷⁶ See CUC Guidelines, *supra*, note 64 at p. 41.
⁷⁷ *Ibid.*



necessary. Multiple interviewees in the Judiciary describe the CUCs as vital offshoots of the courts to which they are attached.

While Bar-bench committees, which play the same role, were in place prior to the introduction of CUCs, the Judiciary has attempted to operate a CUC in every court. Membership varies widely, often including advocates, NGO’s, government agencies, Chiefs, religious leaders and elders in addition to Judiciary employees. Membership is also very open as the nature of the court and the membership of the NCAJ help inform the composition of the CUC.⁷⁸ Therefore, it appears anyone who is interested and has relevant information may join. Members change often, as employees within organizations change and new organizations become involved, however, the turnover in members does not appear to hurt the ability of the CUC to provide valuable input. The NCAJ’s Guidelines note that:

CUCs provide the Judiciary with an opportunity to make the justice system more participatory and inclusive since the public is represented by all arms of government, civil society organizations opinion leaders, representatives of women and youth, the clergy, and faith-based groups and the private sector.⁷⁹

Indeed CUC members include representatives of groups that work on women’s issues. Multiple members cite the CUCs as a great source of information for them and their organizations, fostering a mutually beneficial relationship with the Judiciary. CUCs also ensure that different actors play their role in enabling the Judiciary to fulfil its mandate and discussions go beyond court practice. The quorum of the day is flexible, changing from time to time. Usually CUCs meet quarterly as per the Guidelines, but sometimes they don’t meet because of budgetary constraints, issues with the court calendar or a lack of strong leadership, which is centred in a chair.⁸⁰ Transport money is often requested for members as authorized in the NCAJ’s CUC Guidelines,⁸¹ especially in rural areas. This ensures greater inclusivity and the participation of some members who may not be able to otherwise.

Everyone is allowed to speak, share their views or put an item on the agenda, making CUCs more democratic than hierarchical. The CUC also advises or makes recommendations on the practicability of Judiciary policies. The NCAJ’s CUC Guidelines state that “[a]ll CUCs must promote gender equality by ensuring that not more than two-thirds of its members shall be of one gender”⁸², though most CUC members are not aware of this strict requirement. Even where women are outnumbered or spoken over, perhaps because of the democratic style in which meetings are conducted, many strong voices for women are present. There is concern that the two thirds gender rule is not always able to be observed, especially in hardship areas where government agencies and other organizations are less likely to post women. Nevertheless, while establishing separate holding cells for women and children is the only gender issue outlined in the NCAJ’s CUC Guidelines,⁸³ most CUCs that participated in a FGD report having worked on gender related issues. Overall, CUCs are a bright light in innovation, cooperation, synergy and potential to further tackle gender issues.

Tribunals

The consultants only visited one Tribunal, the Rent Restriction Tribunal. Tribunal employees are paid less than their Judiciary counterparts and are currently paid by the relevant ministry. This difference has been noted to affect the morale of tribunal employees and appears to have eclipsed any concerns over gender equality, which seem less prominent. It was noted, however, that under the Kibaki government, significant efforts were put into mainstreaming gender in ministries which trickled down to tribunals. Tribunal employees feel that the Judiciary are more courteous to their own staff than to the public while the reverse is true at the Rent Restriction Tribunal.

78 *Ibid* at p. 43.

79 *Ibid* at p. 41.

80 See CUC Guidelines, *supra*, note 64 at pp. 44-45.

81 See *ibid* at p. 48.

82 *Ibid* at p. 45.

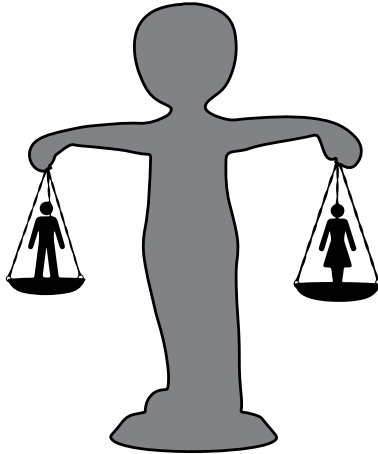
83 *Ibid* at p. 48.



This may be because some tribunals such as the Rent Restriction Tribunal are key players in affording ordinary Kenyans, and particularly women, access to justice and may have switched much earlier to a service oriented approach to help the public navigate the legal system. Tribunal employees are aware of the types of clients they serve and willing to adapt to their needs.

Kadhi Courts

The kadhi courts operate entirely separately from the other courts and departments within the Judiciary. Multiple kadhis feel like the rest of the Judiciary does not understand what they do or how they decide cases.



In fact, Judiciary employees who work outside the kadhi courts also expressed this view, most often stating that they do not know what happens in the kadhi courts, legally or administratively. It is noteworthy that no kadhi has ever been appointed a judge. Therefore, appeals are heard by judges who do not understand sharia law but who can appoint a kadhi as an assessor to explain points of law to the court. Kadhis usually attend the same training sessions as other magistrates but also have their own annual kadhi retreat once per year. More recently, kadhis were not included in all the magistrate training which they found helpful. They use informal methods of communication such as WhatsApp groups in order to mentor younger kadhis as there is no practical training that they undergo before being hired by the Judiciary because without a Bachelor of Laws, they do not qualify to go to the Kenya School of Law. Very few kadhis have degrees in both sharia law and common law.

All kadhis in the Judiciary are male. Some kadhis express a preference for male employees but others do not mind and see the value of having female employees in the Registry to serve female clients. Multiple, but not all, kadhis can see the value in having female kadhis. All kadhis that the consultants spoke with were aware of the rights and freedoms enumerated under the Constitution and often felt that because fairness is their guiding concept in sharia law, a lot of what they do is compliant with the Constitution.

Conclusion

The Judiciary has made great strides in introducing gender equality and equity into its organizational culture, however, there are still many improvements that can be made. Banishing blatant direct discrimination of women is only the first step and it is telling that none of the Judiciary's strategic documents mentions gender.⁸⁴ The problem with it being so bad for women in the Judiciary prior to the transformation is that improvement over very hostile working conditions is considered a big step forward when with few exceptions, the Judiciary has concentrated on introducing formal equality, rather than substantive equality for men and women so that a true level playing field does not yet exist. The Judiciary cannot become complacent and needs to instill a culture of gender equality by articulating its commitment to the cause and executing constant evaluation on its performance on its constitutional obligations for both genders. This evaluation must include an examination of strategic plans and the individual actions of Judiciary's employees themselves. Employees must also be encouraged to develop solutions and empowered to implement them.

There are many generalizations that are made about women working in the Judiciary but no obvious ones about men. The majority of these generalizations are negative yet there seems to be very little inquiry into the reasons behind these generalizations. In addition, African culture is often cited to explain the tendency for people to want to conform to traditional gender roles and have differing expectations of men and women. Patriarchy, however, has been a struggle for women throughout the world and the influence of traditional gender roles is present in many places outside Africa. To accept that patriarchy is uniquely inherent in African culture is a self-fulfilling prophesy that suggests that nothing can be done to promote gender equality.

84 See Judiciary, *Corporate Strategic Plan 2014 to 2018* (Nairobi, 2014); Judiciary, *Judiciary Transformation Framework 2012 to 2016* (Nairobi, 2012); and Judiciary, *Strategic Blueprint: Sustaining Judiciary Transformation 2017 to 2021* (Nairobi 2017).



A hierarchical organizational culture puts seniority and rank above merit and inclusivity. It also encourages impunity in the top cadres because employees of a lower rank will find it hard to report their bad behaviour. This is also true for behaviour involving gender discrimination or sexual harassment. Hierarchical organizations also discourage divergent views, reaffirming the status quo and suppressing innovation. In an organization where women were historically discriminated against, it also introduces another barrier to the advancement of women into leadership roles and other spheres of influence. With an inclusive workforce that feels free and empowered to discuss gender issues and innovate solutions, challenges faced by vulnerable people have a better chance of being addressed.

Once the Judiciary makes a clear commitment to working on gender issues, it must also ensure this priority is extended to the kadhis courts and tribunals. Judiciary employees must all feel like they belong within the Judiciary to ensure that all actors within the Judiciary's formal justice sector can create synergies and efficiencies in learning how best to promote gender equality. Judiciary employees can learn from the experience of the kadhi courts and tribunals and vice versa. In order to truly bring gender equity, equality and inclusiveness to all outlets of the Judiciary, everyone must forge ahead together.

4.2 EQUAL OPPORTUNITY

Kenya's 2010 Constitution and much of its subordinate legislation outlaws unfair discrimination and requires that both genders are provided with equal opportunities at work. Furthermore, Kenya's international obligations also include specific commitments to ensuring gender equality in the workplace including equal work for equal pay. But the gender pay gap, evident in countries the world over, is more complicated than just assessing whether male and female employees of the same rank are paid and promoted at the same level. Equal opportunity also demands that individual occupations do not become gendered. In addition, traditional gender roles usually associated with each gender should not affect work opportunities, including access to training or prospects for career advancement.

Data

73.6% of Judiciary employees responding to the SAQ feel that based on their experience, the Judiciary treats men and women equally when hiring new employees. 12.6% (2.5% men; 10.1% women) of employees feel that men are favoured more often while 13.5% (8.9% men; 4.6% women) feel that women are favoured more often. Aside from nearly three quarters of Judiciary employees feeling that hiring new recruits is done fairly, those who think there is some discrimination against one gender are roughly split in half with both men and women thinking that each gender is more likely to be chosen. This shows there may not be any favouritism but perhaps just an issue where employees do not understand the reasons for hiring decisions. Education about this issue and a more transparent process may help cool any resentment between the genders.

93.5% of the Judiciary's employees think that based on their own experiences men and women are paid equally. For added certainty, the question was phrased as follows; "Based on your experience, how would you describe the Judiciary's pay for men and women who are doing similar work? A person's pay includes salary, allowances and benefits."⁸⁵ Only 4.2% believe that men are paid better and 1.3% feel that women are paid better. These are impressive results and shows that the pay structure is largely equal and transparent.

75.4% (37.1% men; 38.3% women) of Judiciary employees believe that their gender has not affected their working life. It is noteworthy how evenly this belief is ascribed to by both men and women. 17.8% (8.3% men; 9.2% women; 0.3% other) of employees believe that their gender has affected their working life positively while only 6.8% (2.5% men; 4.0% women; 0.3% other) of employees believe that their gender has affected their working life negatively. Most reasoning behind these answers cited issues that were also identified as problematic in the IDIs such as transfers, hardship areas, gender roles including maternity and breastfeeding.



4.6% (3.4% men; 0.9% women; 0.3% other) of Judiciary employees think that “the Judiciary should ensure gender equality (both genders are represented)”⁸⁶ by having “[a]t least one man or at least one woman”⁸⁷ in each job category. 32.3% (split almost exactly evenly between men and women) of employees think that the Judiciary should ensure gender equality in each job category by having at least one third men or at least one third women. 63.2% (27.0% men; 35.9% women; 0.3% other) of employees think that the Judiciary should ensure gender equality by striving for a 50/50 balance in each job category.

78.7% of Judiciary employees do not think that there are “jobs that should only be done by men or by women”⁸⁸. 12.5% of employees think that sometimes there are jobs that should be only performed by one gender and 8.8% think that there are jobs that should only be performed by one gender. When asking which jobs should be gendered, common answers included jobs involving heavy lifting or labour, drivers and security officers for men and secretaries, customer service personnel and food preparation and service for women.

JUDICIARY EMPLOYEES BY CADRE AS OF 2018

-Drawn from data from the Human Resources department

Job Category	Female	Male	Total	Female %	Male %
Judges	63	97	160	39.3	60.6
Magistrates	242	230	472	51.2	48.7
Kadhi		54	54		100
Registrar	3	3	6	50	50
Registrar – Deputy	1	1	2	50	50
Registrar – Assistant	1	1	2	50	50
Legal Officer	2	3	5	40	60
Law Clerk	18	9	27	66.7	33.3
Legal Researcher	46	4	50	92	8
Tribunal CEO		1	1		100
Chief of Staff		1	1		100
Executive Officer	5	12	17	29.4	70.6
Executive Assistant	120	206	326	36.8	63.2
Archivist	16	14	30	53.3	46.7
Archives Assistant	38	40	78	48.7	51.3
Court Bailiff	30	24	54	55.6	44.4
Process Server	40	38	78	51.2	48.7
Architect		3	3		100
Superintendent of Works		3	3		100
Quantity Surveyor		1	1		100
Building Technician		3	3		100
Artisan		3	3		100
Supplies Chain Management Officer	14	26	40	35	65
Supplies Chain Management Assistant	1	1	2	50	50
Store Keeper	22	37	59	37.2	62.7

86 See Question B17 of the Judiciary Gender Audit SAQ.

87 *Ibid.*

88 See Question B18 of the Judiciary Gender Audit SAQ.

Finance Officer	4	12	16	25	75
Economist	2	1	3	66.6	33.3
Accountant	40	79	119	33.6	66.4
Accounts Assistant	28	54	82	34.1	65.8
Human Resource & Administration Officer	23	25	48	47.9	52.1
Human Resource Assistant	26	11	37	70.3	29.7
ICT Officer	20	59	79	25.3	74.7
Librarian	14	8	22	63.6	36.4
Library Assistant	7	10	17	41.2	58.8
Public Affairs & Communication Officer	4	3	7	57.1	42.8
Photojournalist		1	1		100
Risk & Internal Systems Auditor	6	9	15	40	60
Efficiency Monitoring Officer		1	1		100
Performance Management Officer		9	9		100
Monitoring & Evaluation Officer		1	1		100
Programme Officer	1	3	4	25	75
Clerical Officer	1065	1265	2330	45.7	54.3
Secretary	245	7	252	97.2	2.7
Secretarial Assistant	247	1	248	99.6	0.4
Telephone Operator	25	8	33	75.8	24.2
Driver	11	149	160	6.8	93.1
Computer Operations Assistant	1	1	2	50	50
Support Staff/Messenger Staff	332	297	629	52.8	47.2
Security Officer	1	13	14	7.1	92.9
Security Warden		1	1		100
Security Guard	11	117	128	8.5	91.4
Total	2776	2959	5735	48.4	51.6

Recruitment and Promotions and the Two Thirds Gender Rule

Most Judiciary employees spoke favourably about how recruitment and promotions are conducted within the Judiciary. It is felt that the Judiciary endeavors to bring in gender balance and not over recruit one gender. These sentiments are echoed in the SAQ results above where nearly three quarters of respondents thought both genders were treated equally. A minority think that men or women are favoured more, which suggests that the respondents' views result from individual experiences rather than systemic discrimination. The prevalence of perceived equality in recruitment may be due to the Judiciary's efforts since the transformation to link recruitment to merit rather than other irrelevant considerations. Women, alongside men, are found to score highly on both competence and qualifications required to do the job. IDI participants see gender as an incidental factor influencing the Judiciary's recruitment process in that the current gender balance of a particular position is only considered after candidates are shortlisted on merit.

Gender also comes up when dealing with maternity and paternity leaves. Where a woman has to take maternity leave, Judiciary employees prefer to deputise that person with a male. To date, however, there are no instances where they had considered paternity leave in this manner though.



“I have heard male Heads of Stations say that they don’t want too many females in their stations. They are canvassing with HR at headquarters to have females removed (won’t say why), to reduce the numbers of females as they are ever taking maternity leave and taking children to hospital or older women are going through menopause so they are moody. I have heard this from Heads of Stations outside Nairobi as well.”

- Judiciary employee



“We also consider women at reproductive age as maternity leave etc. is hard on a workplace. In one court, we have 3 who are on maternity leave and 2 are expectant so the work suffers; the others have a lot of work. The only thing that affects opportunities is that women take care of kids – they ask for permission to get time off for sick kids and to take them to school. At the reproductive age, there is a lot for women to do and try to balance with the family so we can’t have too many women of child bearing age in one place.”

- Judiciary employee

The consultants also heard that too many women working together can cause personality problems as infighting occurs. This is the perception of multiple Judiciary employees, both male and female, in various cadres and is indicative of the generalizations about gender that are frequently made within the Judiciary. It is hard to substantiate these claims but bias training may help managers ensure stereotypes do not affect their decision-making. No interviewee was aware of a gender discrimination complaint being made regarding a recruitment or promotion decision other than the rare instance involving a traditionally gendered job such as tea making (which is discussed below). Nonetheless, there is a complaint procedure to be followed through Human Resources where complaints are escalated if not resolved, however, IDI participants are not aware of any formal gender discrimination complaints. This is noteworthy because more than a quarter of employees feel that there is gender discrimination, either in favour of men or women. Secretaries, which is a gendered job within the Judiciary (with only 1.6% being male) complain about being kept late yet because the understanding of discrimination in the Judiciary appears limited to direct discrimination, no further inquiry has been made into whether this amounts to indirect gender discrimination.

Amongst Judiciary employees, promotions are also thought to be influenced more by the candidates’ competence and qualifications than gender. There was some concern expressed, however, that promotion into the higher ranks of the Judiciary has been heavily skewed in favour of men. This view is further explored in the section on Gender Representation on Leadership (see Thematic Area 3 below).

Interviewee observed that a recent clerical cadre recruitment resulted in nearly all new recruits being female. This was cited as an example of females being overemployed perhaps due to unclear hiring criteria. There is a common misconception that there only needs to be one third women in each subset of employees; where there are more women than men, it is often considered a problem, not only for the reasons cited above including possible maternity leaves and problematic behaviour, but also because it is seen as disrupting gender parity where female employees number more than 50%. When there are more men than women, however, most Judiciary employees are not bothered as long as there are at least one third female employees. This view is supported by the nearly one third of Judiciary employees (both male and female) in the SAQ results who believe gender parity requires striving for no more than one third of either gender as opposed to a 50/50 gender balance. It is interesting that the one third requirement is always applied to women but rarely to men. This trend may be indicative of the Judiciary’s historical experience where men dominated, therefore one third is considered such an improvement that it is good enough. Yet, it reveals a shallow understanding of the Constitution’s two thirds gender rule, which is merely a mechanism to achieve true gender balance.



This common misunderstanding of the two-thirds gender rule may also be the reason why there is a pervasive perception of both male and female Judiciary employees that it is problematic that there are more female than male magistrates. According to the Judiciary’s management at the time the consultants were collecting data, there are 230 male magistrates and 242 female magistrates for a total of 472. Consequently, 48.7% of magistrates are male and 51.3% are female. This is a remarkable example of gender parity especially considering how few female judicial officers there were in the Judiciary’s not too distant past. But 100% of kadhis, who are technically the same rank as a magistrate, are male, which virtually no one mentions as a gender concern. The kadhi courts are discussed in more detail below. When the Judiciary’s 54 kadhis are included in the total magistrates, there are 46.0% females at the magistrate level and 54.0% males. Yet, the perception that there are too many females at the magistrate level is ubiquitous among judicial officers and management personnel.

Many departments in the Judiciary describe policies that are still a work in progress as much of the way things were done in the past was not systematic. Therefore, most departments have not articulated how to comply with the constitutional two thirds gender rule.

“Most things in Judiciary are in flux. There are issues described in policies but we don’t have them in law. They are policy formulations such as the recruitment of staff – there should be some form of gender parity but no Act directs the Judiciary to do this; it is only policy (and in the Constitution). So it depends on the goodwill of the Judiciary. If there is no goodwill, they can do what they want. But so far, gender parity has been pursued aggressively.”

- Judiciary employee



It is also interesting to note that concern over ethnic diversity came up multiple times in the IDIs and amongst employees who completed SAQs. Multiple employees expressed the view that a lack of ethnic diversity was more of a problem than gender inclusivity in the Judiciary.

Terms, Benefits and Employee Development

Just as the SAQ shows over 93% of Judiciary employees feel that the Judiciary pays men and women equally when considering salaries, allowances and benefits, the consultants’ qualitative data also supports a commonplace view that there is equal pay for equal work even across job categories. Multiple employees stressed that gender does not affect pay in the Judiciary because the pay structure is gender-blind and therefore employees are treated equally. The consultants also inquired about redundancy practices but were consistently told that because the Judiciary had never implemented a redundancy program, the influence of gender in the making of redundancy decisions cannot be determined.

Some Judiciary employees think that gender may affect the deployment of staff where management takes an employee’s family situation into account and attempts to avoid disturbing the family when making deployment decisions. This appears to be a managerial practice and is not consistently practiced as multiple complaints around deployment and family issues are still reported. Females benefit from this practice because they often move with their children or are responsible for their care. Yet, most Judiciary employees, both male and female, still cite this as a challenge in the Judiciary when parents of young children and especially mothers, are transferred over great distances, affecting their ability to ensure good care and schools for their children.

Some Judiciary employees, mostly male, feel that men should have additional paternity leave because women get three months for maternity leave while men only get two weeks for paternity leave, however, specific reasons for this need are rarely provided. This minority view appears to reflect an understanding that discrimination can only be analysed in terms of formal equality where everyone should be treated the same and not substantive equality which would require looking at how rules and actions affect different groups of people differently. Because maternity leave in Kenya is only three months, it is realistically only



intended to enable a woman to recover from childbirth and breastfeed her baby in the first few months when breastfeeding is required at frequent intervals as opposed to parental leave. Parental leave is usually open to both genders and is usually much longer in order to allow for one parent to care for the infant.⁸⁹

The fact that Judiciary employees need support was also highlighted in the IDIs. The possibility that counselling be provided or covered under the medical cover was brought up in relation to stress. Specifically, young mothers face stress in trying to balance the needs of their children with a demanding job, newly married couples' marriages suffer because of the pressure of the job and having to be far away from their families and employees are affected by alcoholism in epidemic proportions due to stress. Alcoholism was cited as a male problem but it affects employees of both genders whose marriages break down for reasons that may be ultimately related to their work.

“It is really an unspoken issue – as a Judiciary, we are not supporting our employees. There was a new trend in our station where three ladies here recently lost pregnancies. I think it was because of stress.”

- Judiciary employee



Gendered Jobs

While according to the data provided by the SAQ, just over three quarters of Judiciary employees do not think that there are jobs only one gender should do, many still view some work as more suitable to one gender over the other. Where some Judiciary employees believe that anyone can do jobs that does not involve manual labour, others believe that traditional gender roles are relevant in determining which jobs men and women should do.

“The work is not manual so gender does not matter as there’s little that involves a lot of physical work. Anyone can carry files around.”

- Judiciary employee



“There has been respect between both genders. The only place where there is a shift is where there are some issues with cooking tea. Women are given that role. Ordinarily they are ladies because male support staff are willing to do cleaning and the women will make the tea. It is informed by Kenyan culture generally; in most cultures in Kenya, a women’s place is in the kitchen. Other than that, gender does not affect the assignment of work.”

- Judiciary employee



The consultants heard from multiple Judiciary employees about cooking, making tea, cleaning and other duties that are associated with traditional gender roles. Prior to the Judiciary Transformation, there were cleaner jobs, cooking and tea making jobs and some askari or security guard jobs, many of which have since been outsourced to private companies. Currently, there job category of support staff handles all of this work. Therefore, a male support staffer may be asked to make tea, whereas this never happened before. Some employees have refused to do work assigned to them because of traditional gender roles and some have refused to do work associated with the other gender. Different support staff managers handle these

89

See ECtHR, *Konstantin Markin v. Russia (Grand Chamber)*, Application no. 30078/06, judgement of 22 March 2012, at para. 131.



refusals in different ways. Some have moved personnel around while others have tried to be more proactive and explain that everyone is equal and has to share equally in the work to be done. Assigning work in accordance with traditional gender roles appears to be more common, however, the second approach is more consistent with the transformation of the Judiciary and living up to its obligations to promote the constitutional principles including gender equality. It is also important to note that these are the same attitudes that prompt male Judiciary employees to request exclusively female magistrates, management personnel or judges to perform tasks such as note-taking or arranging food and drinks for meetings. Senior female Judiciary employees recounted frequent and recent occurrences of this behaviour.

Secretaries, drivers and kadhis have also been cited an examples of gendered work. Often, by virtue of the numbers of employees who perform this work, multiple Judiciary employees do not see it as problematic to have almost exclusively female secretaries or typists or almost entirely male drivers.

“When there are both genders in a position, they are assigned equally. But for other categories such as typing/secretarial, it is over 90% women. This is the inclination; for a very long time, it has been a lady’s job – very few men apply. In the whole of this county, there is no man secretary. Drivers are generally men.”

- Judiciary employee



Kadhi Courts

As aforementioned in the Organizational Culture section, the kadhi courts operate entirely separately from the rest of the Judiciary and there is little understanding of how they operate in virtually all other parts of the organization. Most Judiciary employees, including some kadhis, believe that kadhis must be men as per the dictates of Islam. There are, however, many female employees who work within the kadhi courts. Sometimes a preference for male staff in the kadhi courts has been expressed by senior employees but this appears to be the exception. The more common preference is for Muslim employees, yet some non-Muslim employees also work in the kadhi courts.

“A female clerical officer was assigned to the kadhi court and an employee complained. I asked ‘why are you complaining?’. The employee said that on Fridays, men can’t greet ladies on Friday because they are going to mosque. I explained that it is OK, we don’t expect you to greet her on Friday and I explained to her, she won’t get a greeting on Fridays. There are no issues now. He may be aggrieved but he hasn’t come back to me and this was some time ago. When I got a male clerical officer, that’s when he said he wanted a male. He was Christian, but for him, it was strictly about gender.”

- Judiciary employee



This appears to be a minority view because many females do work in the kadhi courts located throughout the country. In fact, many Judiciary employees (and stakeholders) cite this positively because most litigants who initiate cases in the kadhi courts are women and as Muslims, they often prefer dealing with women.

Although some Judiciary employees thought that a female kadhi was unheard of, others had a different view. IDI participants explained that the qualifications for being a kadhi are as follows:

- Must hold an academic degree in Islamic law (sharia law)
- Must be a demonstrably practising Moslem



- Must conform to the requirements of Chapter 6 of the Constitution
- Must be a person of demonstrable good conduct which is deemed in Kenya to describe all holders of a Good Conduct Certificate
- Must be a person who is demonstrably well-versed in English, Kiswahili & Arabic

Some Judiciary employees acknowledge that there are women with these qualifications. It was noted that the former CJ Willy Mutunga attempted to open up the discussion of appointing female kadhis as part of the Judiciary Transformation’s work on gender parity in the Judiciary, but it did not come to fruition. Multiple Judiciary employees feel that the objections to having female kadhis are more a result of the Islamic culture which dictates that the position cannot be occupied by a woman and not Islam itself. But there is an emergent view in Muslim society that women can be kadhis. There is no existing law that prohibits women from presiding over disputes or being appointed kadhis. Certainly, the Constitution does not exclude women and there is no verse in sharia law to that effect either. Some Imams believe women cannot be excluded as jurisdictions such as Nigeria, Egypt and Malaysia have female kadhis.

The kadhi courts are of particular interest in the Judiciary Gender Audit because the kadhi courts primarily serve women. As a family law court, it is usually women who institute actions. In fact, 4% of Kenyans say they turn to the kadhi courts and 8% turn to the courts of law.⁹⁰ This number is striking when you consider that only Muslims can access the kadhi courts and approximately 11% of Kenyans are Muslim⁹¹. Consequently, kadhi courts serve a higher proportion of potential clients the courts of law. Multiple CUC members feel some Muslim women would prefer to deal with female kadhis, especially when pertaining to certain marital issues. Other IDI and FGD participants think Muslim are most opposed to the adoption of female kadhis in Kenya.

Two things are required to employ female kadhis. First, the Judiciary needs to take proactive action as a recruiter which may mean affirmative action. Some Judiciary employees report women have applied to be kadhis but that their applications did not progress for unknown reasons. Second, the Judiciary must conduct outreach and consultation with the Muslim community the kadhi courts serve.

“The Constitution does not ban women to be kadhis – it is comes to the women and litigants themselves – will they go or try or apply?”

- Judiciary employee



While almost all kadhis interviewed (who were based in various parts of the country) were in agreement that it is possible to have female kadhis, there are more mixed opinions in the CUCs. There were also concerns over whether the Muslim community would accept it. Some are dead set against it and feel that the possibility of female kadhis is not an issue that needs attention. Others feel it is against Islam. Still others thought it would improve the approachability of the kadhi courts for some Muslim women just as some prefer female doctors.

“Women in the public won’t feel free to go before a women kadhi to tell her about her issues because of customs. The men are the ones traditionally to hear about these cases. Women don’t want female kadhis – no one will tell you directly – no one will ask the question – but it is something that people know. The court has not done consultation on this question.”

- Judiciary employee



⁹⁰ See *Justice Needs in Kenya 2017, supra*, note 67 at p. 130.

⁹¹ See < <https://www.knbs.or.ke/religious-affiliation/>>, retrieved 20 November 2018.



“Sometime back in kadhi courts, female kadhis were needed because women have personal issues that cannot be discussed openly with men. It was a huge debate. Because of the religious aspects as kadhis do not only listen to cases, they also join hands in marriages and make fasting announcements about when people should fast. Men in the Muslim community did not want it and so were imams . But look at the dispute resolution – look at the types of issues coming before the kadhi – the religion aspect won over.”

- Court User Committee Member



Most of all, the question of female kadhis is about inclusivity for sharia law practitioners and clients. A more inclusive Judiciary can better understand those it serves. Though the issue is a sensitive one, it could have the effect of increasing access to justice and so the matter does deserve more targeted research, including data collection and community outreach. What’s more, there is precedent for female kadhis in other jurisdictions. At some point, a constitutional legal challenge to the composition of the kadhi courts may be launched and the Judiciary will need data to support its position. True inclusion happens when all parties try to understand each other, therefore opening up the discussion could be useful but it is a long term process that must involve mutual education. Gender equality is among the most basic constitutional principles and while the Constitution does not address how to incorporate constitutional values into sharia law, it does invalidate traditional law that violates it.⁹²

Tribunals

At the Rent Restriction Tribunal, the Officer-In-Charge in Garissa is female and two out of the three officers are also female. This is contrary to the fact that employees from other parts of the Judiciary have reported that gender has been an issue where women have found it exceedingly difficult to serve there. In Lamu, all the Tribunal staff are male by design due to the recent terrorist attacks. The Tribunal recognizes that when you post a female, the female moves with the family as opposed to males and therefore they didn’t want to have families posted there given the terror attacks. This recognition of where an employee’s family usually resides bears out from other IDIs. The Rent Restriction Tribunal appears to have already considered families in its posting practice but it should also be noted that station transfers are done at the Ministry and not by the Tribunal itself.

Conclusion

“The Judiciary is one of the most progressive institutions in terms of gender. It is the only government agency where we have achieved at least one third in virtually all sectors. In fact, magistrates are more than 50%, very positive and not as bad as Parliament or the Executive. The policies – we have gender parity – is not to meet the minimum threshold. That is just a guide – we should be more progressive to go beyond that. 50/50 should be the target. All policies are in transition, for instance the HR policy - proposals are floating but the existing policies give an indication of the direction we are going which is to be more gender conscious and representative as an institution.”

- Judiciary employee



The Judiciary has made good efforts to implement the two thirds gender rule and overall most employees do feel that it treats all employees fairly and equally. It has achieved gender balance in the most populous aspects of its operations. Yet as an institution charged with promoting and upholding the Constitution, the Judiciary should make efforts to reduce the genderization of the work its employees perform. Employee education has been shown to work and further attempts at this should be made. Further education around the two thirds gender rule and more guidance to managers on how to implement it would also be useful.

92 See Subarticle 159(3) of the Constitution.



While pay is considered equal, the Judiciary should ensure that it is supporting its employees in their work and meeting the needs that arise. By constantly monitoring and evaluating its own performance in relation to gender equality, equity and inclusiveness, continuous improvement is possible to ensure that all Judiciary employees can enjoy equality of opportunity. This will not only require continuous dialogue with its employees but also court users as it strives to ensure that aspects of its operations are constitutionally compliant. The Judiciary must remember that it is charged with promoting constitutional values and therefore it could be held accountable on gender equality parameters therefore, it has a due diligence to at least collect data and make organized outreach efforts to resolve barriers to true equality.

4.3 GENDER REPRESENTATION IN LEADERSHIP

The 2010 Constitution envisions not only both genders being able to participate fully in social, economic and political life but also being able to participate in leadership positions in each of these spheres as



well. Equality is meaningless without equity in leadership. Leadership opportunities allow the people in such positions to not only shape discourse, policy and decisions, but also serve as role models. Inclusive leadership makes a difference just by representing the people it leads, encouraging increased buy-in from members of the organization, inspiring minorities to reach for leadership positions and changing attitudes towards those minorities.⁹³ These positive outcomes are in addition to any substantive changes that inclusive leadership may make in how the organization operates. For these reasons, the consultants felt it was very important to hone in on the Judiciary’s gender representation in leadership positions.

Data

50.0% (25.2% male; 24.5% female; 0.3% other) of Judiciary employees responding to the SAQ think there is “gender equality (both genders represented) in the Judiciary’s senior positions”⁹⁴. 18.1% (8.3% male; 9.8% female) of employees feel there is gender equality in only some positions while 19.6% (7.7% male; 11.6% female; 0.3% other) feel senior positions lack gender equality. 12.3% (6.7% male; 5.5% female) of employees say they do not know. A large variety of leadership cadres were mentioned as needing to work on their gender balance.

93 See generally Ruth Sealy and Val Singh, “The Importance of Role Models in the Development of Leaders’ Professional Identities”, in *Studying Leadership*, Kim James and James Collins, eds. (Palgrave, 2008) at pp. 208-210.

94 See Question B20 of the Judiciary Gender Audit SAQ.

34.3% (19.0% male; 14.7% female; 0.6% other) of Judiciary employees think that “[m]en and women in leadership positions are viewed the same”⁹⁵ while 45.7% (23.3% male; 22.4% female) of employees think that “[t]he respect a leader is given in the Judiciary depends on individual performance and not gender”⁹⁶. 18.7% (4.3% male; 14.4% female) think that men are treated with more respect than women in leadership positions. Conversely, only 1.2% (all male) believe that women are treated with more respect than men in leadership positions.

GENDER REPRESENTATION IN POSITIONS OF LEADERSHIP IN THE JUDICIARY

Position	Males	Percentage	Females	Percentage	Total
Chief Magistrates	27	58.7%	19	41.3%	46
Registrars (incl. Registrar of Tribunals)	3	42.9%	4	57.1%	7
Directors	8	72.7%	3	27.3%	11
Judges (High Court & equivalent)	73	55.7%	58	44.3%	131
Presiding Judges	29	65.9%	15	34.1%	44
Principal Judges (incl. CJ)	3	60.0%	2	40.0%	5
Judges (Court of Appeal)	14	66.7%	7	33.3%	21
Judges (Supreme Court)	5	71.4%	2	28.6%	7
JSC	7	63.6%	4	36.4%	11

Most Judiciary employees note that there are more female magistrates than male magistrates, but this only holds if kadhis (who are all male and do exactly the same job) are not included. A closer look at the number of magistrates at each step of seniority shows how the number of women reduces drastically as one moves up the organizational ladder.

GENDER REPRESENTATION IN THE MAGISTRACY⁹⁷

Position	Males	Percentage	Females	Percentage	Total
Resident Magistrates	47	32.6%	97	67.4%	144
Kadhis	55	100%	0	0%	55
Senior Resident Magistrates	76	50%	76	50%	152
Principal Magistrates	42	66.7%	21	33.3%	63
Senior Principal Magistrates	33	61.1%	21	38.9%	54
Chief Magistrates	27	58.7%	19	41.3%	46
Registrars & Deputy Registrars	4	40%	6	60%	10

95 See Question B22 of the Judiciary Gender Audit SAQ.

96 *Ibid.*

97 These numbers were collected from the Registrar of the Magistrates Court in June 2018 and therefore the total number of magistrates differ from the numbers quoted in the Data subsection above which date from March 2018.



The Importance of Inclusivity in Leadership

The two thirds gender rule encapsulated in Subarticle 27(8) of the Constitution aims to ensure gender equality in leadership because leaders affect most aspects of public life. They shape opinions with their attitudes, language and demeanour let alone their decision making and policy implementation abilities. One example of this effect is how the perspectives of Judiciary employees are affected by a change in the Chief Justice. Elective or appointive bodies provide leadership and this is why they were included in the wording of Subarticle 27(8).

The JSC greatly affects the lives of Judiciary employees and the Judges of the Supreme Court affect the nation’s law and by extension society. When these bodies are diverse, including gender-wise, better decisions are made because more perspectives are considered in the deliberation process.

“It is a fantastic thing. Whenever you sit with women in a meeting, you get a balanced view of the situation rather than when testosterone is flowing. It is because some men make decisions on assumptions and when it comes to practical decision-making, if you don’t have women present, you will have excluded them. Gender diversity makes better decision making and also brings inclusivity to decision making. If there is no inclusion, it will be negative. We thrive as humans in being part of the decision making process.”

- Judiciary employee



“Judicial officers meet about cases and if we are mixed gender-wise, then different issues will come up. Your history, who you work with and diversity of perspective help highlight what, as a man, you may not notice. If we don’t have women at the table, some things will not come to light. Clerical staff may not say or cannot explain properly to the males in leadership. The Judiciary is very hierarchical – until your peer says it and the peer can articulate it, it won’t be considered. By extension, having women in leadership roles is very important.”

- Judiciary employee



Judicial officers make decisions that affect the lives of more people than just those who come before them. Furthermore, administrative leaders in the Judiciary can also affect the lives of court users through their work on court processes, case management, communication strategies, outreach and access to justice. The importance of inclusivity in the Judiciary’s leadership cannot be overstated and is more pronounced with gender inclusivity because of the historical and current lower levels of participation by women in the administration of justice as litigants, practicing advocates and judges. Improving diversity in the Judiciary’s leadership improves the public’s confidence in the administration of justice, introduces diverse viewpoints to decision making and encourages a diverse pool of applicants for the institution.⁹⁸

“For me, gender balancing should not stop before it is 50/50 because we need that feeling of inclusivity. We do not want to feel that we are not getting leadership positions because there is a preference for men or men are threatened. Beyond our assessment within the Judiciary, there is an assessment by members of the public. If we make them feel that there is equality, the image is that justice is actually being done.”

- Judiciary employee



98 See Winifred Kamau, “Women Judges and Magistrates in Kenya: Challenges, Opportunities and Contributions”, eds. Ulrike Shultz and Gisela Shaw, *Gender and Judging*, (London, Oxford Hart Publishers, 2013) at pp. 167-8.



It is evident that there is some awareness in the Judiciary on the importance and benefits of having an inclusive leadership beyond fulfilling the constitutional two thirds gender principle. Practically, inclusivity builds public confidence in the Judiciary and its decisions.

Staff Treatment of Female Leaders

As the SAQ data indicates, there are differing views on how staff treat male and female leaders. The largest segment believe that gender does not play a role in how subordinates treat their boss and the next largest segment think male and female leaders are treated equally. But almost one fifth of Judiciary employees (most of them women) think that male leaders are accorded more respect. The IDIs offer detail about this perspective because when the question is open ended, a larger minority (again mostly women and mostly leaders themselves) agree and have specific examples of behaviour from staff and how it differed when the leader was male versus female. Most describe the resistance they face as innate as opposed to conscious animosity. The treatment from Judiciary staff was particularly singled out although the same problem is associated with how other judicial officers and advocates treat them.

“There are times when I have a feeling – when under a male Head of Station, I have seen the way the staff revere and treat him, so contrary to the way they treat me. It is a feeling with staff specifically. First they hardly question the authority of a man, they obey more and willingly submit unlike when there is a female. It is hard work making people comply with the rules. That has made me be more firm and strict with staff, even with judicial officers.”

- Judiciary employee



“What a man would achieve much more easily, women leaders have to work harder for. You have to be more aggressive in asserting yourself and stamping your authority. Personally, I have had issues when leading men. They will not take instructions from you, will not do a task as fast as you would like and are always testing you. Even women – women don’t give as much respect to women leaders, not as much as to a man. Women will not come when a lady calls a meeting but when a male judge calls a meeting, women come. It is a prejudice that is in the African culture.”

- Judiciary employee



In contrast, those who feel that all leaders are treated equally or according to their individual characteristics, do not offer specific examples. Furthermore, Judiciary management personnel indicate there are more complaints about female leaders than male leaders. Many of these complaints are attributed to the lower respect accorded to female leaders in the Judiciary or the minority view that female leaders exhibit non-constructive behaviour such as favouritism and friction with other female employees. Some female leaders feel that the qualities usually associated with authority are not congruent to what is expected from women.



“The truth is that men bosses are more respected than women bosses. When a lady is firm, they say she is bitchy or moody or on her period. Most people, including women themselves, expect females to be a doormat, especially the males. It is a culture. Personally, I am very tough and on top of things. I always believe as long I am doing the right thing, I do not have to be liked by everyone. It is very helpful to get support from other women, especially because some men think that you are inferior. As a women leader, it is difficult to reprimand males. They can be rude or hot tempered. Many ladies including myself have been disrespected by juniors, even by prosecutors appearing before me, not by all of them but by the majority of them.”

- Judiciary employee



“From the little experience I have at this station, being a female judicial officer, they do not expect you to display certain qualities. When you are strict and firm, they say ‘but she is a woman’ and ‘why is she doing that?’. I find female judicial officers are not given the same playing field when it comes to working. People (staff, police, advocates etc.) lower their expectations and there is a general assumption that as a female judicial officer you will not be firm. So if you are a little bit more firm, there is a sense of surprise. But if the same action is taken by a male colleague, it is considered OK. It is about the aggressiveness – they expect us to be a little subdued on authority and decisiveness.”

- Judiciary employee



Younger and more junior female leaders, who may be new to leadership positions, especially notice this trend and how pervasive women leaders being treated with less respect is in the justice sector.

“For us women, you have go an extra mile to prove prove yourself right to both genders, especially to the staff, but also to the litigants. I have had instances where beyond the assessment of being female, there are assessments of my size and age. More than half of the staff are older than me and others are my age. I would not have this problem if I was a man.”

- Judiciary employee



“It has an effect on lower level, younger women – it demotivates them as they come in. It is like a cycle – it snowballs and gets worse as you move up. Some just give up. When they get higher up the ladder, they tend to leave because there is no space to be bold enough. They just leave or just succumb to it and don’t fight anymore.”

- Judiciary employee



Judiciary Employees Views on Gender and Leadership

Many Judiciary employees describe the representation of women in leadership roles as fairly well distributed, however, the further up one goes in rank, the more concern there is. These views are borne out by the numbers. The fact that most Judiciary employees think there is gender equality in leadership may be affected by the standard they use to assess equality. Only 63.2% of Judiciary employees believe that the institution should strive for gender equality by trying to achieve a 50/50 gender balance. Some IDI partic-



ipants refer to the constitutional requirement of at least 30% women, which does not reflect the test set out in Subarticle 27(8), which requires not be more than two thirds, or 66.7%, of one gender. Inversely, each gender must hold no less than 33.3% of the positions at issue.

The fact that the Deputy Chief Justice and the Chief Registrar of the Judiciary are women appears to play a large part in many Judiciary employees’ reasoning that there is gender equality in leadership. These two examples are often quoted as evidence of inclusive leadership, but most interviewees do not mention that there has never been a female Chief Justice. Only one commented that gender equality demands a female Chief Justice in the future. And only a few female interviewees commented on the perceived assumption that the Chief Justice must be male. There is a general belief that the two thirds gender rule should be complied with in all cadres but there is little mention of monitoring processes to make accurate assessments or specific strategies to achieve this goal.

Nevertheless, multiple Judiciary employees note that gender is considered when committees are formed and consequently they enjoy a relatively fair distribution of men and women. Others think appointments ensure that only the minimum constitutional requirement is met. Taskforces and other high profile committees rarely seem to be led by women though some sit as deputy chair. This has been the case despite these positions being appointed, not elected.

“Women are trying; they are aggressive and qualified. Women are always included in task forces - you are nominated – but in lower numbers. It is a question of ‘let’s give them the one third, the minimum, because of the Constitution. Once they achieve the minimum, go to the men.”

- Judiciary employee



Several Judiciary employees feel that women are often too eager to play “second fiddle”. For example, only one woman applied to be Chief Justice when the position became vacant in 2016. Only two applied in 2011 to be the first Chief Justice appointed under the 2010 Constitution. Yet, the majority of candidates for the Deputy Chief Justice in 2011 and 2016 were female as most people expected JSC to appoint a Chief Justice and Deputy Chief Justice of opposite genders. A few Judiciary employees noted in each of these recruitment campaigns, both the CJ and DCJ positions were vacant yet still the popular view appeared to be that a man should occupy the CJ position and a woman should occupy the DCJ position. Multiple employees feel the more power a position entails, the harder it is for a woman to attain, which affects who applies and who is considered appointable or electable.

“There is no difference between men and women trying for leadership positions. Everyone wants to be a leader – apart from CJ.”

- Judiciary employee



“It seems there is a mindset that the CJ has to be a man and so the DCJ is a woman. When I say I will be CJ one day, people say no, DCJ.”

