EAST AFRICAN MAGISTRATES' AND JUDGES' ASSOCIATION LAW

JOURNAL

EAMJA Law Journal, Volume 3, No. 1, 2020

EAMJA 2019-2021 COUNCIL MEMBERS

Hon. Justice Sophia A.N. Wambura
(TANZANIA) PRESIDENT

Hon. Justice Keitirima John Eudes **(UGANDA)**
DEPUTY PRESIDENT

MEMBERS

1. Hon. Justice Rutazana Angeline, IPP, **(RWANDA)**
2. Hon. Justice Mutabazi Harrison, Secretary General, **(RWANDA)**
3. Hon. Sheikh Wehliye, Deputy Secretary General, **(KENYA)**
4. Hon. Justice Nzioki Wa Makau, Treasurer, **(KENYA)**
5. Hon. Justice Kadigwa Gashongore, Deputy Treasurer, **(RWANDA)**
6. Hon. Sikhoya Naume, Publicity Secretary, **(UGANDA)**
7. Hon. Angelo Rumisha, Deputy Publicity Secretary, **(TANZANIA)**
8. Hon. Justice Asiimwe Tadeo, UJOA President, **(UGANDA)**
9. Hon. Patrick Kiage, CMJA Vice President, **(KENYA)**
10. Hon. Wilberforce Samson Luhwago, JMAT President, **(TANZANIA)**
11. Hon. Justice Monica Mugenyi, EACJ
12. Hon. Justice Jacqueline Kamau, KMJA President, **(KENYA)**
13. Hon. Salum Hassan Bakar, ZAJOA President, **(ZANZIBAR)**
14. Hon. Aloysius Natwijuka **(UGANDA)**
15. Hon. Barbara Ojoo, **(KENYA)**
16. Hon. Hawa Mnguruta, **(TANZANIA)**
17. Hon. Musabyeyezu Solange, **(RWANDA)**
18. Hon.Theresia Sedeyoka
    Head of the Secretariat

Contents

07 MESSAGE FROM THE PRESIDENT

CALL FOR PAPERS 09

13 MESSAGE OF CONDOLENCE

16 COVID-19 PANDEMIC AND BEYOND; VIDEO CONFERENCING AS THE PANACEA TO OFF-SITE (EX-SITU) JUSTICE IN KENYA

40 LEGISLATING HEALTH AND HUMAN RIGHTS IN THE FACE OF PANDEMIC: LESSONS FROM UGANDA'S COVID-19 EXPERIENCE

54 THE PRACTICAL CHALLENGES ON THE REALISATION AND ENJOYMENT OF THE RIGHT TO A TRIAL WITHOUT UNDUE DELAYS IN TANZANIA

76 CONTROL OF CLIMATE CHANGE THROUGH POLICIES AND LAWS IN THE EAST AFRICAN COMMUNITY

96 PLEA BARGAINING AND CRIMINAL JUSTICE DISPENSATION: THE TANZANIA PERSPECTIVE

108 A COMPARATIVE ANALYSIS OF THE LEGAL FRAMEWORK FOR INCLUSION OF WOMEN IN TRADE

EDITORIAL

The East African Magistrates' and Judges' Association (EAMJA) draws membership from the organizational bodies representing Magistrates and Judges in the East African countries, namely; Kenya Magistrates' and Judges' Association, (KMJA), Uganda Judicial Officers' Association, (UJOA), the Judges' and Magistrates' Association of Tanzania (JMAT) and the Rwanda Judges' and Registrars' Association (RJA). Also, the Zanzibar Judicial Officers' Association (ZAJOA) of Zanzibar and the East African Court of Justice (EACJ) are the Associate members.

EAMJA's historical background dates back to March, 2000 during the KMJA Annual General Meeting held in Nairobi, Kenya, when a meeting between KMJA representatives and delegation from UJOA, revived an idea hatched earlier on to form a regional body. There followed other meetings in Kampala, Uganda and Arusha, Tanzania. During the Arusha meeting held on 22nd February, 2001, the idea was discussed further this time in the presence of representatives from JMAT. During this meeting, three associations resolved to form the EAMJA. This culminated in the EAMJA launch on the 1st of September 2001 in Mombasa, Kenya and other associations have come on board like Rwanda since then.

The Association has since organised various activities around institutional development, and conferences to judicial issues of sub-regional concern. In October 2019 EAMJA held its annual conference and general meeting. The event was hosted by the Zanzibar Judicial Officers' Association (ZAJOA) and held in the Spice Island of Zanzibar. The conference was graced by His Excellency Dr. Ali Mohamed Shein, the President of the Revolutionary Government of Zanzibar. Besides its serious discussions on the issue related to Land and Land Use, but the hospitality of the People of Zanzibar left memorable experiences with the members who attended. This year's conference will be in Kampala in October, we hope, depending on the COVID-19 pandemic status.

One of the objectives the Association is to advance legal knowledge among its members through the publication of the East African Magistrates' and Judges' Association Journal (EAMJA-JOURNAL). The Journal is enriched with papers and publications predominately from experiences Judges and Magistrates based on their day to day administration of the law within their jurisdictions. Additionally, the journal features debates from different members from member associations to EAMJA discussing topical Judicial issues touching the Judicial staff and the Judiciary as a whole in relation to the administration of Justice in our respective countries. The papers gave us data for informative and comparative purposes that can be used to improve the delivery of justice in our respective Jurisdictions.

This issue is packed with educative papers and discussions that share experiences from different jurisdictions. The issue opens with the message of condolences to the Honourable Augustino S.L. Ramadhani Chief Justice Emeritus of the United Republic of Tanzania. The President of EAMJA Morns the loss of such a distinguished and long serving judicial mind and the former patron of EAMJA. His Lordship Ramadhani joined his creator on April 28, 2020.

COVID-19 pandemic has challenged the administration of justice in mots East African Jurisdictions. This issue features two articles dedicated to sharing experiences on how to administer justice during these difficult times. Hon. Wakahiu's article on Covid-19 Pandemic And Beyond; Video Conferencing As The Panacea To Off-Site (Ex-Situ) Justice In Kenya, shares experiences by courts in Kenya on how they could manage remote-controlled courts. He expounds challenges related to this new and unavoidable guest in these times, giving workable solutions on keeping the courts open but taking care of the Judicial Officers', litigants', and Advocates' health. ***Legislating Health and Human rights in the face of a pandemic: Lessons from Uganda's Covid-19 Experience*** is another article in this issue by Mbabazi. The article highlights the legal challenges

associated with the implementing the measures adopted in response to COVID-19.

Timely administration of justice should concern every judicial officer. Hon. Rumisha, shares experiences on the administration of criminal justice in Tanzania vis-à-vis the realisation of the right to a speedy trial in Tanzania. In his article ***the Practical Challenges on the Realisation and Enjoyment of the Right to a Trial Without undue Delays in Tanzania,*** he shares the law and practice on the realisation of the right in Tanzania. Other papers in this issue are ***Control of Climate Change through Policies and Laws in the East African Community*** by Hon. Angote**,** ***Plea Bargaining and Criminal Justice Dispensation: the Tanzania Perspective*** by Dr. Ndumbaro & Hon. Mshomba and ***A Comparative Analysis Of The Legal Framework For Inclusion Of Women In Trade*** by Dr. Siboe

This Journal however comes to you at a very difficult moment for all of us in East Africa and around the whole world due to COVID -19 pandemic. Otherwise we would have wished each one of you to have a hard copy of the same. We are still hopeful that COVID-19 the global pandemic will be dealt with and we shall have a chance to share in it. All in all we thank you all for the efforts and support to see EAMJA triumphs. We pray that the almighty keeps you all safe.

Please stay home, stay safe.

Sikhoya Naume

THE CHIEF EDITOR

MESSAGE FROM THE PRESIDENT

Greetings Hon. Members!

This Journal comes at very trying times to most of us due to the COVID 19 pandemic. Some of us were saddened by the untimely demise of our loved ones, friends, and or relatives. May their Souls Rest In Eternal Peace. My sincere condolences to all of you. Some of us are still taking care of the sick. My Prayers are for their fast recovery. Most of us have witnessed great changes in our lifestyles. Some of us are working at home due to enforced lockdowns while others are still in offices. We cannot work, meet or even travel like we used to or would have liked. Most of us rely on video conferencing to meet and discuss issues or even hear cases, we now practice social distancing. It is an era of no gatherings.

We may recall that the present Council was elected into office on the 24th of October, 2019 during the memorable Annual General Meeting held in Zanzibar. May I once again thank the President of the Revolutionary Council of Zanzibar, His Excellence Dr. Mohamed Shein, Chief Justice of Zanzibar, Hon. Omar Othman Makungu, Hon. Salum Hassan Bakar, President and Members of ZAJOA as well as the Organizing Committee for a well-organised Conference. It was both educative, entertaining, and refreshing. Ahsanteni sana.

As I walk into the office as part of the new Council, I look ahead to face the lurking challenges seize and exploit the abundant possibilities and opportunities. Our immediate task will be to study and build on what

our predecessors put in place and continue to learn from them especially the Immediate Past President Hon. Lady Justice Angeline Rutazana. She knew the Association's mechanisms and steered its development firmly and strongly but also diplomatically. I know it was not an easy task but I appreciate it that you have given me a robust, dynamic, and vibrant team that features some new faces and a return of some loyal leaders who will provide much needed assistance to chart our course forward.

My vision is to see stronger collaboration with the Managements of our member Judiciaries and especially the Hon. Chief Justices who are our EMJA and, of course, the respective member Associations' Patrons. We are looking forward to an enhanced collaboration within the member countries, the East African Cooperation, and International Associations, actioned through trainings, mentorships, and exchange programmes of judicial officers.

Your membership Hon. Members is our foundation. I do know that different members want diverse things out of EAMJA. Thus enhanced engagement of members is our priority. We have walked a long way together having strong leadership and dedicated and persistent talents. We are strong but we still need to grow. Therefore we have much to do as a team. I welcome the challenge and look forward to hearing from you.

At our first meeting, Council Members resolved to continue holding the Council Meetings and AGM, revive the EAMJA'S Journal and ensure the Adoption of the Proposed Gender Policy. I thank the Editorial team under the leadership of Hon. Naomi Sikhoya, our Publicity Secretary and Hon. Angelo Rumisha the Deputy Publicity Secretary for their tireless efforts to ensure the publication of this Journal despite the COVID 19 lockdown.

I also wish to thank all members who have contributed articles for publication in the Journal. Your response has been very encouraging. I hope that you will enjoy reading the articles herein. I however urge other members to continue sending us articles that are not only educative but will be of assistance in mentoring young judicial and non- judicial officers. So kindly look into your professional past and find those pieces of information offered in writing or verbally, by a professor, judge, teacher and parent who illuminated your professional way and made you change your daily practice, or views about our field of activity and share it with us.

Before I pen down may I kindly request all of you to once again go through the Draft Gender Policy and give us your comments.

Stay Safe.

Sophia A.N. Wambura, Judge

PRESIDENT, EAMJA

CALL FOR PAPERS

1. About the Journal

The East African Magistrates' and Judges' Association Journal - EAMJA Journal, is a reputable, referred, international, biannual Journal published twice a year in June and November. EAMJA- Journal is an applied Journal that publishes quality papers from Judges, Magistrates, Academics, Legal practitioners and other professionals in interdisciplinary works of relevance to law and practice in East Africa. Besides, Research Notes, Conference Reports, Viewpoints, Book Reviews and events are also welcome.

2. Manuscript Requirements

2.1 A submission will be considered for publication only on the understanding that it has not been published elsewhere in whole, in part, or in substance; and above all it is submitted exclusively to the EAMJA-JOURNAL.

2.2 Any form of plagiarism detected in any manuscript will disqualify a submission from further consideration.

3. The EAMJA-Journal invites authors to submit manuscripts based on the following:

i. Comment on articles. Manuscripts for comment articles, analysing and commenting on recent cases, legislation and other topical matters must range between 1500 and 2500 words. No footnote shall be allowed in comment articles. References, case citation, legislation and relevant literature should appear in brackets in the main text. All comment on articles should be accompanied by a short abstract not exceeding 50 words. The comment must bear the following headings:-
Title (descriptive)

- Name/Citation of relevant case/legislation/material
- Legal context
- Facts
- Analysis
- Practical significance

ii. Full-length articles. Manuscripts for full-length articles must range between 5000 and 11,000 words (including footnotes). Each submission must be accompanied by an abstract of between 100- 200 words indicating briefly the overall argument of the author. The heading of the abstract should be in italic form and

bolded and indented on the left side below the name of the author. Three key words must be written immediately below the abstract and footnotes must be kept to the minimum.

iii. Book Reviews Book reviews may range between 1500 to 2000 words although review articles could be much longer. The title of any book review must take the following format:- Author/Editor Name, Book Title, Publisher, Year of Publication, ISBN, Number of Pages, Price. Book reviews should be clear and objective and particularly address these points:- • The intended audience of the book • The main argument and objective of the book • The soundness of the argument and the research methods used • The strength and weakness of the book as a scholarly piece of work

iv. While authors shall retain the copyright in their work, they will execute agreements to grant EAMJA-Journal an exclusive licence to publish their work in print and in electronic form and distribute it. Authors should also confirm that they have obtained permission from copyright owners of any third party material included in their work.

4. Submission Guideline

4.1 All manuscripts to EAMJA-Journal must be word-processed, double spaced, with wide margins written using Times New Roman style in an A-4 format. For fonts in the main body text, use font size 11 point, font in the header use font size 12 and in the footnotes, use font size 10.

4.2 The following rules of citation shall be applicable to submissions:-

i. All title headings for the articles, case comments and book reviews should be in capital letters and bolded.

ii. Subtitles should be in Arabic numbers e.g. *1. Introduction* if the article does not have subtitles within the titles and if there are sub titles then it should be e.g.:
3.0 An Overview on Criminal Law
3.1 Tanzania Penal Code
3.2 Criminal Procedure Code

iii. Name of the author should be capitalized in each first letter of the name with a* after the name

iv. Cases shall be cited as: Hon. Godi Akbar H. Akbar v Uganda [2009] UGHC 13. Cases names within the text shall be italicized

v. Books should be cited starting with author's surname followed by initials. The title of a book should follow, edition, with publisher, place of publication, and year of publication, finalised by page number. Example: Cross, N, Criminal Law and Criminal Justice, SAGE Publications Ltd, London, (2010), Page 11.

vi. A chapter in an edited book should be cited in the following format: Author's name followed by title of chapter in italics then the names of editor (s), title of the book, publisher, place and year of publication followed by pages of chapter. Example Mwaikusa, J., The Judiciary and the Public Order in Tanzania in Peter, C.M., *et al*, Fundamental Rights and Freedom in Tanzania, Mkuki na Nyota Publishers, Dar es Salaam, 1998, Page 116

vii. A journal article should be cited starting with the name of the author as in books, followed by article title in italics, then journal's name, year of publication, volume and issue number, followed by page numbers of journal covering the article. Example: Rumisha, A., *Managing Own Judicial Reforms: Tanzania's Judiciary Success Story,* IJA Journal, 2020, Page 350-357

viii. The use of '*op cit*', '*loc cit*', or other such abbreviations, other than '*ibid*' (next to the work cited immediately above) are not acceptable.

ix. Cross-references should be done in either of the following manner 'Rumisha (no. 2 above) p.14' or Rumisha (1996) p. 14.

x. Citation of internet based materials should always indicate the name of the author, tittle of the work, link or webpage and the date when it was accessed.

xi. Quotation marks should always be avoided. Quotation from any source should be in italics, indented both side with 1.5cm. Longer quotations should be avoided, where necessary authors should paraphrase them.

xii. Name (s) of author (s), academic title and/or professional qualifications, main appointments, and email addresses must be footnoted at the first page of the manuscript.

xiii. Information regarding contribution to the Journal shall appear on the first pages of the journal.

xiv. All manuscripts shall first be reviewed. In order to ensure a fair review, authors shall be advised to avoid information within the text that discloses their identity.

xv. All manuscripts shall further be subjected to editorial review for style, arrangement, literary quality and scholarly contents. The Editorial Board reserves the right to reject, edit or shorten any submission approved for publication.

xvi. A decision on every manuscript shall be made in a timely manner and communicated to authors.

4.3 No two manuscripts of the same author shall be published in one journal issue. However a co-authored manuscript may be published alongside a sole authored manuscript.