- Judiciary employee





Most Judiciary employees interviewed feel women in the Judiciary are generally ambitious, even aggressive and willing to put themselves out there. They think women are actively applying for formal leadership positions. With staff level positions, women appear more organized in terms of their career paths, taking proactive steps to ensure they have the necessary qualifications ready for when higher positions are posted. Even with mid-level leadership positions, multiple Judiciary employees feel women are more organized with their paperwork and details. It is only at the very senior levels that some employees, notably female, feel that they or their colleagues sometimes hold back perhaps due to a lack of confidence, socialization to not expect to be in very senior positions or fear others do not see them in these positions. Men, however, feel that women are equally vying for all, even senior, leadership positions.



“Women always apply for the second tier position such as the deputy position – it has nothing to do with the Constitution but because of traditional reasons. What women have been raised to believe is that men should be leaders. It is changing but it will take some time. We need to change societal attitudes and not just in the Judiciary.”

- Judiciary employee



“Unless commissions like NGENC come up strongly and tell women that they are qualified – most Directors are still men – if they do go for it – it is Director of HR. The organizational culture is supporting women now, but it is now up to the women to come out strongly when positions arise at the top level. The JSC will interview the candidates who have applied.”

- Judiciary employee



Many female Judiciary employees are disappointed in the behaviour of high level female leaders. Some feel those who succeeded early on had a “queen bee mentality” in that they did not relate to or support women further down in the Judiciary’s hierarchy. Currently, some of the Judiciary’s more recently recruited female leaders still feel there is not as much camaraderie or help from senior women as they would have expected. Some have not been able to find female mentors but have had more success getting advice from male leaders. Study participants note that as women advance in their careers, they become privileged and may lose their connection to the struggles of the common. On the other hand, some senior female leaders feel they do relate more easily to the struggles faced by their juniors and try to escalate these concerns, though usually on an individual basis where their help was sought. These efforts were more often reactive rather than proactive such as mentoring female leaders or pursuing policies to support substantive equality. Moreover, there appears to be a disconnect between the women who are higher on the organisational ladder and those below.

Administrative versus Judicial Leadership

It might be said that women are progressing further in administrative leadership capacities than as judges, the only Judiciary leaders who create law. The new position created under the 2010 Constitution of Chief Registrar has only been held by women and the majority of Deputy Registrars appear to be women. Judiciary employees feel the JSC, another administrative centre of power in the Judiciary, has a good representation of women. It should be highlighted, however, that the JSC’s composition is subject to constitutional provisions governing its membership where at least 3 of the 11 places are required to be held by women.⁹⁹ It is also interesting that women are better represented in the positions that advocate for the



welfare of judges and magistrates. For example, the present and previous president of the KMJA are both female.

In contrast, many Judiciary employees feel the Supreme Court is not compliant with the two thirds gender principle notwithstanding the 2011 High Court decision¹⁰⁰ that stated that the ratio was within the JSC's discretion¹⁰¹. Nevertheless, this decision also suggests that the state had five years within which to fully implement the Constitution including enacting legislation, policies and programs to implement the rights contained in Subarticle 27(8).¹⁰² In the Court of Appeal, while women have contested for the Court of Appeal's JSC position, no woman has ever run in the election of the President of this court. Consequently, the JSC Representative for the Court of Appeal, the President of the Court of Appeal and the Registrar are all male. Female judges currently make up just 33.3% of the Court of Appeal's bench, the required minimum.

Judiciary Employee Initiatives

Multiple interviewees told the consultants about an informal arrangement amongst the High Court judges and the Labour Relations and Employment Court judges whereby it was agreed beforehand that a female Principle Judge would be elected in the 2018 elections. The judges agreed to proceed in this way because the first Principle Judge of each court under the 2010 Constitution was male.¹⁰³ As a result, in the 2018 elections for the Principal Judge of the High Court, only women ran as candidates. Female judges cited the support of their male colleagues in this decision to alternate the gender of the Principal Judge. Objectively speaking, this a form of affirmative action, but when reached by consensus, the results have the potential to be even more effective than when such arrangements are superimposed. If all judges individually subscribe to the reasoning behind this decision, one would hope that these female Principal Judges do not experience any differential treatment from their peers or Judiciary staff.

Some senior female leaders noted that their colleagues serve as mentors though more junior leaders did not provide the same feedback. The IAWJ KC has also made efforts to help female leaders in the Judiciary. It has successfully advocated for the recruitment of more female judges and senior magistrates. In addition, IAWJ KC supports female candidates for senior Judiciary leadership positions by helping them prepare for interviews and build their confidence. IAWJ KC members also try to counsel each other on how to build positive work relationships in response to the criticism that women do not work well together. They also have discussed the possibility of starting a formal mentorship program. IAWJ KC was also a key partner in initiating and supporting the Judiciary Gender Audit.

Reasons for the Judiciary's Glass Ceiling

If the Judiciary is striving for gender parity in leadership positions, it has not yet reached that goal. Particularly with very senior judges or employees with administrative duties, even eight years after the promulgation of the 2010 Constitution, women are a minority in these positions. Some Judiciary employees, especially females, believe that women are not applying for these very senior positions as much as they should be. Many reasons were suggested for this lack of interest. First, multiple women perceive a glass ceiling where they believe it is unlikely they can achieve very senior positions because they are 'reserved' for men. Multiple employees feel that women shy away from positions that invite significant political pressure and visibility. The lower level of respect accorded to female leaders, from staff as well as the justice community, is also a source of frustration. Some Judiciary employees, again particularly females, also cite additional obstacles women face such as unfair coverage by the media and harsher treatment when they make mistakes. This perception of a glass ceiling appears to affect women's willingness to seek top positions in the Judiciary where there is a high level of politicisation around recruitment.

100 *Federation of Women Lawyers Kenya (FIDA-K) & 5 Others v. Attorney General & Another* [2011] eKLR Petition No. 102 of 2011 (Nairobi).

101 See *ibid* at pp. 52-53.

102 See *ibid* at pp. 48 and 51.

103 The first five year term of the Principle Judge of the Environment and Land Court has not yet expired. The first five year term of the Principle Judge of the Environment and Land Court has not yet expired.



“There is a fair representation of both genders but sometimes it is tough, especially when it comes to appointments. There is this feeling that men will always be an edge higher and women will have to put in more in order to be put on the same platform. In the media, they might talk about her marital status etc. These non-issues are brought up but not for men so it is harder for women.”

- Judiciary employee



“It is probably the Kenyan public, but I think lady judges and ladies in leadership are judged more harshly and expectations are different for them. The former Deputy Chief Justice, Boraza, may not have been treated that way if she was a male. Also, the former Chief Registrar of the Judiciary, Scholei – it would not have happened to a man. Men can get away with it but women are judged more harshly in the Judiciary. Male judges can say things in court and it wouldn’t be interpreted negatively, but when a lady does it, it is irrational or emotional.”

- Judiciary employee



Some Judiciary employees believe that the historical gender imbalance is the reason there are fewer women in leadership positions today. In 1993, there were only three female judges, so some feel there are naturally more women in the lower cadres than higher ones. It is true that having so few women in leadership positions affected the organizational culture, a culture which still remains in some ways and more strongly in certain parts of the Judiciary. Organizational culture also reaffirms itself by affecting who is recruited and promoted because organizations want candidates and leaders who will “fit” with the culture.

Many Judiciary employees believe because there are more women entering the legal profession and consequently the magistracy today, the problem will eventually correct itself as women rise through the ranks. There are two problems with this theory. First, as outlined at the start of this section, because leadership shapes and enforces organizational culture, gender equality in leadership is actually more important than in other areas because of the larger effect it has on the organization. Therefore, letting women rise through the ranks to leadership positions misses an opportunity to truly affect the Judiciary’s working environment as well as its dispensation of justice. Second, the glass ceiling is an obstacle that exists all over the world for women and it does not resolve itself.

Often due to a myriad of reasons, women are the minority in leadership positions in many professions in an abundance of cultures. This is also the case in the Kenyan legal profession where only 3 of 26 senior counsels are female and only 5% of top partnership positions are held by women. But the most concerning statistic is that 29% of women entering the legal profession stop taking out practicing certificates within their first few years of practice.¹⁰⁴ Further research is needed on the specific factors that keep women from applying, being hired, being promoted or excelling within the Judiciary in order to formulate more overt and conscious efforts to increase the number of females in senior leadership positions.

104 @Wuodabiero (Isacc E. N. Okero, then President of the Law Society of Kenya). “Statistics show women lawyers face unique challenges in Kenya. Up to 29% coming into the legal profession stop taking out practicing certificates, only 3 SCs out of 26, only 2 awardees for distinguished service, only 5% in top partnership positions.” @mcywambua #EALSWL17” Twitter 16 November 2017, 6:23am, <<https://twitter.com/wuodabiero/status/931165750500446210>>.



“The higher courts – all of them prefer men. It is competitive but ladies have never win those posts. The Supreme Court only has 2 women out of 7. Why not 3 women and 4 men? I have a problem with it even though some people say it is one third. The male judges are more on the Court of Appeal. There is more balance in the High Court and some Tribunals but as you go higher, men dominate. At the lower levels, there is not as much competition from men. The ideal standard should be 50/50 – we go to the same class.”

- Judiciary employee



Physical Intimidation of Women in Leadership Roles in the Judiciary

Unfortunately, multiple female judicial officers that were interviewed are worried about their security. Some linked the lower level of respect they attract to actual physical intimidation, which is an alarming trend that does not appear to have been previously reported. The consultants heard a few stories of female magistrates being intimidated, followed and even attacked by litigants who had appeared before them. Female judicial officers described how some advocates are much more aggressive when appearing before them and question rulings openly in court when they readily accept the decisions of a male judicial officer. One female judicial officer faced threats and physical intimidation from advocates in chambers due to unfavourable rulings. Multiple female judicial officers worry regularly about their safety because they feel as women they are more vulnerable, especially when they have to walk alone at night. They feel female judicial officers are targeted because of their gender as litigants or advocates do not appear to act this way with male judicial officers. It is noteworthy that security was never mentioned by any male judicial officer, not was security concerns faced by women. Judicial officers should not fear for their safety for simply performing their job. Such fear must undoubtedly affect a person’s work.

Conclusion

Many Judiciary employees cite the female Deputy Chief Justice and Chief Registrar as proof that there is gender equality in the Judiciary’s leadership. Yet there has never been a female Chief Justice and women who apply for the job are an extreme rarity. The Supreme Court is not compliant with the constitutional two thirds gender rule and other parts of the Judiciary barely meet this threshold. Leadership sends a powerful message and while the Judiciary excels in gender equality among the three branches of government, gender equality in leadership is still a live issue and a 50/50 target should be pursued on a more conscious level. The Judiciary seems to have taken a more lax approach to women in leadership than in the lower ranks even though female leaders can change how women are viewed within the justice sector. IAWJ KC has made efforts, but an organization-wide commitment is needed. For example, a mentorship program could help spread best practices across the Judiciary and also improve relationships between employees of different ranks. Recognition of the efforts and initiatives started by employees could also encourage innovation in this challenging area and a reassessment of the current operating culture cannot be avoided.

A number of female leaders report they are being treated with less respect than their male peers and this is an ongoing frustration and poses challenges to their work. This lack of respect is on occasion linked to actual physical intimidation of female judicial officers, a concern that needs urgent attention. Above all, multiple women, as well as some men, perceive a glass ceiling in the Judiciary above which it is extremely difficult for a woman to progress. The low numbers of women in very senior positions confirms this perception. If the expectation that seniority should dictate promotions is restraining the appointment of women to top positions in the Judiciary, this measure must be re-examined. Some men may feel jilted, however, education around these issues and what affirmative action entails as prescribed by the Constitution may go a long way in easing any tensions. The fact that the Principal Judge positions of both the High Court and the Employment and Labour Relations Court are now subject to a consensual agreement to alternate between a male and female occupant is testament to what is possible.



Where affirmative action has been used in employment settings globally, the notion of the ‘best’ person for the job is tempered by consideration of persons who are perfectly capable of doing the job and advancing the position of a historically disadvantaged group. In any event, the necessarily subjective assessment of the ‘best’ person is fraught with hidden biases that must be scrutinized.¹⁰⁵ Sometimes arbitrary qualifications are used to cull vast numbers of applications for employment, especially in lower level jobs due to the high rate of unemployment that is feature of the Kenyan labour market.

In a world where there are no longer traditional career paths, leadership positions in particular should not be subject to arbitrary qualifications and applications should be actively sought from all walks of the legal profession. Special efforts to appoint people that possess a broad range of experience is the next step in encouraging a strong pool of applicants of both genders. Investment in training on inherent biases for decision makers is also an essential step in prioritizing correcting the underrepresentation of women in leadership positions in the Judiciary.

4.4 TRAINING ON GENDER EQUALITY, SENSITIVITY AND INCLUSION

Training can be an effective way to change attitudes and also impart knowledge, understanding and sensitivity. Training was an extensive part of the Judiciary’s transformation agenda and an avenue through which the pre-2010 judicial culture was transformed in a very short period of time to become less hierarchical, more informal and customer centred. In fact, many men who were interviewed in the Judiciary Gender Audit cite training on gender issues as an eye-opening experience that enables them to appreciate the everyday challenges faced by women as well as children. Training that covers gender equality, sensitivity and inclusion helps everyone understand the difficulties and circumstances faced by each gender and how to be sensitive to and accommodate those challenges where possible. Training is also a key area to look at because the Judiciary has the unique ability to deliver targeted training crafted to meet its specific needs because of the resources located within JTI.

Data

82.4% of Judiciary employees responding to the SAQ say they have not “attended a Judiciary training program that discussed how to factor different gender needs into... [their] work in order to ensure equality between men and women”¹⁰⁶. 13.6% of say they had undergone such training while 4% say that “[t]he issue of gender was only discussed in passing”¹⁰⁷. Of those who say they received gender training, 92.6% were trained by JTI. Less than 5% of respondents who say they received gender training were trained by an external organization.

For the most part, neither SAQ respondents, nor IDI participants, could name any dedicated gender training provided by JTI though sometimes gender was mentioned briefly in other training sessions.

105 See Margaret Thornton, “Affirmative Action, Merit and Police Recruitment”, *Alternative Law Journal*, Vol. 28, No. 5 (October 2003) at p. 235.

106 See Question B13 on the Judiciary Gender Audit SAQ.

107 *Ibid.*



Gender focussed training is offered by external providers such as international or local NGO’s that provide human rights based training. This training, however, usually targets judicial officers due to their decision-making roles, which may be why the consultants heard more about it in the IDIs given the number of judicial officers interviewed. Some Judiciary employees cited training they received that focused on how to deal with colleagues in a mixed-gender environment, gender based violence or sexual harassment, but these responses were not the norm. Those in managerial positions, however, pointed out the importance of performing sexual harassment training because it is assessed as a performance standard for managers. Gender issues were brought up during Judiciary Transformation workshops, yet there was nothing specifically focussed on gender. Interestingly, though the Judiciary often rates itself above other branches of government in terms of gender equality, multiple employees were only exposed to detailed gender mainstreaming training while working for other government entities.

“Gender sensitivity training? We have had none. The only thing was that gender was mentioned during the transformation workshops and sexual harassment was being talked about openly.”

- Judiciary employee



The Importance of Gender Sensitivity Training

One of the challenges faced by the consultants was that most Judiciary employees, even those in fairly senior positions who were the subject of IDIs, had never thought about gender in any purposeful way. Multiple interviewees felt that the Judiciary does not have any serious gender issues requiring attention. Upon further probing, some interviewees were able to highlight issues they had not considered in depth before and how gender might play a role. Therefore, it wasn’t that there are no gender-related issues existing in the Judiciary, but that they have not been consciously considered and certainly not viewed through a gender lens. Most Judiciary employees, CUC or Bar Bench members that were interviewed only related gender to the numbers, specifically the two thirds gender rule. Many of the Judiciary Gender Audit participants noted that the IDI and FGD discussions opened their eyes to gender issues. Training around these issues promotes understanding, which is the first step in being able to assess performance and monitor progress.

“This has been a prompt to improve and a reminder on gender sensitivity.”

- Judiciary employee



“This [gender audit] has woken us up. What methods should we consider to leverage service delivery with respect to gender? We may have to think of ways to address the issue and may have to go out of our way to engage the women directly (to know why they are coming), ie. by public participation or at open days etc. We could use questionnaires and collect data to know why they are not using the Judiciary’s services. What is the problem?”

- Judiciary employee





Once Judiciary employees understood what the Judiciary Gender Audit was looking at, many did find the review useful. In many cases, it was merely getting interviewees to look at things from a different perspective. The realization that many went through proves the importance of gender sensitivity training. Often, discrimination, insensitivity or barriers to inclusion may not be intentional but are the result of no one carefully thinking how an action will affect different people. Moreover, it should not be assumed that all Judiciary employees understand what is meant by gender. Many believe that gender only refers to women’s issues.

“We have a level of consciousness within the Judiciary – anything that undermines gender equality is not intentional. We probably need to think about just sensitizing staff - on gender issues, gender perspective, some of the things are unintentional and people don’t recognize it. If you have grown up with these things, they come out in the things that you do. It is just the way with cultural diversity, people don’t know how to handle these matters. But it is important.” -

Judiciary employee

Those who do employ a gender perspective are more likely to have started their own initiative to try to address gender related problems they see in their jobs. Consequently, gender training may actually reinforce the ability of all Judiciary employees to be proactive in their approach by giving them the tools to think about issues from a gender perspective. Yet, in order to truly change behaviour, employees must first understand the problems, including whether they incorporate a gender issue. The Judiciary’s transformation process is not discrete act. Instead it should strive to constantly improve its working environment for all of its employees and its delivery of justice for all court users. Upholding, protecting and fully implementing the Constitution is just an aspect of this ongoing quest.

Training Needs

The Judiciary’s Human Resources department only introduced a training needs assessment within the last few years. JTI now performs this function as part of its annual preparation of a training calendar. As in the past, training needs are usually assessed by asking individual employees what training they would like to receive. Other than the annual colloquiums held for all judges or for all magistrates, individual judicial officers are nominated to attend various trainings offered by JTI. Such an approach has resulted in an ad hoc training schedule that does not take a long term view of developing the Judiciary’s workforce.

Since the completion of the Judiciary Transformation, the organization’s strategic goals have generally not been considered when the training calendar is developed. Many Judiciary employees said that while there was training for staff (as opposed to judicial officers) during the Judiciary Transformation, there has not been as much more recently. JTI now focusses more on Continuing Judicial Education for judicial officers. Yet, organization wide employee training programs can be an integral part of reaching many organizational goals by helping employees understand, relate to and actualize these goals.¹⁰⁸ It was used widely during the Judiciary Transformation and could prove the most useful tool the Judiciary has to meaningfully implement a gender policy.

“At trainings by JTI, they did not cover gender, but they did cover constitutional principles. Training for magistrates, training for judges – it is always addressed – still ongoing and addressed. But it just includes the principles. The rest on how to deal with vulnerable people – there is no training on that; each person it does it on their own.”

- Judiciary employee



108 See Canadian Human Resource Management, supra, note 71 at pp. 278-279.



“There should be a deliberate effort by the Judiciary’s administration on sensitization and training to change attitudes and develop a culture that respects gender and particularly vulnerable groups as a core activity of the Judiciary. With general respect for human rights and training on human rights, it would follow that gender would be respected.”

- Judiciary employee



There is a glaring need for gender training for all Judiciary employees. Aside from helping employees deal with co-workers, it could also enhance service delivery to court users.

Gender Training Content

The Judiciary employees that were interviewed were unanimous in their positive response to the idea of gender training. They felt that it could help improve their own work habits in order to further promote gender quality. Multiple employees recognized that insensitivity to gender issues is usually due to a lack of awareness. One Judiciary employee recounted how male colleagues did not notice when she or even litigants in court were pregnant. When she discussed the specific incidences with these men, they regretted not noticing and felt they were just too busy with their duties to pay enough attention. These conversations are the beginning of sensitivity training as one gender shares their experiences with another. In fact, throughout the process of doing IDIs, there were multiple occasions where an employee shared stories of how he or she started a discussion with a fellow employee who may have invoked a stereotypical or insensitive view of gender. Most times, the employee who made the remark was persuaded to change the view or at least the behaviour. It is these individual conversations that can have real impact as employees share their own experiences and perspectives with each other.

“IAWJ KC has provided that type of [gender] training. They trained their members and worked in partnership with other organizations such as UNWomen, but not with the Judiciary itself. The trainings were useful because it exposes you to gender issues; What is gender? What is discrimination? If you don’t have those basics, it sensitizes you and changes your perceptions and mind set – affects how you look at things, which is very important. We know how to apply the law, but it is more interested in theories and concepts; that’s the beginning of thinking about these things.” -

Judiciary employee



Multiple judicial officers point to the training sponsored by the IAWJ KC but when IAWJ KC is involved, gender training is seen as something for an interest group as opposed to something for everyone. The Judiciary needs to reaffirm its commitment to gender training by taking it on as its own initiative. In addition, gender training goes far beyond sexual harassment. It should aim to provide an understanding and insight into stereotypes, perceptions and biases that is broad enough to be useful to all employees. Multiple judicial officers expressed an interest in training on recognizing one’s own biases, ensuring they don’t affect decision-making and learning how to balance tailoring justice solutions to the parties while maintaining impartiality. Yet, these training topics are helpful to any Judiciary employee who deals with the public.



“We need more training to bring to us up to speed. This is especially true because most of the clients we deal with [in our court] are women. The husband will come firing away aggressively and so we really need the know how to deal with these issues. The men know women are somehow weak and will try to use emotional questions to upset the women and upset how she is delivering her case, which makes it less clear. At this juncture, the man is exploiting the woman and you have to stop this humiliation of the woman. We should also know how we are discriminating against a woman. We should be trained on this. ... This IAWJ KC type of training is needed for both men and women and all judicial officers. Men also need to be sensitized and the many women that have come in. The sensitization needs to be upped because many are joining and need this training.”

- Judiciary employee

While misogyny has been a problem throughout the world, in order to make gender training meaningful to as many people as possible, the curriculum must be developed within the Kenyan multi-ethnic cultural context and within the workplace realities of the Judiciary. Gender sensitivity training is also useful in improving the relationships between Judiciary employees. Workplaces may function better if each gender made an effort to understand the challenges faced by the other. It was stressed repeatedly, however, that managers each have their own way of dealing with gender issues that arise. Gender sensitivity training may encourage staff to see each other as individuals who face struggles that may be related to their gender.

“One of the things that we have done in the Judiciary is that the management styles of each manager in a station really varies – even women can be not as sensitive to women’s issues as maybe they should. It is bad that there is so much variation. We should have a standardized operation for management style for all systems. Let’s get the best practices, document them, harmonize them and then in every court, this is how we will manage people. We can do that just as they do in other countries.”

- Judiciary employee



The content of training specific to judicial officers is discussed in further detail under Thematic Area 11 Judiciary Equipped to Enforce Equality below.

Audience

“We have had some training on gender at the judicial officer level, but not for non-judicial staff. Even for judicial officers, unless we are working with a stakeholder who has a specific interest to sensitize us, the Judiciary itself has no agenda to sensitize us. Even those judicial officers who will get some training – those partnerings that happen only reach a small group, so all judicial officers don’t really get it. No, there is no nuanced training on gender. The staff has had none.”

- Judiciary employee



The audience for gender training is almost as important as the content. In order to truly change behaviour within the Judiciary, everyone needs to have the same understanding and consequently the same training. Gender training should be rolled out on an organizational basis so that all Judiciary employees, including kadhis, kadhi court staff, tribunal members and tribunal staff, undergo it, although there may be additional components required for judicial officers (discussed in more detail under Thematic Area 11 Judiciary Equipped to Enforce Equality below). The same gender training modules should also be made available to CUC Members, Court Annexed Mediators and Advocates as a way of extending the sensitization



process to court users as well. Court Annexed Mediators facilitate dispute resolution between litigants and advocates have a special role in that they act in many courts for various clients, serve as CUC or Bar Bench members, act as a filter for which cases make it to court and provide substantive submissions to aid the court in its decision-making capacity. Because they influence how the justice sector operates in a variety of ways, it is especially important for advocates to get access to the gender training modules, perhaps via the Law Society.

Though there have been administrative and funding complications that have delayed the full transfer of the Tribunals over to the Judiciary, tribunal members and staff also have to be included in any gender training initiatives. Administrative matters should not be used to exclude tribunal members and staff from JTI training or other Judiciary resources that may be able to improve gender sensitivity. Because long time tribunal employees may have benefitted from the gender mainstreaming training developed by the ministries under the previous government, the tribunals could be a resource to the Judiciary on developing its own gender mainstreaming policy and training framework.

CUC members can affect the way the court operates and should participate in CUC discussions having been exposed to the same gender training. Multiple CUC members who participated in FGDs explained how NGOs (even member NGOs) carry out training sessions for the CUC which has been very helpful. Because CUCs may not have easily available financial resources, this could be an effective way to ensure CUC members receive gender training. Nevertheless, the gender training modules prepared by JTI should still be made available to CUCs. NGO's may provide facilitators but considering the high rate of turnover of CUC members, these materials could also be provided to new members when they join.

One example where gender training may be helpful is with handling the formal requests some CUC members have made for a female magistrate in the Children's Court. They feel that female magistrates better understand children's issues and the best interests of a child at various ages beyond materialistic interests. This complaint appears to be common in Children's Courts even though multiple Judiciary employees and some CUC members familiar with children's matters do not see a difference in how male and female magistrates process these cases. The underlying reasons for these assumptions may be addressed through gender training, both for the magistrates and the CUC members. At the very least, with gender training, an informed discussion of the issue may be possible.

Implementation

With the current budgetary constraints facing the Judiciary, gender training may not seem possible. Yet, as the Judiciary obtains more data about how its services are falling short of its constitutional obligations on many fronts due to the every growing need of legal services, it must be creative and flexible in its approach and spending. The bulk of training costs are associated with travel and accommodation required to bring people together. The most important part of a gender training program, however, is the development of meaningful course content that will resonate with all levels of staff as well as the additional target audiences. This will require the input of experts in human rights concepts including concepts such as direct and indirect discrimination, accommodation, affirmative action, profiling and unconscious biases. As stated above, the materials must also make sense for the local context.

Training modules could be delivered by Judiciary employees acting as facilitators such as a train the trainer approach. Or one person could be designated to roll out the training to smaller groups that could increase interactive discussion. By training at individual workplaces, issues relevant to each station could also be discussed. In addition, costs would be kept to a minimum especially as IDIs revealed that Judiciary employees and CUC members may be amenable to attending training sessions without additional allowances. In fact, training provided by local NGOs is often facilitated in this way. Similarly, the Judiciary Gender Audit conducted almost all IDIs and FGDs in Judiciary facilities, often using courtrooms for larger groups.

Such a local training option also solves a gender related issue that was discussed in the IDIs. It was pointed out that many promotions within the Judiciary are dependent on having JTI training but this training usually requires out of town travel, which is harder for those who have family responsibilities



which most often fall on women. In addition, although breastfeeding children can be brought to JTI training sessions, the mother must pay the additional cost of housing a nanny to care for the child during the sessions. Given the importance of training, unorthodox approaches can ensure that budgetary constraints do not limit JTI's mandate.

IDI participants noted that part of the benefits of training are being able to interact with others to learn from their experiences and ideas. This is especially true for gender training which means that groups should be mixed gender-wise and cadre-wise. Any opportunity to mix cadres in training sessions should always be taken advantage of in order to continue breaking down any hierarchical barriers that was started during the Judiciary Transformation. While some female Judiciary employees expressed a preference for having a female only forum, the only way to educate everyone on gender is to open up these discussions between male and female employees in order to foster understanding and better communication.

Finally, gender training should not be a one time event like the Judiciary Transformation workshops. In reality, the transformation of the Judiciary will take a very long time and is still an ongoing process. Recognizing this allows the Judiciary's leadership to continue striving toward organizational goals including living up to its constitutional mandate on gender. Organization wide training should be a permanent feature within the Judiciary because training opens up lines of communication between managers and subordinates which can lead to increased innovation and prevention of complaints. Gender training is about developing an inclusive attitude and applying that attitude to new situations every day. In this way, gender training should be an ongoing conversation, occurring at regular intervals so that it is always top of mind, at least until gender discrimination is no longer a reality in Kenyan society.

“A more structured gender training and sensitization program would be helpful – for information and also for changing attitudes. It doesn’t happen in one time – continuous exposure and discussion is what can bring the ultimate change.”

- Judiciary employee



“We tend to forget. As part of our training programs, we should always have a topic on gender rights and children’s rights because people tend to forget if it is not emphasized – every now and then people will forget.”

- Judiciary employee



A continuous training program can address deficiencies that arise but training has to be considered as a strategic function of the Judiciary.

Conclusion

The Judiciary has not carried out targeted gender training for all Judiciary employees, yet most employees the consultants spoke with thought it could be useful. Gender training will teach all Judiciary employees to use a gender perspective where appropriate to help identify problems and solutions, enabling the Judiciary to meet its constitutional mandate concerning gender. Organizational training needs must be identified by taking the Judiciary's strategic goals into account. Gender sensitivity training could be a useful tool for all Judiciary employees in managing their working relationships with each other as well as court users. An overarching gender strategy would guide long term planning for gender training. Developing a locally appropriate training curriculum on gender and perceptions is key. Additional training on sexual harassment may also be included in the gender training strategy once an appropriate policy is formally put in place. Specifically, multiple Judiciary employees also want further clarity on what behaviour is acceptable in the workplace and what is not.



While the Judiciary Transformation workshops did accomplish a great shift in the Judiciary's culture, there are clear vestiges of stereotyping and attitudes about how men and women should act. Judiciary employees themselves believe a deliberate gender sensitization program for all employees would go a long way toward creating a work environment based on equity, equality and inclusivity where everyone is more aware of gender related challenges and how their actions or words affect others. The Judiciary Gender Audit's participatory approach has already started building this awareness and further training efforts can build on this momentum.

Lasting change can only occur when everyone is on board, including all parts of the Judiciary even those entities who operate mostly autonomously, such as the kadhi courts and the tribunals. CUC members are on the frontline of trying to resolve court issues and therefore also need gender training. The IDIs revealed numerous anecdotes concerning gender related issues involving advocates. In addition, advocates are involved with cases prior to them arriving in court. Because they play a crucial role in the justice sector, they must also be included in any gender training attempting to change attitudes and behaviour. Finally, creative approaches to training delivery must be explored in the face of tight budget constraints. Above all, having a discussion amongst Judiciary employees is more important than a formal training program though standardization of materials could serve as quality control. Because gender training is most effective when treated as an ongoing conversation as opposed to a one time event, it is important that a key person in the Judiciary with gender and human rights expertise take responsibility for working with JTI and overseeing its implementation.

4.5 WORKPLACE ACCOMMODATION AND AFFIRMATIVE ACTION

Beyond outlawing unfair discrimination, Kenya's 2010 Constitution, national legislation and international commitments also require that vulnerable parties be aided in order to put them on an even playing field with others. In this way, workplace accommodation and affirmative action can actually transform a working environment. When marginalized parties are provided with assistance to ensure that they are exposed to equal opportunities at work, it is referred to as accommodation in human rights law. Where reasonable, employers may be required to accommodate marginalized employees. Affirmative action is positive discrimination or preferential treatment of those members of society who have historically been disadvantaged. The 2010 Constitution specifically promotes the active use of affirmative action to correct a legacy of unfair discrimination. With regard to gender, generally women have been historically marginalised in Kenyan society, especially in the work, economic and political spheres.

Data

39.4% of Judiciary employees responding to SAQs did not think there were "any gender related workplace concerns that...the Judiciary needs to address to ensure gender equality"¹⁰⁹. 36.2% of employees think there are gender related workplace concerns while 17.8% sometimes think there are gender related workplace concerns. 6.6% of employees did not know if there were any gender related workplace concerns that needed to be addressed.

40.7% of Judiciary employees do not think that the Judiciary has made an effort to address gender related concerns. 27.3% of employees think the Judiciary has made an effort to address these types of concerns while 15.0% percent think the Judiciary sometimes makes an effort to address these concerns and 17.0% did not know.

109 See Judiciary Gender Audit SAQ Question B6.



Respondents were asked “what gender related workplace concern most requires the Judiciary’s attention”¹¹⁰. There was great variation in the answers but a few responses came up again and again. Judiciary employees named a place for breastfeeding employees to nurse their babies, sexual harassment, transfers and gender balance as some of the gender related workplace concerns that needed the most attention.

12.3% (2.8% male; 9.5% female) of employees think that the Judiciary does not apply gender related affirmative action while 23.0% (12.0% male; 10.7% female; 0.3% other) think it does, but not enough. 38.0% (19.6% male; 18.4% female) of employees think that the Judiciary applies gender related affirmative action as needed. 10.1% (6.4% male; 3.4% female; 0.3% other) think the Judiciary applies it too often while 16.6% (7.1% male; 9.5% female) did not know.

Affirmative action was described as “programs giving an advantage to people who have historically suffered discrimination in order to ensure they are included”¹¹¹ in the SAQ. 42.3% (22.4% male; 19.6% female; 0.3% other) of Judiciary employees think that affirmative action does not affect them. 41.4% (18.4% male; 22.7% female; 0.3% other) think it affects them positively as an individual and 12.3% (7.4% male; 4.9% female) think it affects them negatively. 4.0% of employees said they did not know how it affected them.

Respondents were asked to explain how they felt affirmative action affected them. Many of the answers indicate that people feel that affirmative action is unfair. Comments also touched upon people feeling that qualifications were compromised and their workload increased due to affirmative action measures. The majority of comments though supported affirmative action as a method for promoting equality.

Accommodation of Breastfeeding Mothers

Breastfeeding mothers was the most mentioned example of accommodation offered in the Judiciary. While multiple interviewees used the Judiciary’s usual approach to breastfeeding mothers as a positive example of how equality is being implemented in the workplace, this area was also noted as one the issues that most needed attention in order to ensure gender equality in the SAQ. It should be noted here that the consultants did not interview lower cadre staff but they were well-represented in the SAQ respondents. One of the reasons for this discrepancy may be because flexible (and often reduced) working hours available to breastfeeding mothers so that they can arrive late and leave early, is merely a practice and not a policy. Therefore, it is may not be implemented consistently and will depend on one’s specific manager. In fact, some very senior male leaders in the Judiciary were not always aware of such practices. Some Judiciary employees stated that flex time for breastfeeding mothers could mean that an employee arrives at 9am and leaves at 3:30pm but the actual timing appears to depend on a person’s individual duties and circumstances.

Currently, not all courthouses have breastfeeding rooms but the Judiciary may allow breastfeeding mothers to leave the station to feed their infants. There has been talk to creating creches for the children of Judiciary employees but there is no formal plan in place. When a mother of a young breastfeeding baby is required to travel away from home and stay overnight in a hotel, the infant and nanny are welcome, however, the cost of the additional room (which is required) must be covered by the employee. It should be noted that the hotels where JTI and other conferences are held are often very expensive even with group rates. One Judiciary employee did felt having to travel out of town for these training sessions does affect the career advancement of women as they usually bear the brunt of child rearing. Exploring other non-traditional approaches to training may address this problem.

The Judiciary operational budget does not factor in the need to address gender related issues. Whereas courthouses are often stretched to capacity, adding breastfeeding rooms requires money, but there is no consideration of this in the budget although it is factored into new building projects.

110 See Judiciary Gender Audit SAQ Question B8.

111 See Judiciary Gender Audit SAQ Question B11.



“While breastfeeding rooms in the new courthouses and projected personnel maternity leaves are budgeted for in the Judiciary’s operating budget, there are no budget lines for other gender matters.”

- Judiciary employee



Formal policy implementation is difficult where no budget allocation is made. The person responsible for coordinating gender related policies could also be the accounting officer for a gender budget. This budget does not have to be large, but allocating even a small fund to these issues raises the importance of gender equality within the Judiciary.

Employee Transfers

The subject of employee transfers also surfaced frequently both in IDIs and the SAQ. It seems to be a common problem stressing female employees who are posted to a distant station because of their family responsibilities. Some Judiciary employees note that men may also want to live with their families. Male Judiciary employees that were interviewed appear to empathize with women in this situation but the SAQ results showed some respondents feel women are unfairly given priority and preference with regard to transfers.

Again, like with flexible hours for breastfeeding mothers, there seems to be an informal practice to give special consideration to women with young children when planning for employee transfers which, according to policy, should occur once during every three years of service. As a practice, there is a great deal of inconsistency in how it is applied. The consultants heard multiple stories where women desperately sought assistance when faced with a transfer they did not think they could deal with due to their family obligations. Often, these women did receive help from a senior colleague but not everyone has the ability to reach a high ranking employee to intervene. Plus due to the hierarchical culture within the Judiciary, everyone who experiences this extreme stress may not even advance their case at all. Fortunately, the Human Resources department is currently collecting biodata on all employees, including detailed information about all family members and whether their spouse works for the Judiciary.

“HR is establishing a full profile of employees including where their home is, how many kids they have, how old the kids are and what schools they attend and where husbands lives so we know them better to do transfers. Those factors will be considered for both genders. We are getting information from staff themselves. We have a data sheet and talk to them – if they are lying, it will come out. You also explain why you are doing this. ... Employees are happy about it. One lady was very happy about this initiative. She is a widow with children so moving is difficult. We work with her to ensure that everyone is in form one, then consider moving her after that.”

- Judiciary employee



Establishing a profile of each employee in this way is actually a challenging task. Many families have unofficially adopted children such as those adopted from a family member. They may not have birth certificates or documents to prove that they are the one who is responsible for this child. This initiatives will help those who care for family members regardless of gender, but it is important to recognize that it overwhelmingly benefits women, who are commonly the primary person in the family responsible for childcare. It reduces stress and may remove a barrier to attaining a higher percentage of female leadership. Some Judiciary employees felt staff in lower cadres, who have young families, should be moved over lesser distances than magistrates or judges. Yet, the ability to adapt to an individual’s specific family circumstances allows the Judiciary to provide accommodation to those who really need it, regardless of rank or gender.



“Maybe as a side note, I think it is important to transfer people not too far from their families. While it is a personal decision to have a casual sexual relationship, what is the Judiciary doing to its employees’ marriages? I have discussed this with male magistrates. What about men? It seems justified to take men far away but maybe he wants to be part of his family. If employees are transferred far off, in the next cycle, they should be closer to their families.”

- Judiciary employee



Some Judiciary employees equated being gender sensitive with not transferring female officers to hardship areas because women may have children to care for. Yet, it was also recognized that not all women want to be excluded from those opportunities because there is a monetary benefit payable if you serve in a hardship area. Beyond that, having women in hardship or remote, as they often are, areas can also benefit the community. Having female judicial officers and staff, when normally there are none, can improve access to justice for the women in those areas. And having women in positions of authority, which even a low ranking cadre employee may be viewed as in hardship areas, makes a difference in the community by providing examples of women leaders.

“The Judiciary is doing well in observing the principle of equality but it may need to apply the principle of affirmative action when it comes to transfers in the case of young mothers but we need to encourage women to serve anywhere, especially when they are young and single.”

- Judiciary employee



The employee transfer issue shows yet again that gender sensitivity often involves little more than treating each person as an individual as opposed to applying stereotypes or traditional gender roles.

Alcoholism

In all regions the consultants visited and across all cadres of the Judiciary, Judiciary employees reported that there is an epidemic of alcoholism among employees. Most Judiciary employees also felt that it was almost exclusively a male problem. It was emphasized that when employees are addicted to alcohol, it invariably affects their work. Judiciary employees hypothesized on many reasons that this problem is so common with male employees in the Judiciary. They thought stress and pressure due to workload or separation from family were likely causes.

There is recognition from many managers though, that a strict disciplinary approach will not work and counselling, monitoring and some sort of accommodation is required. Some managers have even developed their own way of monitoring absenteeism and referring affected employees to rehabilitation programs because it is so prevalent. From the information received in IDIs, there does not appear to be consistent approach or policy in place on how to handle these situations. Any formal help that was extended to alcoholic employees seems to be due to a manager’s own initiative. Moreover, the Judiciary or its medical coverage provider do not provide counselling or any type of addiction treatment.

“I have also worked with an alcoholic whom we counselled and he was able to turn around and work well.”

- Judiciary employee





Given the prevalence with which alcoholism is affecting male employees, the Judiciary needs to fully canvas the various initiatives that managers have used in trying to deal with the problem. Along with human resources best practices, this information will aid in the development of a policy framework for dealing with alcoholism in the Judiciary.

Other Accommodation

When an employer accommodates an employee who has different needs, it enables that employee to gain equal access to the opportunities and benefits provided by their employment. Again because women are most often charged with taking care of children, other accommodation that was discussed in the IDIs included caring for sick children, taking them to hospital and also taking them to boarding school. Multiple managers said they were flexible when dealing with these issues, but this latitude is not enshrined in policy and therefore can be applied inconsistently across the Judiciary.

“If it is just one day the employee is away because of a sick child, we don’t record it – it is a French day off but if it is longer, then we have to request a doctor’s note. Men and women both make this request because of their family members or if children are going to school. We are usually accommodating.”

- Judiciary employee



By recognizing that each employee needs individual consideration, some Judiciary employees are already practicing accommodation, even without knowing the formal legal reasoning behind it. Multiple Judiciary employees feel this type of accommodation was worked out naturally due to the increase of female employees. With lower level cadres, managers are able to provide flexibility as long as there is a replacement available.

“Even with the administrative staff, I am flexible and tend to work with individual circumstances. I had two staff (a male and a female) with special needs children; the lady asked to be accommodated to be reporting late because she has to attend to her disabled child before leaving her house in the morning. The man would come in at the usual reporting time. He did not ask for that accommodation because most likely it’s the wife who takes care of the child. I have never received complaints relating to gender discrimination.”

- Judiciary employee



The Human Resources department was given a much more expanded role after the Judiciary Transformation though many Human Resource policies are still in flux in the Judiciary. The department is working to review all of its policies with special attention to these grey areas which might not be included in the Human Resources Manual. They are attempting to develop guidelines that would include discretion to cover areas such as who gets the opportunity to be seconded, what happens when a breastfeeding mother has to travel for work, at which stage in the recruitment or promotion process gender considered, how transfers are handled and how an employee’s circumstances are factored in to these postings. Therefore there is a lot of accommodation happening, it is just ad hoc in approach. By confirming what is provided for in policy, it would ensure consistent and reliable application of these allowances. It may also be helpful to explore whether the Judiciary’s medical coverage can be expanded to include some counselling on the recommendation of a doctor. Employee Assistance Programs are used in many private workplaces to offer confidential counselling or referral and support services and can contribute to the workforce’s wellbeing.



Finally it should be noted that the limits on hospital coverage for maternity care is substantially lower than those for other inpatient services. This difference could be viewed as discrimination against women, who are the only ones who require maternity care. Some Judiciary employees explained that if a C-section is required, the cover is not sufficient. Given that C-sections are often called for the safety of either the mother or child, this is an important health concern. While this is a common practice of insurance companies, the Judiciary is a large enough employer that it may be able to put some pressure on its provider in this regard.

Affirmative Action

As indicated by the SAQ results, more than a third of Judiciary employees do not think that the Judiciary is applying affirmative action or is not applying it enough. Though the consultants were told that there was an affirmative action policy introduced in 2015, the Human Resource department clarified that there is no policy which provides guidance on how to implement affirmative action measures. Moreover, the Gender Policy has never been formally adopted.

Judiciary employee attitudes toward affirmative action varies. The SAQ results show many Judiciary employees think it is helpful, but some Judiciary employees also feel that it affects them negatively. Men may feel this way because women have made large gains, especially in the lower cadres, in a relatively short period of time, but some women also feel that affirmative action is not very helpful, such as the employee sharing her views below.

“Affirmative action works only when there is political will. I do not believe in affirmative action because women end up getting positions on the assumption that they are qualified but the truth is that we are being given and I think it is better to earn than be given. But then again within the society we live, which discriminates against women at all levels, it may be the only way to get women into those positions. So I don’t recommend it but it is the only way for now.”

- Judiciary employee



In the Judiciary’s recruitment, affirmative action is only considered at the last stage of hiring. This means by the time a person’s gender is factored in, all candidates have already been deemed to be able to perform the job. Contrary to some of the views expressed by Judiciary employees, it has not generally been used to relax any of the professional requirements for a certain position. The only exception to this that the consultants learned about was when interpreters or other personnel were required to be fluent in a local language, but required qualifications were only reduced in a very minor way in these rare situations.

“We may consider gender when looking at communities that have a low education level or where the girl child is put down. We may even reduce on the qualifications for clerical officers because we want to get women in these communities. If you level the playing ground because the Judiciary is recruiting locally and most women there did not go to school and we need ladies from those communities, it is a practice – it is not in our policy – to have equal representation. But we have to explain it as we don’t want it to be skewed in one way or the other.”

- Judiciary employee



Classic affirmative action allows for altering the job requirements in a way that ensures recruited candidates are able to do the job (perhaps with additional training or mentoring) or by being more flexible in the approach to hiring. Job requirements have often been cast in stone in Kenya most likely due to the overwhelming number of job applications received for any job that is advertised. But certain jobs, particularly in the lower cadres, can even be learned on the job.



“Affirmative Action is a good recruiting tool because it brings gender parity in the staff in certain communities. Because of our cultural backgrounds, we don’t talk about gender so we are enforcing it because we know ladies are just as good as men. Some, they do better. Interestingly enough, it used to be men secretaries because men didn’t want ladies working for them but now that work is done by women.”

- Judiciary employee



Yet beyond taking the current gender balance in a cadre into consideration when recruiting or promoting employees, the Judiciary has not used any other forms of affirmative action with regard to gender. Mentoring, breaking down hiring barriers or on the job training could also be used as affirmative action and may be useful to correct extreme gender imbalance.

Managing Expectations

In order to combat negative views of affirmative action, training may be helpful. It is important that Judiciary employees do not resent actions taken to increase gender equality because affirmative action is constitutionally mandated. If Judiciary employees truly understand what accommodation and affirmative action is and why and how it is being applied by the Judiciary, they will be more accepting of it. Furthermore, if all Judiciary employees understood the effects of historical discrimination, they themselves may serve as a resource for potential solutions.

Some Judiciary employees felt that it did not seem fair and could even be discrimination that women receive three months off for maternity leave while men only receive two weeks off for paternity leave. A better understanding of discrimination and the policy reasons behind the different types of leave may inform a discussion about how maternity and paternity leave should be handled. Some countries¹¹² offer parental leave which can be taken by either parent in after a maternity leave for the mother to recover from birth and breastfeed the newborn baby. It is important to stress substantive equality over formal equality and training on these concepts would encourage discussion and understanding of the reasoning behind the Judiciary’s policies.

Conclusion

The data collected from the SAQ shows that there are gender related workplace concerns, but it does not appear that employees have many forthright avenues to express these concerns. Communication around these issues needs to be improved. A more robust suggestion box or staff communication policy could help or more expedient avenues via the Judiciary Ombudsman. It is interesting to note that the Employee Satisfaction and Work Environment Survey only showed that only 68% of employees were satisfied with the Judiciary’s communication with employees.¹¹³

In addition, the Judiciary needs to be more proactive in its accommodation of gender related issues. To do this, it requires more accurate data about which issues are most important to employees, disaggregated by gender. The Judiciary’s Performance Management Directorate is capable of collecting this data in the Employee Satisfaction and Work Environment Survey completed every two years. In addition, formalizing the policies on common practices such as allowing flexible working hours for breastfeeding mothers and taking an employee’s family situation into account when deciding on transfers, would ensure these practices are applied more consistently.

112 For example, Norway, Sweden, Canada. The UK offers a parental leave that can be taken at any time before the child turns 18.

113 See *Employee Satisfaction Survey, supra*, note 66 at p. 12.



Finally, education on affirmative action would be helpful in stemming any potential resentment. This training would form part of the content for the general gender sensitivity training that should be rolled out to all Judiciary employees. And the actual use of affirmative action should be more transparent and varied. Various approaches aside from strictly numbers goals could be used. Affirmative action may also be useful in gendered jobs in order to help prevent the stereotyping of certain kinds of work. Again ongoing communication is important to explain any programs offered and the reasoning behind it.

4.6 SEXUAL HARASSMENT

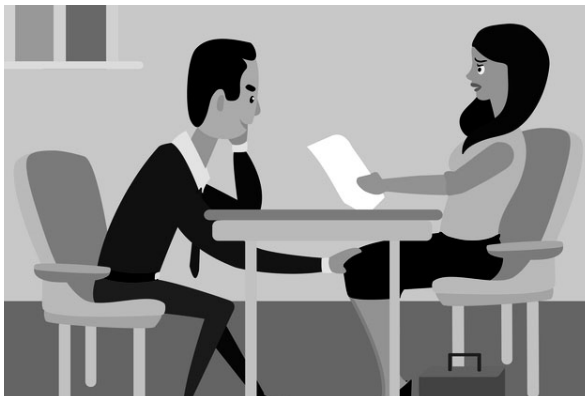
Sexual harassment is defined as:

Unwelcome sexual advances, requests for sexual favours, and other verbal or physical conduct of a sexual nature when: submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, or; submission to or rejection of such conduct by an individual is used as a basis for employment decisions affecting such individual, or; such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.¹¹⁴

The recent global “Me Too” movement highlighted how common sexual harassment is in the modern workplace and even more problematically, the tendency for victims to stay silent and not take action against perpetrators. This movement has manifested itself in countries throughout the world, even where human rights, strong anti-sexual harassment laws and legal precedents for employer liability have been prevalent for generations. In Kenya, there have been rumours of sexual harassment occurring in the Judiciary for many years and the consultants’ were keen to collect data that might shed some light on this aspect of the Judiciary’s work environment.

Historical Perspective

Sexual harassment and what many notoriously referred to as ‘Judiciary incest’ has long been a topic discussed informally between Judiciary employees. In fact, anecdotally, multiple employees attest to the



Judiciary’s culture supporting sexual harassment, especially in the times prior to the Judiciary Transformation. Stories are told of sexual predators within the Judiciary who preyed on women in the pre-2011 era; yet the culture in the Judiciary meant those cases were handled quietly. If evidence was available, the perpetrators would be coerced to quietly resign; if no corroborating evidence existed or the woman was unwilling to report the sexual harassment, the individual could easily serve out their term of office and retire. During the Judiciary Transformation training sessions, for the first time, sexual harassment was discussed openly yet many still refused to report these actions.



“Sexual harassment has been with us in the Judiciary for a long time but people suffer quietly and one has to develop mechanisms to protect themselves. There are some male judges and EO’s who were known for this. One had to resign after a colleague he harassed decided to take up the matter. There was another one who was known for his harassment of ladies. He would pull you towards himself and want to kiss you. There was also an EO who had an inner chamber where he took advantage of the female staff; unfortunately he did this until he retired without anything being done to him.”

- Judiciary employee



“It is not as pervasive as it was or as full of impunity as it was. Judges and magistrates would literally harass females and get away with it and everyone knew about it. Now I don’t know of any particular case of anyone being harassed.”

- Judiciary employee



Data

Many of the questions on the Judiciary Gender audit SAQ pertained to sexual harassment and because of the topic’s sensitivity, an anonymous survey was chosen to collect reliable data. The results of the first large scale survey of Judiciary employees on the subject is very important in confirming the qualitative data collected during the IDIs.

32.8% (11.3% male; 21.5% female) of Judiciary employees responding to the SAQ say a colleague’s behaviour relating to gender has made them feel uncomfortable. 19.3% (6.1% male; 13.2% female) of respondents say that this type of behaviour occurred more than once. While this type of behaviour may not be classified as sexual harassment, it does shed some light on the culture within the Judiciary and how employees feel about what goes on in the workplace. It is interesting to note that while more women have been made to feel this way, a significant portion of men have also been made to feel uncomfortable.

24.2% (7.7% male; 16.5% female) of Judiciary employees say they have felt bullied or harassed because of their gender while working for the Judiciary. This means 31.6% of those who felt targeted were male and 68.4% were female, showing that harassment in the Judiciary does not exclusively impact women. Examples of this type of behaviour in the SAQ included “insults based on your gender, being talked down to because of your gender, being expected to do certain tasks because of your gender or being referred to in stereotypical language”¹¹⁵. 14.7% (3.7% male; 11.0% female) of employees say it occurred more than once and 7.4% (1.2% male; 6.2% female) feel this way frequently. Although not specifically referring to sexual harassment, these results show that this negative behaviour is common.

Sexual harassment was denoted to include “any spoken or physical invitations or advances that are inappropriate or suggestive”¹¹⁶ in the SAQ, which is broader than the Judiciary’s current adopted definition. Nevertheless, it is alarming that 17.2% (5.2% male; 12.0% female) of respondents say they experienced sexual harassment while working for the Judiciary.

This means 30.4% of those who have experienced sexual harassment are male and 69.6% are female. 8.3% of respondents labelled the perpetrator’s behaviour as “inappropriate comments on my appearance”¹¹⁷;

115 See Question B24 of the Judiciary Gender Audit SAQ.
 116 See Question B25 of the Judiciary Gender Audit SAQ.
 117 *Ibid.*



4.3% labelled it as “inappropriate invitations”¹¹⁸; 2.5 % labelled it as “inappropriate touching”¹¹⁹ and 1.5% labelled it as other. In addition, 0.6% of employees, all female, labelled their experience as being threatened or sexual violence. While no man was threatened or experienced sexual violence, men did experience every other type of inappropriate behaviour. Moreover, it is possible that these figures are underreported as many respondents expressed concern that the anonymous survey could be traced back to them.

Notably, of employees who say they felt uncomfortable, bullied or sexually harassed in the Judiciary, 40.8% say the perpetrator was not senior to them; 56.1% say the perpetrator was senior to them and 3.1% did not know if the person was senior to them. 69.9% say the perpetrator was male, 26.0% say the perpetrator was female and 4.1% say they do not know the perpetrator’s gender. Although, feeling uncomfortable, being bullied and being sexually harassed is grouped together in this question, it is clear that bad behaviour is not limited to senior employees targeting junior employees, contrary to the Judiciary’s definition of sexual harassment. And the common assumption that only males carry out inappropriate, bullying or sexually harassing behaviour is not borne out.

Interestingly, of the respondents who suffered bullying or harassment in the past (six or more years ago), 23.5% were men and 76.5% were women. However, for bullying and harassment occurring within the last 5 years, 43.5% were men and 56.5% were women. Of those who suffered sexual harassment in the past (six or more years ago), 31.6% were men and 68.4% were women. Of those who suffered it within the last five years, 38.5% were men and 61.5% were women. It should also be noted that men may be less likely than women to discuss being subjected to bullying or sexual harassment because victimization is not associated with the traditional male archetype. In summary, as confirmed by the IDIs, bullying, harassment and sexual harassment are problems for both men and women and should be taken seriously.

“It is a very sensitive area. We have had some sexual harassment complaints. Mostly women, but some men, have also complained.”

- Judiciary employee



Of those who were bullied or harassed because of their gender, 60.8% did not report it. 19.6% reported it to a peer and 19.6% reported it to a superior. Of those who had been sexually harassed, 63.1% did not report it, 20.2% reported it to a peer and only 16.7% reported it to someone superior to them (which would usually be required by the reporting guidelines).

Overwhelmingly, the most frequently cited reason for not reporting bullying or sexual harassment was fear of retribution. Being unsure of where to report such behaviour and feeling that others will not believe the victim were also mentioned as reasons for not reporting. Punishing the perpetrator and a confidential and trustworthy reporting mechanism were named as ways of encouraging reporting.

Current Policy Framework

The common working assumption that sexual harassment usually occurs when female employees are pressured in a sexual manner by males in superior positions informed the Judiciary’s current implemented definition of sexual harassment. Sexual harassment is defined as occurring when “any person, who being in a position of authority or holding a public office, who persistently makes any sexual advances or requests which she or he know, or has reasonable grounds to know, are unwelcome”.¹²⁰ Similarly, the Judiciary’s draft Sexual Harassment Policy¹²¹ is also based on this premise. The draft Judicial Code of Conduct¹²² is broader but still not as broad as the UN definition cited at the beginning of this section. But these two documents are still in draft form, therefore, the only definition that has current power and effect is the one quoted here from the Human Resources Manual.

118 *Ibid.*

119 *Ibid.*

120 The Judiciary, *Human Resource Policies and Procedures Manual*, (Nairobi, 2014) at p. 6.

121 The Policy version reviewed by the consultants was available in early 2018.

122 The Code of Conduct version reviewed by the consultants was available in early 2018.



This definition requires the harasser to be of a high rank, to act persistently and requires that the complainant can show that the harasser knew or ought to have known it was unwelcome. The effect is that the junior employee must rebuff the advances in some way, putting the burden the victim, in the context of a hierarchical organization culture where fear of retribution is the foremost reason employees do not report offensive behaviour. This definition also excludes a number of situations that may be considered inappropriate if the harasser is a peer, of a lower rank or only committed one act. A broader definition may be more useful, though the Judiciary’s definition of sexual harassment should be based on its own circumstances and any locally relevant data available. The definition is the starting point and along with the reporting structure, are the most important issues to be addressed in a sexual harassment policy. Aside from the legal implications that a definition suggests, defining the problem is the first step in promoting an agreed understanding of sexual harassment which is central to ensuring an organizational culture that prohibits it. The fact that the only time a woman having a sexual relationship with her subordinate came up was when female leadership was being discussed (as opposed to sexual harassment), is strong evidence of an organizational assumption that only males can be sexual harassers.

“Staff say they want a proper definition of sexual harassment. The finger in greeting or patting someone on the back, is that sexual harassment? Both men and women are asking.”

- Judiciary employee



Furthermore, even though the Judiciary’s Sexual Harassment Policy is still in draft form, many employees are aware of it because there has been consultation and requests for comments. So while the draft sexual harassment policy was completed over 3 years ago, because it has been around for so long, some people refer to it even though it has not been approved by the JSC. In its absence, there is only a Circular that was sent by the former DCJ Rawal outlining that all sexual harassment complaints should be directed to her. DCJ Rawal has since retired and the memo is still the only adopted policy framework, resulting in some uncertainty about what reporting procedure to follow as confirmed by the SAQ data. Multiple managers think that the procedure is clear but Judiciary employees state reports should be made to the office of the DCJ (based on the memo although some are uncertain that the new DCJ has taken on this role), Head of Station (unless that person is the harasser), Office of the Judiciary Ombudsman or Human Resources. One Judiciary employee believed the reporting procedure for sexual harassment in the Human Resources Manual protects those complaining, yet there is no mention of how to deal with sexual harassment in this document. In reality, various reporting mechanisms have been used as shown by the IDIs and there is hardly a clear procedure that is consistently followed.

Some Judiciary employees see the existing policy framework as adequate because they believed it was based on discussions with staff, though this may be an example of where employees believe the sexual harassment policy has been formally adopted and implemented. Employees also feel the framework is sufficient because sensitization of subordinate staff on sexual harassment forms part of the Judiciary’s performance target for those in managerial positions. Yet, this approach is hampered by an unclear definition and reporting procedure. Multiple managers, who are in charge of sensitizing staff under them, also feel that consensual relationships fall outside of sexual harassment and are none of their business. Understandably, the current definition of sexual harassment assumes that there are consensual and non-consensual relationships and does not import any understanding of power relations and how coercion can make some relationships look consensual.

There was extensive employee participation when the sexual harassment policy was being developed but no clear opposition. Yet, over 3 years later, it is still not an official policy of the Judiciary. Various reasons for this failure to pass the policy were provided by Judiciary employees. One thought it had been suspended because legislative processes had been skipped. Another cited the inability of JSC to raise decision-making quorum. Others suggested it was actively blocked by a few senior male Judiciary employees who may fear repercussions. Nevertheless, employees still recognize the need for a formal policy and action to back it up.



“The policy should come out very strongly. It should be concluded and enforced. If the policy is there with frequent sensitization and talking to these people about it, the situation will get better. We need at the national level, in order to implement the DCJ’s circular on sexual harassment, there needs to be maybe a committee or some people responsible for it. So for the complaints that come, the person complaining will know that it will end up with a certain committee. After the committee makes findings, they can make recommendations to JSC.”

- Judiciary employee



Experiences of Judicial Employees

Multiple employees that were interviewed had firsthand knowledge of sexual harassment within the Judiciary where they either suffered it themselves, witnessed it, served as a confidante to someone who was suffering it, had it reported to them as a manager or a combination thereof. Below just a few examples of those the consultants heard are provided.

“In my experience judges have female clerk and magistrates. One complained to me that she was called to help a judge to dress – he had no top on. She complained to her registrar that it was inappropriate, but she could not talk to the judge. The registrar withdrew the clerk from the judge and the judge complained. I told him there was an incident and she is not comfortable working with you so you should not work together. The judge insisted that she must serve him so I asked the male registrar to talk to the judge. The girl was traumatized and I had the same experience with that particular judge. I told the registrar that the judge has a habit and it is not right, it is inappropriate behaviour. The judge said the magistrate was being disrespectful and not taking instructions. She was moved 400km away. I told her it was better to go away. The complaint was never advanced beyond that and the lady was punished. Nothing will happen; this is why people won’t report. If you report, it is still a power thing – the people who you are reporting to are also doing it. And at their level, it is going on unabated. It is wrong but what do we do? It is very hard if it is someone very high up like in the Court of Appeal or the Supreme Court. They are the same level as those in charge. They are friends. Someone has to believe you. What will the DCJ do?”

- Judiciary employee



“Sexual Harassment - it exists. When I was a resident magistrate, there was a particular judge, who is now gone, that would call repeatedly. I found it to be harassment because he talked to me with sexual undertones. When we were to go for a meeting, he described buying wine, lingerie and being a guest in his room. He said he was going to come and visit me at my station and I would say no. I would make sure I never picked his calls and then I put my foot down. Sexual harassment hasn’t stopped but now I am more aware. Those serial sexual harassers and the female judges that work with them, they went to school together. Some men also feel harassed; it is even harder for those men to report – don’t think men are not harassed. No, no one uses the procedure.”

- Judiciary employee





“I received a sexual harassment complaint. It was sms and pornographic whatsapp messages. It also once involved touching hair. One of the others who later complained about the same person was a student who said he attempted rape in chambers after he locked the door. It never went through official channels. I did not want to follow up because he was gone. When someone is gone, issues are not taken seriously. Why are they following me with complaints? But if he was still here, I would have followed up. Though part of me says it would have been good to follow up so the new station knows what they are getting.”

- Judiciary employee



“A magistrate came to my office and gave a horror story about a senior judicial officer who propositioned her. She refused and was told ‘you will have it really rough in the Judiciary’. A week later she was transferred somewhere very far away. Her father was sick and she needed to be near him as she was the only person who could take care of him. She was very stressed out. I consoled her and said we have to make a formal complaint. She said no. ‘Listen I am just coming to talk but no, I am not willing to do anything.’ I am not sure what the specific fear is but the administrative tyranny is so consuming. I never understood why people are so scared. I asked her to think about it, telling her there are people to support you. Three weeks later, her transfer was cancelled. I am not sure what happened.”

- Judiciary employee



“After I was transferred to a new station, before two weeks were over, he was touching me everywhere. He comes and hugs me and is touching inappropriately. The following day, I pushed him away. It reached a point where he called me to his office to look at something and he grabbed me – he had been saying ‘do you have a sister? I really like women from your community; they are very beautiful.’ His left hand was on my thighs. I pushed him back again. The third time, I walked out. The following morning he again grabbed me and I pushed him away. I called his superior – he laughed. I told a female colleague – she also laughed. ‘You didn’t know,’ she asked ‘did you do anything?’”

- Judiciary employee



“When it is reported, men will say ‘if you didn’t want it, why didn’t you tell me? You had to go and report it?’ The woman will get so annoyed and feel bad if you touch their bottom but to the man, it is nothing.”

- Judiciary employee



Reporting

Some managers claim to have no knowledge of the existence of sexual harassment. They say no sexual harassment incidents have been reported to them. More than once, however, the consultants were told by managers that they had no knowledge of even any unofficial sexual harassment claim while a colleague in the same department provided specific and often recent examples occurring in the manager’s area of responsibility. This denial of sexual harassment in the face of their colleagues’ claims could suggest different things. They could be honestly unaware of any sexual harassment in the Judiciary or they are aware of rumours but fail to investigate, preferring to ignore it if there are no formal complaints.

In fact, multiple managers reported hearing of rumours amongst their staff about sexual harassment but



having never received a formal complaint, did not feel it was their responsibility to act. Or it was felt that there were a lot of what they viewed as relationships, but not sexual harassment, no administrative action was possible. Some managers also questioned complaints that were about events that happened entirely outside the workplace.

When subordinates perceive that their superiors have chosen to ignore sexual harassment, it allows it to go on unabated, either by default or design. Those subordinates understandably develop a mistrust of their superiors' intentions and may adopt a culture of not supporting or taking responsibility for the enforcement of anti-sexual harassment policies. For example, employees may not voluntarily participate in an anti-sexual harassment campaign and demand confidentiality to speak or act. Victims, on the other hand, already find it hard to report incidents of sexual harassment. The victim's actions are often questioned creating a stigma around coming forward. Without those in positions of authority who will believe and support these claims, victims are even less likely to report incidents. Therefore, it is not surprising that most cases are never formally reported as evidenced in the SAQ results.

“Sexual harassment is there but it is not being reported. There is some complicity because we have accepted it as OK. Sensitization is needed for staff – this kind of treatment would amount to harassment – or if you feel that there are any advances that are inappropriate, there is an avenue for reporting. And it would be taken seriously, not taken against you and not viewed as you are the lesser person or it was because of how you were or how you dressed etc. I like the definition in the HR manual. It has been very difficult separating relationships visa vis harassment. The process of how it is handled does not make it very easy. If you are told to report to your Head of Station, that person could be the harasser.”

- Judiciary employee



“Most of it happens quietly because I think people are ashamed to bring those things out. You will find someone is coming to complain about what the boss is doing but they will tell you I don't want it to come out – I don't want it to go the Committee – I don't want it to be a discipline issue. Just talk to the person. Just caution the person. They will tell you I don't want it to be on the record. Just talk to them and tell them it is not right.”

- Judiciary employee



“For someone to be able to identify sexual harassment, it is 2 parts: me accepting what it is and also being able to say this is what is happening. We are a community; in every community, there is a madman in the marketplace. It would be a lie if we said there is none, but there is no formal complaint about it. In one station, staff complained saying we think there is sexual harassment going on here. It has got to the point where we think the spouses have accepted it. When I talked to the lady, she said it was just a good working relationship, nothing of the sort happens. I talked to the man and he said it was rubbish. Funny that the complaint comes from staff. I told him it came from staff because they noticed. He asked for a transfer because staff complained about him. Then after a few months, he was transferred. My impression was that the lady was fearful and she accepted the relationship that was initially under duress. If you can get rid of fear, you can move forward. Fear is pushed by poverty – losing your job has such high consequences.”

- Judiciary employee





Investigation and Discipline

The handling of discipline of Judiciary employees is split between the Human Resources department and the JSC. For staff up to Grade 9, the HR department is responsible for disciplinary proceedings, including inquiries into sexual harassment complaints. These proceedings are internal administrative processes within the Judiciary to determine whether discipline is warranted and not criminal proceedings per se. Hearings are held by the Human Resources Disciplinary Committee which has representation from all departments. The Committee’s decision must be ratified by the JSC prior to implementation.

An investigative and inquiry process is best served by an inquisitorial approach, however, the procedure described by interviewees appears to be very adversarial making it very much like a judicial process. The person accused of sexual harassment is usually represented by a lawyer whilst the complainants usually represent themselves. In addition, the standard of proof appears to be very high, close to beyond a reasonable doubt. This stressful environment makes coming forward additionally difficult for complainants, who must themselves, and any other employees they call as witnesses, appear in person before the committee and be questioned.

Less is known about how the discipline of higher rank individuals is handled. It was suggested that complaints of sexual harassment for a Judiciary employee with a rank above Grade 9 would go to the Office of the Judiciary Ombudsman or the CRJ to complete the investigation and then be sent to the JSC Human Resources Committee for a final determination. There was also uncertainty about where a case would be handled when one party ranked above Grade 9 and one ranked below. The Human Resources Disciplinary Committee may write a report about what a lower ranking complainant says and then pass it to the JSC to complete the investigation. The reason that the Committee cannot question a magistrate for example, is rooted in the fact that junior employees cannot question higher ranking employees, especially judges, about misconduct. This attitude is a telling sign that hierarchy is still very much pervasive in the Judiciary, especially when it promotes the impunity of high ranking employees.

“The Judiciary should proactively do something on sexual harassment in the workplace; there should be no cover up for anyone regardless of their rank.”

- Judiciary employee



The IDIs revealed that a group of employees submitted an anonymous complaint concerning ongoing sexual harassment by their superiors to the Judiciary. The complaint was not investigated because the complainants remained anonymous, but the fact that they did not feel comfortable coming forward may be indicative of their fear of retribution. The data certainly supports this conclusion. Even if there is not enough evidence to make a finding of sexual harassment, the Judiciary’s commitment to investigating complaints shows how seriously it views the problem. Aside from the possibility of an open-ended investigation being able to uncover information, investigations could also affect the organizational culture surrounding sexual harassment.

Even when sexual harassment is reported, there is a tendency on the part of managers to handle it informally without going through any formal disciplinary mechanism. Sometimes, this is at the request of the victim. Other times, it is the manager who does not want to pursue the formal disciplinary process that forwarding a formal complaint would kick start. And if the alleged perpetrator is transferred, managers see the problem as no longer their responsibility. Because no one appears to ever have been fired from the Judiciary for sexual harassment, the best case scenario is often that one of the parties is transferred.

Judiciary employees feel that when a harasser’s behaviour is known, the harasser will stop because he or she is embarrassed, which suggests that they feel punishment is not necessary. But this notion is based on the seemingly false assumption that sexual harassment only covers unwanted sexual advances as denoted in the Human Resources Manual definition.



Gender and Sexual Harassment

One Judiciary employee felt that the rising number of female leaders in the workplace meant there was likely to be fewer complaints because female victims could more easily find supportive people in positions of authority with whom to raise their sexual harassment complaints. Another employee felt that larger numbers of women in the workforce discourage sexual predators because these men may be too intimidated to make unwanted advances and risk public rejection. However, the data from the SAQ does not support these theories. Sexual harassment is still a problem and the victims are both men and women.

While cases of bullying and sexual harassment of men were mentioned in passing a few times during the IDIs, the consultants did not hear from a male victim. Yet, the data shows that there a significant portion of sexual harassment victims in the Judiciary are male and while a very small amount of sexual harassment is reported, men may be even less likely to discuss it than their female counterparts. The consultants did hear of a sexual harassment complaint report by a man, but it was not taken seriously or pursued. This lack of follow through may have been due to the false narrative that sexual harassment is only a female problem and investigating a case with a male victim will not help solve that problem. It is important for all Judiciary employees to understand that anyone can be a victim of sexual harassment and all victims need support. Furthermore, all perpetrators, whether male or female, must be condemned.

Consensual Relationships

Multiple Judiciary employees feel sexual relationships among co-workers are the real problem in the Judiciary, not sexual harassment. These relationships are especially prevalent in remote stations as there are not so many people to socialize with in these areas. In addition, Judiciary employees are often not accompanied by their spouses when they are posted to a remote location.

“For newly employed employees, if they didn’t know the area, they relied on senior staff to show them around. If supervisors have no professional ethics, they will take advantage.”

- Judiciary employee



“I have heard of sexual relationships; it starts with gossip. They are seen drinking and shopping etc. together. Their spouses may be far away. But it is not sexual harassment, it is a relationship. I would not transfer someone if no one is complaining. It is not affecting work.”

- Judiciary employee



Consent is sometimes an even more complicated issue than sexual harassment, especially in a context where employees fear workplace repercussions for going against their superiors. Therefore, snap judgements of how to categorize relationships should not be made without investigation.

“So I called him and explained the complaint and he didn’t deny it. He said he thought she was willing. He did not think it was sexual harassment. He thought there was consent. He was senior to the complainant. I asked him to apologize and he did.”

- Judiciary employee





“For the ones that we saw, they were not very serious. They were already in an affair and then they break up and someone says it was sexual harassment. But serious ones at this level, we have not seen that.”

- Judiciary employee



Judiciary Employee Initiatives

Because managers’ performance appraisals are linked to whether they sensitize their staff on sexual harassment, multiple employees with managerial duties report carrying out training on this topic. The content and manner in which sensitization is carried out does not appear to be specified. Moreover, clarity of which policy is applicable as well as its ability to adequately address the issue will necessarily affect the outcomes of any sensitization efforts. Some managers find staff do not want to talk about it, but others find they are open to sensitization.

“I have seen the DCJ’s memo, have yet to see a booklet or manual or policy. I just researched what I can on sexual harassment and explained what the staff wanted to know. I thought it would be helpful to get one man and one women because many times it goes unpunished because people fearing to report because many perpetrators are senior and they fear their seniors. Appointing a man and a woman in each station gives them someone to report to. My criteria was that I wanted an approachable, senior and elderly person, like an auntie or an uncle. I have not had any complaints.”

- Judiciary employee



Some managers bring external people to the workplace to discuss sexual harassment. Others ensure they discuss it at every staff meeting. Some outlaw relationships amongst employees, discourage lewd stories, course jokes or commenting on a person’s appearance and apply the same restrictions to people external to the workplace. Other managers actively discuss sexual harassment with their clients or the public. In response to a sexual harassment complaint from an advocate, one manager explained to the Judiciary employee that if advances are rebuffed, they should be discontinued as unwelcome advances are the problem. Additional employee initiatives are discussed below.

“Because people took advantage of employees when they were settling in a new station, I thought it would be a good idea to have a mentor identified for everyone including staff. That’s why the mentor must be of integrity. As a manager, you must know your staff.”

- Judiciary employee





“I implement the policy myself – no touching or untoward comments, no posting messages in WhatsApp that are suggestive. That is sexual harassment. I do it in a joking manner so they get the point. I told them to report to me. Then I will write the complaint and forward it to Human Resources. So far I have not had any complaint. We have students and first thing, I tell the boys to protect their sisters. Students can be vulnerable. So can litigants in court. I use posters in Kiswahili. Men - they like groping, not so many women but I have heard about some females too.”

- Judiciary employee



Conclusion

The data collected in the SAQ depicts sexual harassment as a prevalent problem amongst both male and female employees in the Judiciary. More importantly, most feel that they cannot report it and therefore may not be able to resolve the situation themselves, meaning it may be a source of continuous and marked stress for employees. In order to change behaviour, a clear definition, detailed explanations and consistent training for all staff is needed. Because concern over sexual harassment complaints from court users was mentioned, however infrequently, in both the SAQ and IDIs, information and training for external stakeholders, especially members of the CUCs, may also be a good idea. This outreach will help ensure sexual harassment is truly stamped out in the Judiciary and an inclusive culture that discourages all types of harassment is forged.

Any sexual harassment policy must clearly set out the boundaries on appropriate behaviour and be formally adopted to show that the Judiciary is serious about eradicating the problem. Likewise, the Judiciary needs to consistently take all sexual harassment complaints seriously and investigate them, no matter who the victim or the alleged perpetrator is. Impartiality is key in the investigation process so that the Judiciary can build its credibility with victims as an enforcer of any anti-sexual harassment policy. Given the Judiciary’s poor track record in handling sexual complaints, it may even consider outsourcing the investigation process to allow for all employees to be subject to the same mechanisms and emphasize that there is no impunity for very senior employees. These changes could go a long way towards changing the Judiciary’s culture surrounding sexual harassment.





5.0 FINDINGS OF THE JUDICIARY GENDER AUDIT: EXTERNAL

External Service Delivery Gender Equality and Inclusion

This portion of the audit requires a review of the Judiciary's external operations. Such an external review entails analysis of the Judiciary's service delivery and dispensation of justice. This part of the assessment addresses how the Judiciary is enabling the implementation of the principles of equality, equity and inclusion as it carries out its constitutional mandate to facilitate access to justice for all. This examination analyses the Judiciary's understanding of the plight of historically excluded groups and gender and its facilitative role in this regard, case management processes, effect on societal attitudes, contribution to access to justice for all citizens through various methods including alternative justice systems and application of the law in jurisprudence.

5.1 EQUAL TREATMENT IN COURT PROCESSES

Aside from gaining access to the justice sector in the beginning and the actual outcome at the end, the litigation process involves many steps that litigants often find foreign and intimidating. It is also important to consider the different stages a case goes through and how a litigant's experience might be affected by gender. While the consultants have not researched the views of the public directly, the introspective research carried out on the Judiciary does provide some insight into how each gender is served. The consultants examine whether gender plays a role in how the Judiciary interacts with its stakeholders through court processes and what the implications might be.

Court Users and Gender

The IDIs showed there are fewer female litigants than male litigants appearing before the Kenyan courts. In fact, the Judiciary's own Court User Satisfaction Survey, produced by the Performance Management Directorate, shows only 28% of respondents are female.¹²³ The survey sample included a cross-section of the usual court users, but unfortunately did not break down much of the data by gender. The HiiL Justice Needs in Kenya survey does provide some insight into some of the factors that may contribute to the lower participation in the formal justice system by Kenya women. Here, it describes the common situation where a person has a serious legal problem but chooses not to do anything to resolve it:

37% of the lower-income groups say that they remained passive because they did not believe in their capabilities to resolve the problem. For the higher income Kenyans this percentage is much lower, 30% and 27% for the two higher income groups, respectively. Interestingly, the lower-income respondents report slightly more often that the main reason for doing nothing is that they did not know what to do to resolve the issue (15% higher-income; 24% lower-income). ... We also observe that 28% of Kenyans from the lowest income group say they did nothing because the other party was more powerful, whereas among the highest income group this is only 13%. This indicates that the justice system is not seen as an equalizing force by a sizable part of the population.¹²⁴

These observations point to a lack of confidence, lack of information and the assumption that a person's status or corruption as more important in influencing outcomes than justice as reasons some people do not engage with the formal justice system. More specific research in this area may indicate where assistance can best be provided to ensure that women are able to access the courts at least in a measure equal to their male counterparts.

The small ratio of female litigants is exaggerated in criminal matters where the vast majority of litigants are male as reported by IDI participants and confirmed by the number of females in prison making up just 18% of the prison populations.¹²⁵ Yet, women who are in conflict with the law and are placed in remand are

¹²³ Court User Satisfaction Survey, *supra*, note 68 at. p. 11.

¹²⁴ Justice Needs in Kenya 2017, *supra*, note 67 at p. 158.

¹²⁵ See National Council on the Administration of Justice, *Criminal Justice System in Kenya: An Audit*, (Nairobi, 2016) [hereinafter *Criminal Justice System in*



less educated than their male peers with about 20% actually being literate and another 51% just barely being literate.¹²⁶ This leaves them more vulnerable within the formal criminal justice system which operates on strict procedures and legal formalities. Moreover, because pauper briefs where the court pays an advocate a nominal fee to ensure that the defendant is represented, are only available to those charged with murder and only about 4% of violent crime is committed by women,¹²⁷ most women in conflict with the law will not be represented.

In criminal matters, the boy child is also at a significant disadvantage. As minors they are not able to represent their own interests and are vulnerable like all children, but are still viewed as criminals and even aggressors in crimes involving female children. Less attention is given to the boy child and the corresponding high rates of incarceration.

Accommodation of Litigants

During the IDIs, judicial officers described how they personally try to play a role in promoting gender equality and inclusion. Multiple pointed to the fact that many courts have tried to have clear service charters posted all over their courthouses in order to ensure that all litigants are aware of the costs and time frame within which they can expect a decision. Often Judiciary employees feel that just being sensitive to the circumstances of the litigants before them can help. Some even admitted that they can sometimes be a bit dismissive and not really “see” the person before them as they are too busy writing. Some also suggested that it is constantly a challenge because they feel that they don’t always have the time to give to each case because they are judged more on the quantity of cases they deal with and not by the quality of how they handle them. This is a reference to how the performance of judicial officers is evaluated by the Performance Management Directorate. Finally some relax the strict rules of procedure in the interests of fairness. An example is provided below:

“I have sat in a rural setup. When listening to a lady, I give them time. It is a question of time. Even magistrates need to be trained on how to listen to them. One even cried after the judgement of a case in court for over 20 years. It is a question of a judicial officer who has the right attitude in mind unlike in the past where we had a lot of technicalities. Even ladies – it is we judicial officers who will interpret the law. Parliament will not go into the detail – it is for the judge to look at it – it is why we are here. Sitting here, when you see a party from the village, you must understand her problem. Tell her, if you go on, it may not help you. Give parties the chance to amend the proceedings.”

– Judiciary employee



The stark reality in the Kenyan courts, especially for those outside Nairobi, is that very few parties are represented. By taking a less formalistic approach to legal dispute resolution, some in the Judiciary are able to promote equality. But still, there are many others who feel that they cannot depart from the strict common law legal rules. Most rules of procedure have been adopted directly from the British common law, yet the 2010 Constitution was written with the Kenyan context in mind. There are many provisions in the Constitution which speak to the way the Judiciary dispenses justice, such as prescribing that access to justice and alternative dispute resolution methods be front of mind.¹²⁸ Because these provisions have constitutional weight, they are an opportunity to reform the justice systems British common law legal rules for the Kenyan context. Another judicial officer tells the story of a litigant who was not being served by the usual court process:

“When we write to the advocate, we don’t copy the client. In mediation, we are supposed to address

Kenya] at p. 52.

126 See *ibid* at pp. 174 and 182.

127 See *ibid* at p. 52.

128 See Articles 48, 159 and others in the Constitution.



parties directly but we don't have their contacts so we go through the lawyers. Then when they come for the mentions, we get their mobile numbers etc. Some want access through lawyers and some also prefer direct communication. We would not even have their address. We are keeping the mobile numbers in CMS [Court Management System] as we ask them to fill in contact forms. It was unique to mediation but now contact forms are generally used for almost all courts."

- Judiciary employee



Family Courts

The Family Division of the High Court in Nairobi now requests all possible heirs, including and especially females, be present to tell the Court on the record that they consent to litigation, settlement or other probate arrangements that are being made. This was due to the Court being told in the past that there were no other heirs when there were women who may have been married, which may have disintitiled them under customary law but makes no difference under the current statutory family law regime. After having their rights explained to them in open court, some women still say they do not want their inheritance but multiple judicial officers will say they are awarding it to them and they can transfer it to their male relatives if they so choose. While the requirement that all heirs be present in court to ensure that they are aware of their rights and give their consent is now an instituted practice in the Family Law Division in Nairobi, other judicial



officers have also taken it upon themselves to demand the same thing in the regions. They did so because they too saw male heirs abusing their position where female heirs may not have been aware of their rights. Still other interviewees explained that some widows end up paying their more educated male relatives to initiate and pursue their case in court because they do not know how to go about it. These experiences of judicial officers highlight the still disadvantaged position of women, and especially rural women, in family law matters.

IDIs revealed that the Family Division still experiences a very large proportion of their litigants being unrepresented even though some are aided by civil society. They also have a higher proportion of female litigants compared to many other courts. This is why they have developed a simplified tool documenting the law on inheritance. In addition, the Kilimani Family Division Bar Bench validated the Family Court's service charter in order that these court users could agree to what the service charter claimed. The Family Division also is the only court in Milimani that actively encourages litigants themselves to come to office of the Deputy Registrars of the Family Court to ask questions including around the mandatory mediation. There is usually a long queue of litigants waiting to see these Deputy Registrars. This means that the Deputy Registrars have a large amount of interaction with the public, which has really helped them to understand how litigants experience court processes.

"There was an instance in 2015 where a lady stripped at the gate because she did not know the processes. We are the only Deputy Registrars that have signage to show people where to go and have a waiting room."

- Judiciary employee





Criminal Courts

Within the criminal courts, judicial officers stated that they would often order a pre-sentencing report on female accused persons, because they want to ensure they have all the relevant information before making a sentencing determination. They are concerned that they have all the information on mitigation or other extenuating circumstances that might affect their sentence such as whether there are dependent children and if there is anyone else to take care of them and whether the defendants are pregnant or breastfeeding infant children. However, there are limits to this gender perspective. As one judicial officer describes below, for certain offences, the effect on society is the paramount consideration:

“In drug trafficking, I deal with men and women equally. There is no room there because the law calls for harsh sentences because drugs have caused havoc in this world. I would not want to treat a woman differentially when the consequences are the same for society.”

- Judiciary employee



This point of view was expressed by various judicial officers. Drug trafficking is also an interesting area because it is one of the few offences where a higher proportion of accused persons are female. In fact, at the Jomo Kenyatta International Airport Court, where due to its location the vast majority of cases involve drug trafficking, it was estimated that for these types of offences, there are roughly equal numbers of men and women who come before the Court. It should also be noted, however, that most crimes may hold the same consequences for society, regardless of whether they are committed by a man or a woman. Yet, it is also important to recognize that time and again, judicial officers reported that women who are charged with criminal offences usually face petty crimes or regulatory offences such as selling illegal brew.

Moreover, the practice of sentencing in general may benefit from formally being able to deal with gender concerns that arise for men or for women in the application of the Judiciary’s sentencing guidelines. It was suggested that the effects of a women’s imprisonment on her children might be considered. This consideration does not mean that women cannot be jailed but just that judicial officers must be sensitive to the different circumstances of each person who comes before them.

“The judiciary policies and operational frameworks are silent on gender. The different guidelines, e.g on bail and sentencing, do not address gender concerns and yet there are important gender concerns. For instance, they are there in the determination of bail terms for a lactating or pregnant woman.”

- Judiciary employee



Application of the Law and Gender

The application of a seemingly gender neutral law can also cause gender equity problems.

IAWJ KC has been influential in advocating for fairer interpretation of laws that affect women such as requiring spousal consent to dispose of matrimonial property. Another area that was mentioned repeatedly was the situation that occurs when two teenagers, who are often boyfriend and girlfriend and below the age of consent, consensually engage in sexual behaviour. Alternatively, the male may be a few months or a couple of years older than the girl who is his girlfriend. Because the girl is viewed as being incapable of providing consent (whether or not the boy is actually of age himself), the male alone is often charged with a sexual offence such as defilement.



“It is possible that in a sexual offence case that the boy child has not been properly catered for by that Act. We have noted as judicial officers and have gone out of our way to assert the rights of the boy child. Where a boy and girl are the same age – only the boy has been convicted and a few of us have been active on this issue.”

- Judiciary employee



“There is a need to amend the law in the case of minors, sexual offence cases where both parties are under 18. There are a lot of issues for the male child. Society has mostly engaged to protect the female child.”

- Judiciary employee



While a number of judicial officers noted this problem in the IDIs, beyond raising it as an issue that needs to be addressed, there was no information regarding proactive actions that have been taken by the Judiciary in order to combat it. Nevertheless, it is a serious issue that has previously been noted by the Judiciary in its Audit on the Criminal Justice System:

Sex education needs to be talked about openly, and further research needs to be done on the best approaches to adolescent sexuality. Boy children are more at risk of being in conflict with the law than girl children. While a range of programmes are available for vulnerable girls, there is an absence of programmes for boy children. Interventions which seek to reduce the vulnerability of boy children to being in conflict with the law should be investigated.¹²⁹

As the Criminal Justice Audit suggests, this is an area that needs to be looked at more closely and the application of the law by the Judiciary should receive attention with formal data collection to back up these important trends that are being noticed. Furthermore, multiple Judiciary employees reported an epidemic of defilement cases in Western. The perpetrators, all young males usually under 30 years of age, face harsh sentences, often life imprisonment. Judicial officers feel because the law is clear, there is nothing they can do but apply it. In recognition that life sentences do not seem to be a deterrent, it was suggested that something else needs to be done. The strict application of the law is not addressing the issues at play here and more research is needed as to whether cultural norms, lack of employment or education or other societal causes are to blame. The Judiciary has the power to ensure data is collected so attention can be drawn to these matters.

Kadhi Courts

There are procedural issues that make it difficult for any vulnerable party to initiate a case, but some were highlighted in the context of the kadhi courts.

“Gender has come up in civil procedure with the issue about where to sue. If a women from Mombasa is married in Kisumu and if she fights with her husband, she has to file for divorce where the defendant is according to rules, but it is hard for women with no money. The woman would have come back to her parents in Mombasa as so there are access to justice issues. It is very difficult for women who are not working or have a very low income.”

- Judiciary employee



This issue is exacerbated for women who come to the kadhi courts because the women are usually



suffering. The man is not as affected because under sharia law, he can marry up to four women but women cannot remarry until they are divorced. Therefore unlike women, men are not usually in any rush to resolve a dispute before the kadhi courts. For this reason, the kadhi courts try to move as fast as possible in processing cases. Most cases are filed in the kadhi courts by women so delay is a serious concern.

Another kadhi court process that can seriously disadvantage a woman is according to sharia law, the evidence of two women is equal to one man. While Kenyan kadhies observe this rule in the marriage ceremonies they perform, in other matters or in the kadhi courts, male and female witnesses are usually treated the same because of the oath that they take. One kadhi thought this practice that is common to all kadhi courts in Kenya was due to the 2010 Constitution. It was not known how other kadhi courts outside of Kenya deal with this issue.

Tribunals

Tribunals are in themselves a way of bringing justice closer to the people with less formality and easier access. The Rent Restriction Tribunal is an example of this:

“Generally Tribunals are supposed to be more informal; they are not supposed to be very technical, but because we are applying an act on contracts, we can’t deny a landlord his right to enforce a tenancy contract. As we are doing so, we are incorporating those gender equality principles.”

- Judiciary employee



Kituo Cha Sharia helps to prepare the documents of a large number of the Rent Restriction Tribunal’s litigants who then appear before the Tribunal on their own. While the regulations to the Tribunal’s enabling statute requires that proceedings before the Tribunal be commenced by filing a plaint, the Tribunal is considering using standardized forms but they recognized the challenge as each case is different. Nevertheless, Tribunals in other jurisdictions commonly use forms to further simplify and speed up the hearing process for litigants.¹³⁰ Such a method can clarify the complainant’s case for tribunal members and further the understanding of the process for litigants, especially for the vast majority who are not represented.