4.4 Upon publication of their submission, authors will receive one hard copy of the issue of the EAMJA-JOURNAL where their submission appears and/or be allowed to access their published articles electronically.

4.5 Manuscripts must be submitted in word format (soft copies) and all correspondence must be addressed to the Chief Editor, EAMJA JOURNAL in the following address:

The Chief Editor,

East African Magistrates' and Judges' Association,

P.O. Box 3140,

Arusha

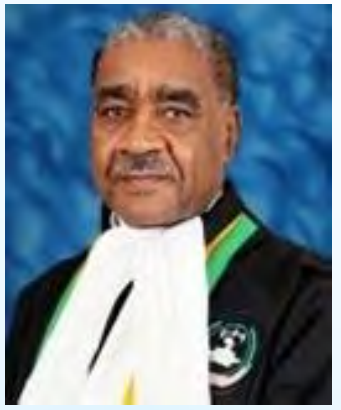
TANZANIA

info@eamja.org

And copy to:

sikhoya_naomi@yahoo.com

MESSAGE OF CONDOLENCE



On April 28, 2020, I learnt with sorrow the sad news of the passing on of Hon. Mr. Justice Augustino S.L. Ramadhani, The Hon. Chief Justice Emeritus of the United Republic of Tanzania who served the United Republic of Tanzania and the Judicial Community for 40 years.

Born in Zanzibar on 28th December 1945, Hon. Mr. Justice Augustino L. Ramadhani, studied in various Primary and Secondary Schools before joining the University of Dar Es Salaam and graduating in 1970 with Bachelor of Laws.

After graduating, he joined the army where he rose to the rank of Brigadier General, but he remained humble and hardworking. He retired from the army to avoid conflict of interest.

In 1978 he took up a role as the Deputy Attorney General in Zanzibar following his appointment by His Excellency Hon. Abdul Jumbe Mwinyi, the then President of Zanzibar.

The same year, he was appointed The Chief Justice of the High Court of Zanzibar. In 1989 he was elevated to the Court of Appeal of the United Republic of Tanzania; the Highest Court of the land.

I personally began working with Hon Mr. Justice Ramadhani when I was a District Registrar of Mbeya Zone in 1999 when he was Chair of the Court Panels. But more closely in 2004 when I was the Senior Deputy Registrar of the Court of Appeal and in 2007 when he was appointed the Chief Justice of the United Republic of Tanzania. By then I was the Registrar of the Court of Appeal. With those few years of working with him I cannot say I knew him because as stated by his Lordship, The Hon Chief Justice of Tanzania, Prof. Ibrahim H. Juma that it is very difficult to describe him. There are a

lot of things he did which most of us never knew. But briefly I can say he was a God fearing person, a believer in the Rule of law and a person who truly loved his Country. I will give a few examples in these.

1. As a God Fearing Person

The God fearing Chief Justice would not only attend Masses but played the Piano in Church. He served the Church in various capacities and assisted it in various Church projects. I also learnt that he was the retired Chair of Council of Joint Religious Bodies His love to serve God and his people was also witnessed when on 28th of December, 2013 he was Ordained as a Priest in Zanzibar. He was indeed a Man of God.

2. A Person who loved His Country

Apart from serving the Military as an Army Officer he humbly took up other appointments and willingly went to the frontline in Uganda while he was a Deputy Attorney General when he could have refused to go.

But again he humbly took up other appointments while serving as a Justice of Appeal, he served in the Electoral Commissions of Zanzibar and Tanzania Mainland and the Warioba,s Commission on amending the Constitution.

After retiring from the bench he was also appointed Chancellor of Iringa University from 2013 up to the date of his passing. Just as he loved teaching and mentoring young people, he was willing to learn from them and his subordinates. He was a teacher and a role model to many of us in various fields.

3. His belief in the Rule of Law

Hon. Mr. Justice Augustino S. L. Ramadhani was not only a believer of the rule of law but also a promoter of the same. This was has been witnessed in Tanzania and at the Regional and Continent level through his court decisions as well as Papers presented. His passion to serve the people saw him serving as the Justice of East African Court of Justice and The **African Court on Human and Peoples' Rights**. It was not surprising when in 2010, he was appointed the President of The African Court on Human and Peoples' Rights

Those who knew Hon. Mr. Justice Augustino S. L. Ramadhani will remember him for his enthusiasm, great sense of humour and cheerfulness. He loved Sports and always made follow ups on the team's performances in SHIMIWI Competitions.

I will personally remember him for his tolerance and flexibility to adapt to change if it is the best way out of solving any problem. His humbleness, thankfulness on anything no matter how small and a person who was quick to seek forgiveness even on behalf of others**. Most of all I will remember him as a person of who maintained the A, B, C and Ds of the values he believed in.** He would not only **Advocated** for the said values but **Believed** and lived according to those values**, committed** himself and was **a Champion** of them by strongly **Defending** the said values**.**

As the Chief Justice of the United Republic of Tanzania, he was the Patron of the East African Magistrates' and Judges' Association. He actively participated in the activities of the Association and meetings. He told me he wanted Tanzania to host the EAMJA AGM before he retired, a dream which was to come true. In 2010, as the Chief Justice of the United Republic of Tanzania, he cordially hosted the EAMJA Annual Conference and Annual General Meeting held at Ngurudoto Hotel in Arusha.

His humility and kindness has left unforgettable memories of the 2010 EAMJA Conference.

The EAMJA Executive Council and all Judges and Magistrates of East Africa grieve with the Judiciary and the Government of the United Republic of Tanzania. We are thinking of all grieving for the loss during these difficult times.

We send our condolences to the Hon. Chief Justice of the United Republic of Tanzania; all serving and retired Chief Justices, Justices, Judges, Registrars, Magistrates and all Members of the Staff whom he worked with in the Region as well as to Members of His Church Community.

To Mama Saada the Wife of the late Hon. Mr. Justice Ramadhani, Daughters Bridgette and Marina; sons Francis and Mathew; grandchildren; friends and relatives, we first say Thank You very much for allowing him to share his precious time with most of us. By sharing his time he gave us the most part of his life while you all missed him. As briefly summarized by Hon Mr. Justice Sylvain ORE, President of the African Court on Human and Peoples Rights said "***He was a blessing.***" It was his family that allowed him to be a blessing to all of us.

We then say Sorry because when he retired and was eager to share most of his time with you he fell sick. You made tireless efforts of taking care of him until God called him. May the Almighty God shower his heavenly blessing to you and keep you in his hands.

Though gone from our sight but as once stated by the Late Dr. Reginald Mengi that "***one will not be remembered for his riches but acts.***" His works will continue to remain in our minds and hearts.

May His Soul Rest in Eternal Peace. Amen.

Sophia A N. Wambura, Judge

PRESIDENT

COVID-19 PANDEMIC AND BEYOND; VIDEO CONFERENCING AS THE PANACEA TO OFF-SITE (EX-SITU) JUSTICE IN KENYA

George Njenga Wakahiu*

Abstract

*This article is written in the wake of **COVID 19** a worldwide airborne pandemic. Kenya's approach to prevent the spread of the disease was to restrict movement of persons in containment measures such as lockdowns. The article examines how **COVID 19** impacts on the delivery of justice in Kenya by exploring how video conferencing is used, to mitigate the effects of **COVID 19**. It explores the infrastructure existing in the Kenya. It recognizes that video conferencing is a new concept and discuses in the context of court within the meaning of the law. It examines the pros, cons and challenges not as leisure, socializing or business meeting platform but it in the context a judicial system. The author argues that there exist situations that Kenya is faced with various other conditions make on-site court sittings entirely impossible and in others, on-site courts sittings waste valuable judicial time. The author discusses the suitability of "courts" video conferencing and recommends measures to facilitate the courts continued use of video conferencing after **COVID 19** pandemic has subsided.*

Key Words: COVID 19/Video conferencing/Courts

1.0 INTRODUCTION

Traditionally courts of law are known to operate from courtrooms as their work place. The core business of these institutions is to dispense justice to litigants who appear either in person or through their legally appointed representatives before the presiding judicial officer. In this way, "court" connotes working within the four corners of a building. In the context of administration of justice, it would mean justice dispensed outside the courtroom or "on-site". However, it is not always the case that justice is dispensed on-site. There are situations where it may be dispensed off-site or ex-situ outside the four corners of a building. This is especially so when courts have to move out to visit scenes of crime, making prison visits to mention matter and now in the wake of COVID-19 pandemic using technological devices to work from home.

COVID-19 has had multiple implications on all the sectors of the society and the justice system has not been spared. Governments have been forced to take diverse measures key among them being discouraging social gatherings. This is a directive that speaks to the core of the court business since many people flock the courtrooms in attendance to their cases. The justice system being a key sector, a raft of measures were put in place to ensure the wheel of justice continues rolling. Among the measures taken was asking the judicial officers to work from their homes. This was to be met by the use of video conferencing or teleconferencing in order for the cases to continue being heard.

This paper puts a keen focus on the use of video conferencing by judicial officers during trials. The paper seeks to answer and indeed answers the question as to the practicability and sufficiency of the use of video conferencing during trials in Kenya and the quality of the justice obtained thereafter. The paper is divided in eight chapters as follows: chapter one gives a brief introductory statement outlining the organization and agenda of the paper, chapter two deals generally with the COVID-19 pandemic and its implications on the administration of justice in Kenya, Chapter three analyses the use of video conferencing by judicial officers during trials in Kenya giving some of its advantages and disadvantages, chapter four dwells on the legal implications for the use of video conferencing during trials in Kenya, chapter five pauses the legal question as to the place of video conferencing within the Kenyan legal system, chapter six touches on the interplay between video conferencing and various constitutional rights guaranteed under the Constitution, chapter seven then contains the concluding remarks and finally chapter eight offers a number of recommendations.

2.0 EMERGENCE OF COVID-19 PANDEMIC

Corona Virus Disease 2019 abbreviated as COVID-19 is an infectious diseases that attacks the respiratory system of human beings. The disease broke out towards the end of the year 2019 from Wuhan, China and spread quickly across nations, continents and the rest of the world. In January 2020, the world health organization (WHO) declared the decease a public health emergency of international concern and hence COVID-19 became a pandemic where all nations were put on alert.

On the 11th March, 2020, the World Health Organization (WHO) characterized the Coronavirus Disease (COVID-19) as a pandemic and called on all countries to take urgent and aggressive measures to combat the pandemic. On 15th March, 2020, Kenya recorded her first case related to the virus. The days that followed did not come with any positive news as the numbers kept on skyrocketing.

2.1 IMMEDIATE IMPLICATIONS OF COVID-19 IN KENYA

Being aware of the new reality that the country had posted the first COVID-19 case and further in response to the WHO call for a harmonious fight against the virus, the Government of Kenya established the National Emergency Response Committee on Coronavirus, which in the interests of the public, has announced various national measures to mitigate the pandemic. On March 15, 2020, the National Council on the Administration of Justice resolved to scale down operations across the entire justice sector in order to reduce interaction with the public as a way of stopping the spread of COVID-19.

This entailed reducing court activities to a minimum with a raft of measures being undertaken by the stakeholders in the Justice sector in order to comply with guidelines issued by the National Emergency Response Committee. Subsequently, the JUDICIARY continued to dispense justice albeit in a scaled-down manner, by increased use of ICT tools such as video conferencing, e-filing and emails to process urgent applications and deliver judgments. This directive was gazetted vide GAZETTE NOTICE NO. 3137 which notified the public of the practice directions for the protection of JUDGES, judicial officers, JUDICIARY staff, other court users and the general public from the risks associated with the global corona virus pandemic. The Objective of the Practice Directions was to attain the following aims:-

(a) The just determination of the proceedings;

(b) The efficient disposal of the business of the Court;

(c) The efficient use of the available judicial and administrative resource.

(d) The timely disposal of proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties; and

(e) The use of suitable technology

Teleconferencing, videoconferencing and other appropriate technologies were to be used where practicable and taking into account the prevailing circumstances, the court may make use of teleconferencing, videoconferencing and other appropriate technologies to dispose of any matter. As the old adage goes and indeed confirmed by the Limitation of Actions Act[1], time waits for no man. The Act[2] provides guidelines on the period of time that certain matters must be filed in a court of law. In essence, if these matters are not filed in a court of law within the period specified, then the people seeking to benefit from the application of the law automatically lose the ability to move court as of right. Further to this, there were orders which had been issued by the courts, some of them *ex pate* which required extension. The abrupt scaling down of courts activities created confusion, disquiet and generated controversy especially amongst advocates who were agitating for the immediate up-scaling of court activities. In the meantime, with the gazetted directions, some courts were able to in keep up with the directions and they started to have court sessions by way of video conferencing.

4.0 VIDEO CONFERENCING AS A PANACEA

4.1 WHAT IS VIDEO CONFERENCING AND HOW IT WORKS

[1] Cap 22, Laws of Kenya
[2] Ibid

Video conferencing is a method of communication which uses the web to connect two people or a group of people via a live video and audio feed in real time. Video conferences are held with the help of video conferencing software or platforms using equipment such as monitors, projectors, laptop and CPU's with webcams plugged in. In this regard, video conferencing fulfils the necessary humanitarian function of virtual interactions without having to meet physically.

4.2 CONDITIONS FOR USE OF VIDEO CONFERENCING TRIALS

It is important to note that the use of video conference as a mode of trial is an exception not the norm. Moreover, not all circumstances are fit for video conference the decision whether or not to use video conference is discretionary. As noted earlier, "The assessment of the type of protection measure that should be accorded to a witness is done on a case-by-case basis taking into account whether the measure; (1) is necessary in light of an objectively justifiable risk; and (2) is proportionate to the rights of the accused". Even in the criminal case where the accused makes his personal appearance in curt impossible, the prosecution has to make an application for the accused's exclusion. For the prosecution of children or witnesses generally, an application has to be made so that the court can consider its merits.

Moreover, in civil cases where evidence has to be taken *de bene esse* or where evidence needs to be taken in camera due to the physical absence, or for the protection of witnesses, a formal application has to be made. It may also be important to note that the court's core business being dispensation of justice should have some inherent power to make orders for video conferencing. For example, where in a case where the suspect is a child offender, the court should *suo motto* be in a position to make an order for video conferring to protect child offender even without the child having to make any application.

As earlier noted, prison mentions are an important activity of the court but the same requires resource in traveling terms of time, escort, security and space in court. The decision to engage prison mentions by way of video conferring should be made by a judicial officer presiding over cases guided by his / her timetable and convenience.

Lastly, any judicial officer who chooses to use video conferencing in a trial should realise that there are no statutes or rules for procedure set to guide video conferencing. Hence such a judicial officer must spell out to the parties the terms of the trial. Everything, ranging from the timings, decorum, list of attendees / participants, recording, muting, chatting, to pronouncements of findings should be directed by the judicial officer hosting the video conference. This should be the case until at least at a time when the use of video conferencing is fully recognised as a formal and usual mode of conducting judicial trials and rules promulgated to guide use of trials via judicial conferencing.

4.3 ADVANTAGES OF USING VIDEO CONFERENCING IN A TRIAL CONTEXT

Video conferencing is becoming an increasingly viable method of communication for businesses, as well as in the public sector. In the context of video conferencing as a mode of conducting a judicial trial, some of the advantages of video conferencing would include:

Firstly, it is more personal and engaging than phone conferencing alone. Although conferences conducted over the phone can allow for effective communication in many situations, video

conferencing is unique in that it allows participants to see each other's body language. For judicial

purposes, the witness demeanour is at the heart of every sound and accurate Judgement as it informs the veracity of the evidence of a witness.

Second it saves time and money since it is a relatively cheap application. Since there is no traveling required fatigue and travelling time and expenses are minimised. Logistical problems such as inability to travel for reasons such as vehicle breakdown, lack of fuel and lack of personnel (for instance for transporting prisoners to court) are solved.

Third when using video conferencing for prison mention purposes, there would be no need for extra security which is ordinarily required while transporting poisoners from the PRISONS to courts. Further, most video conferencing platforms have audio recording and re-play functionalities. It means that a conference can be viewed later for clarity purpose or for participants who will have missed the meeting to know its contents

Finally, most video conferencing platforms also have transcription functionalities so that at the end of a meeting, the speeches by each of the participants can be availed in text form. For judicial purposes, this saves the JUDGES or MAGISTRATEs a lot of time normally spent in jotting notes or writing down the evidence, submissions and other proceedings in a normal court setting.

4.4 DISADVANTAGES AND CHALLENGES IN USING VIDEO CONFERENCING IN A "TRIAL" CONTEXT

Despite all the numerous advantages, video conferencing bares a number of disadvantages. In the context of a judicial trial, video conferencing has the following shortcomings:

First, most people do not seem to differentiate and use for all purposes. Use of video conference for holding court trials during the day and the same system for virtue meetings with friends and relatives in the evenings make it look somehow confusing. When the official forum also becomes the social forum, people tend to underrate the official part of it and think of it more of a social forum which cannot be taken with the same seriousness as an official forum.

Secondly, the use of video conferencing can be less personal than a face-to-face meeting. This gives the notion that there is less privacy, confidentiality and secrecy in using the technology. While video conferencing is generally more personal than a conference that's conducted over the phone, it does have the potential to be less personal than a face-to-face meeting.

Thirdly, video conferencing does not accurately capture the body language of the participants. It goes without saying that most of human understanding of other human beings comes from body language. In judicial proceedings, the demeanour of witness is a key element in the delivery of sound and accurate Judgements. This is because it is from the demeanour of witness that a Judgement of judicial officer can assess the verity of the evidence of a witness. Moreover, in appeal, the appellate courts do not normally have the opportunity to see the demeanour of witness as appellate courts normally deal with issues of law and not facts. The Criminal Procedure Code[3] specifically provides that a judicial officer should ensure he:

[3] Chapter 75, Laws of Kenya, section 199

"...has recorded the evidence of a witness, he must also record such remarks if any) as he thinks material respecting the demeanour of the witness whilst under examination".

This emphasizes that the demeanour of witness is important as it goes to the quality and correctness of a Judgement for an incoming judicial officers and for the appellate court. Even though video conferencing allows people to see each other, it is not always capable of recreating real live communication as between a judicial officer and a witness so that the judicial officer can observe the demeanour of the witness.

Fourth, video conferencing has high potential for technological failure. Many Video Conferencing platforms are developed and based in developed countries especially in the United States of America. Servers for the platforms are based in these developed countries. The distance aspect comes with it issues like lagging images, poor communication and intermittency clear. It is worth noting that for clear, fluent and consistent Video Conferencing one needs high speed internet. It is common for Video Conferencing participants to see messages of low Bandwidth. High speed internet will require extra expenditure.

The connection may not always be perfect, which sometimes lead to blurry image transmissions and the loss of important visual cues. However, even with the perfect connection time lag is inevitable. That is why it is important to set the rules, ethics and ethos of video conferencing. This is especially so because in a court set-up, there are always rules on decorum to be such as the attire to be donned by the judicial officer and lawyers. Ideally, there should be no material departure from the rules of decorum when holding a trial via Video Conferencing than in a conventional court.

Fifth, video conferencing will require training. There is no doubt that there is low level of technology / computer literacy amongst many users ranging from JUDGES, MAGISTRATEs, judicial staff and even lawyers. Although use of Video Conferencing is not rocket science, it is worth noting that it calls for some minimum level of technical knowhow. It must be understood that Video Conferencing is a relatively new concept to many people, not only in the JUDICIARY but also in many other enterprises. Hence, there will be need to train users. The JUDICIARY ought to allocate time, money and human resources to train the employees. However, even after a thorough training, people will need days or even weeks to get used to the new mode of interaction.

Sixth, there are several privacy, confidentiality and insecurity concerns. Perhaps this is the most critical challenge that may have to contend with. It would be very worrying for litigants to imagine that evidence or documents tendered in the course of judicial proceedings would end up in the hands of unintended and unconcerned parties as this would be intrusion of their privacy.

Seventh, in the context of a judicial trial, there can be inability to unlock full potential owing to the extent to which other actors for example, the POLICE, PRISONS and PROBATION DEPARTMENTS. The full potential of using video conferencing as a panacea to a myriad of problems can only be meaningfully realised or unlocked if other players in the administration of justice are also capable of embracing the same technology. Equipping the JUDICIARY and JUDGES and MAGISTRATES alone with laptops, internet connectivity emails and so on and so forth would achieve very little if the POLICE, PRISONS and PROBATION DEPARTMENTS (as the corrective institutions) as well as lawyers are not enabled to use the same technology

It should make a lot of sense to reap the benefits of video conferencing to make prison mentions. At a time like this when POLICE stations are congested with new cases and even where POLICE stations are far from the court's location, there would be a great deal of benefits if courts can be able to take plea by way of video conferencing. In a nutshell, the full benefits and potential of the use of video conferencing would not be realised unless the NCAJ take initiatives to equip all the players in the administration of justice with video conferencing facilities.

Eighth is lack of ethical and code of conduct for use of video conferencing in the context of a judicial trial has not been established. There are no rules, ethics and ethos on issues like who should speak or be seen or be muted at a particular time, decorum for participants. As such a video conference trial can become unruly thereby depriving the court the respect and integrity that is normally associated with it.

Ninth, there are financial and administrative difficulties. Investing in video conferencing as a means for dispensation of off-site justice will inevitably calls for use of finances. Other than the software, and internet connectivity, other hardware requires to be installed to achieve desired performance

(i) Screens / Monitors

(ii) Cables; Internet, HDMI, VING.

(iii) Remote controls

(iv) Webcams

(v) Mounts / Racks

Unfortunately, before purchasing the equipment many questions about technological appropriateness, where the servers are located, how secure a platform is will have to be answered. Notably, the procurement processes in Kenya are slow and stringent and it might take a long time before a video conferencing system is fully established and useful in Kenya

4.5 PRE-EXISTING USE AND INVESTMENTS ON TECHNOLOGY AND TECHNOLOGICAL INFRASTRUCTURE

Kenya's departure from stringent, archaic and unresponsive judicial approaches was enabled by the enactment of Article 159 (2) (d) of the Kenya Constitution 2010. The Article demands that justice be administered without undue regard to procedural technicalities. This provision has been used to preserve inherent powers of the courts where there is no specific provision of the law to fill in procedural lacunas. This section saves the inherent powers of court so that such powers should not be limited in any way by any provision in a given law. The inherent powers of the Court are used to achieve orders necessary for attaining the ends of justice for instance making of orders for off-site court set-ups and prevent abuse of the process of the Court caused by delay such as would be caused by scaling down of courts activities or restriction movements of persons as a measure to prevent the spread of COVID-19, amongst others.

Apart from the constitutional basis, Kenya boasts of a dynamic Civil Procedure Act.[4] Section 1 A of the Act was incorporated into our laws vide Act No. 6 of 2009 to implement the dream of expeditious disposal of cases by introducing into our law 'the overriding objective principle.''

According to this principle, courts are required by law to disregard meaningless and technical procedural requirements in order to ensure the delivery of substantive justice. It facilitates the just, expeditious, proportionate and affordable resolution of disputes.

It can therefore be seen that long before the coming of COVID-19, Kenya already had a constitutional basis and statutory basis for use of technology such as video conferencing. The adaptation, application and embracement of use of technology within the JUDICIARY were first noted in The JUDICIARY TRANSFORMATION FRAMEWORK (JTF) which was the JUDICIARY's blueprint (2013 to 2017). Under the JUDICIARY TRANSFORMATION FRAMEWORK., the Chief Justice established the Integrated Court Systems Committee, to urgently address the question of ICT in the JUDICIARY.

The second blue print of Sustaining the JUDICIARY Transformation came out strongly on the use of ICT. Chapter five of the blueprint expounds on the new JUDICIARY Digital Strategy. One of the focal areas in SUSTAINING JUDICIARY TRANSFORMATION (SJT) is harnessing of ICT to support access to justice. This came out clearly in the State of the Judiciary and the Administration of Justice Annual Report, 2016 – 2017 which disclosed that;

"The key areas of ICT improvement for the JUDICIARY includes E-filing, Transcription Solution, Case Management, Speech to Text Software, e-ticketing and receipting, among others. During the period under review, JUDICIARY developed its ICT Master plan 2017-2022 which is expected to be launched in FY 2017/18. Further, two courts were installed with JUDICIARY Automated Transcription System (JATS); e-filing system was developed for Milimani Commercial Division, Case Management System (CMS) was developed and its prototype is being implemented in Supreme Court, Milimani Commercial and Tax Division as well in Chief MAGISTRATE Court at Milimani. JUDICIARY plans to roll out JATS in in more courts in the FY 2017/18.

On internet connectivity, a total of 29 court stations were installed with WiFi while 76 stations were connected to WAN and WiFi. To support the financial function, JFMIS System was developed and its roll out in most courts will be finalized in 2017/18 FY. Further, 80 per cent of court stations were using mobile money payments"[5]

In addition to the above, the JUDICIARY has operationalized JFMIS, a financial system. The Finance Directorate has made significant steps towards automation of its functions and more specifically the finance and accounts operations at court stations.

The JFMIS system is centralized at headquarters. It allows for remote access and some operations do not require one to access the office to work. Using the JFMIS system, one does not have to physically access the office and perform the tasks required.

Tasks such as expenditure, deposit and revenue management can be performed remotely to a certain extent. The system allows for the issuance and subsequent transmission to the concerned of revenue and deposit receipts. Under expenditure management tasks such as processing of imprests, LSOs or LPOs and payment vouchers can largely be done electronically and hence electronically. With some innovation, litigants can file matters electronically, assessment can be done and payment received. The litigant would then get confirmations electronically from the court station and manual receipts can be issued later.

In addition compliance with monthly statutory financial obligations for returns can be done at home. Here the station accountant just needs to be in the KRA's itax system to be up and running. With the JFMIS system, only a few tasks such as updating the, CRB, Memorandum Cash book are manual and will require physical access to the office.

[4] Chapter 21, Laws of Kenya

[5] SOJAR (2016 – 2017)

5.0 THE LEGAL QUESTION ARISING FROM THE USE OF VIDEO CONFERENCING IN JUDICIAL TRIALS IN KENYA

As seen above, Video Conferencing is a relatively new aspect and more so it is not really a conventional mode of administering justice. It will take a lot of effort from the affected sectors to convince users and consumers to embrace Video Conferencing as a recognized court system. There are multiplicities of issues that arise from the introduction of video conferencing in judicial trials. Various basic rights are trampled upon and the question as to whether video conferencing fits in the description of a "court" within the meaning of the law. Some of the vital legal issues that arise are outlined below;

5.1. WHETHER THE VIDEO CONFERENCING IS A "COURT" WITHIN THE MEANING OF THE LAW

What is the definition a "court"? Does it mean the person holding the office or the physical building? Are certain buildings designated to be court or can a court be constitutionally convened under a tree, in a private house, at the beach or at an animal park or at a zoo? Is a room or at the prison premises a court? Perhaps the word 'Court' is among the most variously defined nouns. The Interpretation and General Provisions Act defines it as, any court of Kenya of competent jurisdiction.

In Kenya, there are many instances where the court has to leave the conventional court room to a different location. Scenes of crime and Site visits are a common practice. In most cases, these sites or scenes are not always enclosed. Most are open air spaces. Prison visits are common phenomena in Kenyan courts. So long as a gazetted JUDGE or MAGISTRATE or KADHIs together with a court assistant, litigants and their legal counsels (optional) are present, the court is duly constituted at those sites or at the prison premises. It follows therefore that a "court" is the duly appointed and gazetted JUDGE, MAGISTRATE or KADHI (with or without support staff) and litigants (with or without their legal counsel)

With all these differences between a Video Conference and a conventional courtroom, the public or litigants may not decipher or conceptualise how a seemingly simple "video show" can be tantamount to a court. They may therefore lose confidence in the proceedings. It is for this reason therefore that we need to define what a "court" is within the meaning of the law

Essentially a Video Conferencing may look different from a conventional courtroom. For instance, it may require some space which is quite different from the conventional courtroom. The Video Conferencing may require a room which has been modified with noise mufflers to avoid echoing which distracts sounds. The room may be much smaller than a conventional courtroom. It may therefore not hold as many members of the public like a conventional courtroom. It may lack feature such as benches which are present in a conventional courtroom. A litigant may be surprised to see only a picture of the JUDGE, MAGISTRATE or KADHI instead of the real person.

At least for MAGISTRATES, the MAGISTRATE's Court Act 2015 has stipulated how trials at the MAGISTRATE's courts should be held. It stipulates that such sittings maybe held at any place within the local jurisdiction of the MAGISTRATE.[5] It further provides that the sitting of a MAGISTRATE court may be held at any other such place convenient to the judicial officer for the purposes of doing specific things like taking down of evidence in specific matters.[6]

It is important to note the aspect of gazettement. As a matter of practice, all JUDGES, MAGISTRATEs, KADHIs and members of tribunal are gazetted. Further, all court buildings are also gazetted. Perhaps lack of gazetting for video conferencing may pose a legal question as to the validity of non-gazetted video conferencing trials

5.2 WHETHER EVIDENCE / PROCEEDINGS TAKEN BY WAY OF VIDEO CONFERENCING SHOULD BE RECOGNIZED AS "VALID PROCEEDINGS AND EVIDENCE" WITHIN THE MEANING OF THE LAW.

It is worth noting that The Evidence Act[7] did not, at the time it was enacted, or even by the time the said cases were determined; make provision for the reception of evidence recorded on video. It follows therefore that an issue of the admissibility of video evidence may be raised in a trial held via video conferencing. That issue was clarified by G.B.M. Kariuki J. when he stated thus:

> *"The absence of specific legislation on video evidence does not, as I have said, outlaw or render inadmissible video evidence. This court has a duty to adopt a commonsense approach in the face of these challenges when faced with questions of admissibility of video evidence notwithstanding that there is absence of regulations to direct the manner in which such evidence should be adduced or admitted. This court has inherent power to do justice in accordance with the law. This is core."*
>
> *……The court has inherent jurisdiction to admit as evidence, material, including video pictures, which is relevant and calculated to place all the facts before it and thus give the correct picture of the case. And JUDGES, in this regard, must be bold spirits, ready to develop the law. They must be valiant in preserving the powers vested in them by the Constitution and the*

[6] Ibid, section 6(2)

[7] Chapter 80, Laws of Kenya

general law, so as to dispense justice which must always be the polar star by which the court must be guided in all litigation. The JUDGE-made law is as much part of our law as the statute law. The former develops out of necessity. It is shaped by changing or novel circumstances. It must respond to and keep pace with advancement in science and technology and societal changes. It cannot be static."[8]

As regards admissibility of evidence taken technologically rather than on a face to face basis, Hon Justice Fred Ochieng in ***LIVINGSTONE MAINA NGARE v REPUBLIC***[9] observed that

"In New Zealand, the Court of Appeal was faced with the issues about whether or not a computer programme in electronic form was a "document"; and also whether or not a computer disk (which was in the form of a hard disk), on which a computer programme was recorded, was also such a document.

Those issues fell for determination in ***R. Vs Misic [2002] 2 LRC 1*** *The court held as follows, at page 9 "it is unarguable that a piece of papyrus containing information, a page of parchment with the same information, a copper plate or a tablet of clay, are all documents. Nor would they be otherwise if the method of notation were English, Morse code or binary symbols. In every case, there is a document because there is a material record of information".*

He emphasised in the same case that the feature, rather than the medium, is definitive. He quoted the United Kingdom case of ***TAYLOR Vs CHIEF CONSTABLE OF CHESIRE***[10] in which the court quoted with approval, from the following words from the judgment of the Court of Appeal in ***R V Maqsud Ali***[11]

"Evidence of things seen through telescopes or binoculars which otherwise could not be picked up by the naked eye have been admitted, and now there are devices for picking up, transmitting, and recording conversations. We can see no difference, in principle, between a tape recording and a photograph. In saying this we must not be taken as saying that such recordings are admissible whatever the circumstances, but it does appear to this court wrong to deny to the law of evidence advantages to be gained by new techniques and new devices, provided the accuracy of the recording can be proved and the voices recorded, properly identified; provided also that the evidence is relevant and otherwise admissible, we are satisfied that a tape recording is admissible in evidence."