The Rent Restriction Tribunal listens to each party, attempts to understand the case and then crafts unique solutions. The Tribunal also considers education of the public part of its mandate. It must explain to its litigants what is allowed under the law and what behaviour is not lawful. By engaging directly with the parties, the Tribunal can effectively protect vulnerable parties and correct unlawful behaviour by explaining the law to the parties. This method is effective because parties respect the tribunal members.

“We can address discrimination because sometimes women come and landlords say she comes home very late at night when she doesn’t have a husband etc. We make the landlord know that whether they are single or married, male or female, rights are applied equally. If the tenant is performing his or her obligations and the complaint is not one of the grounds provided for in the legislation such as gender prejudices – we will not allow them.”

- Judiciary employee



130

For example, Tribunals in the UK, Canada, Australia and South Africa all make extensive use of forms.



Tribunals could actually be a practical resource for the Judiciary on how to apply gender equity through informal solutions. Furthermore, the experience of tribunals can help inform the Judiciary's overarching gender policy on service delivery and accompanying training programs. Conversely, it may be helpful for JTI to offer the continuing legal education that judicial officers receive to tribunal members as it seems they do not have access to regular training programs through the ministries. Tribunals may also benefit from the CUC structure as envisioned in the NCAJ's CUC Guidelines¹³¹ in order to help further refine their case management processes. The consultants were not made aware of any Tribunal which has an operating CUC.

Court User Committees

Participants in the CUC FGDs feel the observations made by the CUCs contribute immensely to the Judiciary's administration of justice. CUCs share experiences, ventilate complaints and emergent issues, improve efficiency, help achieve tailor made practice directions for the division and station and get justice sector community buy in. All of these actions improve the court user's experience, foster more inclusive court procedures and increase the effectiveness of the courts in the community. CUC members feel a CUC is especially helpful in the Children's Court, perhaps because local and cultural issues are also a large part of CUC discussions.

With outcomes such as operation desks with contributions on content from judges, the justice sector can only benefit from the CUCs' collective problem solving abilities. There is, however, a need to ensure there are an adequate number of female members, especially in rural and hardship stations where this is sometimes a challenge as many justice sector agencies do not appoint as many women to these areas. Having a CUC that is representative of the community is important because local gender related problems the public face in court processes can be solved in an expedited and informal manner. Beyond simplified procedures, one FGD participant suggested that there could be a Judiciary or CUC presence at the Huduma Centres which are widely available to citizens all over the country. Litigants do not always find it easy to ask questions at a court about how to do things and reinforcing avenues to information with a CUC orchestrated presence is an interesting idea that could be tailored to the local area.

Conclusion

It is appropriate for the Judiciary to consider whether the Constitution has altered its obligations in delivering justice in the Kenyan context. Moreover, because the 2010 Constitution is paramount, many vestiges of the common law, most often imported during the colonial period, may have to be amended to fit within the purpose and spirit of this document. It offers an opportunity to re-examine how the Judiciary operates, not only as a state organization but also how it operates as an institution dispensing justice to all Kenyans. The fact that female participation is much lower than male participation in the formal justice sector must be factored into this review.

Many parts of the Judiciary have already adapted their court processes in efforts to become more user friendly and to ensure that vulnerable parties are not being taken advantage of. Family law courts are an example of this but criminal law courts see issues yet have not been able to address them effectively. Every court, division and station should be encouraged to ensure their processes and procedures are as user friendly as possible and then share best practices, including those that originate in the kadhi courts or tribunals. CUCs will necessarily be a useful tool to tackle this task. Through training, Judiciary employees can be instructed on how to apply a gender perspective in order to be able to spot gender issues in court processes and develop meaningful and effective solutions to those problems. Transparency in court processes is very important both to the understanding of litigants and to the perception that justice is being done. For example, judicial officers especially are respected in their communities and should take the opportunity to explain the law and its purpose and effects wherever possible.

131 See CUC Guidelines, *supra*, note 64.



5.2 PUBLIC PERCEPTION OF GENDER IN THE JUDICIARY

As aforementioned, while the Judiciary Gender Audit did not research the views of the public directly, the introspective and qualitative research the consultants carried out on the Judiciary is also informative of the challenges faced by different genders while working in the Judiciary and dealing with the public. In the past, there were far fewer women who served as judicial officers or in leadership positions, which may have informed the opinion of some Kenyans, especially in some rural areas, that women cannot take up these roles. The Constitution names the Judiciary as an important state actor in protecting and promoting rights and freedoms, national values and other constitutional principles.¹³² It follows that the Judiciary must also play a role in transforming the attitudes of citizens that are contrary to these constitutional values and principles by standing up to gender discrimination from the public.

Public Education

Not surprisingly, Judiciary employees have differing views on whether educating the public should or can be done. Some Judiciary employees explained how the public needed to be made aware of what the Constitution says and its effect on how things operate within society. Others said that it was difficult to implement everything provided for in the Constitution because of the African culture in which Kenyans exist. In the few examples that were shared where Judiciary employees attempted to explain why things must change relating to how men and women are treated in society, they often succeeded in changing attitudes. Judicial staff and especially judicial officers are respected in their communities and have an opportunity to try to explain what gender equity truly means to the public and why it is important. The Judiciary Transformation process showed how change is possible but Judiciary employees could be encouraged further to explain the Judiciary’s positions to the people. If the Judiciary provides additional information on these positions and why they were adopted, it may help employees undertake this education of the public.

Judiciary employees recognized how the current communication policy has significantly improved the image of the Judiciary from that of a stuffy, insular institution to a more service-oriented delivery arm of government. In the same way, the Judiciary can adopt a strategy to explain why gender balance and equity is important for society.

“We have done a lot in the Judiciary, but we can do more, not only educating Judiciary staff but also the people we serve – particularly men.”

- Judiciary employee



For example, interviewees explained how when more than one employee from a station is on maternity leave, it can affect work and service to the public to the point that sometimes, the public may even complain. Workload issues around staff absences are not new and not confined to the Judiciary. While some may view this problem as a gender issue, it is a legal obligation for employers to provide women who give birth maternity leave. Everyone needs to understand this. Employees must be able to explain this to the public and that absences are just temporary. Proactive planning around maternity leaves may also help alleviate any workload problems.

132 See Subarticle 159(2)(e) of the Constitution.



“We need to be role models; walk the talk and apply it in the Judiciary when required, administratively or jurisprudentially, in the very small way we know and it will have a ripple effect. I sensitize the staff and the public on local radio stations. I talk about sexual offences which is a big thing here. Judicial officers don’t do it enough – talking about what the law says and what people should do. Don’t marry a child under 18. You can be jailed if an under-18 is living in your house. It helps a lot. I also talk to Chiefs, barazas and villages about defilement. They can ask any questions they want. I, a prosecutor and police officer in charge of gender matters and a children’s advocate - talk to them in language they understand. It has been effective.”

- Judiciary employee



CUCs may have a role to play in disseminating this type of information. They can provide information to their communities about the law and how the justice system works. CUC members agree that sensitization of the public is important. It was suggested that reaching out to the public, perhaps through radio or other media, is important because people need to understand why the Constitution and the law support gender equality and what it means in practical terms.

“We also talk to the media and educate about the law. Through the CUC we should be educating the police, the Chief, the pastor etc., all those people. And at Open Days for the Judiciary, we can do a lot of talking to members of the public.”

- Judiciary employee



It was also pointed out that there is very little interaction between litigants themselves and the Judiciary. Beyond suggestion boxes that do not appear to be checked regularly or whose contents are not analysed for frequency of complaints or trends, the only other way to make a formal complaint to Judiciary employee or the Office of the Judiciary Ombudsman. Yet, the Office of the Judiciary Ombudsman is not devolved and is not approachable in an informal manner. Some may also not be comfortable asking questions or complaining to their local judicial officer or staff.

“The Judiciary needs to do a lot of sensitization with people who can handle customer desks properly to reassure court users. They have a formed opinion. They just sit in court and there is no desk to follow up with and share concerns.”

- Judiciary employee



Those who regularly interact with the public should be able to collect data to be reviewed in the aggregate. They should also be empowered to openly discuss issues in hopes of resolving them. CUCs may also serve as a link between the public and the courts, though the public may not be aware that these committees exist or know how to contact CUC members.



Patriarchal Culture



All patriarchal societies use stringent gender roles to empower men and control women. Traditional gender roles dictate that men be assertive, aggressive, smart, tough and provide for their families while women are beautiful, passive, weak, nurturing and take care of their families. These traditional gender roles deem certain behaviour acceptable for each gender and permeate public dialogue and people’s views, sometimes without their realizing it. Because women are valued for their appearance, more attention is often paid to how they look. It is interesting to note that how women dress came up time and again during the consultants’ discussions on gender. Judiciary employees would often comment that some women dress inappropriately but no one ever commented on how men dressed. It was raised as an issue many times that some women dress in a way that reveals too much.

“Only tell the ladies that they must dress formally. This has been an issue, at times, the way they dress is too revealing. The public will complain. It is the same across the country. The public expects us to be dressed smart with our hair well done. Justice is perceived and everyone will deal with the public.”

- Judiciary employee



One wonders whether no man has ever dressed in a manner that someone felt was unsuitable or whether the standards are different for men and women. Individual complaints from the public must be dealt with on their merits but it is also important to ask whether too much attention is paid to how a woman dresses as opposed to the work she is doing. Multiple senior female Judiciary employees also felt that when women applied for high profile positions, the media often played up a woman’s attire more than her qualifications.

In addition, the country’s patriarchal culture also downplays the importance of women’s labour in the home which has a bearing on how people view matrimonial matters. It was noted that litigants often do not understand why women should get half of the matrimonial property for ‘doing nothing’. Yet this is another example of an area where public education is needed. This may occur through the court’s decisions, the way it articulates the law in court and in speaking about its work to the public.

While much attention is paid to the rural areas where patriarchal cultures are strong, there must be an understanding that these basic stereotypes, of how society judges a woman’s appearance or her lack of employment (regardless of the work she does at home) are predominant throughout the nation. If Judiciary employees have some basic understanding of gender issues, they can attempt to explain issues when there are questions raised by the public.



When the Law is in Conflict with Cultural Norms

An example where the Judiciary has been actively trying to abide by the law even if many Kenyans feel things should be done as they traditionally were is succession. Judiciary employees report that it comes up more with unrepresented litigants but it has also been a problem when counsel are acting because some people will not even disclose that there are daughters in the family. Because culturally many people still believe that married women or women in general cannot inherit anything, they may not even list their sisters as possible heirs. Often, local Chiefs may not even report the female children of the person who died, but some judicial officers insist that they must identify all children, whether alive or not, in order to be able to make a fair distribution. Simply explaining the issues at stake could help make people understand how the Constitution and its implementing laws are attempting to foster fairness.

Guidelines on these practices, however, do not seem to exist and in reality, each judicial officer has a different way of resolving this inquiry. Codification of the steps that need to be followed may ensure that these proactive measures are uniformly adopted across the country and especially in areas where cultural beliefs may not be gender sensitive. Furthermore, there are differing opinions on how to handle women who also subscribe to the view that they should not inherit anything. Some believe they must award a distribution to them according to the law anyway and others believe it cannot be forced upon them due to adversarial nature of the legal system or because it may put the women in danger when local culture is overtly opposed to women inheriting property. This is further complicated by whether these women consent to not taking a share.

“It is a challenge in some areas. If you give it to them anyway, you can risk the lives of these women. Where the colonialists were, there was a break of 80 years when colonialists expropriated land and broke the customary land tenure. Then when the land was given back to Africans, it was under a new system, it was not clan land. In Western, it was always African clan land, so they will say this is clan land and this is how our culture works and you will be risking her life if you give it to her anyway. Kisumu was a settlement area so you would not have this dynamic. But a rural area would reflect it. Western, Masiai, Narok, Isiolo & Coast (outside of urban centres) have this problem. The funny thing about it is in an urban setting, you are forced to conform to the urban culture because your next door neighbour is not your clansman. It is different and not as progressive where everyone is of the same culture or clan. In diverse areas, there is more progress and sensitivity because individual cultures are not as strong.”

- Judiciary employee



In areas such as the ones described above, it is not clear that there is any protection for women who are not disclosed to the court as possible heirs. Further research on how family law issues are handled in these areas may be warranted to see if further action needs to be taken by the Judiciary to ensure that justice is done regardless of gender. Again, public education may need to be conducted, especially for local Chiefs, who are often asked to verify family members for the court.

Gender Balance

Some CUCs have cited a problem achieving not more than two thirds of one gender because, especially in remote areas, many of the stakeholders do not have any female personnel. But it is precisely in these remote areas that female voices on the CUC are so important because the culture may restrict the full participation of women in society. Therefore, the CUC Guidelines should provide suggestions on how to deal with this challenge and CUCs should be encouraged to be creative to make sure women in the community feel that are represented.



“Gender balance needs to begin with CUC membership and the membership is mostly men. It doesn’t meet the two thirds gender rule.”

- Court User Committee Member



Gender balance was also mentioned quite extensively in regard to staffing, especially in smaller stations. Many Judiciary employees felt that gender balance among judicial officers is especially important because the public prefers it and it ensure no one feels excluded. Nevertheless, sometimes, posting women to rural courts is a challenge because those with children may prefer working in a more urban centre because of the availability of schools and healthcare. However, special efforts to ensure gender balance still need to be made. With the larger number of female magistrates that are now employed by the Judiciary, this should be less of an issue as not all women will have children of a young age.

Still, in some areas, where a strong patriarchal culture is present, members of the community have rejected female magistrates. The Judiciary has tried to stay the course and maintain these postings. It is important that these women are supported to ensure that they do not have to endure a hostile work environment. Discriminatory objections against the posting of female judicial officers must be met with persistent public education and backing from top management. The same is true where there are discriminatory complaints against the posting of male judicial officers to children’s courts. There is no reason that men cannot make decisions regarding a child’s welfare. Specific case-related complaints can be addressed, but stereotyping is not a valid complaint. Members of the Judiciary’s top management must visit these areas to explain why it is important to have judicial officers of both genders and why the Constitution demands it.

“What I can say is that in the context of an African country, the reaction to women in leadership is different in different regions of country. In urban settings, the public seeing a judge who is a woman – there is no issue. But in some conservative communities, then those attitudinal issues will arise. Culture change takes time; the national culture is patriarchal and masculine. In those conservative areas, the way the public perceives a female judge is different. I know of an instance where a representation was made to the CJ to get a man instead of a woman judge. The CJ refused this request from rural areas. From my point of view, within the institution, we don’t have that problem.”

- Judiciary employee



As previously discussed under the Gender Representation in Leadership section, even if there are no formal complaints made by the public against having a female judicial officer serve their community, they may still treat a female differently from a male. Many female judicial officers felt that they were accorded less respect than their peers, including from advocates and the public.



“The public tells me I am harsh. I don’t feel it would be the same if I was male. When I was new and I would deny an injunction, lawyers would be visibly angry and would react saying ‘that is unfair’. They would challenge you in court after you have made the order, but if you want to challenge it, there is a method. But for her male colleagues, the lawyers would just say ‘much obliged’ and they are out the door. The lawyers have an inclination to push the boundaries, asking you sit longer. It is the same still, just showing itself in different ways. The lawyers will say they could not get transport to be in court on time. Really, they should have planned to travel the night before but a male judicial officer could say ‘if not here at 9am, I will go ahead.’”

- Judiciary employee



While these views appear very subjective, they were heard over and over from female judicial officers and do deserve being addressed. A formal mentoring program may be an appropriate way to support these female judicial officers who expressed frustration with this type of behaviour. Such a program should be coupled with training for court personnel to ensure that courtroom decorum rules are applied uniformly as well as ongoing public education about gender equality and what it means on the ground. The issue of judicial officer security was also raised in the Gender Representation in Leadership section as many female judicial officers were concerned about their safety, some having experienced direct threats from advocates or the public. The Judiciary must take these threats seriously and help female judicial officers file complaints with the Law Society for advocates or the police if warranted.

Gender and Judging

There was a lot of discussion from Judiciary employees and CUC members about the perception of the public, including litigants and their advocates, about whether the gender of a judicial officer will make him or her biased in particular cases. Often these perceptions are based on societal stereotyping. While there was some disagreement, most judicial officers strongly felt that gender does not make a difference as to the outcomes of cases. Nevertheless, the courts receive many bias applications based on gender.

In addition, in family law, perhaps because it is usually a man versus a woman, clients have a strong preference for a judicial officer of the same gender as them. But what is more interesting is that there is a pervasive feeling amongst male litigants in custody disputes that whether they are the plaintiff or the defendant, they will lose because under the best interests of the child test, there is always a strong preference for the child to be placed with the mother. More research could be done as to whether there is an unwarranted bias towards the mother and if the data shows this, training and guidelines on how to apply the best interests of the child test could be adopted. Male judicial officers have also been pushed to disqualify themselves because of claims that men cannot understand the issues involved in child abuse cases. If claims of bias are solely based on stereotyping, judicial officers must have the training and courage to reject these claims. In the process of doing this, the test for bias needs to be further developed jurisprudentially in the Kenyan context, especially with regard to gender matters.



“When I practiced in the Children’s Court, there was a perception that women magistrates were softer on the women and so people complained (the male litigants). So they brought a magistrate that was male. I would recommend a balance of male and female magistrates in the Children’s Court. The bias could be true – that is why we have appeals. With issues of bias in the Judiciary, I don’t think there is a recommendation to solve it. People cannot be trained out of their bias. I wouldn’t be comfortable with a training recommendation because bias is a personal matter. If there is such a training though, it might help.”

- Judiciary employee



Some people do feel that training does not help bias, however, bias usually occurs subconsciously. The first step is to try to identify one’s biases, on an ongoing basis. Working to correct them is a long term undertaking, however, offering opportunities to discuss biases as well as how to handle complaints of bias would be extremely beneficial to judicial employees as well as all staff. Multiple judicial officers expressed an interest in more information about how to know one’s own biases, ensure they don’t affect decision-making and balance being flexible with impartiality. This may be a solid training opportunity that could be part of a general program on discrimination.

Gender bias claims have also been made in the criminal courts. But again, multiple judicial officers who were interviewed feel that gender does not make a difference when judging.

“I do not assign cases based on the gender of the judicial officer but there have been times when an accused may ask for a particular gender based on the perception that the other gender may be biased. In one case, a male judge was requested and I decided to assign the case to a male judge and it didn’t help the accused. In general, we hear all cases across gender lines and decide on the basis of the facts of the case.”

- Judiciary employee



Studies have been conducted in other jurisdictions on whether the gender of a judge matters. While there is some disagreement, it may be said that it can make a difference in how prevailing patriarchal attitudes in the law and legal process are addressed as opposed to how the facts of a case are interpreted:

This discussion is often framed around the ‘difference’ debate, namely, whether women judges decide cases differently from men due to their lived experiences (Abrahamson, 1998; O’Connor, 1991). Some studies argue that women judges do not judge differently from their male counterparts (McCormick & Job, 1993; Walker & Barrow, 1985; Westergren, 2004). ... Overall, there is growing evidence that suggests that women judges do make a difference, whether consciously or subconsciously, in the decision [sic] of cases and in challenging existing societal patriarchal norms endemic in the law and in the practice of courtroom culture.¹³³

Such scholarly evidence cannot be said to support judicial stereotyping but it does show that a representative judiciary is more likely to deliver justice by recognizing all parts of the society it serves. In addition, the consultants observed that the gender of the Judiciary employee did not determine the information they provided in an IDI. Their exposure to gender issues, however, was more determinative of how they understood gender dynamics, which suggests that training can be an effective tool to promote gender equality in the Judiciary’s delivery of justice.



Kadhi Courts

The Judiciary has considered female kadhis before during the Judiciary Transformation. Multiple employees thought the reason it was not implemented was because of the community, however, there were kadhi court users in the FGDs that felt differently. These kadhi court CUC members want female kadhis. As aforementioned, though there are two issues to deal with in order to achieve female kadhis in the Judiciary, proactive recruiting as well as public outreach and consultation with the Muslim community. Here, the second portion about affecting the public’s perception of who can be a kadhi is discussed.

“I recommend we have these discussions among the kadhis on these issues, the law and also on issues of perception of the community so we can recommend to the Judiciary’s leaders how to be inclusive and how to highlight those issues. It is hard for them to do these things without the acceptance of the community. It is needed to provide the right environment for women kadhis to work in - for example.”

- Judiciary employee



Employees have shied away from analyzing how the advent of the 2010 Constitution affects the kadhi courts and how they operate within the Judiciary. However, this is an issue that needs to be addressed. Multiple kadhis are open to having female kadhis and there are even female sharia law scholars in Kenya. As discussed in the Equal Opportunity section, the Constitution promotes gender equality and therefore discourages gendered work and kadhis should not be an exception. But wide-ranging outreach with the country’s Muslim community is important. The first way to collect such information may be to initiate discussions with the kadhi court CUCs. Kadhis that have an understanding of both sharia law and common law may be best placed to facilitate these discussions.

Some kadhis have already begun challenging practices that may be acceptable within the Muslim culture but are not permitted under Kenyan law. It may be useful for them to share their experiences and any best practices with their colleagues as well as with other magistrates.

“Kadhis officiate marriages so the kadhi is very good to ask for IDs to ensure both parties are 18. Because he has done that, he has challenged the culture, so some may get married before someone else, but this has helped. It was the kadhi’s own initiative. When the Children’s Act came out, he did it. The Koran doesn’t allow breaking the law and Kenyan law says marrying an underage girl would be defilement.”

- Judiciary employee



Such initiatives must be done alongside public education. Be it common law court or kadhi court, the Judiciary must be seen to be implementing the law and not subverting it.

Conclusion

The way in which Kenyan society perceives gender affects the attitudes of Judiciary employees and also how the Judiciary can implement the gender equality provisions provided for in the Constitution. Societal change happens over a period of time and requires catalysts. The Judiciary has tried to ensure it will have a presence in all 47 counties and because of the respect it commands in most communities, it is well placed to provide public education on gender equality and what is envisaged by the Constitution. Such a program does not need to be costly, but by training staff and having content available to them and the public, perhaps through its website, employees can act as a resource for the public. Partnerships with local NGO’s and other community organizations can also be used. Having a dedicated person in the Judiciary to coordinate public education on gender equality would also be extremely helpful.



The Judiciary has made real gains in diversifying its workforce even in rural areas where women were not previously posted. Already, the number of female judicial officers has made a difference to the public perception of who a judicial officer is and what justice looks like. In addition, the Judiciary has shown commitment to posting female judicial officers even when a community prefers a man for discriminatory reasons. It does need to support its female leaders and judicial officers by ensuring that the public is aware that the Judiciary stands for gender equality and will not tolerate attempts to intimidate female judicial officers by unacceptable behaviour from advocates or litigants. The Judiciary must encourage and support its employees in reporting this inappropriate behaviour. Female judicial officers must be made to feel that they can do their jobs in the same manner as their male counterparts.

The Judiciary has developed a strong network of CUCs and they serve as a positive influence on ensuring that gender equality issues are discussed. This is why special efforts need to be made to ensure that the not more than two thirds gender rule is observed in CUC membership. CUCs should be encouraged to be creative to ensure they consider women's issues. Judiciary employees have also implemented their own initiatives on how to protect vulnerable parties, but it is not clear that these measures are being applied consistently everywhere. Further attention may be needed for some rural areas where a culture of patriarchy has stood unchallenged. Public education is even more important in these areas.

While the Judiciary appears to receive many bias applications because of the judicial officer's gender, it must reject applications that are based solely on stereotyping grounds. In doing so, it must reaffirm that it is committed to maintaining a competent workforce which is sensitive to the issues before the court. It must also further develop its bias jurisprudence to address the difference between a reasonable apprehension of bias as opposed to applying traditional gender stereotypes. Patriarchal culture is a part of Kenyan society, as it is with most cultures in the world, but it may be easier to solve issues by employing a gender perspective.

Finally, the Judiciary may want to consider whether it should employ female kadhis from the perspectives of both sharia law and its constitutional obligations. This discussion must be facilitated by the kadhis themselves and involve a great deal of public participation and input by the kadhi court CUCs. Furthermore, the kadhis should be encouraged to ensure that they are promoting and protecting the Constitution, including its gender equality provisions, in all aspects of their roles as kadhis.



5.3 ACCESS TO JUSTICE

The United Nation’s Rule of Law Unit explains that “[a]ccess to justice is a basic principle of the rule of law. In the absence of access to justice, people are unable to have their voice heard, exercise their rights, challenge discrimination or hold decision-makers accountable”.¹³⁴ The United Nations Development Programme (UNDP) defines access to justice as “the ability of people to seek and obtain a remedy through formal or informal institutions of justice, and in conformity with human rights standards”¹³⁵. CEDAW’s General Recommendation No. 33 lists the components of women’s access to justice as justiciability, availability, good quality, accountability and provision of remedies. Ensuring access to justice is a real challenge that the Judiciary is obligated to work towards as per the Constitution.¹³⁶ As caseloads grow, the financial and administrative challenge of running a truly national Judiciary is daunting and access to a fair dispute resolution system can be frustrated in a multitude of ways. People have to be aware of the system, not have any apprehension to engage it, physically be able to reach the required institutions and have affordable legal representation options. Still delays or inappropriate remedies can invalidate access to justice. Therefore access to justice requires addressing an array of issues. As aforementioned, the Judiciary Gender Audit did not research the views of the public directly, but its introspective research on the Judiciary does help assess the interplay between gender and access to justice.

Data

While new courthouses have been opened across the country, HiiL’s recent *Justice Needs in Kenya* survey notes that only 10% of Kenyans seek to resolve their legal disputes through the courts¹³⁷. Those who do choose this avenue are disproportionately urban dwellers and have higher incomes.¹³⁸ Consequently, the Judiciary has much to do to play its part in increasing access to justice for all Kenyans.

The SAQ results showed that 57.1% of Judiciary employees responding to the survey thought that men and women face the same problems when seeking and receiving services from the Judiciary. 14.4% of respondents thought that women faced more problems while 9.2% thought men faced more problems and 19.3% did not know. There was extreme variety in the suggestions offered to remedy problems faced by either gender including collecting additional data and offering Judiciary staff gender sensitivity training. It is alarming, however, that though only a few people mentioned it, eliminating the sexual harassment of court users was noted. Of course, if the Judiciary’s culture supports sexual harassment, it should not be surprising that this behaviour may also affect its clients.

134 See “Access to Justice” at < <https://www.un.org/ruleoflaw/thematic-areas/access-to-justice-and-rule-of-law-institutions/access-to-justice/>>.

135 UNDP, *Programming for Justice: Access for All – A Practitioner’s Guide to a Human Rights-Based Approach to Access to Justice* (Bangkok, 2005) at p. 5.

136 Article 48 of the Constitution.

137 See *Justice Needs in Kenya 2017*, *supra*, note 67 at pp. 68-69.

138 See *ibid* at pp. 68 and 153.



The IDIs also uncovered a reference to a senior Judiciary employee making inappropriate advances to advocates. Because court users can be vulnerable, it is a priority to collect more data on this issue.

The Judiciary does not currently track and compile statistics on gender such as the percentage of litigants, role in litigation or types of cases, but multiple IDI participants did note that gender is one of the parameters that is recorded in the Daily Court Returns Template (DCRT). The details of each case that is called in the courtroom, including the gender of each party, are noted down and then entered into the computerized DCRT system that is used to compile data by the Performance Management Directorate. Unfortunately, the Performance Management Directorate does not compile or report on any of the data relating to litigants and their gender. This is a lost opportunity as this information would be extremely helpful in depicting who is using the courts. The Performance Management Directorate produces a Court Users Satisfaction Survey every two years but these results are also not disaggregated by gender. It is noteworthy, however, that survey respondents include a cross section of court users and the most recent iteration shows only 28% were female.¹³⁹ This suggests that female participation in the court system is lower than that of males, which is confirmed by the IDIs. Without more detailed data though, it is hard to say why this might be.

The consultants sat with the Court of Appeal Registry staff to examine the Court's DCRT records for the month of May 2018. Because these statistics are recorded but not tallied, it took some time to determine that of the 383 cases that were heard in the Court of Appeal that month, 62 involved only female litigants and 46 involved both male and female litigants. The majority of the cases involved only male litigants. These are crude numbers and more meaningful data may be garnered from the High Court or the magistrates courts because they are courts of first instance. It would also be interesting to see who initiates cases, which types of cases and which ones continue to conclusion. These statistics may help determine if there is a measurable difference in access to justice for each gender and enable the tracking of trends such as the high frequency of SGBV cases in the Nyando and Seme courts noted in the IDIs.

There are suggestion boxes in all the courts which are a source of potentially useful information for the Judiciary. Unfortunately, the Judiciary employees that were interviewed were not clear on the procedures and process which govern these boxes, including who checks them, so even when they are used by court users, their impact is lost.

How Men and Women Use the Law

Gender does not appear to affect how many legal problems a person will encounter,¹⁴⁰ however, gender does make a difference as to how one uses the law:

There are visible gender differences: Kenyan women are significantly more likely to report experience of domestic violence than men. Women also report property crime and violent crime more often. This shows a picture in which Kenyan women significantly more often need the law to protect their personal integrity. Men, on the other hand, say more frequently that their legal problems are related to arguing with neighbours about land, disagreements over land titles, cattle raiding, traffic accidents and lending money.¹⁴¹

This characterization suggests that women are more likely to require the protection of criminal law while men are more likely to require compensation provided by civil law. In marginalized areas such as Western Kenya, the Coast and Northern Kenya, Judiciary employees noted that there is an extremely high proportion of rape and defilement cases, where the majority of victims are female while the accused persons are usually male. If women need the law significantly more than men to protect their personal integrity, they are more vulnerable within the formal justice system.

¹³⁹ Court User Satisfaction Survey, *supra*, note 68 at p. 15.

¹⁴⁰ Justice Needs in Kenya 2017, *supra*, note 67 at p. 28.

¹⁴¹ *Ibid* at p. 40.



According to the *Justice Needs in Kenya 2017* survey, “20% of the women who reported to have a legal problem experienced a conflict related to family, compared to just 7% of men”¹⁴². Family related problems were also more prevalent among those who did not have formal education as opposed to those who had.¹⁴³ Although those who face family related legal problems are more likely to take action than those who face other legal problems, “[m]en are slightly more likely than women to take action to resolve their disputes. What is worrying is that about a fifth of the respondents who faced domestic violence as their most serious legal problem did not take action to resolve the situation.”¹⁴⁴ Whereas women are more affected than men by domestic violence,¹⁴⁵ access to justice initiatives that target women are important to ensure the safety of women because family related problems are more likely to be associated with emotional and physical wellbeing rather than economic wellbeing. Violence was also shown to be more prevalent among poorer people,¹⁴⁶ who often face more access to justice issues.

“The bulk are criminal cases which is about 70% men. In succession, it is the reverse. More women are coming to court because women have no property, so they have to be litigants to inherit the property of the men. In civil cases, it is about 40% women because of the family cases bringing the number up. Women go to court when they are forced to go, but men go on their own volition. Men are more often offenders, more often breadwinners – they have to go out and get it and may have to do inappropriate things. Women are looked after so they don’t need to come to court but in succession, they have to go to court to survive.”

- Judiciary employee



Therefore even when women are seeking economic gains, they do so at the point of desperation. Furthermore, when people do not have access to justice, many crimes go unreported in some parts of the country, especially marginalized areas. In fact, the consultants heard stories that illustrate how lawlessness can actually prevail in these types of situations.

“One day, the OCS heard that someone had killed a person 200km up north. So the OCS got a vehicle with officers and they went there. They found two factions on either side of a body. They tried to pick up the body. The people asked “why are you taking that body?”. The OCS said they had instructions to get the body and the suspect because the suspect is supposed to be charged before the High Court and the body has to go to the morgue for post mortem. The elders told them “do not overburden us. That body is the body of the suspect. The person that was killed is already buried.” They showed the OCS the grave. “We don’t have any resources to come and pick up the body. If you want the body, just take it on the condition that you are going to return it to us. The police just went back.”

- Judiciary employee



In such scenarios, the most vulnerable members of society are most at risk. In another court, Judiciary employees found that the number of male and female criminal offenders were approximately equal but the charge differed. Women are more likely to be charged with petty, mostly regulatory offences while men are charged with much more serious criminal offences.

142 *Ibid* at p. 124.

143 *Ibid*.

144 *Ibid* at p. 134.

145 *Justice Needs in Kenya 2017, supra*, note 67 at p. 143.

146 *Ibid* at p. 126.



Barriers to Access to Justice: Distance

A top management Judiciary employee explained there were 69 mobile courts across the country but that budget cuts have affected their operations and the establishment of further mobile courts. These courts reach populations, usually rural and low income, who do not have permanent courts within a reasonable travel distance. Considering transport is often hard to find in these rural areas and the people living there cannot fund travel to pursue a court case, they generally do not use the courts. Therefore access to justice is a problem long before these people even encounter any part of the formal justice system:

All in all, Kenyans with low incomes experience more problems on average than the rest of the population, they are also less likely to seek information and advice, as well as less likely to take action to solve their problems. Therefore, steps towards improving access to justice should consider the most vulnerable Kenyans first.¹⁴⁷

Mobile courts naturally target the most vulnerable Kenyans, however, they are seen as budgetary additions and often are the first to be cut when financial constraints are increased. While the Judiciary appears to have had the intention to establish physical courts where it ran many of its mobile courts, if the mobile courts are unable to run, physical courts are at best unlikely. Many mobile courts operate out of other government buildings such as police stations. One judicial officer described the impact mobile courts had on litigants.

“It is very serious. The women who need maintenance were happy see me – happy they don’t have to come to the main court. They think it is because I am a woman and I understand. 30% of the litigants are women who can’t afford to come to court. Men will have money but won’t pay maintenance unless they are taken to court. If they don’t pay, the women cannot come to the main court as it would cost them KES 500 one way in a public vehicle and that is a slow boat that leaves at 4am.”

– Judiciary employee



Coastal mobile courts were suspended near the end of 2017 when the Judiciary budget was drastically cut. In Northern Kenya, mobile courts were also suspended at this time. Previously, each month the mobile court visited two towns for two days each as each had a backlog of cases. The mobile courts were held approximately 85km and 175km from the main court. As a result, without the mobile court, these cases would most likely not proceed because the area is not serviced by any kind of public transport. 37 cases were waiting to be mentioned at the next mobile court but they were discontinued in 2018 due to a lack of funds.

“I think the mobile court has improved access to justice for all. The reason is the distance. They come from far flung areas. Most of them are very poor. And if we go to places that are near to them, they can just walk.”

- Judiciary employee



147 Justice Needs in Kenya 2017, *supra*, note 67 at p. 183.



This opinion is backed up by the comments made by a Senior Judge in the *Justice Needs of Kenya 2017* survey that cases in rural areas are often unable to continue because witnesses do not have the money to travel to court.¹⁴⁸ IDIs revealed that the majority of cases in Turkana are rape or defilement which affects women more as victims or the caretakers of children.

The significance of mobile courts in increasing access to justice is underscored by the results on travel distance in the Performance Management Directorate’s Court User Satisfaction Survey. 65% of court users travelled 20 km or less to court and satisfaction levels regarding travel times correspond accordingly with the Supreme Court being the exception with 93% satisfaction.¹⁴⁹ This outlier suggests that the Supreme Court is really a Nairobi court.

Barriers to Access to Justice: Legal Representation and Information

There is often a disparity in legal representation in family law maintenance cases which are usually between a man and a woman.

“I often see where the man is represented and not the woman, maybe 40% of the time. It stands out because the man understands about serving documents etc., but the woman doesn’t know. ‘What does affidavit mean?’ The lawyers don’t complain if I explain it to the woman but she is up against a system she does not understand.”

– Judiciary employee



Lower-income individuals are significantly less likely to go to a lawyer (< 4%) or the courts (8%) than high-income individuals (9% lawyer; 10% courts) or the highest-income group (28% lawyer; 24% courts), which results in a large disparity in information regarding the legal process.¹⁵⁰ The pro bono lawyer scheme is limited to capital offences and children in conflict with the law though some in the Judiciary are attempting to expand it to include other cases. There is a shortage of legal aid clinics, especially outside Nairobi and other large urban centres. The government’s plan for a national legal aid system is still not operational. All this makes it extremely difficult to receive legal advice if you are not able to pay for it or hire a lawyer and sustain that representation throughout the litigation process.

“Legal Aid is needed. You don’t take a plea in a murder case unless the state has provided the accused with a lawyer. The difficulty arises in personal cases, ie. matrimonial. The disparity comes in because most women can’t afford a lawyer – the number of cases that are mostly men is high. In civil cases rarely do you find women, only in family court because they are left with children etc. Only 1 in 10 civil cases has a woman. The government doesn’t allocate lawyers. They only do it for capital offences. Even then, the Judiciary doesn’t have money – even the state – pity parties are given the most junior lawyers. You would see lawyers who show up just on the day in court. How is that conducting a case? They lack that connection, the lawyer-client relationship.”

– Judiciary employee



148 *Ibid* at p. 178.

149 See *Court User Satisfaction Survey*, *supra*, note 68 at pp. 21-22.

150 *Justice Needs in Kenya 2017*, *supra*, note 67 at p. 153.



Data concerning unrepresented litigants would also be useful in implementing a suggestion from another Judiciary employee. It was recommended that if marginalized areas were clearly identified, the Judiciary could invite NGO's to train paralegals to aid litigants in those areas. Paralegals can help ensure that the individual circumstances of the litigants are taken into consideration.

Many Judiciary employees and CUC members also felt that judicial officers were very limited in what assistance they could offer to unrepresented persons because it would affect their impartiality and referenced Kenyan authorities on this point of law. Nevertheless, there are a few judicial officers who regularly do make use of more interactive approaches where they ask questions, explain the procedures and even make awards that were not specifically pleaded if they are common in those types of cases. Asking necessary questions of unrepresented litigants can help ensure justice is done. None of these judicial officers reported any negative repercussions such as bias applications. A more inquisitorial approach is also used in the Children's Court due to the wide reaching powers of the court and the number of unrepresented litigants that appear before it. But it can also come down to the judicial officer and their style.

“When you practice a long time, if you don't become inquisitorial, you may not get the truth. You also counsel them.”

- Judiciary employee



There is also a practice, especially in Nairobi courts, to make sure women are aware of the law in succession matters, that they have a right to inherit regardless of their marital status. In addition, the consultants encountered Judiciary employees that were attempting to use forms in order to simplify proceedings for unrepresented litigants in both the kadhi courts as well as tribunals. As a result of recommendations by the CUCs, there are strategically placed customer care desks which help users with directions on various matters from location of courts to how to file a case. Court users have reported that these desks are manned by very courteous staff who make them feel welcome in the institution.¹⁵¹ Finally, efforts have been made to demystify the courts by hosting open days and reducing formalities in the courtroom where judges and magistrates try to make trials and hearings more of a discussion and less of an interrogation. These measures help court users see judges and magistrates as people who understand them and can empathise with their plight.

Barriers to Access to Justice: Filing Fees

Each court sets its own fees. For paupers and other persons of little or no means, there are subsidized filing fees for employment matters. It was unclear how a person's means is assessed for this scheme of subsidized fees. There is also concern about the filing fees imposed in the kadhi courts.

“Most Muslim communities in Kenya are in areas which are fringe areas where we do not have legal services or legal awareness etc. So it is a challenge for them to know the [kadhi court] procedures. They are used to being before the elders and also want the court to do that but it has its own procedures (ie. takes notes etc.). Doing the paperwork, most of them despair when you explain to them; paying filing fees, it is hard for them, especially in very marginalized areas.”

- Judiciary employee



151

See Table 8 in *Court User Satisfaction Survey*, supra, note 68 at p. 26.



Barriers to Access to Justice: Delay

The backlog and slow progress of cases means they take a long time to conclude which makes court users lose confidence in the Judiciary. Mandatory Court Annexed Mediation in the Family Court has helped reduce backlog and time to conclude a case. There are efforts being made to reduce the time frame for SGBV matters and children’s cases to two weeks. This will make the process of going to court more friendly to victims as well as help increase the court’s credibility as a dispute resolution provider. Some judges and magistrates have also taken to ensuring that hearing dates are set in the courtroom rather than telling the parties to get a date at the registry because it makes it easier to agree on a mutually convenient date which would allow the matter to proceed. The consultants also recognized an emerging practice of prioritizing vulnerable parties in court so that children’s matters or those involving women with children were heard first. Courts have also recognised that some users such as lactating mothers have special needs and treat them accordingly.

Barriers to Access to Justice: Stigma

While measures are being put in place to ensure that courts are more accessible and accommodating to both genders, other barriers can still interfere with access to justice. The stigma around being a victim of SGBV makes it difficult for victims to see a case through to the end. Consequently, many such cases are withdrawn before they can be concluded and perpetrators end up not being convicted. At least one CUC has developed a solution for this problem.

“When giving evidence, especially for children who are defiled and mostly they are girls, the victims give it in chambers. We also get pro bono advocates to represent the victims. Even as a station, we have been able to use the CUC for the Family Division to addresses those issues.”

- Judiciary employee



Barriers to Access to Justice: Approachability

A large part of the Judiciary Transformation was making the organization more service oriented where the needs of the court users were considered and met. This culture change has made a difference to the way some Judiciary employees approach their jobs.

“We make sure that when we are posting staff there is a balance between the genders. Particularly in some marginalized areas, most of the women are uneducated, so we made provision to get females employees who spoke the local language. Then the women in the community would be more receptive to them if they were female – it is easier for local women to relate to local lady officers.”

- Judiciary employee



Other Judiciary employees also determined it was necessary to ensure that at least one of the customer care officers at that station was a woman due to the nature of the courts’ clientele. Gender balance in court station staff has also been considered to ensure approachability for female litigants in sex offence cases. Another Judiciary employee emphasized that sensitization was important for all Judiciary staff, especially those who can handle customer care because they need to reassure the public, who sit in court and form their own opinions without anywhere to follow up and share concerns.



Barriers to Access to Justice: Appropriate Outcomes

Court Annexed Mediation was introduced to the Family Court as a Pilot and is now a mandatory process that all parties must undergo before proceeding to a court date.

“The idea was to make a really tailor made solution, especially as I have seen in succession and children’s matters, because in succession there are the nitty gritty details of how property is handled – not just divided 50/50 into pieces. Also in children’s matters, it was our ability to meet the responsibility to each parent. Where you have a solution you were part of, you own it and participation is easier. It was also to reduce litigation by instalment because once you agree on mediation, the right of appeal is closed. Great grandchildren have litigated over succession issues.”

- Judiciary employee



Mediation does give more control over the process and the outcomes to the parties. The only caveat, as described in the Alternative Justice Systems section, is that imbalances in bargaining power must be identified and vulnerable parties safeguarded so they are not exploited. The Constitution empowers the Judiciary to craft its own solutions to uniquely Kenyan problems by putting national values and Kenyan rights and freedoms above strict adherence to the common law and the colonial structures of the past.¹⁵² Therefore the legal avenues to address gender issues are already in place, it is the innovation which is needed.

Kadhis Courts

“In our courts, most of the people who bring cases are women and they get what they want. They haven’t had a problem in accessing the courts. When unrepresented parties come, people there in the registry are women. The registry clerks explain what you need to do and how to draft a petition. CIPK (Council of Imams and Preachers of Kenya) - a Muslim organisation, first they go there to try mediation for reconciliation; if it doesn’t work, then they come to the kadhis courts. The registry clerk will tell them that someone at CIPK will draft the petition. They are sheikhs (Muslim scholars) and they will draft for them or someone can draft on their own. Most of the women who come are in need; she needs the court to hear her to get relief. If you ask her to pay for a lawyer, she won’t be able to pay and access justice. So they can even do it on foolscap paper. The registry clerk explains what is needed. The kadhi court has process servers, are gazetted, and they will serve the parties and draft an affidavit of service. Then we expect the defendant to appear at the appointed time. A case written on a foolscap is a case, it doesn’t have to be typed with lawyer’s letterhead. Family matters are more emotional and can cause disharmony. People are killing others because of these disputes – we have to listen to these people.”

- Judiciary employee



152 See Subarticles 20(3) and (4) of the Constitution.



The use of kadhi courts appears to confirm this accessibility at least at a rate higher than the courts of law. The **Justice Needs in Kenya 2017** survey states that 4% of people in Kenya use the kadhi courts to solve their family law problems compared to 8% of people who go to the courts. When you consider that the Muslim population is approximately 11% in Kenya¹⁵³, and at least one party must be Muslim in order for the kadhi court to have jurisdiction, proportionately, more Muslims are being served.

“There is no matrimonial property in Islamic law. Because it is the man who provides, he owns everything. So what we do is upon divorce, there is something called a sendoff package for women which we enforce like matrimonial property because it is recognized in the Koran. We ask the lady if there is something she contributed to the marriage and also take services in kind into account which informs our award or sendoff gift. The Arabic term is mataa. We also consider how long they were together. The problem is that Muslims don’t know that law allows them to claim that so you find women don’t come to claim it.”