[8] Republic vs Kipsigei Cosmas Sigei & Another, (Kakamega) High Court Criminal Case No. 19 Of 2004

[9] (2011)eKLR

[10] (1988)LRC 193, pg 197

[11] (1966) 1 QB 688, pg 701

In view of the above findings in the various cases cited in many commonwealth jurisdictions, it would be correct to conclude that video conferring is as good as on-site or face to face trial

6.0 THE INTERPLAY WITH VARIOUS CONSTITUTIONAL RIGHTS

6.1 THE RIGHT TO PUBLIC / OPEN HEARING (PRINCIPLE OF OPEN JUSTICE)

Natural justice has been described as "fair play in action the principles and procedures which in any particular situation or set of circumstances are right and just and fair." Its rules have been traditionally divided into two parts: Audi alteram partem which refers to the duty to give persons affected by a decision a reasonable opportunity to present their case and *Nemo* judex in cau sa sua debet esse which refers to the duty to reach a decision untainted by bias. Those two rules are the essential characteristics of what is often called natural justice. They are the twin pillars supporting it.

Generally, however, it is imperative that individuals who are affected by administrative decisions or decisions made by statutory bodies be given the opportunity to present their case in some fashion. They are entitled to have decisions affecting their rights, interests, or privileges made using a fair, impartial, and open process which is appropriate to the statutory, institutional, and social context of the decision being made.

In the modern state, the decisions of statutory or administrative bodies can have a more immediate and profound impact on people's lives than the decisions of courts, and public law has since Ridge vs. Baldwin been alive to that fact. Procedural fairness has embedded in it the age-old natural justice requirements that no man is to be a JUDGE in his own cause, no man should be condemned unheard and that justice should not only be done but must also be seen to be done.

Two points can be deciphered form this statement, first, that no man should be condemned unheard and second that in dispensing justice, justice must not only be done but it must also be seen to be done. This means that it must be visible and open to all. In Kenya, there are many instruments including monuments which stress on this position. For example, at the Supreme Court of Kenya Building, there is a century-old monument of as the "Hamilton Monument" That question invokes the symbolism of the bronze statue with a concrete base outside the Supreme Court in Nairobi, depicting a blind, naked boy donning a wig while clutching a fish and peeing into a fountain, whose water continuously sprays the boy from four turtles. The statue, nicknamed 'Onyango' by some judicial officers, is meant to portray justice as 'naked, blind and slippery like a fish.' Justice is also fearless as a child.

Why do I delve into this issue of justice must not only be done but it must be seen to be done? It is because if we are to embrace technology, we must limit this right or the application of this principle. For instance, if we are to embrace virtual meetings or video conferencing and declare them to be valid courts validly and constitutionality constituted then we must be able to dictate who will be the participants. A virtue meeting or video conference cannot be a free-for-all forum. We must be able to keep away or kick out gate crushers from our video conferences or virtual meetings. The starting point must be the importance of the principle of open justice. This has been a thread to be discerned throughout the world.

In determining a legal dispute a Court of law is necessarily applying or interpreting the law hence it is bound by the values and principles of governance one of which is transparency. The Constitution[12] guarantees every person the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.

This position was affirmed by the Court of Appeal when the Court held:

> *"Section 77(9) of the Constitution states that a court or other authority prescribed by law for the determination of the existence or extent of a civil right or obligation, shall be established by law and shall be independent and impartial; and where the proceedings for such a determination are instituted by a person before such a court or other adjudicating authority, the case shall be given a fair hearing, within a reasonable time. Section 77(10) of the Constitution states that except with the agreement of all parties thereto, all proceedings of every court and proceedings for the determination of the existence or extent of any civil right or obligation before any other adjudicating authority, including the announcement of the decision of the court or other authority, shall be held in public. The oath administrator, though still a valued respectable member of the community in some areas, is not a court or an adjudicating authority established by law to determine the existence or extent of any civil right or obligation. The respondent in this appeal instituted his proceedings in the High Court and thereafter he and the appellant, were entitled to a fair hearing (and decision) within a reasonable time and this should have taken place in public. If they wanted their dispute resolved by the oath of administrator, they should not have begun or continued it in a court established by law."*[13]

[12] Constitution of Kenya, 2010 Article 50(1)

[13] M'kiara vs. M'ikiandi [1984] KLR 170

Long before the promulgation of the Kenya Constitution 2010, Kenyan courts had rendered themselves as for the circumstances under which a court of law may hear matters in camera. This was enumerated by the Court of Appeal when it expressed itself as follows:

> *"Subsection 11 of section 77 of the Constitution is an exception to subsection 10 which provides that except with the agreement of all the parties thereto, all proceedings of every court and proceedings for determination of any civil right or obligation before any adjudicating authority shall be in public. Subsection 11 properly construed, has several limbs, each limb independent of the other. Interlocutory proceedings are included in the subsection as an exception to hearing in public. The proceedings in the instant case were interlocutory and the only question is whether the trial JUDGE had the jurisdiction to order for the holding of in camera proceedings.....Kenya, unlike England has a written Constitution with a provision for hearing in camera in specified circumstances and that is the law which the trial JUDGE cited and relied on. English law, too lays down that the High Court in England may hear cases in private where a public trial would defeat the whole subject of the action, and in cases affecting lunatics and wards of the Court..... So although the broad principle in England is that English Courts must administer justice in public, the principle is subject to exceptions and those exceptions and the exceptions in subsection 11 of section 77 of the Constitution, take account at all times, of the fundamental principle that the purpose of courts of justice is to ensure that justice is done. The paramount consideration in applying the material exception must be that without in camera proceedings justice should not be attained, that nothing short of excluding the public and publicity would secure justice. An example is where evidence to be given is of such character that a witness would not give it in public."*[14]

The general rule as to publicity must yield to the paramount duty of the Court to secure that justice is done; and it is open to party in a suit, upon proof that justice cannot be done otherwise, to apply for a hearing in camera, and even for the prohibition of subsequent publication of the proceedings, in exceptional cases. Additionally, in cases where it is shown that administration of justice would be rendered impracticable by the presence of the public, as for example where a party would be reasonably deterred by publicity from seeking relief at the hands of the Court, an order for hearing a matrimonial suit in camera may be lawfully made subject to the law.[15]

[14] Miller Vs. Miller [1988] KLR 555

[15] Constitution of Kenya, 2010 Article 50(8)

It is common knowledge that the determination of a matrimonial dispute ought to be transparent as mandated by law.[16] Under Article 50(1) the parties thereto have a right to have the same decided in a fair and public hearing. However, the court has discretion to direct in appropriate circumstances that certain part of evidence be heard in Camera. That however is an exception to the general rule and ought to be exercised as and when circumstances dictate.

One of the principle of natural justice is that court proceeding unless special circumstances delimited under article 50 (8) have been met, ought as a matter of transparency and integrity of the court process, be conducted in open court. The acknowledgement that proceedings can be conducted in camera is more of an exception than a general rule. It is an exception which ought to be invoked sparingly and in exceptional cases. Good cause must be shown why a standard constitutional requirement should be exempted.

Whereas the court would be willing to appreciate the respondent's concern from the standpoint of an airtime, the court must not lose right of the requirement that to exercise such a far reaching jurisdiction it must be sufficiently convinced that indeed on the material laid before it an in-camera hearing is merited. Mere allegation not backed by evidence would not be sufficient to qualify a basic constitutional requirement that all court proceedings be in open court. In the case of ***Senator Muthama Vs Tanathi WSB & 2 Others*** relied on by the applicant, they stated in the relevant part as follows:

> *"However just like in litigation the court has the discretion to direct in appropriate circumstances that certain parts of evidence be heard in camera"*

What this implies is that the exclusion of information considered sensitive cannot be done in advance. In other words, a court cannot throw a general fact of secrecy before the matter is set for hearing. It is appreciated that the rules of this court and civil litigation generally now requires that pleadings are filed together with supporting documents. This could understandably be the respondent's concern that once the documents or information it considers sensitive are filed without a court order barring their disclosure to third parties who have nothing to do with the suit, they stand exposed to prejudice. This fear however can be resolved by other means that a blanket order on secrecy. The law requiring physical appearance of litigants for the court to see their demeanour and that of witnesses to be determined from the body language.

6.2 THE RIGHT TO BE PRESENT AT THE TRIAL (CASE WHERE PERSONAL ATTENDANCE OF ACCUSED PERSON IMPOSSIBLE)

The Constitution[17] provides that one the safeguards to guarantee and ensure a fair trial for and accused person is the right to be present at his trial. This constitutional grantee is concretised by the Criminal Procedure Code which provides that:

> *"Except as otherwise expressly provided, all evidence taken in a trial under this Code shall be taken in the presence of the accused, or, when his personal attendance has been dispensed with, in the presence of his advocate (if any)"*[18]

The courts have held over and again that this right can be forfeited by the accused if he makes his personal attendance or presence in court impossible though his own conduct. In such situations a video conference trial might be a good solution since the accused parson can be easily guarded and contained within the PRISONS instead of being brought to court where he can cause drama.

6.3 THE RIGHT TO PRIVACY

This right is a complete departure or rather an exception from the general principle of the right to public hearing. It is entrenched in the law for good reasons. Why do we need to worry or delve into this issue of right to privacy in judicial proceedings? It is because if we are to embrace technology, we must understand that unless we are the makers and keepers of the technology involved, we have to rely on some other agent middlemen who can maintain and house our systems. It is worth noting that the way most of the virtual meeting platforms operate is that when holding a virtue meeting or video conference, we only see a host, and participants But in actual fact between the host (party A also called a moderator in virtual meeting parlance) and our participants (Party C) there is a web administrator (Party C).

6.4 PROTECTION OF CHILDREN

There is no doubt that children are vulnerable and their protection should be at the heart of every case involving children whether as victims of crime or as children in conflict with the law. Discussing the importance of protecting children, Hon. Justice Lesiit in ***Republic v Galma Abagaro Shano***[19] had the following say;

> *"Our laws [Constitution, CPC Children Act Witness Protection Act, Victim Protection Act and SOA among many] have provided for various measures for the protection of witnesses generally and have recognized the importance of identifying which could be classified as vulnerable witnesses for specific protective measures as set out in each of these legislations."*

One such measure is having a child testified from a concealed but comfortable position where she or he cannot be demoralised, intimidated

[16] Constitution of Kenya, 2010 Article 10(2)(c)

[17] Article 50 (2) (f)

[18] Criminal Procedure Code, *Section 194*

[19] [2017] eKLR

or be frightened by the presence of the accused. Moreover, a good video conferencing software should be able to create a child friendly virtue background where without the child having to attend a specialised child-friendly court.

6.5 PROTECTION OF WITNESSES

The Witness Protection Act[20] governs the situation where an order for witness protection may be issued. It provides that the Witness Protection Agency may request the courts, in support of the programme, to implement protection measures during court proceedings which measures may include but not be limited to—

(a) Holding in camera or closed sessions;
(b) The use of pseudonyms;
(c) The reduction of identifying information;
(d) The use of video link; or
(e) Employing measures to obscure or distort the identity of the witness."

Under Section 16 of the said Act the High Court has the power to make a witness protection order by taking into consideration certain factors. It states as follows:

"The High Court may make a witness protection order if it is satisfied that-

(a) The person named in the application as a witness-
    (i) was a witness to or has knowledge of an offence and is or has been a witness in criminal proceedings relating to the offence; or
    (ii) is a person who, because of his relationship to or association with a person to whom subparagraph (i) applies, may require protection or other assistance under this Act;
(b) The life or safety of the person may be endangered as a result of his being a witness;
(c) A memorandum of understanding has been entered into by the witness in accordance with section 7; and
(d) the person is likely to comply with the memorandum of understanding."

In determining a case for witness protection, Justice Gikonyo J in *Republic v Doyo Galgalo & 3 others*[21] stated as follows

> *"Therefore protection of witnesses entails inter alia safety of the witness. From the prescriptions of and words used in the Constitution and the law, if the concealing of the identity of a witness is necessary, in a free and democratic society, to protect witnesses or vulnerable persons, it is justifiable measure, and therefore, not a violation of right to fair trial. The prosecution has maintained in these proceedings as well as in the protection proceedings that the very reason for placing these witnesses under protection is to protect them from harm by the accused and the members of their community. This matter is weighty and it is not lost to this court the security situation amongst communities living within the scene of crime. Consequently, protective measures such as those granted here including obscurity of witness identity by testifying inside a protection box fits the exceptional circumstances of this case. The assessment of the type of protection measure that should be accorded to a witness is done on a case-by-case basis taking into account whether the measure; (1) is necessary in light of an objectively justifiable risk; and (2) is proportionate to the rights of the accused. I say so because the accused also have rights including right to know the person making the accusation or testifying against him"*

It should be safe to conclude that in order to obscure or hide the identity of a witness for the witness's security, use of video conferencing can be useful.

6.6 CASES WHERE THE ATTENDANCE WITNESSES CANNOT BE SECURED WITHOUT UNREASONABLE DELAY OR EXPENSE

In *Livingstone Maina Ngare V Republic*[22] two witnesses were named as GAUTAMA SENGUPTA and GLENN WERE. Both of them are domiciled in the United States of America. The two witnesses had expressed fears for their safety and security, if they were compelled to come to Kenya, to give evidence in the criminal case. They informed the prosecution that they had received explicit threats, relative to the criminal case. That prompted the prosecution to request the trial court to re-locate to the United States of America, for the purposes of receiving the evidence of the two witnesses. The Hon. the Chief Justice of the Republic of Kenya caused the publication of a Gazette Notice designating the Embassy of the Republic of Kenya in Washington D.C, a court, for the purposes of receiving the evidence of the 2 witnesses. However, as the respondent herein raised a strong objection to that development, the trial court did not relocate to Washington D.C.

Hon. Fred Ochieng in determining this case rendered himself thus;

> *"The instruments for video conferencing in this case would be set up within the trial court in Nairobi, and at the Embassy of Kenya in Washington D.C. A judicial officer would be commissioned to be present in Washington D.C. to ensure that the witnesses are present, and*

[20] Section 4 (3)

[21] (2019) eKLR

[22] [2011] eKLR

that none of the said witnesses was coached, harassed or otherwise interfered with. The judicial officer would administer the oath to the witness before he commenced his testimony".

It is therefore clear hate where a witness is far away and his or her attendance cannot be secured without unreasonable delay or expenses, trial by way of video conferencing may be suitable.

6.7 EVIDENCE DE BENE ESSE

In Kenya the taking of evidence *de bene esse* is governed by Order 18 of the Civil Procedure Rules. Such evidence is allowed to be heard on a priority basis in two circumstances. The first is where a witness is about to leave the jurisdiction of the Court. The second is where sufficient cause is shown to the satisfaction of the Court.

The material provisions of Order 18 Rule 9 of the Civil Procedure Rules under which the instant application was filed provide as follows:

9 (1) "Where a witness is about to leave the jurisdiction of the court or other sufficient cause is shown to the satisfaction of the court why his evidence should be taken immediately, the court may, upon application of any party or of the witness, at any time after institution of the suit; take the evidence of such witness in the manner hereinbefore provided.

(2) Where such evidence is not taken forthwith and in the presence of the parties, such notice as the court thinks sufficient, of the day fixed for the examination, shall be given to the parties.

(3) The evidence so taken shall be signed by the JUDGE and shall be evidence in the suit".

In such cases, all that a party needs to do is to show sufficient cause to the satisfaction of the court that his evidence should be taken immediately without waiting for the hearing of the suit in the normal manner. In most cases litigants or witnesses whose evidence is sought to be taken *de bene esse* normally have some medical conditions, sometimes even terminal which hamper or impair their movements. At times, such witness may even be hospitalised. In some circumstances illness or injury may deform a witness so much that physical presence in court would embarrass or demoralise the witness or the parties. With a video conference, such physical appearances can be "hidden" or controlled to avoid such embarrassment or demoralisation. In such cases, taking evidence *de bene esse* by way of video conferencing would be a suitable solution

6.8 FAMILY AND PRIVATE LAW CASES

It is common knowledge that family law matters such as divorce, burial rights and distribution of properties (matrimonial and estates) normally involve issues and facts which are only unique to members of the family or those who may be having special interest in the particular family matter. These are suitable cases for being heard in secrecy and hence video conferencing may be a good approach to these kinds of cases where privacy can be easily achieved.

6.9 PRISON MENTIONS

Perhaps the single activity will be the best beneficiary of a video conferencing system even after the COVID 19 pandemic is over. The prison mention activity is meant to help the court keep a close eye to the inmates.

It is during the prison mention that interlocutory orders in criminal cases are issued. They range from ordering for the prisoner to be taken to hospital, the shaving of remand prisoners (because shaving might change the physical appearance of a remand prisoner and crate difficulties in identification by the victim). Orders for bond terms review are also made at during PRISONS visits. In many cases, it is during prison mentions that some accused persons take the opportunity to change plea thereby speeding up the wheels of justice.

7.0 OPPORTUNITIES IN CIVIL CASES

There may be records on how many civil or criminal cases are disposed of in terms of rulings and judgments at any given moment by each court. However, there has been no formal research on how an advocate's day in court is spent. One observes at a glance that especially in civil cases, an advocate's time in court is mostly spent on waiting for their turns in mentions, applications, hearings, and reading of judgments and rulings. The purposes of mentions range from recording consents, confirming compliance to highlighting submissions.

Unlike in criminal cases where the Criminal Procedure Code requiring the presence of the accused when delivering judgments, there is nowhere in the Civil Procedure Act where a litigant's personal attendance is mandatory. In practice, while dealing with the mentions, applications and submissions aforesaid, only the litigants or their advocates address the court, mostly on documents which are already in the file. A court can only deal with one file at a time. It meaning makes sense to conduct the mentions, applications and submissions by way of Video Conferencing so that advocates can be doing other work in their offices instead of waiting for their turns in congested court rooms.

7.1 CONCLUSION

Whereas it is clear from the above reading that the Kenyan JUDICIARY has put in place adequate financial and administrative measures and has made substantial progress in technological investments, it should be borne in mind that finance and administration are not the core business of the courts. They are

only supportive and facilitative inputs. The courts core business of dispensing justice which is the exclusive domain of JUDGES, MAGISTRATEs and KADHIs as well as other quasi-judicial tribunals under the JSC. Even as workers in the administration and finance departments are able to work off-site, it is important to explore what measures are in place for judicial officers to wok remotely off-site.

As discussed above, the Kenyan Judicial system has already invested heavily in terms of networks, computers, laptops and software. There is adequate equipment and facilities and Kenya is good to go tech with a bit of adoptions or adaptations by tapping into the existing infrastructure. As an immediate or short term measure to mitigate the effect of COVID 19, there has been a litany of practice directions and guideline issue by National Council of Administration of Justice (NCAJ) the umbrella body which is chaired by the Chief Justice of the Republic of Kenya which were intended to guide on how the affairs pertaining to the administration of justice would be run (that is the court, POLICE, prisons, PROBATION department, children DEPARTMENT and legal fraternity).

The wheels of justice must not come to a halt since absolute halting could easily lead to breakdown of the rule of law. There are general challenges which need to be overcome to enable them realise the full potential and benefit of ICT. COVID 19 and other outbreaks or calamities could be mitigated by use of appropriate technology. Some areas of dispensation of justice where privacy of parties or witnesses is concerned (such as in children cases, divorce matters and witness protection cases and prison mentions and mentions in civil cases are best suited for video conferencing both now and post COVID 19 pandemic.

7.2 RECOMMENDATIONS

As has been discussed, there are by situations where video conferencing has been used or can be used even after the COVID 19 pandemic threat is over. However, the JUDICIARY or the NCAJ ought to implement certain measures to unlock and realize the full potential of the technology. Some of these are;

1. Increase the use of Video Conferencing and bar benches as well as other public fora to sensitize public use of Video Conferencing and embrace it as a judicially recognized mode of Administration. This will mean that the CUCs and Bar Bench meetings will be required to start using video conferencing in their meetings. POLICE stations will need to do comments via Video Conferencing Courts correctional institutions (probations and prisons) will need to be connected via Video Conferencing. In short, the whole network of all players in the Administration of will need to use video conferencing.
2. Make formal contracts with platform / software developers. This may cost but it will prevent many flaws and shortcomings. With such arrangements, issues like privacy, confidentiality, security, consistency and connectivity will be solved. With formal contracts between the JUDICIARY and software developers, the JUDICIARY can spell out terms which can bind both parties, with penal consequences in case of breach of the terms of the contract.
3. Install Video Conferencing facilities in all establishments. As earlier notes, the Kenyan JUDICIARY already has most of the facilities required for effective Video Conferencing. Notably JUDGES, MAGISTRATES, KADHIS and judicial staff have Laptops. Connectivity via WiFi is already in place. However, additional ICT hardware needs to be installed so that video conferencing can be fully operational.
4. Train JUDGES and judicial officers on how to use the video conferencing technology.

Although video conferencing is not rocket science, it requires a measure of technological understanding which many judicial officers may not be familiar with. Hence there will be need to train JUDGES, MAGISTRATES and KADHIS on the use of video conferencing technology.

5. Formulate rules of practice in practice notes and guidelines especially rules such as, dress code, court sitting arrangements, time for commencement and termination of Court proceedings.

LEGISLATING HEALTH AND HUMAN RIGHTS IN THE FACE OF PANDEMIC: LESSONS FROM UGANDA'S COVID-19 EXPERIENCE

Mbabazi Edith Mary*

Abstract

The outbreak of pandemics presents significant challenges to states in their search for appropriate response. This article highlights the challenges faced by Uganda while implementing the measures adopted in response to COVID-19. Notable among these is: the adoption of measures that exceed the acceptable limits of encroachment on rights; misinterpretation of the measures leading to abuse of rights in the course of their enforcement; excessive conduct and impute of the security personnel when enforcing the measures, as well as the measures resulting into violation of other rights such as the right to health and food in the absence of viable alternatives.

Research on the aforementioned topic was carried out through the collection of secondary data, reviews of the applicable legislation, and reviews of existing literature to understand the issues surrounding the implementation of social distancing measures and how best they can be implemented.

Some reports reveal that social distancing, if well observed, helps in slowing the transmission of the COVID-19 infection. However, the implementation has been widely criticized for being harsh and unrealistic, which the government needs to address. These criticisms include; lack of a mechanism to enforce social distancing, which has resulted in arbitrary arrests, failing to access court services, quarantine beyond the fourteen days recommended by the Ministry of Health, curfew leading to impounding of motorcycles, lack of access to medical facilities, lack of clear guidance on how to handle vulnerable groups like pregnant women, the refugees, and prisoners during the COVID-19 pandemic outbreak. It is also argued that imposition of the restrictions on truck drivers could impact the movement of essential goods around the East African region said, "Josh Sandler, and Loris' Chief Executive.[23]

The writer recommends that these challenges be addressed through clear legislation, mass education, and communication.

* Magistrate Grade 1, Grade 1, Courts of Judicature, Uganda mbabazi43@gmail.com.

1.0 Introduction

Health rights is an integral part of the rights to Human rights and it the obligation of member states to ensure that the rights are protected. It is found the Constitution of the World Health Organisation.[24] Since 2nd January 2020, the three levels of the World Health Organisation (China Country Office, Regional Office for the Western Pacific and Headquarters) have been working together to respond to the COVID-19 outbreak. On 30 January, the World Health Organisation (WHO) declared the outbreak a Public Health Emergency of International Concern (PHEIC)[25]. On March 11, 2020, the World Health Organization (WHO) declared that an outbreak of the viral disease COVID-19 – first identified in December 2019 in Wuhan, China – had reached the level of a global pandemic. Citing concerns of "the alarming levels of spread and severity," the current statistics reveal that, globally the total of confirmed cases has surpassed 3,000,000, confirmed dead are 207,973 people.[26] As a result the WHO called on all governments to take urgent and aggressive action, to stop the spread of the virus[27]. Subsequently, the Government of Uganda issued orders and guidelines to fight the spreading of the infection including; social distancing, quarantine, curfew, banning of public and private transport, closure of all schools, and other learning centres.[28]

[23] Neha Wadeka, "East African Truck Drivers Carrying essential goods across – boarder may also be transmitting COVID-19

[24] WHO, the Constitution, 1948.

[25] WHO-Western pacific. Coronavirus disease (COVID-19) outbreak. Retrieved from https://www.who.int/westernpacific/emergencies/covid-19 on 21st April, 2020.

[26] WHO, *Corona Virus disease (COVID-19),"* Situation Report"29th April, 2019 accessed who. int./doc on 30th April, 2020.

[27] HRW. Human Rights Dimensions of COVID-19 Response. Retrieved from

[28] https://www.hrw.org/news/2020/03/19/human-rights-dimensions-covid-19-response on 21st April, 2020.
MOH, *Guidelines on Institutions Quarantine for COVID-19* retrieved from www.health,com.og/covid-19 on 17th April, 2020.

We applaud, the Government's response to contain, the spread of the Pandemic COVID-19, to ensure the members of the public are protected, however some critics have raised, concerns regarding enforcement of the social distancing measures, as being excessive and unreasonable.[29].

The writer got interested in examining the legal preparedness of the State, in enforcing social distancing, quarantine, and curfew among others to lower the spread of the pandemic COVID-19 in Uganda.

The article is divided into four parts namely: **part one** introduction, **part two** background of the study, **part three** legal basis of enforcing health measures, **part four** Lessons from Uganda's COVIDF-19 experience and **part five** conclusions and recommendations.

2.0 BACKGROUND

On the 31st December 2019, the World Health Organisation, China Country office, received a notice of a cluster of pneumonia cases of unknown aetiology in the Chinese city of Wuhan, Hubei Province[30] later it was discovered by health experts that patients exhibiting severe acute respiratory syndrome was caused by Corona Virus 2019(COVID-19). The virus has now spread almost too all member states of WHO. Since then, the world grapples with the coronavirus outbreak, "social distancing" has become the slogan of these strange times. Instead of rushing to the hospital, authorities are advising social distancing, purposely to increase the physical space between people to prevent the spread of the infection by COVID-19. In this current crisis, face masks have become a fashion accessory, which signals, 'stay away'[31].

The term "Social Distancing" refers to the efforts, that aim, through a variety of means, to decrease or interrupt transmission of COVID-19 in a population or group by minimizing physical contact between the potentially infected individuals and the healthy individuals or between groups with high rates of transmission and population groups with no or low level of transmission.[32] Community-level social distancing measures are needed in parallel with containment efforts for example contact tracing and other types of social distancing measures[33].

The canters for disease control and prevention define social distancing as "remaining out of congregated settings, avoiding mass gatherings and maintaining a distance approximately six feet or two meters from the others when possible[34]. The social distancing measures may include, self-isolation, this means staying put or isolating from others because there is a reasonable probability that you have been exposed to someone with a virus. Another form of social distancing is mandatory quarantine, which occurs when the government orders a person to stay in one place, for instance, a home or a facility for fourteen days. (Janet Olszewski, 2010).[35]

When the influenza pandemic broke out in the United States during the period between 1918 and 1919, about 50 to 100 million people died, at the time when the global population was still small. It was one of the deadliest pandemics in human history. The Government of US employed social distancing at that time and the reports revealed that early, sustained, and layered implementation of social distancing lowered the overall and pick attack rates of the viral disease compared to other jurisdictions, were social distancing was not employed[36].

Following this historical background, in 2005 the president released the *National Strategy for pandemic influenza,* which was followed in 2006 by the detailed *National Strategy for Pandemic Influenza Implementation Plan* from the US homeland Security Council **(HSC), (Janet Olszewski, et, al, 2010)** to be used in future[37].

The year 2020 has been struck by the pandemic COVID-19, indeed as part of the plan to address the pandemic, US Centre for Disease Control, was directed to assess the sufficiency of the existing legal authorities to implement such social distancing measures, such as suspension of public gatherings, quarantine, curfew among others, as well as their legal capacity to prescribe medicine on a mass or community-wide basis.

Following this massive spread of the pandemic, most countries like the UK, Germany, and Scotland have responded by enforcing social distancing, and Uganda has also followed suit. The president announced 13 measures to wit; closure of all leaning institutions, suspended prayers in churches and mosque, mandatory quarantine for those returning from outside countries, burials and weddings were limited to family members, private and public transport were burned. The president also emphasised about nutrition to strengthen the immune system.[38] However, following the enforcement of social distancing, some concerns have been raised about human rights. For example, some critics argue that the interventions have greatly been disruptive on a large scale and the economy has slowed down. Take for example, it is being argued that the restrictions imposed by the Government, on truck drivers could be detrimental to East African

[29] The Independent, "*Social Distancing Archives,* News 18th April 2020

[30] WHO, *"Report of WHO-Joint China-mission on corona Virus Disease 2019(COVID-19) WHO* Report16-*24 February, 2020?*

[31] Robert J. Glass, Laura M. Glass and J. H Jason Min, "Targeted Social Distancing Designs for pandemic influenza" 2006.

[32] ECDC, "considerations relating to social distancing measures in response to COVID-19"Technical Report23 March 2020.

[33] Ibid.

[34] Janet Olszewski, Social Distancing Law Assessment, July 2010. Retrieved from https://www.ncbi. On 13th April, 2019.

[35] Janet Olszewski, the Social Distancing Law assessment Template 2010.

[36] Janet Olszewski, et, al, 2010).

[37] Ben Suleiman IJIE, "Policy development and implementation in Nigeria federal System" October 2018.

[38] Kenneth Muhangi, *"Uganda's COVID-19 fight, defying the Odds to contain the Global pandemic*, New Vision, Tuesday May, 5ht 20202.

economies, considering the fact that Uganda is a land locked Country, depends on trucks from the ports of Kenya and Tanzania. It could become catastrophic if essential goods cannot move from one place to another.[39] Some argue, human contact in refugee camps and slams is inevitable and that besides, they can't afford soap Jambiel Mani Jambiel aged 44 years old, South Sudanese living in Uganda's Kiryadongo refugee settlement is worried because the physical distance is impossible and that the food and water are likely to be scarce[40]. Patience Atuhaire on BBC described life in mandatory quarantine as chaotic, that people who had arrived from different countries, had been bundled together in one venue, (BBC, 2020)[41]. That the most pressing challenge was that of quarantine beyond the 14 days recommended. That because of the uncertainty about the period for quarantine, she became stressed and anxious[42]. John Kungu chairman for 29 years, resident of Namuwongo, lamented that the biggest challenge in Namuwongo[43]was that not everyone was convinced of the dangers of COVID-19. So they keep moving around without fear in search of food, health facilities. For example, Sam Katongole a resident of Kazo Central, said that he was not afraid, because his blood was strong and therefore, was not frightened about the virus. His biggest challenge, however, was his lack of food to eat[44]. A businessman in Kiseka also indicated that he was not worried whatsoever about the virus, save for fear that his company was going to collapse. Human rights activists argued that they are no guidelines to manage special cases, such as pregnant mothers, taxi drivers are having difficulties in keeping their homes running, for example, Hasan Abigira sent his family of four to the village to cope with the lockdown,[45] the president of Uganda Law society also echoed the same concern about the directives, which did not put into consideration, the rights of inmates."[46] It is also being argued that Ugandan forces have consistently been implicated in gross human rights abuses, including arbitrary arrests, extortion, illegal detention, and use of excessive force[47]. Some critics argued that arrests and detention at the time, when social distancing is being implemented, did not make any sense since it defeated the purpose of social distancing. That first of all suspects are bundled together giving way for the virus to spread[48].

[39] Neha Wadekar, "East African Drivers Carring Essential Goods across – boarder may also be transmitting COVID-19" QUARTZ AFRICA April 2020

[40] Deborah Leter and Gat Kouth, "Fears in Uganda over Corona Virus Outbreak in Refugee Settlements. Retrieved from AL Jazeera.com/ News/ accessed on 21/4/2020.

[41] BBC.com, Report by Atuhaire Sheila on BBC, 12th April, 2020.

[42] Ibid.

[43] Interview held at Namwongo on 13th April 2020.

[44] BBC News retrieved on 16/4/2020.

[45] Hamza Kyeyune , "Shut down in Uganda over COVID-19 hits poor heard" retrieved aa.com. tr.com 21st April, 2020

[46] Simon Peter Kinobe, "latest twits from Uganda Law Society, security agents advised to arrest but not to assault or those who fail to follow the president's guidelines. Retrieved from twiter. com/Uganda law society21/4/2020.

[47] Ibid.

[48] Ibid.