- Judiciary employee



Therefore even with trying to make the process as uncomplicated as possible, a lack of legal awareness can also be a barrier to access to justice in the kadhis courts. However, Judiciary employees note that the kadhi courts do not operate on the same strict rules of evidence so it can actually be easier for many women to litigate in the kadhis courts as opposed to the common law courts. In this way, the kadhi courts were not letting technicalities get in the way of taking evidence and hearing a case long before the current Constitution became law. What’s more, the kadhi courts could still be made even more accessible. At least some Muslims and Judiciary employees believe female kadhis could increase the kadhi courts’ accessibility to women. The thinking is that men would not have a problem talking to female kadhis though there is disagreement on this issue, leading one CUC member to comment:

“If we can’t get female kadhis, can we get female counsellors at the kadhi court? And can we still have a female kadhi – we still have issues with women.”

- Court User Committee member



Court User Committees

CUCs operate as a monitoring and evaluation tool. As a part of this mandate, the CUCs help elucidate ongoing challenges such as missing files and ensure courts act justly towards vulnerable parties such as women and children.

“It is a critical element for the CUC to contribute and provide an opportunity for the Judiciary to know where it is heading towards. The Judiciary can use it as an indicator as to whether they are dispensing justice or not. The CUC talks about concerns and so the clients are given a voice. Because that happens, it is very easy for Judiciary to know if it is working in the right direction for justice.”

- Court User Committee member



153

See <<https://www.knbs.or.ke/religious-affiliation/>>.



“When we are litigating, we cannot assist one another, but when we come to the CUC, we can assist one another. Stakeholders can even take Judiciary issues to members organizations and come back to facilitate communication.”

- Court User Committee member



The CUCs have played an important role in identifying gender related problems and coming up with solutions such as spotting legal issues which negatively affect women like land or succession matters. The CUCs have also raised awareness on emerging issues such as the need for psychosocial support for victims of SGBV. Another example is with sentencing for producing illicit brews, an offense many women face. Mitigation allows for more lenient sentences if women have small children or if there is no one else to take care of them.

“What happens in the CUC discussions is that we bring out challenges that women have in the court, especially relating to land matters – these are because of the cultural set up. We work on ways to increase access for women to court. One thing that really helps women is that magistrates and judges have been very keen to find out who are the dependents especially where there are only a list of only male relatives. They will ask whether there are any daughters or widows. It was not a CUC recommendation but just from the discussions, the Judiciary team picked out these issues and figured out how to deal with this situation. So now even the Chiefs are keen on this issue and will probe.”

- Court User Committee member



One CUC member joined the Committee to find out about how the Judiciary works and develop a good working relationship. Another organization used to refer people to the Judiciary Ombudsman but even after following up on letters, they were not getting responses, so the organization started writing to the EO directly instead. The CUC has enabled the organization to get a lot of assistance from the local Deputy Registrar and Executive Officer to solve issues. A proposal was even made to devolve the Office of the Judiciary Ombudsman because it is impractical to send people to Nairobi to file a complaint. Generally, the feedback from CUC members was positive with some of the only challenges being that the local CUC leadership can really affect the operations of a CUC, including how proactive it is and how often it meets. Also, multiple staff transfers in a station can have a negative impact on the CUC, disrupting its momentum.

NCAJ’s CUC Guidelines contain useful values such as accountability, interdependence and constitutionalism¹⁵⁴ and stipulations requiring the CUC to conduct its own monitoring and evaluation such as biannual stakeholder surveys, an important task it may need the Judiciary’s assistance to carry out. The Judiciary’s Performance Management Unit has the expertise to carry out surveys and other types of data collection and may be well used in aiding the CUCs with monitoring and evaluation.

CUCs are a bright light in innovation, cooperation and synergy. Moreover, the Justice Needs in Kenya 2017 survey cites their potential to make an impact on access to justice:

Two inspiring examples of institutional design for evidence-based policies are Judiciary’s Performance Management Directorate and the Court User Committees. Kenya is well placed to be a world leader of evidence based, user centred development of its justice system.¹⁵⁵

Some CUC members say they have issues with the current CUC policy and having to report to the NCAJ as they want local autonomy. CUCs want to be able to directly address complaints raised by the public, but again data would be helpful to this process.

154 CUC Guidelines, *supra*, note 64 at p. 42.

155 Justice Needs in Kenya 2017, *supra*, note 67 at p. 187.



Tribunals

Tribunals under the Judiciary should also consider adopting a CUC framework to improve their operations and assist in the identification of gender issues. Of course, gender training is key to fully utilizing a CUC. Rent Restriction Tribunal IDIs reveal that this tribunal receives most of its complaints from tenants and specifically low income tenants that reside in areas such as Kibera, Karibungi, Haruma and Pmwani. Tribunal employees feel that the majority of complaints are filed by women. They do not have any data and may also benefit from Performance Management Directorate assistance on data collection. When the consultants visited the Rent Restriction Tribunal, it was planning on implementing the DCRT system which at a minimum denotes the gender of the parties to each case that is heard.

“Mostly women come to the Rent Restriction Tribunal because when a family is looking for a house, more men are at work (or women are conducting a business where they live) so most of the time, it is the wife who looks for premises. So when there is a conflict such as an eviction or notice to vacate, the people who are served most is the women. The tenancy contract entered into is usually between the man and the landlord but it is the woman who lives there and comes to file proceedings. Where someone has been thrown out and has nowhere to live, we make orders to reinstate or open locked out premises as we deal with the rest of the issues. Very many women’s rights are really affected when a tenancy contract is violated generally – rights of women and children because it is a residential premises and some of women really suffer.”

- Judiciary employee



The Rent Restriction Tribunal deals mostly with the middle and lower segment of society, where you find the majority of women. Cases are resolved quicker compared to the courts; they usually resolve disputes within a month. Because the vast majority of litigants that appear before the Tribunal are unrepresented, they require a lot of direction from staff as well as the tribunal members during court sessions. They are advised to get legal assistance in the drafting of pleadings, but the Tribunal is more interested in substantive issues as opposed to procedure and this informality allows it to be more efficient. If the parties admit and agree on the facts, the Tribunal will issue orders immediately. Some of the larger and older tribunals have really worked on efficiency and can be a resource on how to increase access to justice for the Judiciary. Another important feature of tribunals is that not all tribunal members are advocates. These members usually have other expertise relevant to the tribunal’s mandate and offer insight into the practicalities of decision-making and remedies. Their non-legal orientation also makes tribunals more approachable for clients.

“Non-lawyer views are very important in tribunal decision-making. Issues of housing affect so many social matters that law itself cannot address and when you address the social issues, you reduce the number of appeals or complaints. Also, the litigants see that person and they identify with that person so they know the court can understand the issues they are going through.”

- Judiciary employee





Conclusion

The Judiciary has implemented various strategies to try to ensure that gender is not a barrier to access to justice, however, more work can be done. The CUCs have proved themselves to be an invaluable tool in pointing out the difficulties faced by litigants but more data on the various parameters affecting access to justice is greatly needed. The practices of the kadhi courts and the Rent Restriction Tribunal are great sources for inspiration for the Judiciary generally and forums are needed for all the players within the formal justice sector to learn from each other and share best practices. Greater degrees of informality are warranted where most cases involve at least one party who is less sophisticated, unrepresented and in need of a speedy resolution of their dispute.

It would be helpful to see the Judiciary's own statistics disaggregated by gender including the biennial Court User Satisfaction Survey. This information should also be released to the public as it will inform policy decisions in government as well as in the NGO sector, which may lead to additional resources being put towards solving gender related access to justice problems.¹⁵⁶ This data could also inform the work of the CUCs and provide a useful monitoring system for some of their innovative solutions. Once the Judiciary has local data that shows the sophistication and ability of its litigants to engage with the formal justice system, it may provide a basis for even adapting flexibility in some of the common law rules of procedure.

In order to make access to justice a reality, a specific office within the Judiciary needs to take ownership of promoting and safeguarding it. That way, the positive practices of some courts or judicial officers can be highlighted, recognized and shared with other areas of the Judiciary. Those looking out for access to justice can also ensure that services to the most vulnerable are protected and form partnerships to expand them because these people already face extreme difficulty in accessing and the consequences of not being able to are drastic.¹⁵⁷

156 This conclusion corresponds with the findings in *Justice Needs in Kenya 2017*, *supra*, note 67 at p. 187.

157 See *Justice Needs in Kenya 2017*, *supra* note 6, at p. 183.



5.4 ALTERNATIVE JUSTICE SYSTEMS



Traditional conflict resolution

Alternative Justice Systems (AJS) are methods of resolving conflict without resorting to the formal justice system or courts. In Kenya, various ethnic communities have traditional forms of dispute resolution that were widely practiced before the common law system was introduced with colonialism. Many of these traditional justice systems are still practiced in Kenya today. Alternative Dispute Resolution (ADR) is a type of AJS and is broadly considered to include negotiation, conciliation, mediation, arbitration and adjudication. If all parties agree to use an ADR approach, disputes can be settled outside the formal justice sector. It is often said that AJS and ADR offer quicker, more accessible and relevant outcomes to a person looking for justice. Most importantly, the Constitution requires the Judiciary to promote the use of AJS and ADR.¹⁵⁸ Subarticle 159(3) requires that the tenets of traditional justice systems cannot be employed to contravene the Constitution, therefore gender must still be carefully considered when employing these alternative dispute settlement strategies.

Importance of Alternative Justice Systems (AJS) in the Kenyan Context

The use of AJS can greatly increase access to justice for all Kenyans. The ***Justice Needs in Kenya*** survey highlights the fact that the courts alone cannot satisfy the demand for dispute resolution in Kenya and how it is important to view alternative justice systems as a part of the overall system of justice.

We see from the data that a lot of fairness - both in terms of process and in terms of a solution - is provided outside the so-called formal justice system. So only strengthening the formal justice system will not be enough to deal with the demand for justice that emerges from the data. At the same time, only focusing on informal justice systems is not enough either. The data suggests that the perspective for developing policies needs to be that of a whole justice journey for a particular type of justice problem, ultimately leading to a fairness for as many situations as possible. Envisage a strategy that focuses on developing improved justice journeys for the four most pressing justice needs that emerge from the survey: crime, land, family and employment.¹⁵⁹

This means that AJS, including ADR, must be able to co-exist and work in tandem with the formal justice sector, sometimes even within the same case, to deliver a wide range of justice solutions to the people of Kenya. Unfortunately, Performance Management Directorate's Court User Satisfaction Survey did not ask respondents any questions about ADR or AJS.

The ***Justice Needs in Kenya*** survey does reveal that about half of the more than 6000 respondents (54% men; 46% women) try to use a non-institutional dispute resolution mechanism, such as family, friends, church or cultural leaders or elders, as opposed to an institutional dispute mechanism, which includes the police, the courts, a lawyer and the local chief.¹⁶⁰ For the purposes of differentiating between AJS and the formal justice system, local chiefs, along with all non-institutional dispute resolution methods would represent alternative justice systems. This would mean that more than half of respondents pursued

158 See Subarticle 159(2)(c) of the Constitution.

159 *Justice Needs in Kenya 2017, supra*, note 67 at p. 184.

160 *Ibid* at pp. 66-69.



alternative justice systems. Interestingly, the local chief was rated the most useful dispute resolution mechanism with 17% of respondents saying they use them for dispute resolution.¹⁶¹ In fact, the survey goes on to state:

Here we see that the chiefs consistently score well on the different aspects of the justice journey. They provide affordable justice in an efficient manner, which is rated highly in terms of the quality of both the procedure and the outcome. Lawyers and courts are also seen as performing quite well, but from the costs dimensions it quickly becomes clear that many Kenyans have difficulties with affording their processes and services. ... Overall the spider web [graphic] illustrates why people in Kenya continue to rely on informal justice, as it provides a viable path to justice that is easily accessible and considered fair. A way forward could be to further empower the chiefs to deliver justice to their communities. All of these findings are in line with the recommendation from the local experts to invest in the dispute resolution capacity of chiefs and assistant chiefs.¹⁶²

Along with enlisting the help of family members and independently contacting the other party, chiefs were also rated most helpful in addressing a family justice problem, which was the problem most affecting women. The police and the courts, on the other hand, were found to be less helpful with family problems as opposed to other types of legal problems.¹⁶³ Lower-income people were much less likely to go to a lawyer or the courts than their higher-income counterparts while those at the bottom of the income scale were most likely to go to a chief.¹⁶⁴ The benefits of AJS are more readily accessible because they are local and facilitators know the parties, authentic because these mechanisms already have community buy-in and understood so the parties know what they have to do.

Alternative Justice Systems (AJS) and Gender

The most prevalent AJS mentioned were the traditional justice systems of the various tribal cultures of Kenya along with other cultural adaptations such as barazas. AJS used in the regions the consultants visited include pastors, imams, boda boda bus stop groups, markets, village elders, family members, clans, nyumba kumi, village committees, chiefs, barazas and maslaha. Almost all Judiciary employees who were interviewed described traditional justice systems being used in the area they worked. Some AJS systems interface with the formal justice system when NGOs or judicial officers refer parties to them or arrange trainings for them.

“The traditional justice system is very strong here; Kaya community elders are very organized and most of the disputes would go there first, even when they come to us. We put it in a system where we touch base with them – the Giriyama people. We sometimes send people to them when one is calling another a witch, which is practically a death sentence in this community. 90% of the mothers in the High Court, it is because of those cases. The offence can apply to a man or a woman. Once you are called a witch, you have to leave the community. We try to get them back in the community. For calling someone a witch to be undone, there must be an oathing ceremony by elders. Even if there is a conviction and sentence or plea bargaining, you need to go back to undo it in your community and do the oath to cleanse that person who was accused of being a witch. They bring back a report. It is part of their sentence. There is a public meeting and a cleansing in the forest. It helps a lot. Even if you jail the offender for falsely accusing someone, there is no recourse for the victim without an oathing ceremony.”

- Judiciary employee



161 *Ibid* at pp. 70-71.
 162 *Justice Needs in Kenya 2017, supra*, note 67 at p. 78.
 163 See *Ibid* at p. 139.
 164 *Ibid* at p. 156.



Although either men or women can be accused of being a witch, it usually afflicts women who are often accused by their own children. When the court is able to ensure an oathing ceremony is done for cleansing, it enables the woman to reintegrate into her community. The problem is that the women often don't have the money to pay for the cleansing but through training, the local CUC is trying to help resolve this issue. Other judicial officers also noted the challenge presented by the culture within which most of these traditional dispute mechanisms exist. The decision-making usually follows traditional laws so some judicial officers may ask that the resolution is sent back to them so they can ensure it is fair. For example, traditional justice cannot be used to exclude a woman who is entitled to inherit. FIDA also works with traditional justice systems, helping women who do not have enough evidence to proceed to court in succession or land claims.

“FIDA works with elders to train them on laws affecting women, especially on access to property and family issues. If a woman has no documentation, you cannot bring her to court, so they send her to the elders. FIDA facilitates the process by doing a letter to the Chair. Elders sit in a group of 4 or 5, mostly men, but they are trying to increase the number of women. There is a local one that has included 2 women but it is usually just men. For example, if there are no documents and a woman is being evicted, they ask ‘how do you own this land?’ Some woman will not know the land parcel number or the husband is dead or he never gave her the sale agreement and she is not aware if payment was completed. If there is no green card or title and no receipts of payment, there is no evidence of the claim and no case to put up in court. However, the Chief will know that the lady has lived there for 40 years. Access to justice depends on the Chief’s capacity. The Chief will say take her to court. FIDA explains why they can’t, but there can still be resistance.”

- Court User Committee Member



Because traditional justice mechanisms are less formal, they operate more on the basis of the rules of the community of where they are based. In the scenarios described above, they do offer a real alternative for vulnerable parties who need a resolution to their problem and may not have the evidence required by the formal justice system. It does, however, take the emphasis off reforming the formal justice system so that it can work for everyone. Once an alternative justice system remedy has been obtained, parties may be encouraged to return to the courts to try to regularize their land ownership or interest.

Other times, there may be no connection between the local traditional justice system and the formal justice system at all. Some judicial officers say they would not want any GBV cases to be settled through traditional justice mechanisms because survivors will not get justice as the family may get some compensation but there is nothing done to help the victim who may even be a child. Concern was also expressed in that sometimes a woman may be told if she first withdraws a case before the courts, then they can talk with the elders. But this can leave a woman with no options if she is not able to achieve justice via the traditional justice method.

“A village elder knows almost everyone. If there are any disputes, people first go to the village elder. I hear that in criminal cases. You realize that not all matters must be litigated and some can be referred back to the village elders. The decisions are more inclusive but not on gender parameters – it depends on the facts of the case. I would suggest that where there are village elders council, there should be both men and women village elders so women can also contribute to them.”

- Judiciary employee



Gender inclusivity in decision-making is the main concern that was raised with traditional justice mechanisms. But most interviewees also thought that training could help a great deal with this issue.



Everyone doing dispute resolution should have the opportunity to be trained on how to integrate gender equality into decision-making, including local District Chiefs, Assistant Chiefs, elders and even those Chairpersons in the marketplace. It is interesting to note that some of the newer forms of traditional dispute resolution such as the nyumba kumi initiatives operate with each member of a household, whether male or female, gets a vote. These newer forms use many of the same discussion and consensus decision-making strategies of historically based traditional dispute mechanisms in an inclusive way and have been successful at curbing petty crime because everyone knows each other so there is a high level of accountability.

“We need a partner to come and work with us on AJS. The people here are so organized so a pilot for AJS would be good. We need to train the elders on the Constitution, international human rights instruments and respect for women. Training would change their behaviour; ignorance is the problem. The Judiciary has no funds so we need to partner – that’s the place to start. It is so important because AJS can increase access to justice, reduce crime and help the women find their rights and respect in society. Women don’t know that there are laws and what is in the Constitution. If we tell them, they would do it because they respect the authority. Let’s deal with gender equality at the source.”

- Judiciary employee



Alternative Justice Systems (AJS) Taskforce

The Judiciary has appointed an Alternative Justice Systems Taskforce that has been researching and documenting AJS practices within and outside the Judiciary throughout the country in an effort to develop a framework for the Judiciary to fulfil its constitutional obligations to promote traditional dispute resolution mechanisms¹⁶⁵. It is interesting to note that the Taskforce has found gender equality to be less of a problem than anticipated with the gender representation among the people who actually do the dispute resolution.

“Gender has not been a controversial topic at all; the challenge will come in the implementation. The constitutional minimum of not more than two thirds has not been controversial. The only place that has controversies was Garissa. That’s what we found on the ground. Women can be considered AJS practitioners and can serve in this AJS system and they are doing it. In most places, there is no difference in the cases they hear or how they sit. They are just accepted as elders.”

– Judiciary employee



The Taskforce has used general questions about justice systems to ensure all perspectives are taken into account in their discussions. This includes a gender perspective as all constitutional obligations are paramount. They routinely ask whether the Constitution is being upheld, including that not more than two thirds of the practitioners are one gender, and whether there are any harmful practices, especially for women or children. Any discriminatory practices are overtly discouraged. In Garissa, there were no female AJS practitioners except on very specific domestic issues where they hear parties and then report to the main group of elders. The Taskforce did not feel that this met the constitutional minimums. But in all other regions that were visited, women were playing active roles and even leading AJS mechanisms in some areas. Therefore, as far as the numbers were concerned, most AJS networks were considered constitutional. By ensuring the participation of both genders as AJS practitioners, it is hoped that AJS will be practiced in an inclusive manner.

The Taskforce was told about many practices that were discriminatory and ultimately harmful to women such as female genital cutting, early marriages, penalties such as giving away a girl and limiting a woman’s right to inherit property. Yet, with capacity building, which for the most part consisted of having con-

165

See Subarticles 159(2) and (3) of the Constitution.



versations about what the Constitution requires, most AJS practitioners appeared willing to amend these practices if it meant their AJS structure would be viewed as legitimate in a legal and constitutional sense. Beyond explaining the constitutional minimums, capacity building needs to cover the reasoning behind the minimums such as why it is important to have elders of both genders. It is important to note, however, that the Taskforce has not studied the actual decisions that result from AJS.

“Looking at the substantive decisions that are made and whether they show gender bias, that will need a more thorough analysis. To assess the everyday decisions that are made, especially on the models that we have identified, deep research is needed to interview the parties etc. Through this engagement, imparting gender perspectives is important enough and changes minds.”

- Judiciary employee



The Taskforce also envisions some form of AJS oversight role that may be performed by CUCs, who often bridge the gap between the informal and formal justice sector, or another part of the Judiciary. Because the ultimate goal is to change the way these traditional practices are implemented, a long term commitment, including monitoring and evaluation, is required. The Taskforce recognizes that apart from ensuring all minimum constitutional standards are met, changing the way people perceive gender is what is really needed in order to affect how traditional customs are practiced generally, even for those who do not engage in dispute resolution. While Kenyans who have land, family, property or social welfare problems are more likely to take action in that over 80% sought information or advice,¹⁶⁶ that means nearly 20% of Kenyans who has these same problems did not take any action at all and this number is even greater for those who are under 25.¹⁶⁷ Even AJS would not affect these people. Therefore, the more the traditional ways of doing things are influenced by the constitutional guarantees of gender equality, the greater the impact.

Alternative Dispute Resolution (ADR)

Alternative Dispute Resolution takes three main forms for litigants pursuing a case before the courts. First, some litigants may have undergone some form of alternative dispute resolution before they file their case in court. Second, the Judiciary has introduced Court Annexed Mediation to certain courts whereby litigants must go through mandatory mediation to try to settle their dispute prior to their case being heard in court. Third, most judicial officers attempt to encourage the parties to try alternative dispute resolution themselves where they feel that the parties can come to an agreement or where application of the law may not offer the best solution.

In the Employment and Labour Relations Court, cases first go through the Ministry of Labour where a Labour Officer tries to mediate the dispute between the parties.

“The first stop is the Labour Officer in the Ministry but sometimes litigants bypass them and file. So we can request that they go back, whether they have been there or not. Others might not go. We can give parameters on what the Labour Officer is supposed to handle. Some cases we ask for that but for some other cases, it may not be straight forward. Only when a complainant reports, usually the employer refuses to come so the Labour Officer can’t do anything because you need to have two parties, so they go to court.”

- Judiciary employee



166 See *Justice Needs in Kenya 2017, supra*, note 67 at p. 49.

167 *Ibid.*



Another source of pre-court ADR is FIDA which holds its own mediations between parties on family law, land or even environmental issues. FIDA is one of the major providers of free legal assistance to women in Kenya. Prior to agreeing to help a woman litigate a claim, FIDA will first attempt to resolve the dispute via mediation usually held at their offices. FIDA boasts that they resolve 35% of the cases that come to them in this manner.¹⁶⁸

Court Annexed Mediation started as a pilot project in the Family Court and the Commercial Court in Nairobi and is now a part of case management in those divisions with dedicated Deputy Registrars who oversee the process. The Family Court has an open door policy so that litigants can come and ask questions about the process and have things explained in more detail. This has allowed a far greater amount of interaction between Judiciary personnel and the litigants than is traditionally possible. Case documentation must be approved prior to mediation. Some men do not ask their sisters to sign the forms saying they consent to the action. They just write married in the spot where they are to sign. The Court ensures every child of the deceased consents to the action and a copy of their ID is on file before the case proceeds. Excluding women as possible beneficiaries is seen throughout the country, yet there is no probing of how informed or valid the consent behind the forms is and this is especially true of cases that are settled via mediation.

The Court appoints an external mediator who is paid on a per diem basis. The most requested mediator, by both men and women, is a religious leader. Mediators are accredited by an external accreditation service and the Family Court has not been able to determine what their syllabus is. It is unclear whether individual mediators, or even the Ministry of Labour Officers, have had any gender sensitivity training. Because of its expertise on women's issues and long history in providing mediation services, FIDA may be a resource on developing a gender sensitivity training module for mediators. Mediators need to be able to ensure that both parties are feeling heard and are not being suppressed by cultural, religious or other expectations.

If the parties can reach an agreement, minutes of settlement are drafted by the mediator. Where a settlement agreement excludes female beneficiaries, if the consent forms have been signed by everyone, it is acceptable from the Court's point of view. Yet, like a contract, parties can come back to court for a review of the minutes of settlement. While the Court Annexed Mediation is still a new program, only one person has come back, a woman who said she did not understand what she was agreeing to. The Court, however, made a determination that she just seeking a better bargain. Neither side was represented in that mediation as is often the case. Parties are able to come to the mediation with a support person such as a relative or friend or an advocate. While many parties in divorce cases are represented by an advocate, succession or children's matters are usually done by the litigants themselves. Some beneficiaries will have advocates but those protesting the distribution usually do not have advocates. In the end, a successful mediation results in an agreement between the parties, which is not subject to the law but formed on the basis of what each party wants.

“When you receive the settlement agreements, some are drawn with a lot of clarity. These are parties who know what they are doing. Some are vague and drawn in general terms such as giving up a whole estate or agreeing to withdraw the case. You may feel it is not equitable and these would go before a judge. We do not have a uniform way for agreements to be drawn so some prefer to go before a judge who adopts it. It is more like a consent judge who just confirms with parties that this is the agreement they arrived at. It is not more probing; it is just a confirmation. By the time they get there, some parties change their mind in court. Some don't even want to come for adoption. They can get it signed in chambers but only if looks very clear on the face of it. The judge doesn't look at fairness, it is more about agreement than fairness.”

- Judiciary employee





There is no gender perspective employed when reviewing cases though any that involve domestic violence or child abuse are excluded from the mediation process. There is no consideration of whether there is an imbalance in bargaining power as personnel do not feel it is apparent from the files. There is also no protection for those who are unrepresented facing a represented party in mediation. While anyone can bring a support person, if that person is not well versed in what the law allows, they cannot help a party know where they should be firm and what they might be awarded in court. Having settlements adopted in court may give a party a chance to change his or her mind after the mediation, but it appears very hard to come back to court once the order is issued because it is not clear that not understanding one’s rights is a valid reason to reopen an agreement. Still, the Court has never had any complaints that the mediation process was not fair and so far, it has achieved a 58% settlement rate.

“There is not any protections for when an imbalance of bargaining power exists beyond that the parties can come with an advocate or another person (relative or friend). The extreme of it is there are instances where the mediator is a male and there is an unrepresented female who has no one else to support her and the other side is male. Bargaining power could be a problem. There are no safeguards for that situation. We never ask them if they are happy or would like to adjourn – now mediation is mandatory.”

- Judiciary employee



Lack of an implemented national legal aid strategy is also a problem. Most succession cases involve a great deal of documentation. More of the succession cases that are filed in person are filed by women because they are burdened with transferring property into their name because their marital property was not jointly held or their husband died without a will. Many back out because they don’t know how to go about making the filing or it is too cumbersome. Through its interaction with litigants, the Court has observed times when a male relative will help a women get through this process and is given a portion of the property for their help.

Finally, numerous judicial officers described how they readily ask the parties in court to try to come to an agreement themselves though an ADR process where they think it will better serve them. Judicial officers can often identify these cases when examining the file or having discussions when the parties come before them in the first instance. In this way, they can promote reconciliation between the parties. Parties are told to go away and have a settlement discussion. If they come back with an agreement, many judicial officers will even do an order which can help with enforcement.

“Through pronouncements in our judgements and rulings and orders issued everyday, we educate. There is a lot of public education in court. I talk a lot in court, especially for cases that I am sending for mediation or out of court settlement. Through your talking, you can say a lot to affect what will happen in the mediation. I am an educator.”

- Judiciary employee



There is also a Judiciary Taskforce on Alternative Dispute Resolution which is looking at how various types of ADR used in public and private disputes in Kenya. This taskforce is not concentrating on traditional justice systems as much as the quasi-legal dispute resolution sector that has developed in response to the high cost and delays associated with the formal justice system. The Taskforce aims to produce a National Policy on ADR.



Court User Committees

The CUCs are a part of the feedback loop for the Judiciary and this is also true with feedback on the use of Court Annexed Mediation. Unfortunately, only 32% of court users are aware of the CUCs,¹⁶⁹ let alone how to access them. But as Court Annexed Mediation is slowly being rolled out to various parts of the country, some CUCs are very encouraging of it and others have contributed to how it is used.

“We are trying to bring in more court annexed mediation because people normally shy away from the courts. They are aware of the courts but they have fear of court.”

- Court User Committee Member



Many in the Judiciary recognize that the CUCs have brought inclusivity and gender sensitivity to the forefront because they actively discuss problems faced by their constituents. Some CUCs have discussed which cases they would not want to see settled via traditional justice systems, such as GBV because of the concern that survivors would not get justice. Many also see CUCs as the ideal vehicle to ensure gender equality is adopted in all AJS and ADR mechanisms. Some CUCs have already taken on this role and try to meet regularly with community elders and specifically try to address gender rights. These practices must be encouraged and lessons shared. Funding is sometimes an issue, but multiple CUCs have made use of their own expertise, often calling on members with experience with these matters to lead training sessions on the law and gender equality.

“Trainings should be offered through the CUC for external stakeholders. There is a key issue of mediation training and there is a large gender component. One issue we have identified is succession and property disputes. We realize a lot of women don’t have the wherewithal to come to court. One of our partners is KELIN to help us working with chiefs on the rights of widows, rights of orphans (HIV) and mediation. They train chiefs and local administrators because they are the ones on the ground. They show them how to deal with it, how to mediate, identify gender issues and deal with them. It is a cultural issue, so we have to consider how to empower chiefs to help this widow and also educate the community.”

- Judiciary employee



The Taskforce on Alternative Justice Systems is also considering this issue. They feel it would be desirable to equip the CUCs to spot gender and access to justice issues so they are able to work on them. Most importantly, they recognize that the local CUC is best placed to identify AJS in the community, sensitize the practitioners of these systems on gender issues and help them implement the constitutional requirements. Multiple CUCs have actually requested the Taskforce provide them with capacity building on how to ensure AJS relates to the Constitution.

“A lot of guys in the CUCs have a dual role. They are seen as being able to bridge the community and formal ideas of justice. So then so long as they can speak the formal legal literacy language and combine it with their own vernacular about justice, it is easier for them to purveyors to be modern forms of justice. We see ourselves as creators of justice entrepreneurs in the social sense.”

- Judiciary employee



169 See Court User Satisfaction Survey, *supra*, note 68 at p. 39.



Kadhis Courts

ADR is also often a precursor to litigants bringing cases before the kadhi courts. Litigants may visit an imam, sheik or ustadha, who is a female who has studied sharia law. If both sheiks and ustadhas are available, a person can choose if he or she feels more comfortable going to a man or a woman. But most often, it depends on where your family is based as to who you go to. Litigants can receive counselling, but they can also be referred to the kadhi courts. Because sharia law forms part of the Muslim religion and culture, these forms of ADR are already integrated into the kadhis courts as sheiks can even write a report that can be taken to the kadhi. Therefore, it may be easier to carry out sensitization to these partners through the kadhi court CUCs and to continue these discussions as Kenyan sharia law develops.

Tribunals

In much the same way that the courts do, tribunals also encourage ADR between the parties or even the use of traditional justice systems where appropriate.

“We use Alternative Dispute Resolution including traditional justice mechanisms. Most tenancy disputes are social conflicts so when parties come, we encourage them to try out of court settlements, to go away and sit by themselves. There is no framework, we just look at a case and if we find a case can be negotiated, we tell them to go and try. Then if they come with agreement, the Tribunal will endorse it. Even some came yesterday. This week, we recorded several. The other thing we do because our disputes are not very complex, they can be simple in nature, so we employ simple and cost effective methods. We also suggest they can discuss the issues with a local elder or religious leader. What we realize is that most of these disputes come about because of attitudes. People believe they have absolute rights on a property. So we have tried to discuss the issues and tell them something is against the law, that the tenant and landlord has his or her rights and that they must operate within the law. Most are not aware what they are doing is illegal. We tell them ‘you are supposed to be prosecuted’ and it helps them to apologize and amend their ways.”

- Judiciary employee



Because tribunals encourage the use of ADR and AJS the same way courts do, they may also benefit from establishing CUCs or Tribunal User Committees (TUCs) for ongoing consultation. These TUCs would be helpful in trying to educate AJS practitioners and the public at large about what the law says in their area of expertise and how to ensure that the constitutional minimums, including those on gender equality, are fulfilled.

Conclusion

ADR and AJS have the potential to greatly increase access to justice, especially for women who on aggregate experience decreased economic resources, lower education levels and less familiarity with formal processes than their male counterparts.¹⁷⁰ Yet it will only benefit them if the gender equality provisions of the Constitution are respected. The Judiciary is making great strides at trying to mainstream both ADR and AJS. However, given the serious historical gender inequities that have existed in Kenya and still affect the current societal structure and culture, it is an imperative that the Judiciary makes conscious efforts to evaluate, monitor and safeguard gender equality concerns.

More gender disaggregated research is needed on the impact of ADR and AJS. The Performance Management Directorate may consider designing a study on the differences between men and women’s experiences in Court Annexed Mediation as well as AJS. The Taskforce on Alternative Justice Systems would be a good technical resource for how to design and implement such a study. Such a survey might

¹⁷⁰ Anne Syomwene and Jonah Nyaga Kindiki, “Women Education and Economic Development in Kenya: Implications for Curriculum Development and Implementation Processes”, *Journal of Education and Practice*, vol. 6, no. 15 (2015) at p. 39.



provide data helpful in determining whether perceptions in bargaining power or access to legal information affects the outcomes of Court Annexed Mediation. If mediation outcomes are differing significantly from what the courts would have decided or if there are any gender biases that show up in the data, adjustments to the process may have to be explored.

This research would also help education initiatives to target any gender inequities or any other problem areas in either the Court Annexed Mediation processes or AJS. The Judiciary may consider a train the trainer approach in empowering CUC members to build capacity in their local areas. This is another area where a dedicated person coordinating these efforts and being able to identify common concerns throughout the country while working to safeguard gender equality within the Judiciary may be useful. In the meantime, the Family Court Annexed Mediation unit may consider using consent forms that clearly explain the law, what each person is entitled to and what the practical ramifications of their consent to the action are.

The reception received by the Taskforce on Alternative Justice Systems to their capacity building efforts is encouraging, but this delegation is high level and is not able to reach all areas. The gender equality training modules that may be developed by JTI may be a good starting point for developing training materials for use in supporting CUC members or other Judiciary employees in capacity building among local Court Annexed Mediators and AJS practitioners. While the Judiciary does not accredit individual mediators, it does have an obligation to ensure that they have been trained on how to consider a gender perspective, be sensitive to unrepresented parties and spot where a significant imbalance in bargaining power would not allow a conscientious mediation to occur. While the Alternative Justice Systems Taskforce does foresee some oversight role that is needed to ensure that AJS is being practiced within the boundaries of the applicable constitutional requirements, the Judiciary must also ensure that the Court Annexed Mediation process is providing a satisfactory level of justice to all parties. Beyond collecting data from the parties and on the outcomes, part of this process may require developing a legal test through jurisprudence for when a Court Annexed Mediation can be reopened.

5.5 JUDICIARY EQUIPPED TO ENFORCE EQUALITY



This parameter looks at whether the Judiciary is equipped with adequate training and resources to enable it to apply human rights legal principles to create equitable gender jurisprudence. Judicial officers need to be able to recognize gender issues, be sensitive to them and understand how they can take them into account in decision-making while still remaining impartial. They also need to be aware of the various human rights instruments and concepts in order to ensure they promote equality and equity in their jurisprudence as required by the Constitution. The Maputo Protocol, an international agreement that was ratified by Kenya making it part of the Kenyan law,¹⁷¹ actually requires the state to ensure that the Judiciary is equipped to effectively interpret and enforce gender equality rights as well as reform existing discriminatory laws and

171

See subarticle 2(6) of the Constitution.



practices so as to promote women’s rights.¹⁷² Being cognisant of its role, training, access to legal resources and legal research tools along with careful consideration to case management will help ensure that the Kenyan Judiciary can enforce the Constitution’s promise of equality regardless of gender.

The Role of Judicial Officers

The first step in ensuring that the Judiciary is properly equipped to enforce equality is to confirm that all judicial officers are aware of their specific role with regards to this constitutional mandate. All judicial officers must understand that beyond having a duty to not discriminate based on gender,¹⁷³ they are charged with integrating a gender perspective in their activities,¹⁷⁴ promoting gender equity and letting it guide them in the discharge of their mandate¹⁷⁵ as well as providing appropriate remedies to any women whose rights or freedoms have been violated¹⁷⁶. National values such as equity, inclusiveness, equality, non-discrimination and protection of the marginalized must be considered when making judicial decisions¹⁷⁷ or applying the Constitution or any law¹⁷⁸. Furthermore, in applying the Bill of Rights, a court must develop the law progressively and promote equity and equality.¹⁷⁹ The Judiciary should also ensure its judicial officers are aware of international human rights instruments and jurisprudence, especially that which pertains to the rights of women.¹⁸⁰ Discrimination can be direct or indirect and indirect discrimination requires particular scrutiny by the Judiciary; therefore substantive, not just formal equality is paramount and affirmative action can be used if necessary.¹⁸¹

These are high expectations put on the Judiciary but as long as judicial officers understand the transformative nature of the Constitution, appreciate their role in promoting gender equality in society, the institution will be on the right path to fulfilling its full mandate. While some judicial officers already understand this obligation, they all still require ongoing support. When it comes to the understanding of discrimination concepts such as affirmative action, gender equality and the difference between direct discrimination and indirect discrimination, there was a clear distinction between those with surface understanding and those who understood how these concepts merge with their mandates as judicial officers. Multiple members of the Judiciary only see gender as relating to women. Some interviewees gave vague explanations of concepts such as “gender equality means every group is given its space and rights”, while others reported taking time to reflect on the impact that potential decisions could have. This Impact was especially evident in cases concerning family and matrimonial matters, where litigants are of different genders and a middle ground is needed to accommodate the realities of both parties.

“The decisions we make in cases before us should be progressive on the issue of gender because that is what is expected of us by the Constitution. It is the only way that as a judicial officer I can propel those who are not so well advanced in gender equality. We cannot allow things to remain the way they have always been. As a judicial officer, I want to play my role and I feel it is right to advance the gender principle.” -

Judiciary employee



172 See *Maputo Protocol, supra*, note 39 at Subarticles 8(a), (b), (d), (e) & (f).
173 See Subarticle 27(4) of the Constitution.
174 See *Maputo Protocol, supra*, note 39 at Article 2(1)(c) and (d).
175 See *Judicial Service Act, 2017* at subsections 3(j) and (k).
176 See *Maputo Protocol, supra*, note 39 at Article 25.
177 See *High Court (Administration & Organization) Act, 2015* at Subsection 3(1).
178 See Subarticles 10(1) and 2(b) of the Constitution.
179 See Subarticles 20(3) & (4) of the Constitution.
180 See *Victoria Falls Declaration, supra*, note 43 at Principles 15 and 22.
181 *Ibid* at Principle 5.



As advocates and Judiciary employees realize how involved and lengthy the process of fully implementing the Constitution is, the Judiciary must re-examine its role as a common law arbiter and how strictly it adheres to an adversarial legal system given its new constitutional obligations. There are varying views on this issue that deserve careful consideration.

“It is hard for a judge to bring up an issue unless the advocates first brought it up.”

- Judiciary employee



If advocates are not making gender equality arguments where they are warranted, judicial officers still have to interpret a very transformative constitution and consider its effect on the law and the facts before them.

“To enhance gender equality, we have to be more aware of what is out there such as those international instruments. We have to know to ask more questions and be alive to the issues, not just looking at what is presented.”

- Judiciary employee



Given the fact that many parties are unrepresented in the Kenyan legal system and that advocates may not be aware of how to bring forward new constitutional arguments, this approach seems more appropriate. The common law tradition in Kenya was inherited from the colonialists, but the 2010 Constitution has created new rights that were not previously enshrined in the law. It begs the question as to whether the role of a judicial officer has been altered by the new supreme law of the land.

Training

Gender issues should be incorporated into all training modules offered by JTI. Training on how to incorporate a gender perspective that would ensure equality and fairness for both men and women would be especially useful to judicial officers. Multiple judicial officers reported not having had any training on how to integrate the constitutional values and principles into their decision-making, but they were also very open to receiving such training. Through the IDIs, judicial officers saw how useful it could be for all types of cases.

“It would be useful because most of the time, as judicial officers, when we deliver judgements, we confine ourselves to the charges that have been laid and the strict law. We should consider the constitutional principles but it is hard to incorporate them into my decisions as the Magistrates Court Act gives very limited leeway when it comes to interpretation of the Constitution. It only refers to damages; that jurisdiction is more with the High Court. Still again there are fundamental values that are in the Constitution that don’t require going to the High Court. Training would open our broader understanding of how to incorporate these values into our decisions.”

- Judiciary employee





There was concern expressed that whereas the Constitution is very progressive, in some cases there is no legislative instrument to realize its aspirations. It is true that there is not always a clear pathway for a judicial officer on how to develop the law in a manner that is consistent with the constitutional standards on gender equality and it is not an easy task that has been assigned to the Judiciary. Nevertheless, open discussions around these issues and learning about how other jurisdictions have adapted their law under new constitutional orders would be useful. Law is an ever-changing field and the challenges posed by the Constitution should be not be shied away from. It is noteworthy that both Canada and South Africa have implemented their broad bills of rights without implementing legislation, leaving individual cases to be decided by the courts. Any training that JTI undertakes on how to incorporate constitutional values and principles into judicial decision-making will be about providing judicial officers with tools about how to view problems from different perspectives and how to look at existing law after the advent of the Constitution. Each judicial officer still has complete discretion to decide each case and whether or not to use those tools or not. Training just covers options on how to look at things so that gender issues are not ignored.

“We want the serious discussion about how to be conscious of these gender matters when making the decisions.”

- Judiciary employee



The major exception to judicial officers saying that they hadn’t had training on how to incorporate gender equality into their decisions was a IAWJ KC training program on the jurisprudence of equality which was supported by UNIFEM and held years before the promulgation of the Constitution. This particular training was spoken of as extremely useful numerous times by the judicial officers who attended the training. Many described it as ‘eye-opening’ in that law was not viewed at only black and white but used to accommodate gender equality ultimately to ensure fairness. Only some judicial officers were able to take the jurisprudence of equality training yet even those who did expressed interest in having similar training again, especially in light of the new Constitution.

“I was trained by IAWJ KC on the jurisprudence of equality (international jurisprudence). It discussed the how to apply human rights norms and human rights standards into our judgements. Even when I myself am confronted with a matter, I look at those standards. For election petitions, I used those international norms, the principle of equality and non-discrimination, integrity – ICCP rights which are also in our own Constitution. Relating international principles to constitutional principles helps because the Constitution tells us that all international law that is ratified is part of the law.”

- Judiciary employee



JTI may want to revisit the jurisprudence of equality training program when designing its own gender training module for judicial officers. It should be emphasized that unlike in the past with the IAWJ KC sponsored training, all judicial officers must undergo the training modules on how to incorporate gender equality into decision-making. Gender equality is not only a women’s issue and this audit has raised instances of possible male discrimination as well. Equality is an important constitutional value that everyone has a stake in reaffirming.



“One thing about having a man writing a judgement enforcing CEDAW – I find it resonates more than when a women writes it. It conveys to the public that this is something that everyone is aware of rather than an activist woman judge. One of leading decisions of Court of Appeal where international instruments were cited resonated more because it was written by Justice Waki, a man. So if you train more male judges to be gender sensitive and enforce international instruments, there will be more acceptance.”

- Judiciary employee



Some judicial officers themselves felt that exposure to international jurisprudence and best practices along with looking at the post-2010 local constitutional jurisprudence can have a big impact. They recognized that this exposure can change the way they look at their cases. The idea that a judicial officer can probe beyond the arguments made and look to precedents from outside Kenya, where similar constitutional principles are being applied, is helpful. Some judges deciding constitutional issues have made this a practice as they strive to develop constitutional jurisprudence about how to implement the new rights provided for in the 2010 Constitution. Indeed there are judicial officers who have written pioneering decisions on how equality will be interpreted under Article 27 and they could serve as resources or speakers for JTI. Various levels of training may also be appropriate to accommodate judicial officers with varying degrees of exposure.

Finally, as discussed above, judicial officers must have a good understanding of direct and indirect discrimination and how to apply these concepts in their decision-making, especially indirect discrimination which may not be as evident without closer examination.¹⁸² Almost all judicial officers that the consultants interviewed seemed to suggest that intent is always a part of discrimination in the way they explained the difference between direct and indirect discrimination. Discrimination does not require any intent and is a simple factual determination. Indirect discrimination means that something has the effect of being discriminatory even if it is not discriminatory on its face (like direct discrimination). This means that motive is not part of the factual determination and discrimination can be found even where the perpetrator did not intend it.

This understanding greatly affects the burden of proof when weighing evidence of discrimination and can make it easier to bring discrimination suits which will help further enforce gender equality.