3.0 Legal basis for enforcing measures:

The government derives its mandate from the **International human rights law,** which guarantees everyone, the right to the highest attainable standards of health and it is the obligation of the Government[49], to take steps to prevent the threats to public health and to provide medical care to those who need it. Human rights law also recognizes that in the context of serious public health threats and emergencies threatening the life of the nation, restrictions on some rights can be justified, when they have the legal basis, are strictly necessary for public health threats, and emergencies threatening the life of the nation, restrictions on some rights can be justified[50], when they have a legal basis are strictly necessary. The scale and severity of the COVID-19 pandemic rise to the level of a public health threat that justifies restriction on certain rights, such as those that result from the imposition of quarantine or isolation limiting freedom of movement. It is also suggested that for such measures to be effective, careful attention has to be drawn to human rights such as non-discrimination, and values such as transparency and respect for human rights are embraced to be able to foster an effective response amidst the turmoil and disruption that inevitably results in times of crisis, and limit the harm that can arise from the imposition of overly broad measures that do not meet the above criteria.[51]

Since 11th March 2020. The Government has been working tirelessly to avert the spread of the pandemic COVID-19. following the report of the first case of Pandemic, the government responded by issuing strategic policies, action plans, among others issued in line with the Constitution of Republic of Uganda 1995, which require the government of Uganda to take-up reasonable measures necessary to ensure that the spread of the Pandemic COVID-19 is averted[52].

In light of the risk posed by the deadly pandemic COVID-19, the Public Health Sector has the mandate to protect, control, and prevent the spread of the infections caused by the Pandemic COVID-19. The said mandate is derived from International Human Rights law as elaborated below.

3.1 The legal framework for health rights is found under **Article 25 of the Universal Declaration (UDHR) 1948** provides that[53], "Everyone is entitled to a high standard of living adequate for their health and wellbeing of himself and family including food, housing, clothing, medical

[49] The Constitution of the World Health Organisation, adopted by the international Conference, New York 19th-22nd June, 1946, entered into force on the 7th April, 1948.

[50] Ibid

[51] HRW, "Human Rights Dimensions of COVID-19, 2020. Retrieved from www.gherson.com on 19/4/2020.

[52] The Constitution of the Republic Of Uganda 1995.

[53] Article 25, UDHR1948.

care, and social services, the right to security in case of employment, sickness, disability, widowhood, old age, or other lack of livelihood in the circumstances beyond his or her control. The above provision covers a comprehensive right to health. It sets the pace for many others[54].

3.2 The World Health Organisation Constitution (1979) provides for the right to health[55]. The preamble of the fore mentioned constitution provides that; "the enjoyment of the highest attainable standard to be one of the fundamental rights of every human being."

3.3 The International Covenant on Economic, Social, and Cultural Rights (ICESCR) 1948. Article 12 requires the Government to recognize the right of everyone to the highest, attainable standard, of physical and mental health[56]. Article12(2)d further states that; "the state parties to the present Covenant shall take steps to achieve the full realization of these rights, shall include among others, the creation of conditions which would assure medical services and medical attention in the event of sickness.

3.4 The international convention on the elimination of all forms of discrimination against women in 1979. Under article 12(e) (1V) states that parties shall take appropriate measures to eliminate discrimination against women in the field of healthcare to ensure, based on equality between men and women, access to healthcare services including those related to family planning[57]. This is in line with social distancing employed to eliminate or lower down the infections.

3.5 The African Charter on human and people's rights 1981[58] provides that, "the state has an obligation under **Article1** to take appropriate measures to curb down the infection of coronavirus from spread to a larger part of the population[59].

3.6 The African Charter on the rights and welfare of the children[60] provides under article 24[61] every child to enjoy the best attainable state of physical, spiritual this includes the provision of nutritional food and safe drinking water as well as adequate healthcare. In line with this, the President has been supporting the poor across the country by giving food and other necessities to enable them comply with the guidelines.

3.7 The protocol to the African charter on human and people's rights on the rights of persons with disabilities in Africa 2019. The Protocol under **Article 17, [62]** provides that "every person with a disability has a right to attain the highest attainable standard of health" this provision requires this government to develop strategies/ legislations to ensure protection during the outbreak of the viral disease COVID-19.

3.8 The East African treaty Article 188, requires every member state within the East African Region to ensure the efficiency of health care services. It is the responsibility of the East African leadership to join hands to ensure its people are protected. They should share knowledge and good practices used in the prevention of the outbreak pandemic COVID-19.

3.9 At the domestic level, **the Constitution of the Republic of Uganda, particularly Article 22 of** the Constitution is also relevant in the circumstances of the deadly disease COVID-19, on the protection of the right to life, health, and safety[63]. In light of the danger that COVID-19 poses on members of the public, it threatens the right to life, health, and safety. The government has, therefore, the mandate to promote human rights requirements by providing health facilities, mass prescription of drugs on the community-wide scale.

Furthermore, **Article 43 (1) of the 1995 Constitution of the Republic** of Uganda, provides a window for limitation of the rights thereby stipulated for example to ensure protection of the public interest. One of the public interest ends for which the rights provided for under Uganda's Constitution may be limited is the protection of health of the general public especially in the face of pandemics such as COVID-19. This is because of the nature of the measures required in order to make appropriate responses.[64]

In the particular case of COVID-19, some of the most critical protective measures highlighted by WHO is for the public to maintain a social distance of at least 1 metre with anyone with signs of the disease.[65] Also emphasized have been the lockdowns in order to deny the disease the requisite fulcrum for reproduction.[66]

[54] Article 25 of the Universal Declaration (UDHR) 1948.
[55] The Constitution of the World Health Organisation, adopted by the international Conference, New York 19th-22nd June, 1946, entered into force on the 7th April, 1948.
[56] Article 12 (ICESCR) 1979.
[57] Ibid.
[58] Article 16, (ACHPR) 1981.
[59] Ibid.
[60] African charter on the rights and welfare of the children, 1990
[61] Ibid.
[62] Article 17, the protocol to the African Charter on Human and Peoples Rights, 2019.
[63] Article 22 of the Constitution of the Republic of Uganda, 1999.
[64] See, for example, Ben Twinomugisha, COVID-19 & the Right to Health in Uganda: Analysis of the national response and its implications for the realisation of the right to health, CEHURD Technical Brief Series, April 2020, page 2.
[65] See, for instance, WHO, Coronavirus disease (COVID-19) advice for the public, retrieved from https://www.who.int/emergencies/diseases/novel-coronavirus-2019/advice-for-public (last accessed on April 26, 2020).
[66] See for instance, Imperial College COVID-19 Response team, Report 9: Impact of non-pharmaceutical interventions (NPI) to reduce COVID-19 mortality and healthcare demands, 2020 retrieved from https://www.imperial.ac.uk/media/imperial-college/medicine/sph/ide/

In view of a general lack of a sufficient culture of 'discipline' among our people, and especially so if the threat is not yet perceived to be real, there is a likelihood of ignoring useful guidance where its implementation is to be offered voluntarily. This is even much more so in highly poor and communal societies such as Uganda with largely disorganised settings in terms of crowded public transport systems, food markets, worship centres *etcetera*. Indeed, the President of Uganda has himself highlighted the 'indiscipline of our people' as one of the major challenges to the fight ageing COVID-19.

However, a clarification should immediately follow; ssome people – perhaps most – engage in these alleged acts of indiscipline not because of failure to try to comply. A number of the continued movements, for example, are linked to survival as people try to look for food especially from the markets and those who work there. Indeed, during a brief interview with a local council leader in Kazo Central, a Kampala suburb, we learnt that women market vendors were pleading with the authorities to allow them continue their business in a manner that seemed contra to the adopted standard operating procedure of reducing their number in the market and instead working on alternate days.[67] Asked 'why?' this official noted that most of these women are single mothers who were determined to risk their lives in a crowded market environment in order to protect their children from starving.[68]

Under such circumstances, and mindful of the state's duty to protect lives and health of people within her jurisdiction from COVID-19[69], the government of Uganda has since issued a total of 6 regulations prescribing a range of measures. …

Furthermore**,** the Ministry of Health has powers under the **Public Health Act Cap 281**[70] to issue rules and orders to combat the spread of COVID-19. Subsequently SI 45/2020 the Public Health (Notification of COVID-19) Order. By this law, the Minister has powers to make rules, quarantine, inspect premises and disinfect them to combat the spread of the disease.[71] **The Public Health (Prohibition of entry in Uganda) Order, 2020.** The minister has powers to prevent the entry of any person, animal, or article into Uganda through any of its borders except aircraft and vehicles conveying cargo into the country. **The Public Health (prevention of COVID-19) (Requirements and conditions of entry into Uganda) order, 2020**[72]**.**

Provides that mandatory examinations of all persons entering Uganda, mandatory isolation for a designated place for people found infected and those suspected to be sick, categorizing persons based on their countries of departure and transit. The law further creates provisions for offenses committed due to failure to comply with regulations by vehicle operators[73]. The order remains in force until notification of its expiry. **The Public Health (Control of COVID-19)**[74] **Rules impose measures for the control and prevention of COVID-19** [75]provides for the rule in line with prevention and control refer to the rules but briefly, restrictions include; Restrictions on public gathering, closure of schools and institutions of higher learning, churches, and mosques among others.

Following the above analysis, it is very clear that the government has a legal basis for intervening in fighting the pandemic. Although they are human rights abuses being cited, they can be addressed through other interventions.

4.0 Lessons learnt from Uganda (COVID-19)

Uganda's experience in this regard generates a number, of important lessons that can be picked as part of future responses to pandemics as highlighted below:

a) Early and decisive response to pandemics is one of the surest ways of dealing with pandemics especially those that are contagious. Important to note in this regard is the fact that Uganda locked down some of the concentrated places such as Schools before confirmation of the first case of COVID-19. More drastic measures followed as deemed appropriate in view, of the numbers and dynamics of the cases with the effect that her infection rates have remained low to date. However, countries that delayed responses ended being overwhelmed leading to fatalities as the infections outweighed the available facilities.

b) States should always be careful when choosing the measures to be adopted in response to pandemics by among others considering their legality and cost for human rights and other constitutional tenets. More stringent measures such as the declaration of situations of emergency should not be preferred over other available and less restrictive options.

c) States must invest in developing more health infrastructures that can accommodate a reasonable number of patients for proper care during pandemics.

d) Uganda has been at the fore front in spreading the gospel about

gida-fellowships/Imperial-College-COVID19-NPI-modelling-16-03-2020.pdf (last accessed on April 26, 2020).

[67] Interview with the Local Council leader of Kazo Central, Kawempe Division, Kampala, on April 20, 2020.

[68] *Ibid.*

[69] WHO, International Health Regulations (IHR), 2005, Articles 3, 4 & 5.

[70] The Public Health Act Cap 281 Laws of Uganda. (see section 11 of the PHA 281)

[71] The Public Health (Notification of COVID-19) Order2020.

[72] Public Health (prevention of COVID-19) (Requirements and conditions of entry into Uganda) order, 2020 See section 11 of the Public Act Cap 281 laws of Uganda. See also Philip Karugaba, "the Ministry of Health Uganda issues statutory instruments to combat COVID-19.20th March 2020 retrieved from ulii.org.

[73] Ibid.

[74] The Public Health (Control of COVID-19) Rules SI 54/2020 imposes measures for the control and prevention of COVID-19 download from ULII.

[75] The Public Health (Control of COVID-19) Rules imposes measures for the control and prevention of COVID-19.

the killer COVID-19. As a result Ugandans have embraced the good practice of self-isolation, washing hands continuously, and keeping a distance among others. It is a good example to adequately sensitize the masses about the measures adopted in response, their necessity, and the cost of failure to comply with them.

e) Clarity of communication is critical, especially when disseminating the orders which are to be enforced by the security personnel to guard against excesses emanating them being misinterpreted. In Uganda, misinterpretation of the extent of curfew led to arrest and torture of people found in their homesteads simply because they were 'not inside the house. Lesson learnt is that the message should be clear and addressed to the right people for example has been at the fore front to educate the public about the measures. This has been partly responsible for the successes.

f) Leadership in the popularisation of the measures and taking strategic action in key. President Museveni has been regularly updating the public, through media briefings, about the new measures, making clarifications on those that are seemingly unclear, as well as calling upon the public to comply. In response to concerns over the Kampala elite community who were still filling up some highways in the guise of exercising their bodies by way of jogging, the President recorded a video of him undertaking physical exercises indoors as a way of persuading them to stay home.

g) Governments need to guard against the tendency of security forces exploiting the panic and tension around pandemics to violate rights and liberties under the pretext of enforcing measures adopted. There should be an effective reporting mechanism for errant officers and accountability action should be taken timeously through a judicious process to motivate compliance.

h) Partnership with non-state actors can be a useful tool for compensating gaps especially in terms of critical resources with which to respond to pandemics. In this regard, the government of Uganda has been able to accumulate a substantial amount of donations from the general public and business community in terms of vehicles to enable facilitate transportation of the Ministry of Health's interventions as well as food items to supply to those who, by the measures adopted, are facing serious food shortages.

i) There is a need for nationals to adopt a culture of always reserving some resources including food and money savings for times of uncertainty such as pandemics which may require lockdown. This would help reduce the panic generated from having a big starving population with limited time to mobilize resources to feed them.

5.0 CONCLUSION AND RECOMMENDATION

In conclusion, the Government is applauded, for its efforts in combatting the disease pandemic COVID-19 and the key state actors at the forefront in containing this virus. On the other hand, we also recognise that as we fight this war, interventions should be put in place to uphold the rule of law. The enabling factors that are very critical to the efficient implementation of social distancing are missing. Edward and Gearge1980 as cited by Chkondi, et al. 2019 identified four critical factors to be considered if implementation problems are to be avoided. These factors include communication, attitude, and bureaucratic structure and mandate by the police officers. **Delgado (2006)** as cited by **Chikond et al (2019)** also suggested that the other factor is empowered implementation, efficient leadership, and awareness.

Through communication orders to implement policies are expected to be transmitted to personnel clearly, while such orders must be accurate and reliable. Inadequate information can lead to miss understandings on the part of the implementers who may be confused as to what is required of them. In effect orders that are unclear, vague, and inconsistent end up not being implemented.

a) It is recommended that the restrictive public measures, must always respect human rights and international legal principles such as UN Syracuse (11) principles (and article 3 provides.[76] On this basis, the following conditions must be met;

b) Public necessity demonstrated effectiveness, and scientific rationale, proportionality, justice.

c) It is also suggested that for such measures to be effective, careful attention has to be drawn to human rights such as non-discrimination, and values such as transparency and respect for human rights are embraced to be able to foster an effective response, amidst the turmoil and disruption that inevitably results in times of crisis, and limit the harm that can arise from the imposition of overly broad measures that do not meet the above criteria.

d) As they are no regulations to provide procedures, and the penalties for non-adherence. For instance, in the UK it is an offense to flout strict public health guidelines. If you are found guilty you are convicted and fined or imprisoned or both. These regulations give power to the police to enforce social distancing. Therefore it is recommended that the parliament in consultation with the Ministry of Health should review the current policies on COVID-19 to

[76] ECDC, "considerations relating to social distancing measures in response to COVID-19"*Technical Report23* March 2020.

include fines for raising income which in turn would be used to secure resources used by health workers to prevent the spread of the viral disease COVID-19.

e) The country needs a strategic plan to fight new and emerging threats to public health. Therefore, the parliament has the responsibility to review the current law needs to suit the current outbreaks.

f) The new guidelines orders issued, for instance, did not factor who has the power to enforce legal measures of social distancing. Therefore, it is recommended that in instances, where a person is aligned before the court, a mechanism should be in place to enable court users to access court services.

g) Communication is also a serious challenge. The orders or directives are expected to be transmitted to the appropriate personnel clearly while such orders must be accurate and consistent. Inadequate information can lead to misunderstanding on the part of implementers who may be confused as to what is required of them. Therefore orders should be clear, consistent, and accurately transmitted.

h) Therefore, the ministry of health should come up with a communication strategy developed to suit the current circumstances. It should inform the public of the rationale of implementing social distancing. It should encourage people public to take action at a personal level as a means of protecting themselves[77].

i) It is also important the Ministry of Health, addresses the potential stigma by upholding a sense of solidarity in the population; everyone is to some extent at risk, and "that we are all in this fight together."

j) The government is applauded for giving support to the poor however, the intervention needs to be strengthen. It is also recommended that continued support be given to communities, to facilitate adherence to, and implementation of, social isolation measures. It must ensure continued provision of essential services and supplies e.g. food, medicine, and access to healthcare.

k) Further recommend that encouraging contact with friends, family, and other networks via internet-based communications is necessary.

l) Financial compensation is recommended. Restrictive social distancing measures come with financial burdens, families, communities, and as such, businesses will be affected. Therefore financial compensation is a preventive strategy, which may facilitate public health adherence to social distancing measures.

m) Business continuity management is also recommended. It is a process by which an organization ensures that it's most critical activities and processes are operational regardless of incidents. Some business continuity measures such as teleworking may also reduce the spread of the virus.

n) The ports of entry, and quarantine should be strengthened. The public health emergencies at ports across the country, and declaration cards system for the entry and exist passengers into the country as well as monitoring of temperatures of exit and entry passengers should be put in place by Ministry of health.

o) Dispatch medical staff and expert group of medical officers for consultation should be established to minimise the mortality of sever patients. Medical resources across the country should be mobilised to ensure patients are able to access doctors.

p) Social distancing measures should be monitored. They should be monitored throughout the period of enforcement and evaluation to identify lessons for the future in case resurgence occurs.

q) In most cases, voluntary compliances are believed to be sufficient to achieve the desired levels for the mitigation of the spread of the COVID-19 pandemic. Mandatory social distancing measures raise fundamental questions about the balance between individual rights and the protection of the health of the larger community. It important that the measures are kept in line with human rights.

r) Assisting businesses and other private bodies to develop continuity of operations plans to implement during the COVID-19 outbreak and developing ordinances for local governments is important.

s) Ministry of health also should plan to put in place infrastructure that allows the deadly virus to be isolated quickly so that if a new strain of the flu crops up in the future, we should be able to contain the infection soonest.