International Human Rights Instruments

The ***Victoria Falls Declaration of Principles for the Promotion of the Human Rights of Women***, 1994, an international agreement that is ratified by Kenya and thereby part of the Kenyan law,¹⁸³ specifically speaks to the Judiciary’s duty to be familiar with international human rights norms and jurisprudence. It requires that judges be particularly aware of local and international human rights norms and jurisprudence relating to women.¹⁸⁴ While multiple judicial officers did confirm that they cite international human rights instruments in their judgements, especially with issues pertaining to women or children, others had not considered them. Often, they felt they were not relevant to their area of law.

It was clear from the IDIs that judges and judicial officers are familiar with the provisions of the Constitution and national legislation relating to gender equality and non-discrimination. This awareness, however, seems to be superficial and does not extend to a comprehensive understanding of the application and implication of these laws. In fact, several interviewees asked to be trained on these issues because they did not feel they were sufficiently conversant with them. Unfortunately, judicial officers are not equally familiar with the provisions of international law. There is some awareness of the ***Convention on Elimination of All Forms of Discrimination Against Women*** (CEDAW), but there was little mention of the ***Maputo Protocol*** or other African Union instruments which provide for the equality of women and girls and non-discrimination on the grounds of gender. This stood out, along with interna-

182 *Ibid.*

183 As per Article 2 of the Constitution.

184 See *Victoria Falls Declaration, supra*, note 43 at Principles 15 and 22.



tional human rights jurisprudence as areas where further training and education is needed. The number of decisions citing these instruments could change once they receive training on how to incorporate gender equality into their decision-making.

“I cite CEDAW. I have had cases of violence against women. And I have a section in all my judgements where I incorporate international instruments. I also incorporate sentencing principles. I have also used international jurisprudence and studies on international human rights. It helps to borrow because it shows we are in tandem with what is applied elsewhere. The whole world agrees domestic violence is awful. Why should you think you can do this? This little act has a bigger bearing so I am using the powers of a court so everyone knows x,y and z.”

-Judiciary employee

While some judicial officers feel that they don’t have to cite international instruments or cases because it is already in Kenyan law with the advent of the Constitution, others still feel that the international instruments are clearer on gender equality. In addition, citing these international human rights standards may help develop the Kenyan gender equality jurisprudence, enunciate legal tests and legally define the constitutional values and principles.

“We do that all the time. International instruments are much more advanced on gender issues than the local law so they give us leeway to make decisions which we would not make if we just used the Kenyan laws. CEDAW – use that a lot, equality principles, ICCPR, Maputo Protocol – all international Human Rights instruments. For example, with property, children’s rights, SGBV - our laws give us the basic one sentence, but the illumination comes from these international instruments. For me, I always try to do it.”

- Judiciary employee

Legal Resources

Judiciary officers felt they could not produce quality decisions without good research because law is dynamic. Some prefer to do their own online research while others wanted the assistance of researchers. Research is also what has also made some judicial officers more comfortable with international human rights concepts. There was a shortage of research assistants reported though, especially among newer judicial officers as the initial ones hired were attached to certain judges and when they left, they were not replaced. Wait times for research assistance can be as much as four weeks.

“Right now we have around 20 researchers for 3 High Courts [including the Environment and Land Court and the Employment and Labour Relations Court]. The law says every judge should have a researcher but we don’t have that. The Employment and Labour Relations Court only has one for the whole court. With 12 judges and one researcher, it is very hard to get help with research.”

- Judiciary employee

The Judicial Service Act does state that every judge should have their own researcher¹⁸⁵ but it is unclear whether this provision was ever completely implemented. Researchers are not available to magistrates and therefore they have to do their own research. Courthouses appear to be equipped with wifi, however, with the severe shortage of funds facing the Judiciary since late 2017, there has not been any money to pay for the wifi. There are also challenges facing the Judiciary’s libraries where they may not have requested

185

See the *Judicial Service Act*, 2012 at Section 7.



resources or libraries that now how to help. This may very well be a training issue. Nevertheless, easy access to legal information and research is an issue that needs attention. Beyond a quick google search, judicial officers do not have much time for research due to their workload. High case loads and limited time frames for decisions are also real barriers to creating well thought out jurisprudence.

“For us, we have to do cases in a short time. Research support and skills need to be improved. Here, there is a lack of internet sometimes and the library is not well stocked and the librarian not always able to help. With the workload and output required, we need to focus and take time and that time is not there. You have a target and can’t be exhaustive in creativity because you are busy working on the target – need to do 20 judgments a month. The culture of performance management is stopping us. The 20 are diluted, not properly thought out. 3 or 4 pages as opposed to time to write. We churn them out and there is no quality.”

- Judiciary employee



Workload was mentioned more than once as a real concern and challenge to doing justice to complicated constitutional issues. Some felt that the targets were an issue while others felt that most judicial officers were actually having to work well above the targets in order to handle what was coming through the door. Given the situation, it is hard to tackle unconscious biases or indirect discrimination. Furthermore, while performance management targets address quantity of judgements, they do not appear to address the quality of judgements.

It was also noted that because South Africa has such a similar constitution to Kenya’s, South African decisions are very useful, along with those of the Supreme Court of Canada, Supreme Court of Australia, Supreme Court of India and some courts in the USA. But it is unclear whether the Judiciary has access to any online legal search engines or research services that may improve results. Moreover, legal research is a learned skill and training can only improve research efficiency and effectiveness. Information about where to find basic information about discrimination law and gender equality may also be helpful as judicial officers need quick access to relevant resources as they attempt to incorporate these concepts into their decisions.

Jurisdiction

Multiple magistrates believe that because of the way a magistrate’s jurisdiction relating to the Bill of Rights is described in the Magistrates Act,¹⁸⁶ that they cannot apply the Bill of Rights or consider applications filed pursuant to it. The best protection provided against gender discrimination under the Constitution is in Article 27 in the Bill of Rights. If magistrates, who hear the bulk of cases in Kenya, cannot provide redress to infringements of the rights enunciated in Article 27, the Judiciary will not be able to address gender equality at its most basic level. Access to justice is a live issue in Kenya and to tell a litigant who manages, against all odds, to approach a magistrates’ court to enforce gender equality that he or she can only pursue these issues at the High Court is unconscionable. As subordinate legislation, it is also doubtful that the Magistrates Act can override Subarticle 21(3) requiring all public officers to address the needs of the vulnerable including specific groups which directly relate to the enumerated grounds in Subarticle 27(4). Articles 20 and 21 aim to make the Bill of Rights far reaching in purpose and effect yet, the Magistrates Act severely limits its application. This limitation is of great concern if the Judiciary is going to be able to fully implement the constitutional promise of gender equality.

186 See Magistrates Act, 2015 at section 8.



“90% of cases happen in the Magistrates Court. For bad legislation, you have to blame Parliament because the Judiciary is just applying an Act. You can’t blame the Judiciary because the Judiciary cannot enact laws, it only interprets them and only the High Court has the mandate to find a law unconstitutional.”

- Judiciary employee



In a related issue, judicial officers currently interpret the jurisdiction concerning an accused person’s rights narrowly in that only the High Court can address these issues while the vast majority of criminal cases come before magistrates. The effect of this is that an accused person, most of whom are unrepresented unless they are charged with a capital offence, can only claim constitutional remedies in the High Court as opposed to the magistrates courts. Magistrate courts serve as courts of first instance for most crimes and are usually the easiest to access. This issues, however, is currently before the Supreme Court in the **Hussein Khalid & 16 Others v. the Attorney General & 2 Others case**¹⁸⁷. If the courts’ view of this jurisdiction changes, it could increase the magistrates courts’ caseloads even further and would make training even more of an imperative. Yet, the positive effect on access to justice could outweigh these challenges.

Court Management

“Statistics tell a story so we can craft a story about the people we deal with. Without the data or the facts, it is hard to craft the policy. If more men are filing, we need to know. We have encouraged more people to file succession cases. Are we effective? It is important to invest in data that is disaggregated by gender so we can know.”

- Judiciary employee



Having more detailed gender disaggregated data as well as data about the types of cases being filed will help the Judiciary get a better idea of where they stand on gender equality and the delivery of justice so that more targeted measures can be made based on statistical evidence. This type of data and monitoring can help pinpoint where the Judiciary is falling short of the constitutional standards it is charged with upholding or may also clarify problems that the courts are facing in implementing the Constitution. While the Court User Satisfaction Survey notes that 56.88% of court users were involved in criminal matters, 32.28% were involved in civil matters and 10.84% were involved in traffic matters,¹⁸⁸ a more detailed analysis of the types of cases being pursued would be helpful to see how the courts are being used. Coding cases by issue and then keeping track of the gender of the litigants could provide extremely useful information in understanding where the issues are.

The uneven caseloads carried by different courts was also noted, especially as many new courts are being established and may not yet have large caseloads versus other courts where the workload is extremely high. The consultants did observe uneven workloads as described. The real issue is if all judicial officers are not being fully utilized given that there are constant budgetary issues and increasing demand for the Judiciary’s services on a national level. Data on the types of cases being heard may also help inform flexible or creative working arrangements in order to help out those areas that are facing higher caseloads.

187 Hussein Khalid & 16 Others v. the Attorney General & 2 Others [2017] eKLR Civil Appeal No. 1 of 2015 (Nairobi HC).

188 See Court User Satisfaction Survey, supra, note 68 at pp. 18-19.



In addition, many judicial officers started with the view that gender issues were often confined to constitutional applications. The truth is that gender issues could arise in any case and all judicial officers must be alive to these issues because as litigation under the new Constitution is still maturing and judges may have to address these issues even when they have not been flagged by the advocates.

“Not many constitutional applications here, but many in Nairobi on these constitutional issues. Also because there is a constitutional division there, even someone in Mombasa who is aggrieved may file in Nairobi because the Constitutional Division can dispense with a case quicker without delay, almost instantly in those constitutional matters. In that division, they only handle constitutional matters so they are able to hone in on those issues. It would be good for them to file here as we also need to learn, but because we have so many other cases, we cannot do as much justice to them. Training would help the High Court judges do better justice to these types of cases. Also access to justice would be improved as not everyone can file in Nairobi.”

- Judiciary employee



Kadhi Courts

The following quote explains how the common law courts and the kadhi courts differ in their application of the principle of gender equality.

“It comes in through fairness, which is an Islamic concept and with development of the law – and specifically within the national and international development of law to try to incorporate fairness. Gender equality is not a concept in Islamic law. There is a maxim which says anything that brings about fairness or justice is Islamic. That guides us. So if affirmative action brings about fairness, it is good. That includes substantive fairness. There is a religious duty to offer substantive justice – that is what we learn about when we study sharia law.”

- Judiciary employee



The kadhis, like few other legal jurisdictions in the world, are operating in a dual legal regime and like their common law counterparts, are interpreting legal principles in the shadow of the new Constitution. While there are different schools of thought on the extent to which sharia law can be developed, kadhis should be given the chance to work this out in the Kenyan context. Multiple newly recruited kadhis obtained a degree in sharia law outside of Kenya and because of this training may be more likely to see sharia law as developing through the decisions of kadhis the same way that common law does. Still, within the kadhi courts, like the Muslim community at large, there is division on how progressive the courts should be. If their decisions were reported, it would enable a jurisprudential conversation about how to incorporate the new Constitution’s principles. In addition, reporting decisions could help bridge the gap between the kadhi courts and the common law legal community within which they operate. Reported decisions would offer a record of how sharia law is applied in Kenya.

As described in the Organizational Culture section above, kadhi courts operate in a segregated manner within the Judiciary. Those who do not work in the kadhi courts, most of the advocates who appear before them and the judges who hear their appeals do not have a real understanding of sharia law. Conversely, those trained in sharia law are not allowed to attend the Kenya School of Law. In order to be true partners in delivering justice, all sides must try to understand each other. Ensuring that kadhis, magistrates and even judges have the opportunity to train together will also support this goal.



Kadhis are charged with ensuring that sharia law is practiced in a way which conforms with the Constitution. A lot of what they do serves the interests of women, which is why women are the vast majority of litigants initiating claims before the kadhi courts. Nevertheless, some believe there is some tension between sharia law and the Constitution that needs to be resolved.

“There is a conflict between the Constitution and Islamic law which places the court in a difficult position. For example, when it comes to succession matters where one, some or all of the parties are Muslim, Islamic Law does not allow for equal inheritance between boys and girls. This is because the culture is set up such that men have more responsibilities than women thus it makes more sense for them to inherit more. This is not the position in the Constitution.”

- Judiciary employee



The development of Kenyan sharia law does not have to make it unrecognizably different. If reported kadhi decisions consider the question of how the Constitution affects sharia law in Kenya, it may be useful to consider the common law tools of equity such as a trust where one holds an interest for another party. Kadhis may also want to have discussions amongst themselves on these issues. If the kadhi courts are to be considered part of the Judiciary, they should ascribe to Kenya’s constitutional principles including gender equality. It is useful to juxtapose these conversations with the way in which traditional justice mechanisms are also undergoing a rethinking. Societal attitudes among non-Muslim Kenyans are also being examined as the traditional justice systems of many other Kenyan communities are also having to align with the gender equality provisions of the Constitution.

Conclusion

There are an array of tools that a Judiciary needs to be able to implement a constitution as transformative as Kenya’s. These basic needs include understanding one’s role, being trained on how to handle the issues that may arise, having knowledge of international human rights instruments and being able to access the legal resources necessary for meaningful legal research. But the Judiciary also needs to have unencumbered jurisdiction, strong court management techniques and an integrated system of courts that all conform to the same constitutional principles. Given the severe budgetary constraints faced by the Judiciary, creative approaches are needed to determine how to safeguard all these instruments. Many of these issues can be addressed at JTI training sessions. It appears even just sharing experiences and having an open discussion amongst a variety of judicial officers on how to consider constitutional principles in decision-making would be a meaningful start. In addition, as encouraged by some of Kenya’s ratified international agreements on how to tackle discrimination against women, closer links and cooperation between various countries’ judiciaries on human rights law should be explored.¹⁸⁹ This may be partnerships that are developed on a regional or even international scale.

The Judiciary also needs to make a commitment to maintaining valid and useful research tools for its judicial officers. JTI may be able to spearhead this initiative and could be aided by a person responsible for coordinating gender equality within the Judiciary. Given that multiple judicial officers have seen fit to borrow from certain jurisdictions that have implemented similar broad bills of rights and that Kenyan case law on these issues is starting to develop, it may also be appropriate to create a bench book on equality law citing both cases from other jurisdictions and post-2010 Kenyan cases. This could be a useful training tool or reference guide for judicial officers who are struggling to deal with these issues on their own.

Further consideration should also be given to how data on cases is collected. The Performance Management Directorate may benefit greatly from having personnel with legal expertise imbedded in their staff to be able to help with the coding of cases beyond the civil and criminal distinction. They might also help with developing targets that not only address quantity but also quality and do not have a chilling effect on judicial officers trying to apply constitutional principles in their decisions. As stated previously, gender

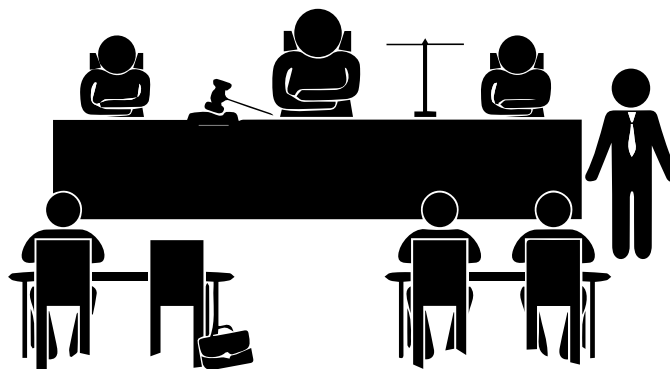
189 See *Victoria Falls Declaration of Principles for the Promotion of the Human Rights of Women*, 1994 at Principle 23.



disaggregated data would shed light on a number of issues facing both men and women in accessing justice. These types of parameters could be developed in conjunction with the person coordinating gender equality initiatives and any results be thoroughly analysed with their input.

Jurisdictional issues also need to be looked at more closely and considered in light of the specific constitutional obligations placed on the Judiciary. Limits placed on the constitutional jurisdictions of various courts may be explored through jurisprudence or even through active law reform. Finally, given the special circumstances of the dual jurisdiction of the kadhi courts, it seems appropriate to give real consideration to whether their decisions should be reported. It would help promote understanding of the kadhi courts and help the kadhis reason through how the Constitution affects their application of sharia law and how this dual jurisdiction can be intellectually reconciled.

5.6 JURISPRUDENCE



Jurisprudence is the body of case law that the Judiciary develops. These decisions are the outcomes of each case but also serve to affect the processing and conclusions drawn in future cases because each decision forms part of Kenya’s post-2010 constitutional common law. Access to the justice system in the first place and how a case is processed affect the different experiences of each gender within the justice sector. The jurisprudence allows for a final assessment on how the Judiciary is living up to its mandate to promote the Constitution’s principles and values,¹⁹⁰ protect society’s vulnerable¹⁹¹ and develop the law in keeping with the rights and freedoms provided in the document¹⁹².

The Judiciary’s Constitutional Obligations in Developing Jurisprudence

Unlike the other components of the Judiciary Gender Audit, the assessment of a selection of the Judiciary’s post-2010 jurisprudence was a discrete exercise. For this reason, it is useful to review the Judiciary’s constitutional obligations on gender equality in the development of its jurisprudence separately here. The core mandate of the Judiciary is to dispense justice to all irrespective of status and to protect and promote the purpose and principles of the Constitution.¹⁹³ When applying the Constitution or any law, the Judiciary is also bound by the national values and principles of governance including human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised.¹⁹⁴ In addition, the courts have express mandates to determine matters brought before them including whether a constitutional right or freedom has been denied, violated, infringed or is threatened.¹⁹⁵ Specifically, when applying the Bill of Rights, the courts are required to “develop the law to the extent that it does not give effect to a right or fundamental freedom”¹⁹⁶.

190 See Subarticle 159(2)(e) of the Constitution.
 191 See Subarticle 21(3) of the Constitution.
 192 See Subarticles 20(3) and (4) of the Constitution.
 193 See Subarticle 159(2) of the Constitution.
 194 See Subarticles 10(1) and (2)(b) of the Constitution.
 195 See Subarticle 22(1) of the Constitution.
 196 Subarticle 20(3)(a) and Subsection 7(1) of the Sixth Schedule (Article 252) of the Constitution.



This means that the pre-2010 Kenyan common law must be considered in light of the new Constitution and its protection and promotion of the welfare of vulnerable groups like women. The Bill of Rights must be interpreted in a manner that promotes “the values that underlie an open and democratic society based on human dignity, equality, equity and freedom and the spirit, purport and objects”¹⁹⁷ of this chapter. In addition, the courts must “adopt the interpretation that most favours the enforcement of a right or fundamental freedom”¹⁹⁸. Therefore, the courts must take a purposive approach to the interpretation of each right and freedom which requires challenging norms and stereotypes that detract from these rights.

Article 27, contained in the Bill of Rights, describes the right to equality and expressly highlights gender equality as a priority when it states that “[w]omen and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres”¹⁹⁹. It also specifies that no one, including the state, can discriminate directly or indirectly on the basis of sex, pregnancy or marital status among other grounds.²⁰⁰ Therefore, the courts must be able to recognize gender discrimination, whether it is direct or indirect and where it has the effect of discriminating against one gender even if unintended. Furthermore, international legal instruments ratified by Kenya are considered part of Kenya’s law.²⁰¹ Such obligations include particularly scrutinizing indirect discrimination, recognizing substantive gender equality, not just formal equality where everyone is treated the same, is important and employing affirmative action if necessary to address discrimination.²⁰²

Judges (and by extension magistrates and kadhis) have a specific duty to be aware of local and international human rights norms and jurisprudence, particularly those that relate to women.²⁰³ More specifically, the Judiciary should be guided by CEDAW when interpreting and applying law, including the Constitution, common law and customary law, as well as making decisions.²⁰⁴ To help accomplish this, the Judiciary should develop closer links and cooperate with other judiciaries on human rights law.²⁰⁵ The Judiciary must also combat all forms of discrimination against women by integrating a gender perspective in all activities and using corrective action where it persists.²⁰⁶ Women whose rights or freedoms have been violated deserve appropriate remedies and the Judiciary must ensure it is competent to do so.²⁰⁷ Finally, because the state often fails to act against violations of human rights in the private sphere, including within the family, which encourages frequent private violations, the Judiciary should be prepared to act within these private spheres.²⁰⁸

In order to give full effect to equality rights, “the State shall take legislative and other measures, including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination”²⁰⁹. Over and above the state’s obligation to address past discrimination, it must specifically act on gender equality and “take legislative and other measures to implement the principle that not more than two-thirds of the members of elective or appointive bodies shall be of the same gender”²¹⁰. This obligation is commonly referred to as the two-thirds gender rule.

Given the broad and purposive approach that the courts are bound to employ when interpreting or applying the Bill of Rights, the Judiciary has a unique responsibility when it comes to developing jurisprudence on gender equality, equity and inclusiveness. Judges and judicial officers have an obligation to contribute to the actualization of the Constitution’s vision of gender equality through their decisions as they carry out their mandate. Below, a selection of cases was purposively sampled to provide a snapshot of the Judiciary’s gender equality jurisprudence so far.

197 Subarticle 20(4) of the Constitution.
198 Subarticle 20(3)(b) of the Constitution.
199 Subarticle 27(3) of the Constitution.
200 See Subarticles 27(4) and (5) of the Constitution.
201 Subarticle 2(6) of the Constitution.
202 See *Victoria Falls Declaration*, *supra*, note 43 at Principle 5.
203 See *ibid* at Principles 15 and 22.
204 See *ibid* at Principle 11.
205 See *ibid* at Principle 23.
206 See *Maputo Protocol*, *supra*, note 39 at Subarticles 2(1)(c) and (d).
207 See *Maputo Protocol*, *supra*, note 39 at Article 25.
208 See *Victoria Falls Declaration*, *supra*, note 43 at Principle 3.
209 Subarticle 27(6) of the Constitution.
210 Subarticle 28(8) of the Constitution.



Each case was reviewed on gender parameters including the courts' use of language around gender. The cases sampled are from the superior courts as decisions from the magistrate and kadhi courts are not reported by the National Law Reporting Council.

Two-Thirds Gender Rule Case Law

The interpretation and implementation of the Constitution's two-thirds gender rule has been the subject of much litigation. Not surprisingly, implementation has been most problematic with high status leadership and elected positions. In 2011, a new constitutionally dictated Supreme Court was formed, requiring the recruitment of seven Supreme Court Justices. The JSC recommended a male Chief Justice, a female Deputy Chief Justice and five Supreme Court Justices, only one of which was female. This meant that there were only two females on the seven person bench. FIDA filed a petition in the High Court arguing that because two-sevenths was less than one-third, the two-thirds gender rule was not observed and the appointments were therefore unconstitutional. The three judge bench in *FIDA Kenya & 5 Others v. Attorney General & Another*²¹¹ found that until the state had the opportunity to enact legislation, policies and programs as envisioned by Subarticles 27(6) and (8) of the Constitution, the application was premature as the right to enforce the two-thirds gender rule had not yet crystallized. It emphasized that these rights would only crystallize when the state took such action or failed to do so within five years of the promulgation of the Constitution.

The conclusion that the Constitution must be implemented by enabling legislation is confusing given that it is the supreme law²¹² and has priority over any other legislation. It is disappointing that this early case interpreted the two-thirds gender rule to be virtually unenforceable for the first five years. The Court did not exercise the power given to it, but instead deferred to the Legislature, which has outrightly avoided the implementation of the two-thirds gender rule. Yet, the language of the decision and the manner in which it addresses the petitioners, members of the Kenyan chapter of the International Federation of Women Lawyers, is even more disappointing:

In conclusion: dear petitioners, we regret to inform you that your petition has been rejected. It is hereby ordered dismissed. It is a missile that was fired before first ascertaining the target. This petition appears to be a guided missile launched not only at the JSC but also at the Constitution itself inadvertently without tangible aggression, complaint or grievance [emphasis added]. Please understand that we intend no offence by our decision. We do not hold you in contempt. In fact and indeed we do not regard the women who were not considered for the Supreme Court as less deserving than those who were recommended and appointed. It is not their failure but because JSC exercised a legitimate discretion within the parameters of the law in favour of those who performed better than them.

We realize from your submissions and conduct that you will find this decision disappointing but your disappointment should not be exaggerated by the thought that this rejection reflects in any way on your legal and human worth. You have our sympathy in the sense that it is too bad that you did not succeed. It is in the nature of our work that we cannot always guarantee success to applicants and respondents who file their cases before us no matter what they think of their case, if the law and facts be not on their side. We found your grievances misconstrued and unfounded. To borrow from the Ghanian case and to paraphrase, Mr. Ongoya Advocate and associated counsel erected a "NO ENTRY" sign post to the appointment of the five Supreme Court Judges. Mr. Muite Advocate with the assistance of Ms Muthoni Kimani and associated counsel took up the role of a demolition squad to successfully tear down the said sign post without physical or verbal force of violence but factual legal construction of the law and facts both of which favoured them.

To the Petitioners and supporters we advise that you keep your feminine missiles to their launch pads until the State acts on policies and programmes as are envisaged in Article 27(6) and (8) and the Legislature has legislated accordingly to set the formulae, mechanisms and standards to implement the spirit and import of the whole Constitution within the time frame set by the Constitution or in default of their complying within that time frame.²¹³

²¹¹ *FIDA Kenya & 5 Others v. Attorney General & Another* [2011] eKLR Petition No. 102 of 2011 (Nairobi HC) [hereinafter *FIDA Kenya*].

²¹² Subarticle 2(1) of the Constitution.

²¹³ *FIDA Kenya*, *supra*, note 215 at pp. 52-53.



This language is condescending, patronising and inappropriate in addressing an organization of lawyers who are aware of how legal decisions are made. In addition, citing the petitioners' lack of tangible complaint or grievance betrays the Court's failure to appreciate that the two-thirds gender rule is an affirmative action mechanism designed by the Constitution's framers to address historical gender inequality in positions of power throughout the nation's history. Referring to test litigation on significant constitutional issues as 'feminine missiles' belittles the petitioners and women as the potential beneficiaries of the Constitution. Plainly put, the Judiciary does not live up to its role in protecting and promoting gender equality in this seminal case on the two-thirds gender rule.

In 2012, the High Court adjudicated a constitutional petition that sought a declaration that the Sugar Board elections of a 13 member board were unconstitutional because they could not result in a body that conformed to the two-thirds gender rule and threatened further infringements on the petitioners' rights. The *Milka Adhiambo Otieno & Another v. Attorney General & 2 Others*²¹⁴ Court found that the Sugar Board had to abide by the two-thirds gender rule and while there was no legislation yet enacted to implement it, other measures such as policy could be used to accomplish the task in the meantime. Even though the Court held that while the Attorney General and the Sugar Board had to undertake other measures to implement the two-thirds gender rule, it held that the application was made prematurely because the election results and gender makeup of the board were not yet known. This holding is perplexing given that the Constitution clearly states that "[t]he High Court has jurisdiction, in accordance with Article 165, to hear and determine applications for redress of a denial, violation or infringement of, **or threat to** [emphasis added], a right or fundamental freedom in the Bill of Rights"²¹⁵. In addition, it was not contested that only one of the fifty people offering themselves for election to the Sugar Board was a woman, therefore, it was impossible that the 13 person board would have been constitutional. Nevertheless, the Court did recognize that the two-thirds gender rule applied outside legislative bodies and employed affirmative action reasoning to the facts before it to find that gender equality was needed in the composition of the Sugar Board:

The issue of affirmative action was well within the minds of the drafters of our Constitution. There was arguably the need to bridge historical imbalance. That is the import of the said articles. The same were a deliberate move to take care of the said inequalities. We also take cognizance of the role women play in the agricultural sector of our economy. They shoulder much of the work although; [sic] as the parties verily admitted it is the men who take home the spoils. The parties also conceded that in the sugar belt zone women do not own title deeds. Women may indeed not have an equal playing field [sic] with the men.

From the election herein it is clear that out of the fifty candidates only the 2nd petitioner was a woman. The question to pose is where we [sic] the rest of the women? What happened to them? The answer is not for us to speculate. In any event history speaks volumes and aloud on this matter and we need not say more, our view nevertheless is that it is imperative that the affirmative action envisaged by the Constitution 2010 ought to be given life and purposive meaning.

Two issues however were raised by the respondents, namely that the time frame of five years to implement the same is yet to expire and that the petition before us is premature. We do agree with the respondents only to the extent that the time to legislate in support of Article 27(8) under the Fifth schedule of the Constitution is given as five years from the date of promulgation. However the said Article creates room to achieve the same before legislation is put in place. The article also stipulates other measures of achieving the same through affirmative action and direct state policy. This in our view was a deliberate move bearing in mind that legislation may take long. The respondents therefore have a duty; they also have ways and means of undertaking such steps and policies towards achieving this call.²¹⁶

214 *Milka Adhiambo Otieno & Another v. Attorney General & 2 Others* [2012] eKLR Petition No. 33 of 2011 (Kisumu HC) [hereinafter *Otieno v. AG*].

215 Subarticle 23(1) of the Constitution.

216 *Otieno v. AG*, *supra* 218 at pp. 9-10.



In this early case, the Court was alive to the issues of gender equity and consequently contributed to the broad and purposive interpretation of the two-thirds gender rule. Later that same year, the Supreme Court released the *Matter of the Principle of Gender Representation in the National Assembly and the Senate*²¹⁷ Advisory Opinion on how the two-thirds gender rule was to be implemented in the National Assembly and the Senate during the upcoming 2013 general election. Specifically, the Court considered whether the two-thirds gender rule required immediate implementation or progressive realisation. The majority opinion, with the Chief Justice dissenting, noted that the absence of a specific requirement in relation to the two houses of Parliament implied that, unlike in the case of county assemblies, the two-thirds gender principle should be progressively realized.

As a result, it could not be enforced immediately. Accordingly, the Court advised that, if measures necessary to crystalize the principle into an enforceable right were not taken before the 2013 elections, it would not be applicable. Nevertheless, bearing in mind the constitutional duty to promote the representation of marginalised groups and the five year deadline for the enactment of laws implementing the Constitution, the Court advised that legislative measures giving effect to the two-thirds gender principle in the National Assembly and the Senate should be in place by the five year deadline, 27 August 2015.

The dissenting opinion of then Chief Justice Willy Mutunga used a substantive approach to equality instead of the formalistic one preferred by the majority and provided an analysis of why the two-thirds gender rule should be implemented immediately:

- 11.4 What is undeniable is Kenyan women have continuously and consistently struggled for their equity and equality in all spheres of life. There is a consistent historical thread of this agitation as documented by the publication **Ed; Ruto, Kamari- Mbote & Muteshi-Strachan, Promises and Realities: Taking Stock of the 3rd UN International Women's Conference (Nairobi: ACTS Press, 2009)** that is consummated by the majority vote in the 2010 referendum and the subsequent promulgation of the constitution on August 27, 2010. Arguing that the two-thirds gender rule requires progressive realization flies into the face of this history of struggle by Kenyan women. Katiba Institute is definitely right when it argues that the one-third is simply a minimum and that progressive realization must be confined to developments that move the country towards a 50/50% threshold in gender equity and equality.
- 11.5 I see no reason a constitution that decrees non-discrimination would discriminate against women running for Parliament and the Senate. I see no constitutional basis for discrimination among women themselves as the consequence of the progressive realization of the two-thirds gender principle would entail. A constitution does not subvert itself. Deciding that women vying for county representation have rights under constitution while their counterparts vying for Parliament and the Senate are discriminated against would result in that unconstitutional position. This article read with the provisions of Articles 27(4), 27(8) and 81(b) make it abundantly clear that the two-thirds gender principle has to be immediately realized.
- 11.6 I believe the immediate implementation of the two-thirds gender principle is reinforced by **values** of patriotism, equity, social justice, human rights, inclusiveness, equality and protection of the marginalized. Such values would be subverted by an interpretation of the provisions that accepts progressive realization of this principle.
- 11.7 I am in agreement with Counsel for the Katiba Institute that the Constitution's view to equality, as one of the values provided under the constitution, in this case is not the traditional view of providing equality before the law. Equality here is **substantive**, and involves undertaking certain measures, including affirmative action, to reverse negative positions that have been taken by society.

²¹⁷ Matter of the Principle of Gender Representation in the National Assembly and the Senate [2012] eKLR Advisory Opinion Application No. 2 of 2012 [hereinafter *Principle of Gender Advisory Opinion*].



Where such negative exclusions pertain to political and civil rights, the measures undertaken are immediate and not progressive. For example, when after struggles for universal suffrage Kenyans succeeded in getting that right enshrined in the Bill of Rights of the 1963 constitution, nobody could be heard to argue that we revert back to the colonial pragmatic progressive realization of the right to vote!²¹⁸

The Chief Justice was cognisant of the need to adopt a purposive approach in line with the national values and principles when interpreting the Bill of Rights. He also recognized that the equality provided for in a constitution that stresses protection of the vulnerable and marginalized and affirmative action measures demands substantive and not merely formal equality. Substantive equality requires helping the disadvantaged and not just treating everyone the same as prescribed by formal equality. Unfortunately, the other members of the bench did not agree with this position, though they did provide a deadline for Parliament to legislate measures to implement the progressive realization of the two-thirds gender rule. This deadline has passed unheeded and the majority’s decision greatly contributed to the lethargy in implementing the two-thirds gender rule.

Also in 2012, the High Court determined a consolidated constitutional petition and judicial review challenging the President’s unilateral appointment²¹⁹ of new County Commissioners in *Centre for Rights Education & Awareness (CREAW) & 8 Others v. Attorney General & Another*²²⁰. The challenge was based on the fact that the appointments were done in a manner that ignored several express constitutional principles including the two-thirds gender rule. The Court held that the Executive must embrace and adopt the new standards outlined in the Constitution. Having found the appointment was unconstitutional in so far as it did not comply with the two-thirds gender rule, the Court deemed the respondents’ justification for failing to appoint the requisite quota of women unsatisfactory because it was apparent there were more than enough adequately qualified female candidates. The argument that the two-thirds gender rule was subject to progressive realisation was also found to be erroneous:

I take the view that the phrase ‘progressive realisation’ is applied to those circumstances where an allocation of limited resources is required. The state can only achieve certain rights over a period of time as resources are limited. The phrase is used in reference to socio-economic rights, and this is made clear in Article 21 of our Constitution.

- 51. In matters of appointment or election to office in order to achieve gender equality and equity, there is no qualification of the state’s obligation as there is no outlay of resources required and which is shown to limit or inhibit the realisation of this right. This is particularly so in a scenario such as the one before the court where, on the respondents’ own admission, there are at least another 16 female District Commissioners with the requisite qualifications to meet the criteria that the respondents had set for appointment as County Commissioners. There is really no justification or explanation for the President’s failure to observe the requirements of Article 27(8). The ‘appointments’ or ‘deployments,’ whatever term is used, assuming that the President had power to make them, fail the test of constitutionality by disregarding the national values and principles set out at Article 10(b) and the principle contained in Article 27(8) of the Constitution.²²¹

This was a progressive decision, particularly in light of the fact that it was passed just two years after the promulgation of the Constitution. The Court recognised that in order for gender equality to be realised in all appointive and elective bodies, the progressive realization excuse had to be limited to appropriate situations where external circumstances make it impossible to immediately realize a constitutional right. The decision, however, was appealed to the Court of Appeal. In 2013, that Court ruled in *Minister for Internal Security and Provincial Administration v. Centre for Rights Education & Awareness (CREAW) & 8 Others*²²² that

218 Principle of Gender Advisory Opinion, *ibid* at paras. 11.4-11.7.

219 Or ‘deployment’ as a later Gazette Notice referred to the elevation to the new government positions.

220 Centre for Rights Education & Awareness (CREAW) & 8 Others v. Attorney General & Another [2012] eKLR Constitutional Petition No. 207 & JR Miscellaneous Application No. 208 of 2012 (Consolidated) (Nairobi HC) [hereinafter CREAW v. AG].

221 CREAW v. AG, *ibid* at paras. 50-51.

222 Minister for Internal Security and Provincial Administration v. Centre for Rights Education & Awareness (CREAW) & 8 Others [2013] eKLR Civil Appeal No. Of 2012 (CA) [hereinafter Minister v. CREAW].



because the appointments were made during the period of transition from the previous Constitution to the current one, the President’s powers to appoint positions outside the national government were preserved. The Court pointed out that during the transition, measures to devolve the county governments were still being put in place:

If the appointments/ deployments were being done under the New Constitution and after the passage of the above law that governs the appointments of county officers, clearly the learned Judge’s reasoning would have been correct. As stated the learned Judge was ahead of her time regarding her interpretation of the rule of gender parity in public offices. Had the learned Judge appreciated the aforesaid transitional situation, perhaps she would have arrived at a different finding as we have done that the deployment did not go against the provisions of the constitution as it was done pursuant to the executive powers vested in the President under the old constitutional clauses that were saved in the new constitution.²²³

As the transitional period has expired, the High Court’s reasoning that the two-thirds gender rule should be implemented immediately is still good law as confirmed by the Court of Appeal. In 2016, the petitioners in *Marilyn Muthoni Kamuru & 2 Others v. Attorney General & Another*²²⁴ received a decision responding to their request for a declaration that the Cabinet appointments were unconstitutional because they did not conform with the two-thirds gender rule.

The Court held that the President violated Subarticle 27(8) of the Constitution when he appointed a cabinet that did not conform to the gender principle and that the National Assembly also violated it when it approved the offending cabinet. It gave the President eight months to reconstitute the cabinet due to the upcoming election within that time period. In making its findings, the Court confirmed that the two-thirds gender rule must be implemented immediately and not progressively:

In any event ensuring that not more than two-thirds of the same gender is the bare minimum. It has been over six years since the promulgation of the Constitution. It is loathsome that over six years later, the State still claims to realize some of these rights progressively. The moratorium ought to come to an end especially with regard to appointive positions. ... Perhaps however, it may be noted that it is such basics like appointments made in compliance with the two third gender rule which have the potential of bringing a paradigm shift in the treatment of any disadvantaged gender at any basic domestic level including the education field.²²⁵

The growing number of cases affirming an immediate implementation strategy is encouraging. In early 2017, two further decisions of the High Court affirmed gender equality in rulings on this issue. *Katiba Institute v. Independent Electoral and Boundaries Commission*²²⁶ found that all public bodies are constitutionally obligated to comply with the two-thirds gender rule including political parties. The Court ruled that “[s]imply put, political parties are a vehicle to legislative bodies and eventually into leadership positions”²²⁷. The Court further explained that:

The two-third gender principle cannot be left to legislative process alone, if it has to be effectively and meaningfully realized. That is why the constitution uses the words “other measures” in Article 27 (8) to connote that the principle may be attained through other means even in the absence of legislation. Political parties must take pro-active steps to realize this constitutional objective. Really, the question of two-third gender principle is about logistics and formula which political parties are capable of designing and implementing within their internal organization. They have an obligation to promote objects of the constitution and promote gender parity even during nominations. Any other interpretation, in my view, would not be in accord with Article 259 of the constitution as it will depart from the purposes, objects and spirit of the constitution.²²⁸

223 *Minister v. CREAW*, *ibid* at para. 36.

224 *Marilyn Muthoni Kamuru & 2 Others v. Attorney General & Another* [2016] eKLR Petition No. 566 of 2012 (Nairobi HC) [hereinafter *Kamuru v. AG*].

225 *Kamuru v. AG*, *ibid* at paras. 43 and 59.

226 *Katiba Institute v. Independent Electoral and Boundaries Commission* [2017] eKLR Petition No. 19 of 2017 (Nairobi HC) [hereinafter *Katiba v. IEBC*].

227 *Katiba v. IEBC*, *ibid* at para. 34.

228 *Ibid* at para. 49.



Even in the absence of legislation, the Court found that the IEBC has a constitutional mandate to ensure that political parties, though reluctant to do so, comply with the two-thirds gender rule. Unfortunately, because there were only four months remaining before the election, it was not possible for this judgement to be implemented in the 2017 elections. Yet, the Court was categorical that the implementation of the two-thirds gender rule requires more than legislative measures; A concerted effort of state organs and independent commissions is needed.

In another 2017 decision, *Centre for Rights Education and Awareness & Another v. Speaker of National Assembly & 5 Others*²²⁹, the High Court issued orders to dissolve Parliament because it was found to be unconstitutional for not adhering to the two-thirds gender rule. It found that the National Assembly and the Senate had “failed, refused and or neglected to perform their constitutional mandate prescribed in the constitution”²³⁰. The Court gave Parliament and the Attorney General sixty days to enact the required legislation to implement the two-thirds gender rule, failing which Parliament would be dissolved. Of note are the Court’s comments on how it saw judicial review being handled, recommending that the courts refrain from developing two lines of jurisprudence, one under the common law jurisdiction and another under the constitutional jurisdiction. Instead the test set out in the Constitution should take precedence:

*My strong view is judicial review and the exercise of judicial authority is now entrenched in our constitution and this ought to be reflected in the court decisions and any decision making process that does not adhere to the constitutional test cannot stand court scrutiny.*²³¹

By invoking Subarticle 159(2)(e) to protect and promote the principles and purpose of the Constitution by discouraging two separate jurisprudential avenues that may allow some actors to avoid constitutional requirements. As Kenya’s post-2010 constitutional jurisprudence starts to take form, the courts are attempting to implement the constitutional notion of gender equality and developing their own local legal tests to do so.

In 2017, another High Court decision negatively impact two-thirds gender rule jurisprudence. *National Gender and Equality Commission (NGEC) & Another v. Judicial Service Commission & 2 Others*²³² was a second challenge to the constitutionality of a Supreme Court comprised of five men and two women. After a male Chief Justice and a female Deputy Chief Justice were appointed, the action specifically challenged the appointment of the fifth male, Justice Lenaola, as opposed to the composition of the court generally. Unfortunately, instead of turning on the two-thirds gender rule and the purpose behind it, the decision reaffirmed the oversimplified approach that the most qualified person must be chosen. This view ignores the fact that the two-thirds gender rule is an affirmative action measure meant to remedy the historical and continued discrimination women face in obtaining positions in elective or appointive bodies. The stipulation recognizes that society’s lens for choosing leaders is clouded by patriarchal culture and traditional gender roles, resulting in an appraisal system that is often skewed to favour men. The Court states that:

*Article 232 of the Constitution provides for values and principles of Public Service and in particular that fair competition and merit is the basis of appointments and promotions in the public service before considering other criteria including that of gender.*²³³

However, Subarticles 232(1)(g), (h) and (i) state that fair competition and merit based appointments and promotions are subject to diversity and adequate opportunities for men and women, all ethnic groups and persons with disabilities. And though the Court also refers to the *Judicial Service Act*²³⁴ as requiring the selection of the most qualified person, its interpretation seems unreasonable given that these constitutional provisions require a purposive approach and are paramount to subordinate legislation. It further states:

229 *Centre for Rights Education and Awareness & Another v. Speaker of National Assembly & 5 Others* [2017] eKLR Petition No. 371 of 2016 (Nairobi HC) [hereinafter *CREAW v. Speaker*].

230 *CREAW v. Speaker*, *ibid* at p. 16.

231 *CREAW v. Speaker*, *ibid* at p. 11.

232 *National Gender and Equality Commission & Another v. Judicial Service Commission & 2 Others* [2017] eKLR Petition No. 446 and 456 of 2016 (Nairobi HC) [hereinafter *NGEC v. JSC*].

233 *NGEC v. JSC*, *ibid* at para. 41.

234 *Judicial Service Act*, 2012.



[e]ven if one applied a mathematical formula to the question at hand, the result would invariably have been the same, that two-thirds is 5 while one-third is 2. The number of judges being uneven, the figure can only be approximate and not exact. The 1st respondent [, the JSC,] cannot be blamed for that.²³⁵

This pronouncement follows the reasoning that one third of seven is 2.33 justices, two thirds of seven is 4.67 justices and because “[t]here is no decimal point in human beings”²³⁶, these figures must be rounded off to the nearest whole number. Again, this interpretation is at odds with the two-thirds gender rule requiring “not more than two-thirds of the members of elective or appointive bodies shall be of the same gender”²³⁷. The rule does not dictate that one-third of the positions be taken by one gender and two-thirds be taken by the other, but rather that in order to promote gender equality and eventually gender parity, not more than two-thirds (as opposed to exactly two-thirds) of positions should be held by one gender.

If more than two-thirds, or 4.67 supreme court justices, cannot be male, then the maximum number of men is four. An uneven number is not the problem as only numbers divisible by three produce whole numbers. The issue is whether the maximum proportion of positions per gender is exceeded. If so, the body is unconstitutional. Yet the facts of this case, where a high court judge must review his employer’s decision and possibly remove his senior from office, do not provide a conducive context for principled jurisprudence.

Equality Case Law

In addition to the gender principle case law, gender equality jurisprudence has developed on a variety of matters since the promulgation of the 2010 Constitution. In 2012, the Court of Appeal determined an appeal on the division of matrimonial property in *P.N.N. v. Z.W.N.*²³⁸. The action was filed in 2004 but was not decided in the High Court until 2012. The majority opinion of the Court addresses whether the 2010 Constitution or *Echaria v. Echaria*²³⁹, which was decided in 2007 and requires each party to prove his or her financial contribution to the acquisition of matrimonial property, is the applicable law. The majority found that there was little use for the *Echaria v. Echaria* case after the advent of the Constitution and the *Matrimonial Property Act*²⁴⁰. It also found that the applicability of the Constitution depends on the facts of the case but because it covered the right to equality, inherent and inalienable to all, “[i]t would therefore matter not that the cause of action accrued before the current constitutional dispensation”²⁴¹. The Court found that both parties proved their equal contribution to the properties acquired during the marriage, even by the standards espoused in *Echaria v. Echaria*. A concurring judgement was also written by Justice Kiage, who concurred in the disposal of the appeal, but disagreed that Article 45(3) of the Constitution commands an equal split of matrimonial property upon the dissolution of marriage. The following excerpt is from this minority concurring judgement:

I think that it would be surreal to suppose that the Constitution somehow converts the state of coverture into some sort of laissez-passer, a passport to fifty percent wealth regardless of what one does in that marriage. I cannot think of a more pernicious doctrine designed to convert otherwise honest people into gold-digging, sponsor-seeking, pleasure-loving and divorce-hoping brides and, alas, grooms. Industry, economy, effort, frugality, investment and all those principles that lead spouses to work together to improve the family fortunes stand in peril of abandonment were we to say the Constitution gives automatic half-share to a spouse whether or not he or she earns it. I do not think that getting married gives a spouse a free to cash cheque bearing the words “50 per cent.” ...

Our new constitutional dispensation is no safe haven for those spouses who will not pull their weight. It cannot be an avenue to early riches by men who would rather reap from rich women or women who see in monied men an adieu to poverty. What the Matrimonial Property Act has done

235 *NGEC v. JSC*, supra, note 236 at para. 41.

236 *Ibid* at para. 33.

237 See Subarticle 27(8) of the Constitution.

238 *P.N.N. v. Z.W.N.* [2017] eKLR Civil Appeal No. 128 of 2014 (CA) [hereinafter *P.N.N. v. Z.W.N.*].

239 Peter Mburu Echaria v Priscilla Njeri Echaria [2007] eKLR Civil Appeal No. 75 of 2001 (CA) [hereinafter *Echaria v. Echaria*].

240 *Matrimonial Property Act*, No. 49 of 2013.

241 *Echaria v. Echaria*, supra, note 243 at para. 41.



is recognize at Section 2 that contribution towards acquisition of property takes both monetary and non-monetary forms which essentially opens the field of contribution to both spouses without distinction on the basis of remunerative employment, especially so in an urban setting. ...

I do not see that taken in context, the analytical approach taken by the five-Judge bench in deciding that case, together with their appreciation of the law on matrimonial property rights leading to the conclusion that division must be based on actual quantifiable contribution was amiss. Holding as I do that contribution must be proved and assessed, I do not find that the central thrust of ECHARIA is violative of the marital equality principle of Article 45(3). I would therefore eschew any bold pronouncement that it is no longer good law and should be interred. [emphasis added]

What has changed, from my point of view, is the narrow conception of contribution espoused by ECHARIA in that it went as far only as recognizing indirect contribution which had essentially to be viewed in money or monetary equivalent leaving out such unquantifiable as child care and companionship which fall under non-monetary contribution which is now expressly recognized under the Matrimonial Property Act. ...

In such circumstances, an assessment of the inauspicious party's non-monetary contribution may well turn out to be in the negative, the account in debit. No fifty-fifty philosophy would grant such a party any right to property acquired without their contribution and notwithstanding their negation or diminution of the efforts towards its acquisition. In the end it does work out justly and fairly enough in that assessment may turn out 50:50 or as in the case of NJOROGÉ vs. NJOROGÉ (supra) 70:30 in favour of the man. There is no reason why the math may not be in favour of the wife if that is what the evidence turns up. In many cases in fact, percentages never feature as the Court only ascertains who between the spouses owns which property. It is always a process of determination, not redistribution of property [emphasis added]. And each case must ultimately depend on its own peculiar circumstances, arriving at appropriate percentages.²⁴²

As suggested by the highlighted text, this minority opinion holds that *Echaria v. Echaria* is still good law in the new constitutional dispensation. Though the learned Judge explains that this case can still be used because nonmonetary contributions can be accounted for, he fails to do any constitutional analysis or purposive interpretation of the Constitution. Subarticle 43(5) states that both parties (of either gender) are to be treated equally before, during and after marriage and is supported by the other additional gender equality provisions. One cannot declare that pre-2010 case law is constitutional without engaging in a purposive interpretation of Subarticle 45(3) which includes probing the reasons behind it. Who was it meant to protect and why? Traditional gender roles are still very pervasive in Kenyan society and property is often held in the man's name. On aggregate, even women who work outside the home in addition to family responsibilities, have lower earning power due to historically fewer opportunities in education and high paying jobs, their greater role in raising a family and societal discrimination. Though Subarticle 45(3) is drafted in gender neutral terms, treating men and women the same will only result in formal and not substantive equality because the effect of having to prove and quantify contributions to property acquisition is harder for women. Therefore, this requirement discriminates against women because they generally earn less, pay for consumables as opposed to capital assets and cannot easily quantify their contributions in kind.

In addition, the learned Judge is more concerned that the richer married partner suffer yet a purposive analysis of Subarticle 45(3) shows it is meant to protect women who are usually more economically vulnerable in a marital breakdown. In fact, it may be argued that rich partners can protect themselves because they are more likely to have the means, sophistication and network to have a prenuptial agreement, legal representation or other legal precautions put in place. Moreover, Article 45 is part of the Bill of Rights, which is to be interpreted in a purposive manner that promotes its aims so as to give the greatest effect possible to the right at issue.²⁴³ It is clear from a reading of the whole Constitution that it aims to protect the vulnerable and correct historical wrongs,²⁴⁴ not protect the economically advantaged. Categorizing the

242 *P.N.N. v. Z.W.N.*, *supra*, note 242 at pp. 17-19.

243 Article 20 of the *Constitution*.

244 See generally Articles 10, 259 and Chapter 4 of the *Constitution*.



division of matrimonial property as a determination and not a redistribution suggests that even after long marriages, the person with traceable contributions to property should be protected.

The language in the quoted passage above is also demeaning to women. Though much of the strong language is stated in gender neutral terms, the first quoted paragraph refers to converting coverture, the state of being a married woman, to a passport to half of a couple's net worth. And by using wording such as gold-digging, defined as "[a] woman who forms relationships with men purely to obtain money or gifts from them"²⁴⁵, sponsor-seeking and "brides, and alas, grooms", the judgement is clearly referring to women in general with some men as an afterthought. The statement that marriage "cannot be an avenue to early riches by men who would rather reap from rich women or women who see in monied men an adieu to poverty" reinforces stereotypical thinking that men will inevitably be rich (hence 'early' riches) while women marry to escape poverty. This language flies in the face of the gender equality provisions of the Constitution and the Judiciary's role in promoting them, especially because the facts of this case do not support these derogatory theories.

In 2018, the High Court upheld Section 7 of the *Matrimonial Properties Act* as constitutional in *Federation of Women Lawyers Kenya (FIDA) v. Attorney General & Another*²⁴⁶. This decision explicitly recognizes the purposive interpretation meant to give full meaning to the rights contained in the Bill of Rights and does make reference to the historical disadvantage of women. It also refers to a purposive interpretation being required because the Act fulfils Parliament's obligation to enact legislation as per Subarticle 45(4) of the Constitution but then explains that a plain language reading is all that is needed where the words are clear. It quotes extensively from the minority judgement in *P.N.N. v. Z.W.N.*²⁴⁷, agreeing that the inclusion of indirect contributions such as domestic work and management of the home, childcare and companionship, cures much of the discrimination faced by women in the division of matrimonial property of the past. This discrimination, however, is not discussed or considered in detail. The plainness of the language is also not explained because it is not clear how companionship, childcare or domestic work contributes to matrimonial property. The value of these services, usually provided by women (for their own families or as paid labour), would be insignificant at best in the Kenyan market.

Both *P.N.N. v. Z.W.N.*²⁴⁸ and *U.M.M. v. I.M.M.*²⁴⁹, quoted in the judgement, are more concerned with determining what each party deserves, allowing the courts to decide what each party contributed to the marriage, not the property. While companionship is considered, the notable exception is that claims of adultery do not appear to be. Therefore, a woman may struggle to prove her contribution to specific property and may be further penalized if she did not perform the duties of a 'good wife', such as domestic work, childcare and companionship. A man, on the other hand, will most likely be able to prove his contribution to specific property and not be penalized for being a 'bad husband' because inquiry into his behaviour, including whether he participated in the chores of home-making, is precluded if he acquired property. It is also not shown how the presumption of an equal split of matrimonial property, which may be varied where extenuating circumstances exist, does not achieve the same result without impairing the rights of married women to matrimonial property. *FIDA v. AG*²⁵⁰ adopts a definition of discrimination that includes "when a law or conduct perpetuates or does nothing to remedy existing disadvantages and marginalization"²⁵¹. Discrimination, however, is difficult to determine in the absence of facts (or at least evidence depicting the aggregate situation for each gender at the dissolution of a marriage) and notably neither *FIDA v. AG*²⁵², nor the minority decision in *P.N.N. v. Z.W.N.*²⁵³ deal with facts or the prevalence of the situations they are trying to prevent. Overall, it is most unfortunate that the offensive language in the minority decision in *P.N.N. v. Z.W.N.*²⁵⁴ was quoted in full in the *FIDA v. AG*²⁵⁵ judgement.

245 Oxford dictionary definition, <https://en.oxforddictionaries.com/definition/gold-digger>.

246 *Federation of Women Lawyers Kenya (FIDA) v. Attorney General & Another* [2018] eKLR Petition No. 164B of 2016 (Nairobi HC) [hereinafter *FIDA v. AG*].

247 *P.N.N. v. Z.W.N.*, *supra*, note 242.

248 *Ibid.*

249 *U.M.M. v. I.M.M.* [2014] eKLR Civil Suit 39 of 2012 (Busia HC) [hereinafter *U.M.M. v. I.M.M.*].

250 *FIDA v. AG*, *supra*, note 250.

251 *Ibid* at para. 58.

252 *FIDA v. AG*, *supra*, note 250.

253 *P.N.N. v. Z.W.N.*, *supra* note 242.

254 *P.N.N. v. Z.W.N.*, *ibid.*

255 *FIDA v. AG*, *supra*, note 250.



In 2016, the High Court addressed the constitutionality of section 12 of the *Births and Deaths Registration Act*²⁵⁶ in *L.N.W. v. Attorney General & 3 Others*²⁵⁷. The action was brought by a single mother who was unable to name the father of her child on the child's birth certificate because of the impugned section which provided:

No person shall be entered in the register as the father of any child except either at the joint request of the father and mother or upon the production to the registrar of such evidence as he may require that the father and mother were married according to law or, in accordance with some recognized custom.²⁵⁸

The petitioner argued that the section violated Articles 27 on equality and 53 on the protection of children. Citing the Act's commencement in 1928, well before the advent of the Constitution, the *Universal Declaration of Human Rights*, the *Convention on the Rights of the Child* or the *Children Act*²⁵⁹, the Court noted that attitudes towards women and children born out of wedlock have changed considerably since then.²⁶⁰ With this in mind, the Court considered the purpose and effect of the legislation to ascertain if it was discriminatory. The Court found that the effect was that if a father of a child born outside marriage was not willing to have his name entered as the child's biological father, his name will never appear on the register because there is no proof of marriage. By extension, in order to access his or her Subarticle 53(1) right to have the parental care of both parents, whether they are married or not, a child must know and have the name and identity of both parents on his or her birth certificate. This access is unlikely if the birth certificate only names a father if he is willing to be named and will result in "imposing an unfair burden on women, the mothers of children born outside marriage, and is to that extent discriminatory on the basis of sex"²⁶¹. Women would have to first prove paternity to pursue support from the father. This burden would be considerably ameliorated if both parents' names were reflected on a child's birth certificate whether they were married or not.

In response to the Attorney General's arguments that the purpose of the legislation is to keep accurate birth records and prevent unscrupulous women from falsely claiming a man to be the father of her child, the Court stressed the need for such purposes to minimally impair rights and freedoms as per Article 24 of the Constitution. In addition, it stated:

*The second alleged purpose, protecting the putative father from the alleged machinations of unscrupulous women is, in my view, based on an unapologetic but unacceptable patriarchal mindset that wishes to protect men from taking responsibility for their actions, to the detriment of their children. In my view, balancing the two interests, that of the men and the rights of children, I see no contest. I need not add that such a stated purpose, the alleged protection of men from unscrupulous women, is premised on a negative, discriminatory stereotyping of women as dishonest people who will latch onto a man for child support with no basis.*²⁶²

Finding that the legislation did not minimally impair the rights at issue, the Court held that Section 12 of the *Births and Deaths Registration Act* was discriminatory to both single mothers and children of unwed parents. This discrimination violated Articles 27, 28 and 53 and could not be justified under Article 24 of the Constitution. Engaging in a detailed constitutional analysis of the legislation, the Court underscores the interplay between gender and parental responsibility. A gender perspective was also employed to see the justifications provided by the government for what they were, patriarchal reasoning substituted for the best interests of society. The straightforward analysis of the impugned section's constitutional validity makes it clear that women are being disadvantaged to protect men from revealing that they have fathered children out of wedlock. This progressive and thorough judgement is a good example of the Judiciary fulfilling its role to uphold gender equality through the use of a gender perspective in decision-making and detailed legal reasoning following the roadmap set out in the Constitution.

256 *Births and Deaths Registration Act*, 2012 (CAP 149).

257 *L.N.W. v. Attorney General & 3 Others* [2016] eKLR Petition No. 484 of 2014 [hereinafter *L.N.W. v. AG*].

258 *Births and Deaths Registration Act*, *supra*, note 260 at section 12.

259 *Children Act*, 2017 (No. 8 of 2001).

260 *L.N.W. v. AG*, *supra*, note 261 at para. 59.

261 *L.N.W. v. AG*, *ibid* at para. 91.

262 *L.N.W. v. AG*, *ibid* at para. 104.



In 2017, *Re Estate of Zakayo Kipngetich Chepkwony*²⁶³ was decided when a man died leaving behind children from two marriages but no living spouse. The deceased's unmarried daughter petitioned the Court for a confirmation of grant. As the administrator, the petitioner proposed to divide the property among the two houses in accordance with Kipsigis law. The houses were to then decide amongst themselves how they would share their portions. The petitioner proposed that she should receive an equal share as her brothers. Her brother protested this division asserting that their father had divided his property before his death, giving the sons a 19.46 acre piece of land to divide amongst themselves and a 0.5 acre parcel of land to the petitioner. Therefore, the protester was of the view that the petitioner had already been allocated her portion of her father's property in this parcel of land and the remaining properties should be shared between the brothers alone.

The High Court held that the brother's protest had no merit because besides having no evidence to prove that the petitioner had received any property from their father, the father died intestate meaning his property fell under the purview of the *Law of Succession Act*. Section 38 of this Act provides that where a person dies intestate and is survived only by his or her children, the property should be divided among the surviving children equally. In addition, the division proposed by the protestor discriminated against women contrary to both Article 27 of the Constitution and well-established precedent in *Rono v. Rono*²⁶⁴ that customary law cannot be used to discriminate against daughters:

I need do no more here than point out the express provisions of Article 27 of the Constitution, which prohibit discrimination on the basis of, inter alia, sex. Further, long before the enactment of the non-discrimination provisions in the 2010 Constitution, the Court of Appeal, in its decision in Rono vs Rono Eldoret Civil Appeal No. 66 of 2002, clearly expressed the view that customary law cannot be the basis of discrimination against daughters when such discrimination is prohibited by international conventions, to which Kenya is a party, which expressly prohibit discrimination on the basis of sex.

*The petitioner has proposed distribution of the estate on the basis of Kipsigis customary law, according to houses, leaving out the married daughters of the deceased. As I observed earlier, the estate of the deceased is to be distributed in accordance with the Law of Succession Act. This means that all the children of the deceased, including his married daughters, are entitled to a share of his estate, unless they renounce any interest in the estate.*²⁶⁵

This case shows that the gender equality provisions of the Constitution can be used to eradicate gender discrimination and bolster legal precedents for fairness in this regard. It is also interesting to note that even women themselves cannot discriminate against other women and must abide by gender equality expectations.

In 2018, the High Court determined a dispute about where a deceased man should be buried in *Jane Awino Onyango v. Norah Adongo Onyango & 2 Others*²⁶⁶. The man died leaving behind the children from his first marriage and his second wife, who disagreed as to where he should be buried. The deceased's children wanted the deceased to be buried in accordance with Luo customary law while the second wife thought he should be buried in accordance with his wishes to be interred on their matrimonial property. The matter was heard by a magistrate's court which issued orders pursuant to a consent agreement between the parties but because the language of the consent was too vague, the decision was appealed.

The High Court held that the deceased should be buried on the property where his matrimonial home with his second wife was. Borrowing from existing precedent, the court explained that "[i]n social context prevailing in this country the person who is first in line of duty in relation to the burial of any deceased person is the one who is closest to deceased in legal terms"²⁶⁷. Though the Court did not explicitly do a constitutional analysis, it did apply the gender equity principles espoused in Articles 10 and 27. The Court found that:

263 *Re Estate of Zakayo Kipngetich Chepkwony* [2017] eKLR Succession Cause No. 98 of 2014 [hereinafter *Estate of Zakayo*].

264 *Mary Rono v. Jane Rono & Another* [2005] eKLR Civil Appeal No. 66 of 2002 (CA).

265 *Estate of Zakayo*, *supra*, note 267 at paras. 26-27.

266 *Jane Awino Onyango v. Norah Adongo Onyango & 2 Others* [2018] eKLR Civil Appeal No. 39 of 2017 (Kisumu HC) [hereinafter *Onyango v. Onyango*].

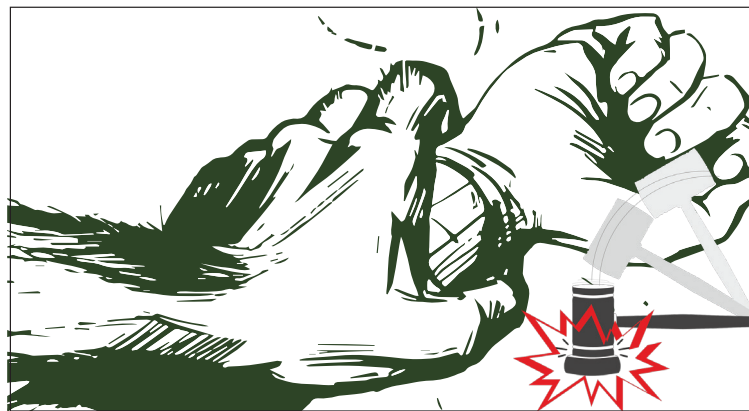
267 *Onyango v. Onyango*, *ibid* at para. 7



The deceased should be buried where he and his surviving wife had established a home. That is the home the deceased built and it does not become less of a home merely because Luo traditions were not followed in the deceased’s lifetime. Further and as I have alluded to, a widow must be accorded her proper status and dignity to bury the man she loved during her lifetime [emphasis added].²⁶⁸

This is yet another case where traditional customary law worked to discriminate against a woman and the Court had to step in. The Court was very categorical that the status and dignity of a woman does not diminish upon the death of her husband. Furthermore, where there is a conflict between tradition and human rights, human rights should always prevail. Nevertheless, in order to explain to the parties and the public (as High Court decisions are reported), especially as the Judiciary’s post-2010 gender equality jurisprudence is still in its infancy, it would be useful to explicitly engage in the constitutional analysis that supports the decision.

Sexual Offence Case Law



There have also been some interesting developments in sexual offence case law since the advent of the 2010 Constitution. In 2013, the High Court in *C.K. (A Child through Ripples International as her Guardian & Next friend) & 11 Others v. Commissioner of Police / Inspector General of the National Police Service & 3 Others*²⁶⁹ heard from 11 petitioners who reported cases of sexual violence to different police stations in Meru. Ripples International, an organisation which cares for vulnerable children, acted for the 11 children who had all suffered some form of sexual violence.

The petitioners claimed that by failing to conduct investigations and act on their reports, the police exacerbated the petitioners’ physical and psychological trauma because the perpetrators were still free. They argued that the police’s failure to conduct prompt, effective and professional investigations into their sexual violence complaints infringed their rights to state protection as vulnerable persons,²⁷⁰ freedom from discrimination,²⁷¹ dignity,²⁷² freedom and security of the person including freedom from torture and cruelty,²⁷³ access to justice,²⁷⁴ a fair hearing²⁷⁵ and protection from child abuse, neglect, harmful cultural practices and all forms of violence²⁷⁶. The petitioners’ also invoked international instruments including the *Universal Declaration of Human Rights*, the *Convention on the Elimination of Discrimination Against Women*, the *African Charter on the Rights and Welfare of the Child* and the *African Charter of Human and Peoples Rights*. The Court agreed with the petitioners’ characterization and issued a declaration that the police’s failure to properly investigate the crimes reported to them was an infringement of the petitioners’ fundamental rights and freedoms.

268 *Ibid* at para. 8.

269 *C.K. (A Child through Ripples International as her Guardian & Next friend) & 11 Others v. Commissioner of Police / Inspector General of the National Police Service & 3 Others* [2013] eKLR Petition No. 8 of 2012 (Meru HC) [hereinafter *Ripples International v. Commissioner of Police*].

270 See subarticles 21(1) and (3) of the Constitution.

271 Article 27 of the Constitution.

272 Article 28 of the Constitution.

273 Article 29 of the Constitution.

274 Article 48 of the Constitution.

275 Subarticle 50(1) of the Constitution.

276 Subarticle 53(1) of the Constitution.



In its judgement, the Court cited cases from other jurisdictions as well as regional human rights case law and found that the state's duty to protect is heightened for vulnerable groups such as girl-children, meaning that the state's actions or inactions need not be intentional to constitute a breach of this duty. The Court agreed that the police participated in gender discrimination by failing to enforce defilement laws which ultimately "contributed to development of a culture of tolerance for pervasive sexual violence against girl children and impunity"²⁷⁷.

This case highlights how international human rights instruments and precedents can aid in the interpretation of the constitutional rights, freedoms and protections afforded to marginalized persons including the girl-child. In addition, they also provide guidance on how to produce a well-reasoned judgement on human rights issues even when a particular court is not experienced in this area. It is important to note that it appears that the case was extremely well prepared by the petitioners' advocates, which may not always happen with such novel concepts. Finally, the Court refused to grant any of the petitioners' prayers concerning enforcement such as monitoring the process of the investigation or implementing guidelines to prevent the police from neglecting their duties. The result is that there is no mechanism to ensure enforcement of the ruling. More recently, the courts have continued to struggle with enforcement of their decisions and this challenge may pose a barrier to furthering gender related justice.

In 2017, another High Court case drew attention to discrimination against the boy-child. *P.O.O. (A Minor) v. Director of Public Prosecutions & Another*²⁷⁸ is the case of a male minor who was accused of defilement when he and a female minor engaged in consensual sexual intercourse. After the accused's case was listed for Children's Service Week by a magistrate, he was afforded legal representation paid for by the state and his advocate filed a constitutional petition alleging that he had been discriminated against on the basis of sex because he alone, and not his female partner, was charged with defilement. In addition, the petitioner claimed that his constitutional rights to a fair trial and not be imprisoned with adults were also infringed due to him being subjected to the criminal justice system without recognition of his status as a child.

The issue of whether section 8 of the *Sexual Offences Act*²⁷⁹ itself was discriminatory or whether it was being applied discriminatorily was raised and a High Court precedent was provided for each stance. While the Court preferred the viewpoint that the law was not itself discriminatory but only being applied discriminatorily, it is useful to note that there is no analysis of the wording of the law or any discussion of direct or indirect discrimination. Indirect discrimination would primarily consider the effect of the law on each gender and may be a useful concept to use in such analysis.

While the precedent stating that the way in which a law is applied can be discriminatory purported to address the law's effect, it also cited a lack of intention to discriminate when intention is irrelevant to the concept of indirect discrimination. This precedent and its adoption may show a misunderstanding of indirect discrimination or even a reluctance to find laws unconstitutional, which is understandable given that this concept was largely introduced under the new Constitution.

The Court found that the petitioner was discriminated against on the basis of sex and in doing so commented as follows:

*Does a boy under 18 years have the legal capacity to consent to sex? Haven't both children defiled themselves? Shouldn't both then be charged or better still shouldn't the Children's Officer be involved and preferably a file for a child in need of care and protection ought to be opened for both of them. I think these are children who need guidance and counselling rather than criminal penal sanctions. I really think in this kind of situation should be re-examined in the criminal justice system.*²⁸⁰

²⁷⁷ *Ripples International v. Commissioner of Police*, supra, note 273 at p. 12.

²⁷⁸ *P.O.O. (A Minor) v. Director of Public Prosecutions & Another* [2017] eKLR Petition No. 1 of 2017 (Homa Bay HC) [hereinafter *P.O.O. v. D.P.P.*].

²⁷⁹ *Sexual Offences Act*, 2009 (No. 3 of 2006) [hereinafter *Sexual Offences Act*].

²⁸⁰ *P.O.O. v. D.P.P.*, supra note 282 at para. 29.



The Court awarded the petitioner KES 200,000 in damages. Nevertheless, it does not appear there has been any criminal justice reform on this issue as this case highlights that males can also be harmed by traditional gender roles. Fortunately, the Judge was alive to the fact that gender discrimination can affect either gender and accordingly promoted gender equality.

*Martin Charo v. Republic*²⁸¹ was the most frequently mentioned case by IDI respondents as a negative example of gender equality in the Judiciary's jurisprudence. The *Sexual Offences Act* deems that a child, or person under the age of 18, cannot consent to sex and therefore, if an adult has sex with a child, the adult has defiled the child and committed a criminal offence. Though the Act may involve problematic wording that can cause discrimination against the boy-child in certain circumstances, the overarching purpose of the Act is to protect children. Yet this 2016 High Court decision, which is the appeal from an accused man in his mid-twenties who was found guilty of defiling a fourteen year old girl, employs negative stereotypes of girls and women to defend the adult male, not the girl-child:

*The offence of defilement should not be limited to age and penetration. If those were to be taken as conclusive proof of defilement, then young girls would freely engage in sex and then opt to report to the police whenever they disagree with their boyfriends. The conduct of the complainant plays a fundamental role in a defilement case. One can easily conclude that the complainant was defiled after hearing her evidence. Several issues come into focus. Did the complainant report the defilement immediately after the incident? Was she threatened after the incident? How long did it take for her to report? Was there threat on her life? How long was the relationship? Were the parents aware of the relationship? All these issues lead to the circumstances of the case as envisaged under Section 8(5) of the Sexual Offences Act [which allows for a defence where the child deceives the accused about his or her age and the accused reasonably believes the child to be 18 or older].*²⁸²

This reasoning focuses on the conduct of the victim and whether consent or even the victim's enjoyment of the sex can be imputed. The Court does not recognize the law that a minor is deemed not to be able to consent to sex for their protection, not that of the adult. The reasoning also relies on the stereotype that girls and women commonly lie about being the victims of sexual offenses. It also subscribes to the stereotype that if a victim does not report a sexual offence immediately, it suggests she is lying regardless of the legitimate psychological reasons for not reporting such an offence. Overall, the Court appears to be more concerned with protecting an adult's ability to engage in sexual relations with a minor than protecting the child. If there is a legitimate argument that the law is discriminatory to men, appropriate constitutional legal analysis needs to be done. This analysis would examine the reasons behind the law and may help inform its interpretation including whether there are societal reasons to protect children from sexual relations with adults or vice versa.

Another 2016 sexual offence case also addresses consent issues in the way it describes the offence committed by the accused. The High Court in *Patrick Bahati Maxwell v. Republic*²⁸³ states that "[t]he appellant's actions were therefore intentional and unlawful as he had no right to have sexual intercourse with M.K. who was not only not his wife or consensual partner but was also a child"²⁸⁴. While section 43 of the *Sexual Offences Act* does suggest that some actions that are coercive, committed by fraud or committed against a person who is not fully aware are taken to be intentional and unlawful except where the persons are married to each other, the Court's phrasing suggests that a spouse, and in this case and historically it is usually the man, has a right to have sexual intercourse with his wife, regardless of consent. By stating that the child in the case at hand was not his wife or consensual partner, the Court unfortunately appears to suggest that a wife does not need to consent to sexual intercourse.

While the effect of this legislation on each gender should be examined in detail, especially given the different physiology of men and women, judges and judicial officers may want to consider whether the language of its decisions may propagate concepts that could be harmful to women.

²⁸¹ *Martin Charo v. Republic* [2016] eKLR Criminal Appeal No. 32 of 2015 (Malindi HC) [hereinafter *Charo v. Republic*].

²⁸² *Ibid* at pp. 3-4.

²⁸³ *Patrick Bahati Maxwell v. Republic* [2016] eKLR Criminal Appeal No. 76 of 2014 (Kakamega HC).

²⁸⁴ *Ibid* at para. 17.



Gender Spectrum Case Law

In 2014, the High Court addressed transgender discrimination in *Republic v. Kenya National Examination Council and Another Ex-parte Audrey Mbugua Ithibu*²⁸⁵. This judicial review application was brought by a transgender woman who sought an order of mandamus from the Court to compel the Kenya National Examination Council (KNEC) to change the name on her Kenya Certificate of Secondary Education (KCSE) and to remove the gender mark. The KNEC had refused to do either because it felt that doing so would encourage the creation of fraudulent certificates and make it impossible for the Council to authenticate certificates.

The High Court referred to case law from other jurisdictions in order to understand the applicant's situation, being diagnosed with gender identity disorder. It also cited international case law concerning the plight of transgender people and how gender identity disorder affects their human dignity. The Court held that there was no legitimate reason for KNEC to deny the applicant's request to change her name and remove the gender indicator from her certificate. The law governing the KNEC's provision of certificates allowed KNEC to amend the certificates. Furthermore, the gender mark on the KCSE was not a legal requirement, therefore removing it would not affect the certificate's validity. The Court described the applicant as "a person with the body of a man and the mind of a woman. For him, the pull of his feminine mind-set is overwhelming. It has emerged that he at one time attempted to commit suicide because of his condition"²⁸⁶. Recognizing how the applicant's human dignity was affected by her inability to have her important documents reflect the gender she identified as, the Court ordered the KNEC to produce a new KCSE in the applicant's new name without the gender marker:

*Human dignity is that intangible element that makes a human being complete. It goes to the heart of human identity. Every human has a value. Human dignity can be violated through humiliation, degradation or dehumanisation. Each individual has inherent dignity which our Constitution protects. Human dignity is the cornerstone of the other human rights enshrined in the Constitution.*²⁸⁷

This judgement recognized the applicant's rights under the Constitution and upheld those rights in the face of discrimination. Because the Court looked to other jurisdictions which had already dealt with legal issues surrounding transgender people, it was able to educate itself on issues of gender identity, including the discrimination they often face. As a result, the Court honed in on the legal issue it identified as most paramount, the right to human dignity, which is specifically enumerated as a protected rights in the Bill of Rights²⁸⁸ and a national value and principle²⁸⁹. Here, the Court carefully refrained from delving into controversial issues that were not before it, but focussed instead on the constitutional analysis required. This is commendable given that there does appear to be a knowledge gap in the Judiciary regarding the gender spectrum beyond male and female. Notably, IDI participants did not broach this topic other than cite this case as an opportunity to learn about gender spectrum issues. The great detail taken to explain gender identity disorder and its stigma is helpful to educate the wider public on these issues.

Kadhi Courts Appeals Case Law

Because kadhi court cases are not reported, these judgements could not be reviewed, however, appeals from the kadhi courts are heard by the Family Law Division of the High Court. *F.B.I. v. B.G.*²⁹⁰ is such an appeal. The husband initiated the case when after having the elders take his wife back to her father's home two years earlier, he then asked the Court to issue orders compelling his wife to return to the matrimonial home. The husband said he sent his wife away because she had been having an affair and threatened to kill him. The wife, however, said her husband was abusive towards her and falsely accused her of having an affair and on that basis sent her back to her parents with their two children.

285 *Republic v. Kenya National Examination Council and Another Ex-parte Audrey Mbugua Ithibu* [2014]eKLR Judicial Review No. 147 of 2013 (Nairobi HC).

286 *Ibid* at p. 10.

287 *Ibid* at p. 11.

288 See Article 28 of the Constitution.

289 See Article 10 of the Constitution.

290 *F.B.I. v. B.G.* [2018] eKLR Civil Appeal No. 6 of 2017 (Garissa HC).



She also said he had not visited the children, provided maintenance for them or paid her dowry of two cows. She no longer wanted to live with him. The Kadhi found that the marriage was still repairable, advised the petitioner to be a good husband and ordered the wife to return home.

The wife appealed the Kadhi's judgement to the High Court which has jurisdiction to hear it like any other appeal from a magistrate court where it must consider the evidence on record afresh and come to its own conclusions.²⁹¹ Incidentally, employees working in the kadhi courts feel kadhi court users are usually not aware of the right to appeal or are reluctant to use it because the appeal is heard by a judge with no understanding of sharia law. IDI participants were not aware of any judge who had sharia law training and unlike magistrates, no kadhi has ever been appointed a judge. Therefore, it is the practice of the High Court to use a kadhi assessor to explain issues of sharia law.

The claim of adultery was not proven in the Kadhi Court because the respondent did not have evidence and did not make a sworn oath. The Court summarised some of the Kadhi Assessor's opinion on this matter: According to the Kadhi assessor, since a husband would find it difficult to find a wife red handed in an illegal relationship and produce other witnesses to prove the case, the respondent had the right as the husband to be asked by the Kadhi to make a strong oath and testify on the allegation personally to enable the husband escape the punishment for false allegation of adultery, according to the Quran.²⁹²

It is unclear whether the husband swearing an oath to his suspicion that his wife has committed adultery would be enough to prove this allegation, which could negatively impact women. The Court found that the husband's actions did not amount to divorce under sharia law but that the original Kadhi erred in ordering the wife to return to the marital home because the marriage had broken down and the order amounted to a violation of her right to freedom of association which is guaranteed by Article 36 of the Constitution. The Kadhi Assessor's opinion was in agreement with this reasoning. Consequently, the Court ordered the dissolution of the marriage and that the husband pay the wife the unpaid dowry of two cows.

While this appeal upholds the wife's constitutional rights, it does not explain its reasoning on how sharia law and the Constitution interrelate which would have been useful for its precedent value. Interestingly, the Kadhi Assessor disagreed with the original Kadhi in how this case was decided. Different people may decide differently, yet, the difference seems to centre on how constitutional rights are incorporated into sharia law. Ordering a wife to return to a husband she does not want to return to and whose behaviour is abusive, is problematic given a variety of rights provided for under the Constitution, including gender equality, freedom from discrimination, human dignity and even security of the person.²⁹³ If both the Kadhi Assessor and the Judge performed more detailed legal analysis to explain how sharia law and the Constitution together mandate the outcome they arrived at, it may discourage unconstitutional orders in the future and foster consistency in kadhi court judgements. Such case law may also help define constitutional rights in the context of sharia law. This jurisprudential discussion is not easy to initiate, yet it is necessary to ensure Kenyan sharia law protects the rights of all parties. One kadhi has considered this issue with respect to child marriage, which is permissible under sharia law, but contrary to the provisions of the Constitution:

*Islamic law plays a bigger role in the discourse on child marriage by tilting the balance through striking a conciliatory tone between historical interpretations of Islamic law accrued over the centuries of Islam and the progressive human-rights sanctioned interpretations that are the hallmark of codified fiqh in countries like Malaysia and Pakistan. For Kenyan Muslim communities, child marriage will still remain an issue to grapple with.*²⁹⁴

The Judiciary needs to be clear on how the Constitution affects the kadhi courts and how sharia law is applied. However, there does not appear to have been any serious effort to reconcile these competing legal schools of thought.

291 *Ibid* at para. 23.

292 *Ibid* at para. 19.

293 See Articles 27, 28 and 29 of the Constitution.

294 Hon. Abdulaziz Kunyuk Tito, "Child Marriage in Islamic Law: A Survey of Source-Texts", *The New Dawn* [Kenya] 1-15 October 2014, Published p. 10.



Conclusion

The Kenyan Judiciary has amassed a significant body of case law enforcing gender equality since the promulgation of the Constitution. Generally speaking, the jurisprudential trend is towards a progressive exposition of what the constitutional concept of gender equality is and how it is relevant to numerous societal issues and legal regimes. This development is a work in progress though and it is disappointing that some of the language used in decisions is derogatory to women, even if this attitude is not intentional. Training and discussion of biases amongst judges and judicial officers may alleviate some of this unfortunate language.

Two-thirds gender rule jurisprudence is a key indicator of how the courts are fulfilling their constitutional mandate to promote gender equality. The trajectory of the case law on this issue is progressive, forceful and to be applauded. While early cases struggled on how to enforce the gender principle, recent cases are more consistent and firm in upholding this strong tool for moving towards gender equality in the civil and political spheres. The courts have also started appreciating and describing the long history of marginalization that has disadvantaged women which is a valuable step towards recognizing gender discrimination in different contexts and creating strong gender equality jurisprudence that invokes affirmative action tools where appropriate. All judges and judicial officers should be made aware of these decisions and have opportunities to examine and discuss their analysis through continuous judicial training. Enforcement of two-thirds gender rule case law along with other cases where the Judiciary has found other branches of government have not lived up to their duties to abide by the Constitution, is an emerging issue that deserves attention.

Generally, when formal constitutional analysis is applied to the facts within a case, the Judiciary's obligation to protect the vulnerable is stressed. Often, judges that have delivered these constitutional decisions have made use of international jurisprudence where similar issues have been considered. The Judiciary's emerging equality case law is developing a Kenyan jurisprudential approach to discrimination but additional training for judges and judicial officers may still be helpful on how to accomplish the legal analysis required by the Bill of Rights. The judges who have endeavoured to use this analysis in their decisions would be of great use in designing and leading training sessions on how to apply constitutional principles in decision-making and the development of jurisprudence. In addition, an Equality Law Bench Book comprised of the growing body of equality case law may form a useful tool to judges and judicial officers alike.

Again, with sexual offences, international human rights instruments and case law has helped focus the courts' attention on gender equality issues and how to tackle them within the new constitutional framework. Interestingly, this is one area where discrimination against males has been identified and condemned though further training on human rights concepts may encourage all judges to be confident in applying these standards and declaring laws unconstitutional where warranted. Sexual offence cases are also an area where judges and judicial officers should be vigilant for negative gender stereotypes and make special efforts not to propagate them.

The Judiciary has done well to recognize the rights of transgender people and look to international jurisdictions to find appropriate precedents to aid its application of the Constitution to these novel legal scenarios. Additional training on how to handle these new issues may be helpful to ensure that the Constitution is front of mind even when parties may not plead a case that way. The same is true for the kadhis as well as judges who hear kadhi appeals. Interpreting and balancing the legal rights afforded by sharia law and the Constitution must not be shied away from. Countries which are subject to parallel jurisdictions of sharia law and another legal tradition could be a valuable source of knowledge. Partnerships and training on these topics will help judges and judicial officers develop the jurisprudence of the Kenyan kadhi courts.

Overall, the Judiciary has accomplished a lot in developing the jurisprudence required to breathe life into the transformative 2010 Constitution. Nevertheless, as the demand for judicial dispute resolution continues to grow, the Judiciary must be committed to ensuring that its judges and judicial officers are kept abreast of constitutional case law and how to perform constitutional legal analysis.





6.0 RECOMMENDATIONS

6.1 STRATEGY AND ORGANIZATIONAL PRIORITIES

➤ **Adopt a Comprehensive Gender Policy**

The Gender Policy should address all areas discussed in the Judiciary Gender Audit and provide clear guidance on how to mainstream gender issues in both the internal and external operations. The policy must also refer to all legal obligations on gender equality and the Judiciary's role in implementing them. It should also identify key performance indicators so that the Judiciary can monitor its own progress in mainstreaming gender. The policy should adopt an action oriented agenda that assigns key roles and responsibilities for implementing the policy to various Judiciary offices. A Gender Resource Person will be responsible for implementing the policy and coordinating the efforts of all the different units. The Gender Policy should also stipulate that a further independent evaluation should be carried out at the end of the policy timeline. Once a comprehensive policy is adopted by JSC, it should be publicly launched so that all Judiciary employees and stakeholders are aware of it.

➤ **Integrate Gender in the Next Judiciary Strategic Plan**

One of the objectives of the Gender Policy should be to integrate gender issues into the Judiciary's strategic planning. An effective long term commitment to working towards building a culture based on gender equality requires that the Judiciary's overall strategic plan takes gender into account in both its internal and external operations. In order to reaffirm this high level commitment, NCAJ may consider adding a IAWJ KC member to the Council to ensure gender perspectives are integrated into all high level actions, with particular attention paid to access to justice. If gender is addressed in the Judiciary's strategic planning, it will automatically find its way into performance management targets, internal circulars and meeting agendas. These changes will contribute to a judicial culture that will over the long term entrench positive and respectful behavior patterns on matters relating to gender.

➤ **Allocate Resources to a Gender Equality Budget**

It is important to have a Gender Equality Budget in order to ensure there are funds available to realize the recommendations of the Judiciary Gender Audit. This report lists some options for minimizing costs in the face of overall budget constraints, but each recommendation should be costed out so that a detailed budget for a Gender Equality spending unit can be included in the Judiciary's budget and work plan.

➤ **Implement a 'New Beginning' Sexual Harassment Policy**

Formal adoption and implementation of an effective Sexual Harassment Policy is an important step that the Judiciary must take to show it is firmly committed to eradicating sexual harassment. The 'new beginning' policy must be a new draft that shows the Judiciary is serious about changing the way sexual harassment claims are handled. It must include a broad definition that captures all forms of sexual harassment including that which is carried out electronically or via social media. It must also feature an effective, independent and confidential reporting mechanism. Accordingly, the Judiciary should seriously consider outsourcing the investigation of these complaints to a neutral and competent third party. This will help project impartiality and consistent treatment for all alleged perpetrators irrespective of position. The ILO Convention²⁹⁵ and Recommendation²⁹⁶ to combat violence and harassment in the workplace may be a useful guide for the new draft. Mandatory interactive workshop style training including role playing should be used to explain the contents of the Sexual Harassment Policy to all Judiciary employees. The Judiciary must also show a strong commitment to punishing those responsible for unacceptable behaviour as a deterrent that will prompt change of the organizational culture surrounding sexual harassment. Management personnel must treat all sexual harassment complaints seriously and investigate them regardless of the rank of the alleged

295 International Labour Organization (ILO), *Convention Concerning the Elimination of Violence and Harassment in the World of Work*, No. 190, 21 June 2019.

296 International Labour Organization (ILO), *Violence and Harassment Recommendation*, No. 206, 2019.



perpetrator or the gender of the victim. Finally, the Sexual Harassment Policy must also be shared with CUCs, court annexed mediators, advocates and court users.

➤ **Employ a Gender Resource Person**

The Judiciary needs a full time dedicated gender resource person, not to handle all gender matters single-handedly, but to help in designing and delivering relevant trainings and champion gender issues within the Judiciary, including gender mainstreaming on an ongoing basis. By delivering training programs to various departments, stations and CUCs, this position will save on ongoing gender training costs. Having relevant expertise and experience, this person will also serve as a resource on gender issues for all entities within the Judiciary. They can coordinate many projects and be a conduit for sharing best practices, highlighting gender related data and how to use it for both internal and external purposes. It must be clear that this Gender Resource Person is not to take on all gender issues in the Judiciary, but to help empower all Judiciary employees to mainstream gender issues and learn how to resolve them at a local level. Gender related access to justice initiatives and the long term goal of institutionalizing the use of a gender perspective in all aspects of the Judiciary's internal and external operations could also be coordinated by this person. The Gender Resource Person should participate in all senior management initiatives and have a budget to carry out the duties of the office.

6.2 HUMAN RESOURCES

➤ **Make a Concerted Effort to Increase the Number of Women in Senior Leadership Roles**

The Judiciary should invest in resources and strategies to increase the number of women in senior leadership roles as the ultimate goal should always be gender parity. As discussed in this report, this goal is even more important in leadership roles. The Human Resources department should consider collaborating with the IAWJ KC to develop a mentorship program for female leaders and use on the job training where necessary. The recruitment procedures for senior positions should also encourage female applicants. Promotions should address multiple parameters beyond seniority and applicants with a broad range of experience including that gained outside the Judiciary should be encouraged to apply in recruitment drives. Proactive and creative recruiting strategies, including affirmative action, may be needed for the recruitment of female kadhis, who serve as leaders in the kadhi courts.