[77] ECDC, "considerations relating to social distancing measures in response to COVID-19"*Technical Report23* March 2020.

THE PRACTICAL CHALLENGES ON THE REALISATION AND ENJOYMENT OF THE RIGHT TO A TRIAL WITHOUT UNDUE DELAYS IN TANZANIA

Angelo Rumisha[78*]

Abstract

The right to a fair trial in general and trial without undue delays, in particular, has so far claimed unshakable position within the criminal justice systems of civilised jurisdictions. The right is recognised by various international, continental, and regional human rights instruments. However, recognition of the right and its enjoyment in the administration of justice are not necessarily the same thing. Sometimes, the two are far apart when it comes to the applicability of the right. Tanzania is a party to continental and regional human rights instruments that recognise the right to a fair trial. However, the practice reveals a violation of the right to a trial without undue delays in the administration of justice. This work makes a critical analysis of the law and practice on the right to a trial without undue delays in Tanzania by examining the extent of its enjoyment. The work concludes on the premise that the minimum acceptable standards of the right to a trial without undue delays are not guaranteed and realised in Tanzania. Legal, financial, and practical limitations hinder the enjoyment of the right. The work recommends legal, financial, and institutional reforms for realisation and enjoyment of the right.

Key Words: Criminal Procedure and Practice/Fair Trial/Right to Speedy Trial/Criminal Justice

[78] *He is the Deputy Registrar of the High Court of Tanzania. Before being appointed the Deputy Registrar, he was the Resident Magistrate. This article is a revised version of a part of the author's thesis; the Right to a Fair Criminal Trial and its Practicability in Tanzania: A Critical Analysis of the Law and Practice, LLD thesis SAUT, 2020, supervised by Hon. Dr. Justice Gerald A.M. Ndika.

1.0 Introduction

The criminal justice system of any civilised society has one primary function; protection of the public by enacting laws, which deter crimes.[79] The effectiveness of a criminal justice system is reflected in its ability to timely deal with crimes thus protecting the society against unacceptable societal norms. However, dealing with crimes should portray a recognition of the rights to the accused person. A trial does not only intend to bring the offender to book but should as well be concerned with the end results were arrived at. Thus, criminal justice of any civilised state does not only provide for rules that assure the fairness of the trial, but a trial conducted in breach of the said rules becomes a nullity.

The right to a fair trial that is presently perceived as forming an integral component of the body of human rights, has existed longer than most human rights instruments.[80] However, the evolution of the right did not come overnight. For instance, during the Medieval period, the accused person had no right to a fair trial.[81] The accused person was not allowed to question witnesses of the prosecution, permitted to defend himself,[82] nor to call witnesses on his defense.[83] The oppressive nature of the rules of a criminal trial gave an unfair advantage of the prosecution side over the accused person.[84] In this period,

[79] Cross, N, *Criminal Law and Criminal Justice*, SAGE Publications Ltd, London, (2010), Page 11.

[80] See Mwimali, B., J., *Conceptualisation and Operationalisation of the Right to a Fair Trial in Criminal Justice in Kenya*, (2012), A thesis submitted to the Law School, the University of Birmingham for the Degree of Doctor of Philosophy, School of Law, Birmingham University, (2012), Page 3. He refers to the case of USA (B.E. Chattin) v Mexican States, United States-Mexican Claims Commission 1927, Opinion of Commissioners under the 1923 Convention Between the US and Mexico 1927, 4 UNRIAA 282, 422. In the said case, Chattin, a US citizen had been arrested for embezzlement while serving as a railroad conductor and sentenced to two years imprisonment. On a claim brought by the US, it was contended that he had not been duly notified of the charges against him and was not confronted by his accusers. The Commission concurred that 'It [was] not shown that the confrontation between Chattin and his accusers amounted to anything like an effort on the judge's part to find out the truth,' and held Mexico liable for miscarriage of justice.

[81] Langbein, J., H, *The Historical Origins of The Privilege Against Self-incrimination At Common Law* in Michigan Law Review, (1994), Vol. 92.

[82] Langbein, J., H,. *The Origins of Adversary Criminal Trial,* Oxford University Press, Oxford, (2005)

[83] Langbein, J., H., (1994), *Ibid.* Page 1049.

[84] Nugent, W., *Self-Incrimination in Perspective*,

the accused was presumed guilty and the burden of proving his innocence was upon him. The prosecution had all rules at their advantage favouring the possible conviction of the accused person.[85]

Between the 18th and 19th centuries, the criminal trial evolved to some contest between the accused person and his accuser. Although there remained some rules that favoured the state, the accused was allowed some of the rights such as the right to a defense counsel,[86] the right to bring evidence, and testify and the like. Also it is during this second phase where rules of an adversarial contest were developed contrary to inquisitorial rules that had dominated the first phase.[87]

Like other human rights, the Second World War was the turning point of the right to a fair trial. The right to a fair trial received recognition as a fundamental human right and was codified in various human rights instruments.[88] Subsequent international, continental, and regional human rights instruments have contained the right to a fair trial as a fundamental human right.[89]

South African Law Journal, (1999), Page 501.

[85] Langbein, J., H (2005), Ibid, Page 510.

[86] Langbein, J., H., (1994), Ibid. Page 1049.

[87] Langbein,, J., H (2005), *Ibid.*

[88] Mwimali, B. J., *Conceptualisation and Operationalisation of the Right to a Fair Trial in Criminal Justice in Kenya*, *Ibid,* Page 2.

[89] See Articles 10 and 11 of the Universal Declaration of Human Rights, Article 14 of the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights,(ICCPR) Article 6(d) read together with Article 7(2) of the Treaty for Establishment of the East African Community, Articles 7 of the African Charter on Human and Peoples' Rights, Article 6 of the Council of Europe Convention for the Protection of Human Rights and Fundamental Freedoms and Article 8 of the American Convention on Human Rights

2.0 Minimum Acceptable Norms of a Fair Trial

The discourse on the assessment of a trial as being fair or otherwise is not a simple task. Standards upon which a trial is to be assessed as being fair or otherwise are numerous, complex, and have been changing from time to time and from one jurisdiction to the other.[90] However, there are minimum standards, which a trial should meet to be characterized as a fair one. Such standards are generally divided from the first stage to the last stage of the trial. As such, the right can be assessed from pre-trial to post-trial stage. At a pre-trial stage, the right to a fair trial includes a set of privileges, which every suspect should enjoy. Such rights include the prohibition of arbitrary arrest and detention,[91] the right to know the reason for the arrest,[92] the right to a lawyer,[93] the right to a prompt appearance before a judge to challenge the lawfulness of arrest and detention,[94] and the prohibition of torture and the right to humane conditions during pre-trial detention.[95]

Article 14 of the International Covenant on Civil and Political Rights provides extensively for the right to a fair trial during the hearing. It includes equality before the courts,[96] the right to a fair hearing,[97] the right to a public hearing,[98] the right to a competent, independent, and impartial tribunal established by law,[99] the right to a presumption of innocence.[100] In this category, other rights are, the right to prompt notice of the nature and cause of criminal charge,[101] the right to adequate time and facilities for the preparation of a defense,[102] the right to a trial without undue delay or else known as the right to a speedy trial,[103] the right to defend oneself in person or through legal counsel,[104] the right to examine witnesses,[105]the right to an interpreter,[106]the right against self-incrimination,[107]prohibition on retroactive application of criminal laws,[108] prohibition on double jeopardy.[109] The right to a fair trial does not end with the termination of the trial. The right exists in the post-trial. The minimum human rights norm in that category includes; the right to appeal,[110] and the right to compensation for miscarriage of justice.[111]

Although the right to a fair trial overlaps both civil and criminal proceedings, and it covers various minimum norms of a fair trial, however, this paper discusses the right to be tried without undue delays else known as the right to a speedy trial. The choice is informed by obvious realities that a criminal justice presents. Criminal justice has serious effects on the life of people and carries with it severe consequences such as unlawful and arbitrary curtailment or deprivation of other basic rights, freedoms, and liberty of the person.[112] Effects such as loss of freedom due to imprisonment or loss of liberty due to long incarceration and on the highest level, a sentence of death are such serious that cannot be imagined in civil justice.[113]

3.0 The Right to a Trial without Undue Delays

[90] https://www.humanrightsfirst.org/wp-content/uploads/pdf/fair_trial.pdf, The Lawyers Committee for Human Rights, (2000), WHAT IS A FAIR TRIAL? A Basic Guide to Legal Standards and Practice, accessed on August 23, 2016.

[91] Article 9(1) of the International Covenant on Political and Civil Rights.

[92] *Ibid.* Article 9(2)

[93] Concluding Observations of the Human Rights Committee, Georgia, UN Doc. CCPR/C/79 Add.75, April 1, 1997 para 27

[94] *Ibid. Article 9(3)*

[95] *Ibid.* Article 7. According to this Article, torture or cruel, inhuman, or degrading treatment or punishment are prohibited. Further, this is a norm of customary international law that also belongs to the category of *jus cogens.*

[96] *Ibid.* Article 14 (1)

[97] *Ibid.* The set of rights is best explained under paragraphs 2 to 7 of Article 14. Also Article 14(3)

[98] *Ibid.*

[99] *Ibid.*

[100] *Ibid.* Article 14(2)

[101] *Ibid.* Article 14(3)(a)

[102] *Ibid.* Article 14(3)(b)

[103] *Ibid.* Article 14(3) (c)

[104] *Ibid.* Article 14 (3) (d)

[105] *Ibid.* Article 14(3)(e)

[106] *Ibid.* Article 14(3)(f)

[107] *Ibid.* Article 14(3)(g)

[108] *Ibid.* Article 15(1)

[109] *Ibid.* Article 14(7)

[110] *Ibid.* Article 14(5). This Article provides that everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.

[111] *Ibid.* Article 14(6)

[112] The Lawyers Committee for Human Rights, (2000), *Ibid*

[113] Section 196 of the Penal Code, Cap 16 [R.E 2002] creates the offence of murder and section 197 of the same Act provides for the punishment of murder, which is death. Section 322 of the Criminal Procedure Act, [Cap 20 R.E 2002] provides that any person sentenced to death, the Court shall direct that such death is by hanging.

Trial without undue delays or else known as a speedy trial can be described as trying an accused person for the alleged crime within a reasonable time. It guarantees the limitation of time in which a trial must be concluded after the commencement of the criminal proceedings against the accused person. In some of the jurisdictions, determination of whether or not a trial is speedy has been provided under the law.[114]

Tracking the history of the development of the right to a speedy trial is not a simple task because of a lack of uniformity of the application of the law, different criminal justice systems, and battles among jurists on the subject matter. Within the Commonwealth, [115] the right to a trial without undue delays dates back to the twelfth century and the Assize of Clarendon, followed by its presence in the *Magna Carta* of 1215.[116]

Article 13 of the Constitution of Tanzania is the operative provision that provides for fair trial rights. Except for Article 13(6)(a) of the Constitution that refers generally to the right to a fair hearing, the constitution remains silent on the express right to a trial without undue delays. Nonetheless, Article 107A(2)(b) requires the courts not to delay justice without reasonable grounds. Understandably, Article 107A(b) of the Constitution imposes an obligation on the court rather than creating a right to a person. The fact that the right to a fair trial is not expressly provided in the constitution, does not make it less important. Indeed, the problem with the Bill of Rights is to specify certain rights and then assume that some not specified would not be equally important.[117] Thus reference of the right to a fair trial in Article 13(6(a) of the Constitution of the United Republic of Tanzania impliedly refers to the fair trial as envisaged in various instruments to which Tanzania is a party.[118]

When a state enters into an international relationship or a treaty for that matter, it does so not as a showoff, but as an undertaking that it shall comply with the terms of such treaties or relationship to its letters. Tanzania is a party to the International Covenant on Civil and Political Rights (CCPR), having ratified the same on June 11, 1976, barely less than three months from its effective date. Article 14 of the ICCPR provides for the right to a trial without undue delays. Article 13 of the Constitution of Tanzania which provides for the right to a fair hearing, should be a reflection of Article 14 of the ICCPR.

Although Tanzania has not domesticated the ICCPR, which would mean that the same has no direct domestic application, however the fact that the Bill of Right was introduced in 1984 after the ratification of the ICCPR on June 11, 1976, indispensably means that the Constitution was drafted having in mind the provisions of Article 14 of the ICCPR. The courts in Tanzania, whenever the opportunity arises, should make applicable the provisions of the ICCPR when dealing with the right to a trial without undue delays. Unfortunately, however, the enforcement of the right to a trial without undue delays is yet to be tested in court; we can hope the best when the time arrives.

It becomes an obvious fact that international conventions to which Tanzania subscribed to and the applicable jurisprudence in such conventions will help courts when interpreting the domestic laws and the Constitution. Understandably, it cannot be said that the conventions form the basis of statutory or constitutional interpretation, rather it is the philosophy, general purpose, and practices behind the conventions that are of significance.[119] While formal domestication of international treaties would be desirable for soft enforcement of the right, however, the practical judicial application of the relevant principles ensures their realisation.[120] Tanzania, like any other state, is bound by the principle of *pacta sunt servanda* to perform treaty obligations.[121]

Any approach that courts in Tanzania will take, has to be in conformity with international obligations that she has undertaken. As a party to the ICCPR she has an obligation to follow the Convention regardless of the legal traditions and domestic law. Paragraph 4 of General Commentary No. 32, obliges member states to follow the provisions of the ICCPR regardless of their domestic legal regime.[122] Tanzania has an obligation under the ICCPR that supersedes the obligation she has under domestic laws. The courts are expected to apply the domestic law in line with the ICCPR. Thus, the application of the right to be tried without undue delays in the Tanzanian criminal justice legal framework should be fairly simple notwithstanding the lack of the court pronunciations in that regard.

3.1 The Basis of the Right to a Trial without Undue Delays

The Human Rights Committee in General Comment 32 gives the

114 See for example the USA Speedy Trial Act, 1974

[115] Ana K., *Right to a Fair Trial in Civil Law Cases in Grote*, in Lachenmann and Wolfrum (eds.) Max Planck Encyclopedia of Comparative Constitutional Law, OUP, 2018, Page 4.

[116] Allen, D., *The Constitutional Floor Doctrine and the Right to Speedy Trial*, 26 Campbell Law Review, (2004),

[117] Rowland, J., V., C, *Equality of Arms and Aspects of the Right to A Fair Criminal Trial in Botswana*, A thesis presented for the degree of Doctor of Law at Stellenbosch University,(2010).

[118] See Article 14 of the International Covenant on Civil and Political Rights; Article 7 of the African Charter on Human and Peoples' Rights; Articles 10 and 11 of the Universal Declaration of Human Right and Article 7 of the Treaty for Establishment of the East African Community.