➤ **Develop an Affirmative Action Policy**

The Judiciary needs a formal affirmative action policy so that all employees have a solid understanding of what affirmative action is and how it is used in the institution. The policy should have examples and provide a detailed explanation of why marginalized groups require this additional assistance. Its implementation will ensure that affirmative action measures are employed in a consistent manner throughout the organization.

➤ **Formalize Policies on Practices that Provide Flexibility to Employees with Young Families**

The informal practices of providing flexible working hours for breastfeeding mothers and considering family situations when determining transfers must be codified into formal policies to ensure that these practices are implemented across the Judiciary in a consistent manner. When developing future Human Resources policies, it is important that a gender perspective is used to ensure that a policy does not affect one gender disproportionately.

➤ **Adequately Support Employees via an Employee Assistance Program**

Some Judiciary employees suffer stress due to their jobs, transfers, having to live separately from family, familial obligations or other personal circumstances. The Human Resources department should ensure employees have a confidential outlet to discuss these concerns by paying for a third party Employee Assistance Program. Because of current budget constraints, issues to be handled by an Employee Assistance Program might be limited to those related to work or substance abuse. The number of sessions provided



free of charge may also be limited. Access to counselling through such a service would address the high frequency of alcoholism afflicting mostly male employees. In addition, some female employees may also benefit from this type of confidential assistance, especially those who are stressed by having to work in an area where the public pushes back against female judicial officers. Female leaders may also face frustration due to their feeling that they are not treated the same way male leaders are. Employees of both genders may be stressed by having to be separated by their family due to the Judiciary's policy that employees transfer every three years. By providing support, the Judiciary will greatly increase the outcomes for employees in all of these situations.

6.3 DATA COLLECTION

➤ Collect and Analyse Gender Disaggregated Data

The Judiciary needs to systematically collect and analyse gender disaggregated data in its external operations. To begin, data from the DCRT (Daily Court Reporting Template system) may be used to provide information on the litigants appearing before a court. Later, variables such as representation, type of case, issues, outcomes and process irregularities can be tracked along with gender. Eventually other management systems could also be used to collect this type of data. Such information is important in identifying trends and determining how best to use resources or employee initiated solutions to tackle gender related problems. It is also helpful in strategic planning and budgeting. Furthermore, if the Judiciary chooses to share its data, tertiary school students or NGOs may perform research on access to justice and gender in a more local context. Statistics on unrepresented parties will also help the Judiciary determine where the greatest need is so it can request local NGOs to provide assistance.

➤ Integrate Gender Equity Parameters in Performance Management Targets

Performance Management targets may be used to reward gender inclusive behaviour and contributions to access to justice. Individual employees could be rewarded along with the gender equality achievements of entire courts. Judiciary Awards could also be given out according to gender equality parameters where commendations for access to justice innovation is an honoured prize. Such recognition could also promote a culture of justice innovation and a more flexible approach to solving litigants' problems. The Judiciary can also reward access to justice innovation by employing qualitative performance management measures in addition to quantitative ones and consider these results in promotions.

➤ Consider Utilizing In-House Expertise for Further Research Projects

The Performance Management Directorate could benefit from having personnel with legal expertise imbedded in their staff to aid with the coding of cases beyond the civil and criminal distinction. Studies on the differences between men and women's experiences in Court Annexed Mediation, other ADR mechanisms or AJS would help pinpoint gender related challenges for court users such as whether perceptions in bargaining power or access to legal information affects outcomes. Local research on whether the gender of a judicial officer affects decision-making could also be useful. Data on how kadhi court users feel about female kadhis could also be collected to ensure that views collected during a public consultation are representative of the community. In addition, the Performance Management Directorate could also assist CUCs in their monitoring and evaluation mandates by helping them design studies and collect relevant data.

6.4 TRAINING

➤ Develop a Gender Sensitivity and Inclusion Training Curriculum For All Employees

The training curriculum should be made up of modules that can easily be delivered through a train the trainer approach. These modules will require the input of experts in human rights concepts such as direct and indirect discrimination, accommodation, affirmative action, stereotypes, profiling and unconscious biases. The materials must suit the local context and employees should be trained in mixed gender and mixed cadre groups so that they may share their different experiences, best practices and learn from one



another. The training should cover workplace and service delivery gender issues in depth and should ideally be done on an ongoing basis. It should be mandatory for all Judiciary employees including judges, judicial officers and those who work in the kadhi courts and tribunals. The modules should also be made available to the CUCs, Court Annexed Mediators and the Law Society of Kenya so that advocates have the opportunity to undergo this sensitizations as well. Finally, if all Judiciary employees are introduced to a gender perspective, it should follow that all JTI programs should include attention to relevant gender matters.

➤ **Design and Implement a Discrimination and Equality Jurisprudence Training Module for Judges and Judicial Officers**

Judges and judicial officers require additional training to ensure they appreciate their role in implementing the Constitution and promoting its objects and aims, including gender equality. These modules should specifically address how to apply constitutional principles to decision-making and jurisprudence. The training should also cover how to recognize discrimination and apply anti-discrimination law and the applicable tests set out in the Bill of Rights. They should also cover international human right instruments and judgements in detail as well as how to utilize them in legal analysis.

6.5 CASE MANAGEMENT

➤ **Put Safeguards in Place to Ensure Fairness in Court Annexed Mediation**

When case outcomes are left to the parties to negotiate, there is real potential for vulnerable parties to be taken advantage of. This danger is especially problematic in family law mediation as there can be large differences in bargaining power and sophistication of the parties. The Judiciary must actively consider the courts' responsibility to ensure that the settlement agreements it endorses do not unduly favour one party, especially when parties who are not represented may feel pressure to make a deal. Referral to Court Annexed Mediation could include an orientation session where it is explained to parties what they can and cannot do, what the process entails and what happens if they do not come to a satisfactory agreement. The Family Court Annexed Mediation Unit may also consider using detailed consent forms that clearly explain the law, what each person is entitled to and what the practical ramifications of their consenting to an action are. Because of the challenges with legal aid, it may not be feasible to ensure all parties are represented, but ensuring all parties are aware of what they are entitled to under the law and banning legal representation in mediation sessions are possible ways of levelling the playing field. Lastly, the Court should also consider enunciating a clear test for when a court annexed mediated agreement can be reopened.

➤ **Target Assistance to Most Vulnerable Parties**

The Judiciary should prioritize providing assistance to the most vulnerable parties involved in litigation. Multiple courts and employees already deal with litigants accompanied by infants or small children first when court convenes. Best practices for handling succession cases must be formally codified, including the practice of ensuring that all heirs, especially women and children, are included in the process and appear in court in person to consent to an action. The Court should ensure these parties are providing informed consent and understand the ramifications of what they are signing. Courts should also consistently seek assistance from relevant organizations to assist children in conflict with the law and avoid them being held in custody. In addition, the operation of mobile courts which reach litigants who would not otherwise attend court must be prioritized. The Judiciary should also consider establishing a specialized magistrate level court for domestic violence matters. Gender disaggregated data can inform additional areas where the most vulnerable parties can be aided.

➤ **Encourage Alternatives to Traditional Litigation**

Judges and judicial officers should routinely encourage the parties to talk over their issues and try ADR or AJS mechanisms. The judge or judicial officer can help the parties frame the issues and give general guidance on how to begin discussions. In light of the new Constitution discouraging technicalities and



promoting equality and fairness, the Judiciary should also promote the use of an inquisitorial approach rather than one that is strictly adversarial when one or more of the parties are unrepresented. Finally, the courts should consider the use of simplified forms for filing where a large percentage of the clientele is unrepresented.

➤ **Discourage All Forms of Gender Stereotyping in Bias Claims from Litigants Against Judges or Magistrates**

Judicial officers must try to reject bias claims from litigants that are based solely on gender stereotyping such as a claim that a male judge cannot render a fair decision in the Family Law Court because he cannot appreciate all the issues. Requests submitted to a Presiding Judge for a judge of a particular gender that are similarly based on gender stereotyping should also be dismissed. Such a decision should be explained and set out in a reasoned judgement applying a locally relevant and comprehensive legal test for bias.

6.6 PUBLIC OUTREACH

➤ **Use Simple Education Materials on Equality and Non-Discrimination to Educate the Public**

Having been trained, Judiciary employees should be able to act as a resource for the public and should be able to explain the basic tenets of the Bill of Rights, especially provisions touching on equality and non-discrimination. It is also important that the Judiciary explain the benefits of a diverse bench and organizational leadership through its website or via posters in courthouses. CUCs can also participate in this effort to educate the community on these issues or specific issues that cause contention such as how succession matters are handled. A version of the gender equality training modules produced by JTI may serve this purpose.

➤ **Start a Training Program for AJS Providers Including Chiefs**

Chiefs are often required to provide evidence of possession in land or succession cases where there are no documents to prove a claim. They should understand why this role is important and how it relates to the constitutional provisions that provide for gender equality and non-discrimination. Similarly, AJS providers need to understand that the Constitution includes the practice of traditional justice mechanisms but sets out what is required of them. They need to be well-versed in the constitutional minimum requirements, how to apply them and traditional justice system best practices. Again, a version of the gender equality training modules produced by JTI may also be used here. CUCs can also be helpful in facilitating and coordinating this training.

➤ **Initiate Formal Consultation with the Muslim Community on Female Kadhis**

Given the gender equality provisions of the Constitution, that some kadhi court CUC members are interested in female kadhis and that multiple kadhis are also open to this idea, the Judiciary should investigate the Muslim Community's stance on female kadhis through public consultation. It will need to meet with all kadhis themselves first. As aforementioned, it may also be helpful to obtain quantitative research data on this topic to ensure that all those concerned can have a say and not only those with the strongest opinions. Then community forums should be held where the gender equality and kadhi court provisions of the Constitution can be explained along with the data collected. If, as the IDI information suggests, women file the vast majority of cases before the kadhi courts and derive the most benefit from them, this should be taken into account when structuring the public consultation.



6.7 JURISPRUDENCE

➤ **Develop the Judiciary's Quality Legal Research Ability**

The Judiciary needs to dedicate resources to ensuring that its judges and judicial officers have the appropriate research tools needed to carry out research on gender equality legal issues. Legal researchers should be trained on various online resources including subscription services maintained by the Judiciary as well as research techniques to find applicable precedents in other jurisdictions. These researchers should also undergo the Judiciary-wide and specific judicial officer training on gender equality and how to incorporate constitutional principles and international human rights law into decision-making. Furthermore, these researchers should be available to all judges for novel and complicated cases. In addition, the JTI may consider producing a research guide including relevant international treaties and a catalogue of available online research tools. Most importantly, the Judiciary should create a curated Equality Law Bench Book as a reference guide for legal researchers, judges and judicial officers. These groups also need to keep abreast of changes to the law and the Bench Book should be periodically updated.

➤ **Ensure Magistrates Have Jurisdiction to Apply the Bill of Rights Through Jurisprudential Exploration of the Issue**

Jurisdictional issues also need to be looked at more closely and considered in light of the specific constitutional obligations placed on the Judiciary. Limits on the constitutional jurisdictions of various courts may be explored jurisprudentially or via active law reform. Because magistrates hear the vast majority of court cases in Kenya, the Bill of Rights will not have a real effect if it cannot be applied in every court. Therefore, the constitutionality of any legislation that purports to limit the application of the Constitution must be examined in case law where this issue arises.

➤ **Consider Reporting Kadhi Decisions to Encourage Kadhis to Explicitly Consider How the Constitution Affects Kenyan Sharia Law**

The Judiciary should consider reporting kadhi decisions to encourage the development of a Kenyan sharia law jurisprudence that is reconciled with the Constitution, including the gender equality rights enshrined in it. These decisions would help promote understanding of the kadhi courts throughout the Judiciary, including amongst judges who hear their appeals. Kadhi court case law would also inform non-sharia trained lawyers who practice in the kadhi courts and the arguments they put forth. Most importantly, reporting these decisions would assist the kadhis in collectively reasoning through how the parallel jurisdictions of the Constitution and sharia law can coexist in kadhi court jurisprudence.



➤ **Develop Strategic Links with Judiciaries in Other Jurisdictions to Promote the Use of International Human Rights Law**

Strategic links with Judiciaries in other jurisdictions may be a resource for training programs as well as an opportunity to use best practices. Multiple judicial officers noted that some foreign jurisdictions also had a similarly structured broad Bill of Rights and that their precedents were useful in employing a legal analysis of the Constitution and the facts of the case. Alliances with these and other Judiciaries could foster connections that would benefit the Judiciary through lessons learned and best practices from regional or international partners.



6.8 OTHER JUDICIARY STRUCTURES

➤ **IAWJ KC Should Consider Admitting Tribunal Members to the Association**

IAWJ KC should extend its membership to include tribunal members. It may also consider doing a membership drive to encourage more men and women to join. IAWJ KC has proven itself as a worthwhile forum to discuss gender issues and the more Judiciary employees are involved, the better.

➤ **Aid CUCs in Rural or Marginalized Areas to Ensure Their Membership is Compliant with the Two-Thirds Gender Rule**

Given that CUCs have helped highlight gender issues and provide avenues for local problem-solving, it is important that they are not comprised of more than two-thirds of one gender. This is especially true in rural or marginalized areas where stakeholder organizations are less likely to post female personnel. The Judiciary, perhaps through the Gender Resource Person, needs to stress that these minimum constitutional requirements are met and provide creative strategies to do so. CUCs should also be attached to additional kadhi courts and tribunals so that they can also benefit from this feedback mechanism and their positive effect on gender equality.



APPENDICES

GLOSSARY

All definitions extracted verbatim from the ‘Concepts’, ‘Definitions’ & ‘Additional information’ Columns of the ‘Glossary of Key Gender Concepts’ Section of the A manual for gender audit facilitators: The ILO participatory gender audit methodology Geneva, International Labour Office (ILO), 2007. (pp. 124-138).

Concepts	Definitions
“Affirmative (positive) action”: ¹	“Affirmative (positive) action means special temporary measures to redress the effects of past discrimination in order to establish de facto equal opportunity and treatment between women and men.”
“Equal opportunity”: ²	<p>“Equal opportunity means equal access to all economic, political and social participation and facing no barriers on the grounds of gender.</p> <p>Equal opportunity in the world of work: Means having an equal chance to apply for a particular job, to be employed, to own or run an enterprise, to attend educational or training courses, to be eligible to attain certain qualifications, and to be considered as a worker or for a promotion in all occupations or positions, including those dominated by one gender or the other.</p> <p>Equal treatment in the world of work: Refers to equal entitlements such as in pay, working conditions, employment security and social security.”</p>
“Equal remuneration”: ³	“The principle of equal pay for work of equal value (as defined in the <i>ILO Remuneration Convention, 1951</i> (No. 100)), means that rates and types of remuneration should be based not on an employee’s gender but on an objective evaluation of the work performed.”
“Feminism”: ⁴	“Feminism is a body of theory and social movement that questions gender inequality and seeks to redress it at the personal, relational and societal levels.”
“Gender”: ⁵	<p>“Gender refers to the social differences and relations between men and women that are learned, changeable over time, and have wide variations both within and between societies and cultures. These differences and relationships are socially constructed and are learned through the socialization process. They determine what is considered appropriate for members of each sex. They are context-specific and can be modified. <i>Other variables, such as ethnicity, caste, class, age and ability intersect with gender differences.</i></p> <p>Gender is distinct from sex since it does not refer to the different physical attributes of men and women, but to socially formed roles and relations of men and women and the variable sets of beliefs and practices about male and female that not only feed into individual identities, but are fundamental to social institutions and symbolic systems. The concept of gender also includes expectations held about the characteristics, aptitudes and likely behaviour of women and men (femininity and masculinity).”</p>



“Gender analysis”: ⁶	“Gender analysis is a systematic tool to examine social and economic differences between women and men. It looks at their specific activities, conditions, needs, access to and control over resources, as well as their access to development benefits and decision-making. It studies these linkages and other factors in the larger social, economic, political and environmental context.”
“Gender-aware / sensitive policies”: ⁷	“Such policies recognize that within a society, actors are women and men, that they are constrained in different and often unequal ways, and that they may consequently have differing and sometimes conflicting needs, interests and priorities.”
“Gender-blind”: ⁸	“Gender-blind describes research, analysis, policies, advocacy materials, project and programme design and implementation that do not explicitly recognize existing gender differences that concern both productive and reproductive roles of men and women. Gender -blind policies do not distinguish between the sexes. Assumptions incorporate biases in favour of existing gender relations and so tend to exclude women.”
“Gender budgeting”: ⁹	“Gender budgeting is the application of gender mainstreaming in the budgetary process. It means incorporating a gender perspective at all levels of the budgetary process and restructuring revenues and expenditures in order to promote gender equality.”
“Gender equality”: ¹⁰	“Gender equality, or equality between men and women, entails the concept that all human beings, both men and women, are free to develop their personal abilities and make choices without the limitations set by stereotypes, rigid gender roles and prejudices. Gender equality means that the different behaviour, aspirations and needs of women and men are considered, valued and favoured equally. It does not mean that women and men have to become the same, but that their rights, responsibilities and opportunities will not depend on whether they are born male or female.”
“Gender equality in the world of work”: ¹¹	<p>“Gender equality in the world of work, within the ILO Decent Work Agenda, refers to:</p> <ul style="list-style-type: none"> Equality of opportunity and treatment in employment; Equality in association and collective bargaining; Equality in obtaining a meaningful career development; A balance between work and home life that is fair to both men and women; Equal participation in decision-making, including in the constitutive ILO organs; Equal remuneration for work of equal value; Equal access to safe and healthy working environments and to social security.”
“Gender equity”: ¹²	“Gender equity means fairness of treatment for women and men, according to their respective needs. This may include equal treatment or treatment that is different but which is considered equivalent in terms of rights, benefits, obligations and opportunities. Equity is a means; equality is the goal.”
“Gender gap”: ¹³	“The gender gap is the difference in any area between women and men in terms of their levels of participation, access to resources, rights, power and influence, remuneration and benefits.”



“Gender mainstreaming”:¹⁴

“Gender mainstreaming is a globally accepted strategy for promoting gender equality. Mainstreaming is not an end in itself but a strategy, an approach, a means to achieve the goal of gender equality. Mainstreaming involves ensuring that gender perspectives and attention to the goal of gender equality are central to all activities policy development, research, advocacy/dialogue, legislation, resource allocation, and planning, implementation and monitoring of programmes and projects.

In 1997, the United Nations Economic and Social Council defined the Concept of Gender Mainstreaming as follows:

“...the process of assessing the implications for women and men of any planned action, including legislation, policies or programmes, in all areas and at all levels. It is a strategy for making women’s as well as men’s concerns and experiences an integral dimension of the design, implementation, monitoring and evaluation of policies and programmes in all political, economic and societal spheres so that women and men benefit equally and inequality is not perpetuated. The ultimate goal is to achieve gender equality.”

“Gender -neutral policies”:¹⁵

“Gender -neutral policies use the knowledge of gender differences in a given context to overcome biases in delivery, to ensure that they target and benefit both genders effectively in terms of their practical gender needs. Moreover, they work within the existing gender division of resources and responsibilities.”

“Gender planning”:¹⁶

“Gender planning consists of developing and implementing specific measures and organizational arrangements (for example, capacity to carry out gender analysis, collect sex-disaggregated data) for the promotion of gender equality, and ensuring that adequate resources are available.”

“Gender redistributive policies”:¹⁷

“These are interventions that intend to transform existing distributions to create a more balanced relationship between men and women; they may target both women and men or one of the two according to the situation. They touch on strategic needs as well as on practical/basic needs, but do so in ways that have potential to change, which help build up the supportive conditions for women to empower themselves.”

“Gender roles”:¹⁸

“Gender roles are learned behaviour in a given society, community or social group in which people are conditioned to perceive activities, tasks and responsibilities as male or female. These perceptions are affected by age, class, caste, race, ethnicity, culture, religion or other ideologies, and by the geographical, economic and political environment.

Productive role: Refers to income-generating work undertaken by either men or women to produce goods and services, as well as the processing of primary products that generates an income.

Reproductive role: Refers to childbearing and the different activities carried out in what is called today the care economy; namely, the many hours spent caring for the household members and the community, for fuel and water collection, food preparation, child care, education and health care, and care for the elderly, which for the most part remain unpaid.”

“Gender-sensitive indicators”:¹⁹

“Are designed to measure benefits to women and men and capture quantitative and qualitative aspects of change.

Gender-sensitive indicators are indicators disaggregated by sex, age and socio-economic background. They are designed to demonstrate changes in relations between women and men in a given society over a period of time.”

“Gender-specific policies”:²⁰

“These use the knowledge of gender differences in a given context to respond to the practical gender needs of a specific gender working with the existing division of resources and responsibilities.”



<p>“Glass ceiling”:²¹</p>	<p>“Invisible artificial barriers, created by attitudinal and organizational prejudices that block women from senior executive management positions.”</p>
<p>“Harassment”:²²</p>	<p>“Refers to any kind of emotional and physical abuse, persecution or victimization. Harassment and pressure at work can consist of various forms of offensive behaviour. Harassment is characterized by persistently negative attacks of a physical or psychological nature on an individual or group of employees, which are typically unpredictable, irrational and unfair.”</p>
<p>“Occupational sex segregation”:²³</p>	<p>“Refers to a situation in which women and men are concentrated in different types of jobs and at different levels of activity and employment, with women being confined to a narrower range of occupations (horizontal segregation) than men, and to the lower grades of work (vertical segregation).”</p>
<p>“Sex”:²⁴</p>	<p>“Biological differences between men and women that are universal and usually determined at birth.”</p>
<p>“Sex-disaggregated data”:²⁵</p>	<p>“Collection and use of quantitative and qualitative data by sex (i.e., not gender) is critical as a basis for gender-sensitive research, analysis, strategic planning, implementation, monitoring and evaluation of programmes and projects.”</p>
<p>“Sex discrimination”:²⁶</p>	<p>“Differential treatment of men and women – in employment, education and access to resources and benefits, etc. – on the basis of their sex.</p> <p>Discrimination may be direct or indirect.</p> <p>Direct sex discrimination: Exists when unequal treatment between women and men stems directly from laws, rules or practices making an explicit difference between women and men.</p> <p>Indirect sex discrimination: Is when rules and practices that appear gender-neutral in practice lead to disadvantages primarily suffered by persons of one sex.</p> <p>Requirements which are irrelevant for a job and which typically only men can meet, such as certain height and weight levels, constitute indirect discrimination. The intention to discriminate is not required.</p> <p>Discrimination is defined in ILO Convention No. 111 as</p> <p>“..any distinction, exclusion or preference based on race, colour, sex, religion, political opinion, national extraction or social origins which nullifies or impairs equality of opportunities or treatment in employment or occupation. In most countries, the law prohibits discrimination based on sex. In practice, however, women in both developing and industrialized countries continue to encounter discrimination in one form or another in their working lives..”</p>
<p>“Women’s empowerment”:²⁷</p>	<p>The process by which women become aware of sex-based unequal power relationships and acquire a greater voice in which to speak out against the inequality found in the home, workplace and community.</p> <p>It involves women taking control over their lives: setting own agendas, gaining skills, solving problems and developing self-reliance.</p>



APPENDIX

JUDICIARY GENDER AUDIT STANDARD OF REVIEW DOCUMENT

Statute	Section	Text	Meaning	External/Internal	Other
Constitution of Kenya, 2010	Art. 21(3)	(3) All State organs and all public officers have the duty to address the needs of vulnerable groups within society including women, older members of society, persons with disabilities, children, youth, members of minority or marginalised communities, and members of particular ethnic, religious or cultural communities.	All state organs and public officers must address the needs of the vulnerable including women.	Both	Case Management, jurisprudence, training, accommodation and affirmative action
Constitution of Kenya, 2010	Art. 27(3), (4), (6) & (8)	(3) Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres. (4) The State shall not discriminate directly or indirectly against a 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. ... (6) To give full effect to the realisation of the rights guaranteed under this Article, the State shall take legislative and other measures, including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination. ... (8) In addition to the measures contemplated in clause (6), the State shall take legislative and other measures to implement the principle that not more than two-thirds of the members of elective or appointive bodies shall be of the same gender.	Non-discrimination on sex including affirmative action and at least 1/3 of elective or appointive bodies must be women.	Both	Number of women judges, jurisprudence



Statute	Section	Text	Meaning	External/ Internal	Other
Judicial Service Act, 2017	3(j) & (k)	The object and purpose of this Act is to, among other things, ensure that the Commission and the Judiciary shall... (j) facilitate the promotion of gender equity in the Judiciary and the protection of vulnerable children in the administration of justice; ... (k) be guided in their internal affairs, and in the discharge of their mandates by considerations of social and gender equity and the need to remove any historical factors of discrimination; ...	The JSC and the Judiciary must promote gender equity in the Judiciary and be guided by it in order to remove historical discrimination in their internal (HR) affairs and the discharge of their mandate.	Both	External strategy, internal HR strategy, training, jurisprudence
Environment and Land Court Act, 2015	18(b), (d) & (e)	18. In exercise of its jurisdiction under this Act, the Court shall be guided by the following principles ... (b) the principles of and policy under Article 60(1) of the Constitution; ... (d) the national values and principles of governance (e) the values and principles of public service under Article 232(1) of the Constitution.	ELC shall consider the elimination of gender discrimination in land law, equity, inclusiveness, equality, non-discrimination and protection of the marginalized in its decisions. ELC shall consider an equitable provision of services as well as adequate and equal opportunities for men and women.	Both	Case management, jurisprudence, training, HR
Convention on the Elimination of All Forms of Discrimination Against Women, 1979	Art. 2(d)	2. States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake: States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake: ... (d) To refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation; ...	Public authorities and institutions will not discriminate against women.	Both	Case management, jurisprudence, training, HR



Statute	Section	Text	Meaning	External/ Internal	Other
African (Banjul) Charter on Human and Peoples' Rights	Art. 18(3)	The State shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of the woman and the child as stipulated in international declarations and conventions.	The state shall ensure there is no discrimination against women and protect the rights of women.	Both	Case management, jurisprudence, training, HR
Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, 2003	Art. 2(1) (c) & (d)	2(1) States Parties shall combat all forms of discrimination against women through appropriate legislative, institutional and other measures. In this regard they shall: ... (c) integrate a gender perspective in their policy decisions, legislation, development plans, programmes and activities and in all other spheres of life; (d) take corrective and positive action in those areas where discrimination against women in law and in fact continues to exist; ...	The state shall combat all forms of discrimination against women by integrating a gender perspective in all activities and use corrective action where discrimination against women continues to exist.	Both	Case management, jurisprudence, training, HR
Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, 2003	Art. 8(a), (b), (d), (e) & (f)	8. Women and men are equal before the law and shall have the right to equal protection and benefit of the law. Parties shall take all appropriate measures to ensure: (a) effective access by women to judicial and legal services, including legal aid; (b) support to local, national, regional and continental initiatives directed at providing women access to legal services, including legal aid; ... (d) that law enforcement organs at all levels are equipped to effectively interpret and enforce gender equality rights; (e) that women are represented equally in the judiciary and law enforcement organs; (f) reform of existing discriminatory laws and practices in order to promote and protect the rights of women.	Women and men are equal before the law (protection or benefit). The state shall take steps to ensure women's effective access to judicial services and women's equal representation in the Judiciary. The state shall also ensure that the Judiciary is equipped to effectively interpret and enforce gender equality rights (training) and reform existing discriminatory laws and practices so as to promote women's rights.	Both	Access to justice, case management, jurisprudence, number of women judges, training



Statute	Section	Text	Meaning	External/ Internal	Other
Convention on the Rights of Persons with Disabilities, 2006	Art. 6	6(1) States Parties recognize that women and girls with disabilities are subject to multiple discrimination, and in this regard shall take measures to ensure the full and equal enjoyment by them of all human rights and fundamental freedoms. (2) States Parties shall take all appropriate measures to ensure the full development, advancement and empowerment of women, for the purpose of guaranteeing them the exercise and enjoyment of the human rights and fundamental freedoms set out in the present Convention.	The state recognizes that women/girls with disabilities are subjected to multiple discrimination and shall take measures to ensure their full human rights and freedoms; The state shall take all appropriate measures to ensure full development and empowerment of women.	Both	Jurisprudence, training & HR
Victoria Falls Declaration of Principles for the Promotion of the Human Rights of Women, 1994	Principle 5	The participants recognised that discrimination against women can be direct or indirect. They noted that indirect discrimination requires particular scrutiny by the judiciary. The participants, further, emphasised the need to ensure not only formal, but also substantive equality for women and, for that purposes, affirmative action may be adopted if necessary.	Discrimination can be direct or indirect and indirect discrimination requires particular scrutiny by the Judiciary. Substantive, not just formal equality is important and affirmative action can be used if necessary.	Both	Jurisprudence, training, HR
Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, 2003	Art. 25	25. States Parties shall undertake to: (a) provide for appropriate remedies to any woman whose rights or freedoms, as herein recognised, have been violated; (b) ensure that such remedies are determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by law.	The state shall provide appropriate remedies to any women whose rights or freedoms have been violated and that the Judiciary is competent to do so.	External	Jurisprudence, training



Statute	Section	Text	Meaning	External/ Internal	Other
Convention on the Rights of Persons with Disabilities, 2006	Art. 13	(1) States Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages. (2) In order to help to ensure effective access to justice for persons with disabilities, States Parties shall promote appropriate training for those working in the field of administration of justice, including police and prison staff.	The state shall ensure effective access to justice for PWD including accommodation and facilitation of their role as direct or indirect participants (even witnesses) in legal proceedings. This obligation includes promoting appropriate training for Judiciary staff.	External	Access to justice, accommodation of clients, training
Victoria Falls Declaration of Principles for the Promotion of the Human Rights of Women, 1994	Principle 15	(1) States Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages. (2) In order to help to ensure effective access to justice for persons with disabilities, States Parties shall promote appropriate training for those working in the field of administration of justice, including police and prison staff.	There is a particular need to ensure that judges, lawyers, litigants and others are made aware of applicable human rights norms as stated in international and regional instruments and national constitutions and laws. It is crucially important for them to be aware of the provisions of those instruments, which particularly pertain to women.	External	Jurisprudence, training
Victoria Falls Declaration of Principles for the Promotion of the Human Rights of Women, 1994	Principle 22	Judges and lawyers have a duty to familiarise themselves with the growing international jurisprudence of human rights and particularly with the expanding material on the protection and promotion of the human rights of women.	Judges have a duty to be familiar with international human rights jurisprudence, particularly regarding women.	External	Jurisprudence, training



Statute	Section	Text	Meaning	External/Internal	Other
Victoria Falls Declaration of Principles for the Promotion of the Human Rights of Women, 1994	Principle 11	The judicial officers in Commonwealth jurisdictions should be guided by the Convention on the Elimination of All Forms of Discrimination Against Women when interpreting and applying the provisions of the national constitutions and laws, including the common law and customary law, when making decisions.	The Judiciary should be guided by the Convention on the Elimination of All Forms of Discrimination Against Women when interpreting and applying law, including common law, customary law and making decisions.	External	Jurisprudence, training
Victoria Falls Declaration of Principles for the Promotion of the Human Rights of Women, 1994	Principle 2	The participants noted that all too often universal human rights are wrongly perceived as confined to civil and political rights and not extending to economic and social rights, which may be of more importance to women. They stressed that civil and political rights and economic and social rights are integral and complementary parts of one coherent system of global human rights.	Economic and social rights are also universal human rights and may be more important to women.	External	Jurisprudence
Convention on the Rights of Persons with Disabilities, 2006	Art. 12(3) & (4)	(3) States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity. (4) States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.	Economic and social rights are also universal human rights and may be more important to women.	External	Jurisprudence
Constitution of Kenya, 2010	Art. 20(3) & (4)	(3) In applying a provision of the Bill of Rights, a court shall – (a) develop the law to the extent that it does not give effect to a right or fundamental freedom; and (b) adopt the interpretation that most favours the enforcement of a right or fundamental freedom. (4) In interpreting the Bill of Rights, a court, tribunal or other authority shall promote – (a) the values that underlie an open and democratic society based on human dignity, equality, equity and freedom; and (b) the spirit, purport and objects of the Bill of Rights.	In applying right to not be discriminated against, a court must develop the law progressively and promote equity and equality.	External	Jurisprudence



Statute	Section	Text	Meaning	External/ Internal	Other
Convention on the Rights of Persons with Disabilities, 2006	Art. 13	(1) States Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages. (2) In order to help to ensure effective access to justice for persons with disabilities, States Parties shall promote appropriate training for those working in the field of administration of justice, including police and prison staff.	The state shall ensure effective access to justice for PWD including accommodation and facilitation of their role as direct or indirect participants (even witnesses) in legal proceedings. This obligation includes promoting appropriate training for Judiciary staff.	External	access to justice, accommodation of clients, training
Victoria Falls Declaration of Principles for the Promotion of the Human Rights of Women, 1994	Principle 15	There is a particular need to ensure that judges, lawyers, litigants and others are made aware of applicable human rights norms as stated in international and regional instruments and national constitutions and laws. It is crucially important for them to be aware of the provisions of those instruments, which particularly pertain to women.	Judges, lawyers and litigants must be aware of local and international human rights norms, particularly those that relate to women.	External	Jurisprudence, training
Victoria Falls Declaration of Principles for the Promotion of the Human Rights of Women, 1994	Principle 22	Judges and lawyers have a duty to familiarise themselves with the growing international jurisprudence of human rights and particularly with the expanding material on the protection and promotion of the human rights of women.	Judges have a duty to be familiar with international human rights jurisprudence, particularly regarding women.	External	Jurisprudence, training
Victoria Falls Declaration of Principles for the Promotion of the Human Rights of Women, 1994	Principle 11	The judicial officers in Commonwealth jurisdictions should be guided by the Convention on the Elimination of All Forms of Discrimination Against Women when interpreting and applying the provisions of the national constitutions and laws, including the common law and customary law, when making decisions.	The Judiciary should be guided by the Convention on the Elimination of All Forms of Discrimination Against Women when interpreting and applying law, including common law, customary law and making decisions.	External	Jurisprudence, training



Statute	Section	Text	Meaning	External/Internal	Other
Constitution of Kenya, 2010	Art. 10 (1) (2)(b)	(1) The national values and principles of governance in this Article bind all State organs, State officers public officers and all persons whenever an of them-(a) applies or interprets this Constitution; (b) enacts, applies or interprets any law; or (c) makes or implements public policy decisions. (2) The national values and principles of governance include... (b) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised	Equity, inclusiveness, equality, non-discrimination and protection of the marginalized to be considered in applying the Constitution or any law.	External	Jurisprudence
Constitution of Kenya, 2010	Art. 60(1)(f)	(1) Land in Kenya shall be held, used and managed in a manner that is equitable, efficient, productive and sustainable, and in accordance with the following principles... (f) elimination of gender discrimination in law, customs and practices related to land and property in land	Land law shall not be gender discriminatory.	External	ELC: jurisprudence
Constitution of Kenya, 2010	Art. 48	The State shall ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice.	All persons must have access to justice and any fee required by the Judiciary must be reasonable and not hurt access to justice.	External	Number of women litigants, drop off rates for women litigants
High Court (Organization & Administration) Act, 2015	3(1)(a)	(1) In exercise of its judicial authority, the Court shall-- (a) be guided by the national values and principles set out in Article 10 of the Constitution	Equity, inclusiveness, equality, non-discrimination and protection of the marginalized to be considered when making judicial decisions.	External	Jurisprudence
Kadhis' Court Act, CAP 11.	6(1)	6. The law and rules of evidence to be applied in a Khadi's Court shall be those applicable under Muslim law: Provided that – (1) all witnesses shall be heard without discrimination on grounds of religion, sex or otherwise	No discrimination against witnesses in Khadi's Court.	External	Khadi's Court: case management



Statute	Section	Text	Meaning	External/ Internal	Other
Indigenous and Tribal Peoples Convention, 1989	Art. 9	(1) To the extent compatible with the national legal system and internationally recognised human rights, the methods customarily practised by the peoples concerned for dealing with offences committed by their members shall be respected. (2) The customs of these peoples in regard to penal matters shall be taken into consideration by the authorities and courts dealing with such cases.	Community justice customs shall be respected as long as they are compatible with the legal system and international human rights. These customs shall be considered by the courts in such cases.	External	Jurisprudence
Indigenous and Tribal Peoples Convention, 1989	Art. 10	(1) In imposing penalties laid down by general law on members of these peoples account shall be taken of their economic, social and cultural characteristics. (2) Preference shall be given to methods of punishment other than confinement in prison.	In imposing penalties on these community members, their economic, social and cultural characteristics will be considered and preference given to non-prison punishments.	External	Criminal court: jurisprudence
Indigenous and Tribal Peoples Convention, 1989	Art. 12	The peoples concerned shall be safeguarded against the abuse of their rights and shall be able to take legal proceedings, either individually or through their representative bodies, for the effective protection of these rights. Measures shall be taken to ensure that members of these peoples can understand and be understood in legal proceedings, where necessary through the provision of interpretation or by other effective means.	These communities shall be able to institute legal individual and group legal proceedings and understand/ be understood through interpretation if necessary.	External	Case management

Statute	Section	Text	Meaning	External/ Internal	Other
Victoria Falls Declaration of Principles for the Promotion of the Human Rights of Women, 1994	Principle 3	The participants were aware that universal human rights are usually interpreted as applying to regulate the public sphere. Violations of human rights in the private sphere, including the family - the site of much of women's experience of violations - are usually perceived to be outside the reach of the human rights. The participants noted that although the state does not usually directly violate women's rights in the private sphere, often supports or condones an exploitative family structure through various laws and rules of behaviour which legitimate the authority of male members over the lives of female members of the family and, in any event, often fails to act to protect women from private violations or tolerates or, indeed, encourages, a structure wherein private violations occur all too frequently.	The state often fails to act against violations of human rights in the private sphere – including the family – and this lack or protection encourages a structure where private violations occur too frequently.	External	Family court: case management, jurisprudence
Victoria Falls Declaration of Principles for the Promotion of the Human Rights of Women, 1994	Principle 23	Closer links and co-operation across national frontiers by the judiciary on the interpretation and application of human rights law should be encouraged.	Closer links and cooperation between various countries' judiciaries on human rights law should be encouraged.	External	Training
Constitution of Kenya, 2010	Art. 172(2)	(3) In its performance of its functions, the Commission shall be guided by the following... (b) the promotion of gender equality.	In its functions, the JSC shall be guided by gender equality.	External	Internal HR strategy, training
Constitution of Kenya, 2010	Art. 172(2)	(1) There is established the Judicial Service Commission. (2) The Commission shall consist of ... (d) One High Court judge and one magistrate, one a woman and one a man, elected by the members of the association of judges and magistrates; ... (f) Two advocates, one a woman and one a man, each of whom has at least fifteen years' experience, elected by the members of the statutory body responsible for the professional regulation of advocates; ... (g) One woman and one man to represent the public, not being lawyers, appointed by the President with the approval of the National Assembly.	Stipulated men and women positions on JSC.	External	JSC: number of women



Statute	Section	Text	Meaning	External/ Internal	Other
Constitution of Kenya, 2010	Art. 232 (1) (i)(i)	(1) The values and principles of public service include ... (i) affording adequate and equal opportunities for appointment, training and advancement, at all levels of the public service, of -- (i) men and women; ...	Public Service values include affording adequate and equal opportunities for men and women.	Internal	HR
Judicial Service Act, 2017	34(5)	34(5) Not more than two-thirds of the members of the [National] Council [on the Administration of Justice] shall be of one gender and the Chairperson of the Council shall, during the first meeting of the Council, ensure that this requirement has been met.	At least 1/3 of the NCAJ must be women and this requirement must be met from the first meeting.	Internal	NCAJ: number of women
Judicial Service Act, 2017	First Schedule 14(1)	14 (1) The Commission shall, within seven days of the conclusion of interviews, deliberate and nominate the most qualified applicants taking into account gender, regional, ethnic and other diversities of the people of Kenya.	Gender diversity shall be taken into account when appointing judges.	Internal	Number of women judges
Judicial Service Act, 2017	Third Schedule 10(2)	10(2) When considering candidates for promotion, the Commission shall take into account the gender, regional, ethnic and other diversities of the people of Kenya and as the relative seniority of the candidates.	When considering promotions, gender diversity shall be taken into account.	Internal	HR: promotions
Universal Declaration of Human Rights	Art. 25(2)	Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection.	Motherhood is entitled to special care and assistance.	Internal	HR: maternity, accommodation
Workers with Family Responsibilities Convention, 1981	Art. 3(1)	3(1) With a view to creating effective equality of opportunity and treatment for men and women workers, each Member shall make it an aim of national policy to enable persons with family responsibilities who are engaged or wish to engage in employment to exercise their right to do so without being subject to discrimination and, to the extent possible, without conflict between their employment and family responsibilities.	In creating equality between men and women workers, the state shall aim to enable persons with family responsibilities to work without discrimination or conflict between work and family responsibilities.	Internal	HR

Statute	Section	Text	Meaning	External/Internal	Other
Workers with Family Responsibilities Convention, 1981	Art. 4	4. With a view to creating effective equality of opportunity and treatment for men and women workers, all measures compatible with national conditions and possibilities shall be taken- (a) to enable workers with family responsibilities to exercise their right to free choice of employment; and (b) to take account of their needs in terms and conditions of employment and in social security.	In creating equality between men and women workers, the state shall aim to enable workers with family responsibilities to have free choice of employment and take their needs into account in employment conditions.	Internal	HR: accommodation
C183 Maternity Protection Convention	Art. 4(1)	(1) On production of a medical certificate or other appropriate certification, as determined by national law and practice, stating the presumed date of childbirth, a woman to whom this Convention applies shall be entitled to a period of maternity leave of not less than 14 weeks.	Maternity leave. See Section 29 of the Employment Act.	Internal	HR: maternity
C183 Maternity Protection Convention	Art. 6(1) & (3)	(1) Cash benefits shall be provided, in accordance with national laws and regulations, or in any other manner consistent with national practice, to women who are absent from work on leave referred to in Articles 4 or 5. ... (3) Where, under national law or practice, cash benefits paid with respect to leave referred to in Article 4 are based on previous earnings, the amount of such benefits shall not be less than two-thirds of the woman's previous earnings or of such of those earnings as are taken into account for the purpose of computing benefits...	Maternity leave benefits to be 2/3 of the women's previous earnings.	Internal	HR: maternity
C183 Maternity Protection Convention	Art. 10	(1) A woman shall be provided with the right to one or more daily breaks or a daily reduction of hours of work to breastfeed her child. (2) The period during which nursing breaks or the reduction of daily hours of work are allowed, their number, the duration of nursing breaks and the procedures for the reduction of daily hours of work shall be determined by national law and practice. These breaks or the reduction of daily hours of work shall be counted as working time and remunerated accordingly.	A woman shall have one or more daily breaks or a reduction in working hours to breastfeed her child. These nursing breaks or reduction in hours shall be counted and remunerated as working time.	Internal	HR: accommodation
Universal Declaration of Human Rights	Art. 23(2)	Everyone, without any discrimination, has the right to equal pay for equal work.	Equal pay for equal work	Internal	



Statute	Section	Text	Meaning	External/ Internal	Other
African (Banjul) Charter on Human and Peoples' Rights	Art. 15	Every individual shall have the right to work under equitable and satisfactory conditions, and shall receive equal pay for equal work.	Equal pay for equal work.	Internal	
Equal Remuneration Convention, 1951	Art. 2(1)	2(1) Each member shall, by means appropriate to the methods in operation for determining rates of remuneration, promote and, in so far as is consistent with such methods, ensure the application to all workers of the principle of equal remuneration for men and women workers for work of equal value.	Equal pay for equal work.	Internal	
Convention on the Elimination of All Forms of Discrimination Against Women, 1979	Art. 11(1)(d) & (2)(c)	(1) States Parties shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights, in particular: ... (d) The right to equal remuneration, including benefits, and to equal treatment in respect of work of equal value, as well as equality of treatment in the evaluation of the quality of work; ... (2) In order to prevent discrimination against women on the grounds of marriage or maternity and to ensure their effective right to work, States Parties shall take appropriate measures: ... (c) To encourage the provision of the necessary supporting social services to enable parents to combine family obligations with work responsibilities and participation in public life, in particular through promoting the establishment and development of a network of child-care facilities	Equal pay for equal work. The state must take measures to prevent discrimination against women on the basis of marriage or maternity. The state must encourage the provision of services to enable parents to combine family obligations with work responsibilities and participation in public life.	Internal	HR: maternity, accommodation
Judicial Service Act, 2017	47(2)(i)	(2) Without prejudice to the generality of subsection (1), such regulations may provide for... (i) mainstreaming of gender and regional equity in the Judiciary.	Regulations may provide for mainstreaming of gender equity in the Judiciary – none as of yet.	Recommendations	
High Court (Organization & Administration) Act, 2015	16(a)	16. The Chief Justice may issue practice directions and written guidelines to judges and judicial officers to— (a) ensure the application of constitutional values and principles;	Not sure if this is done.	Recommendations	



Government of the Netherlands