[119] Dupuy, P., *A General Stocktaking of the Connections between the Multilateral Dimension of obligations and Codification of the Law of Responsibility*, the European Journal of International Law, (2002), Vol. 13 No. 5, 1053–1081

[120] Sloss, D., and Alstine M., V., *International Law in Domestic Courts*, (2015), Available at: http://digitalcommons.law.scu.edu/facpubs/88. Accessed on February 24, (2020). Page 1 6.

[121] Rowland, J., V., C, (2010), *Ibid.* This principle is provided under Article 26 of the Vienna Convention on the Law of Treaties, 1969

[122] General Comment No 32 para 4.

rationale for the right to a trial without undue delays. It notes Article 14 contains "guarantees that States parties must respect, regardless of their legal traditions and their domestic law." This means that a state party to the ICCPR cannot disregard the application of the Article based on their domestic traditions. The general comment discusses the right to a trial without undue delay in a single paragraph, which reads

> *"The right of the accused to be tried without undue delay, provided for by article 14, paragraph 3 (c), is not only designed to avoid keeping persons too long in a state of uncertainty about their fate and, if held in detention during the period of the trial, to ensure that such deprivation of liberty does not last longer than necessary in the circumstances of the specific case, but also to serve the interests of justice."*[123]

Besides the common need of the public that there should end of litigation, the right to be tried within a reasonable time is based on other equally important factors. The right to a fair criminal trial is both sides; to the accused and the public. The efficient criminal justice system should be seen by responding immediately and appropriately to the perpetrators of crimes. A trial that takes too long to finalise will cause unnecessary public discomfort and may result in the public losing confidence in the administration of justice.[124] As a result, the public is likely to take the law in its own hands. Leaving the public to take that course is the least a criminal justice system should expect.

The African Court on the Human and Peoples' Rights, had an occasion of considering the importance of the trial without undue delays in maintaining public trust and confidence. In the case of Onyango Nyangi and 9 others v The United Republic of Tanzania,[125] the Court held that if the society sees that judicial settlement of disputes is too slow, it might lose confidence in the judicial institutions and in the peaceful settlement of disputes. Stressing on the need of trial within a reasonable time and the means of maintaining public trust and confidence in peaceful dispute mechanisms, the court observes;

> *"If society sees the judicial settlement of dispute too slow it may lose confidence in the judicial institutions and in peaceful settlement of disputes. In criminal matter deterrence of criminal law will only be effective if society sees the perpetrators are tried and if found guilty, sentenced within reasonable time."*[126]

The second reason for the justification of the right to a trial without undue delays is of course guaranteeing a fair trial to the accused person.[127] The accused persons for instance, would not trust the trial to be fair, if he were remanded in custody for a considerable time before his trial. The dangers of forgetfulness and thus affecting his defence are high. Another likely evil is the loss of witnesses due to age or in unavoidable eventuality; death. [128] Change of place of abode by witnesses in case a trial is delayed cannot be overemphasized. The combined results of the above-mentioned factors are devastating and are likely to compromise the right to a fair trial.

The right to a fair trial enhances justices to the accused persons. The trial is a fact-finding process that relies on witnesses. Although the trial will not result in unveiling the ultimate truth of what happened in the past, however, it must try as much as possible to reflect the truth. Over time, human beings become forgetful and lose memories. In case a trial is delayed, witnesses may forget some of the crucial pieces of evidence that affect the outcome of the trial. The conviction that may result from such a trial, will inevitably affect the right to a fair trial. When memories of witnesses are still fresh, it is when the courts may safeguard a fair hearing to the accused person.

Lastly, the right to a fair trial ensures minimisation of anxiety upon the caused persons. The fact that those waiting trials live under uncertainty of what will happen to them whether they will eventually be convicted or not and if so what their sentences will be cannot be disputed.[129] A trial without undue delays prevents undue and oppressive incarceration prior to trial, to minimise anxiety and concern accompanying public accusation, and limits the possibilities that long delay will impair the ability of an accused to defend himself and procure his witnesses.[130]

The Supreme Court of India had an occasion of considering the harassment that the accused persons suffer waiting for a delayed trial. After reasoning in that line, it declined to allow a retrial. It noted that, the accused person would be harassed by a prolonged trial. It observed thus;

> *"We are not prepared to keep persons on trial for their live and under indefinite suspense because trial judges omit to do their duty. We have to draw a nice balance between conflicting rights and duties. While it is incumbent on us to see that the guilty do not escape, it is even more necessary to see that the person accused of crimes are not indefinitely harassed. While every reasonable latitude must be given to those concerned 'with the detection of crime and entrusted with administration of justice, but*

[123] General Comment No. 32, U.N. Doc. CCPR/C/GC/32 (2007), para. 35

[124] Steinberg, M., I., *Right to Speedy Trial: The Constitutional Right and Its Applicability to the Speedy Trial Act of 1974*, 66 J. Crim. L. & Criminology, (1975), Page 229.

[125] Application No.006 of 2013, ACPHR.

[126] Onyango's case, *Ibid.,* at page 39

[127] Steinberg, Marc I., (1975), *Loc. Cit.*

[128] Mwaikusa, J., *The Judiciary and the Public Order in Tanzania* in Peter, C.M., e*t al*, Fundamental Rights and Freedom in Tanzania, Mkuki na Nyota Publishers, Dar es Salaam, (1998)

[129] Newman, D., J., *et al*, *Introduction to Criminal Justice*, 4th Ed., Random House Inc., New York, (1988)

[130] SAMAHA, Joel, *Criminal Justice*, West Publishing Company, St. Paulo, (1988)

limits must be placed on the lengths to which they may go."[131]

Although ordering a retrial is a discretion of the Court, however having in mind what the accused person would suffer, the Court in the above case, declined to order the retrial. This signifies the submissions that a trial that is denied, does not only cause anxiety to the accused person, it also causes harassment. On the contrary, a trial that is conducted without undue delays would reduce the sufferings caused by a criminal trial.

3.2 Scope of the Application

The demarcations of the applicability of the right to a trial within a reasonable time are not simple to draw. What amounts to "reasonable time" is not uniform in the application nor can it be universal. The facts of each case must be studied carefully before the court finds the violation of the right to a trial without undue delays. Although the Tanzania criminal justice legal framework does not well articulate the right, international and Regional Courts have given the meaning and applicability of the limits of the trial without undue delays. For example, the African Court on Human and Peoples' Rights (AfCPHR) and the European Court of Human Rights (ECHR) have given four guiding criteria that should guide the court when determining if there has been a violation of the right to a fair trial. These are the length of delay, the complexity of the case, the conduct of the accused person, and the conduct of the Authorities.

Moreover, the Human Rights Committee in General Comment 32 gives the boundaries of the application of the right. It observes thus;

> *"What is reasonable has to be assessed in the circumstances of each case, taking into account mainly the complexity of the case, the conduct of the accused and the manner in which it was dealt with by the administrative and judicial authorities. In cases where the accused are denied bail by the court, they must be tried as expeditiously as possible. This guarantee relates not only to the time between the formal charging of the accused and the time by which trial should commence, but also the time until the final judgment on appeal. All stages, whether in the first instance or on appeal must take place without undue delay."*[132]

3.2.1 The length of the delay

To calculate the length, there must be a starting time. In criminal proceedings, time starts running as soon as the accused is informed by the competent authority that he is alleged to have committed an offence or when he is arrested. Time in that regard, also runs even if the accused had been first interrogated based on being a witness.[133] However, the European Court has held that time when the investigation is mounted but without notifying the accused person cannot be considered. What matters here is the knowledge of the accused that he is involved in a crime and that the process has been put in motion.

The time stops running when the trial is concluded. This time includes the time of appeal to the highest court if there is an appeal. If on termination of the proceedings, the sentence is not fixed, then that is not taken to mark the end of the proceedings. The European Court, for instance, in the case of *Eckle v Germany*, found out that upon conviction, there was no 'determination ... of any criminal charge' within the meaning of Article 6(1) ECHR so long as the sentence was not definitively fixed.[134] Moreover, the fact that the accused may be held in custody throughout the proceedings requires particular diligence on the part of domestic authorities to administer justice expeditiously. Further the duration which might usually be considered as reasonable vary from one case to the other depending on the facts of each case.

3.2.2 Complexity of the Case

Not all cases can be said to be of equal weight in terms of trial proceedings. There are complex and simple cases, thus the time needed for the trial for each case would differ considerably. The more complex the case is, the more the trial is likely to take longer. The complexity of the case depends on several factors. Case law has established that the complexity of the case depends on the number of accused or victims and the number of counts or charges in a particular case. Also the volume of the case file and the number of documents, experts, or witnesses to be examined, the number of hearings held, the need for cooperation from the authorities of a third State, and even the number of pages of a judgement rendered.[135]

It has been held however that the complexity of the case alone cannot be a ground to justify a violation of the right to a fair trial. For example, the European Court in the case of Wenzelhuemer v Austria,[136] the Court concluded that the length of the proceedings (7 years and 5 months across three levels of jurisdiction) was reasonable, principally on the basis of the complexity of the case.

3.2.3 Conduct of the Accused Person

It is common knowledge that no one should benefit from his wrongs. For the Accused person to assert the right to be tried without undue delays, they should come out with clean hands that they do not have a blame in the delays. If delays are occasioned by the accused persons, there is no violation of the right. It is considered a violation

[131] Machander v. State of Hyderabad, AIR 1955 SC 792.

[132] General Comment No. 32, U.N. Doc. CCPR/C/GC/32 (2007), para. 35

[133] See the European Court case in Grigoryan v Armenia, No. 3627/06, 10 July 2012, at para 128

[134] No. 8130/78, 15 July 1982, at para 77

[135] See the European Court cases of Kowalenko v Poland, No. 26144/05, 26 October 2010, at para 77; Buldashev v Russia, No. 46793/06, 18 October 2011, at para 109; and Todorov v Ukraine, No. 16717/05, 12 January 2012, at para 9

[136] No. 33992/07, 10 May 2012, at para 27.

if the delays are attributable to the state. If the trial is adjourned severally at the instances of the accused person or his no appearance that cannot be a violation of the right.[137] In a criminal trial, the accused person is expected to defend his case with diligence.

Equally, if the delays are caused by health problems on the part of the accused person, the state cannot be held to be in violation of the right. For instance, the European Court in the case of Krakolinig v Austria,[138] it held that repeated adjournment of the proceedings had been occasioned by the accused's ill health and found that there was no violation of the right. Understandably, delays due to the health of the accused cannot be attributed to the state or court.

3.2.4 Conduct of the Authorities

When the Court considers that there have been delays in the proceedings, the burden falls upon the respondent State to provide the Court with reasons justifying the delay.[139] If the State fails to provide an acceptable justification, the Court usually considers the national authorities responsible for the delay. Furthermore, a chronic overload of the domestic courts is not an acceptable justification. National authorities cannot seek refuge behind the possible failings of their domestic law. The African Court responding on the submissions that there were many cases, it dismissed the submissions calling it failing of the court that cannot be attributed to the accused person.[140] Not every delay that counts and may result in the breach of the right to a trial without undue delays. As held in the European Court, to find a violation, delays must have a significantly adverse effect on the length of the proceedings.[141]

3.0 Realisation of the Right in Tanzania

Various international, continental and regional instruments that recognise the right to a trial without undue delays form part of the Tanzania criminal justice legal framework. However, realisation of the right to a trial without undue delays has not been smooth. The ever haunting criminal case backlog syndrome and persistent denial of the right remain evident in the administration of justice in Tanzania. Political, judicial leadership and citizens alike have been on record on several occasions on the dissatisfaction of the pace that criminal justice takes.[142] Although each institution in the criminal justice system throws blame on the other, the limitations run across the criminal justice system in Tanzania.

The allegations of violation of the right have seen Tanzania dragged before the international court. In the case of Onyango Nyangi and others v the United Republic of Tanzania,[143] the Respondent state had been sued for allegations, among others, for violation of Article 7(1)(d) of the Charter that provides for the right to a trial within a reasonable time.[144] Several defenses were advanced by the Respondent State such as the complexity of the case as there were many accused persons involved and contribution by the Applicants for various applications to stay the proceedings that had been made before the national court. The African Court dismissed the Respondent's defenses. The court found the Respondent in violation of the right to a trial within a reasonable time. The court held that the violation was not because of the complexity of the case but 'because of lack of diligence on the part of the national judicial authorities.'[145]

The consensus that can be drawn is the admission of violation of the right in Tanzania. Perhaps the question deserving, is why the right is violated despite the existing legal framework? The next section of this works attempts to explain, although briefly, why the right to a trial without undue delays is not realised and enjoyed in Tanzania.

4.0 Practical Limitations of the Right

The right to a trial without undue delays faces challenges in its realisation. There are various hindrances to the realisation of the right. However, as shown, at least for the state to be exonerated from violation of the right, it must prove that it is not responsible in any case. The practicability of the right in Tanzania and failure to enjoy fully the right is attributed to various factors ranging from legal, practical, and financial as discussed below.

4.1 Limitations imposed by Committal Proceedings

In Tanzania, a case triable by the High Court must go through what is known as committal proceedings. These are the proceedings held before a subordinate court pending finalisation of investigation. The accused person in criminal cases that go through committal proceedings may have to languish in jail for several years

[137] See the case of the European Court in the case of Dolutaş v Turkey, No. 17914/09, 17 January 2012, at paras 29–31

[138] No. 33992/07, 10 May 2012, at para 27

[139] See the European Court in the cases of Zelidis v Greece, No. 59793/08, 3 May 2012, at para 27; Petko Yordanov v Bulgaria, No. 33560/06, 26 July 2012, at para 51; and Grigoryev v Russia, No. 22663/06, 23 October 2012, at paras 93–9

[140] Onyango Nyangi and 9 others vs The United Republic of Tanzania, Application No.006 of 2013, ACPHR.

[141] In the cases of Idalov v Russia (Grand Chamber), No. 5826103, 22 May 2012, at para 190 and Borodin v Russia, No. 41867104, 6 November 2012, at para 152, the Court considered that adjournments owing to the judge's conflicting schedule or witnesses or other parties failing to appear as scheduled. The court was of the views that that did have a significant adverse effect on the accused person.

[142] See https://habarileo.co.tz/habari/ucheleweshwaji-kesi-unaathiri-uchumi-magufuli.aspx accessed on February 22, 2020, His Excellence Dr. Pombe Jospeh Magufuli, the President of the United Republic of Tanzania, has been in public more than once on the delayed cases. During the law day celebration in 2018 and 2020, he complained about delayed criminal trials which he associated with the delays in investigations. Also during the Law Day Celebrations for 2019, Hon. Professor Juma, the Chief Justice of Tanzania, in his speech lamented how delayed delay cases

[143] Application No.006 of 2013, ACPHR

[144] The African Charter on Human and Peoples' Rights, 1981

[145] See paragraph 155 of the Judgement of the Court.

before he is committed for trial by the High Court.[146] During the Law Day Celebrations for 2019, Hon. Professor Juma, the Chief Justice of Tanzania, lamented how delayed investigations delay cases. He pointed out that at the end of 2018, a total of 837 cases remained pending in the District Courts and Resident Magistrate's Court for more than twelve months.[147]

Subordinate courts have experienced serious challenges because of unfinished investigations by the Police and other agencies. There is a considerable time that is lost in subordinate courts processing a case that is triable by the High Court. As put by Hon. Justice Makaramba, the biggest challenge facing the time trial in the criminal justice system in Tanzania is delayed in the investigation in murder cases and the time wasted in conducting Preliminary Inquiry (PI) by subordinate courts before committing the accused person to the High Court for Preliminary Hearing (PH) and finally trial.[148] A slightest error has the effect of returning the case at the first stage.

[146] Sangana vs Home Secretary, Government of Meghalaya A.I.R.. 1979 SC 1518.

[147] JUMA, I.H., (2019), *Speech of the Chief Justice Prof. I.H. Juma, Law Day*, Dar Es Salaam, February 6, 2019.

148 Makaramba, R., V., *Unearthing Key Challenges and Solutions in Advancing Justice in Tanzania*. A Paper presented at the Tanganyika Law Society Annual Conference and General Meeting to be held at the Arusha International Conference Centre (AIC) on the 20th day of February, 2015, Page 14. Justice Makaramba was the Judge of the High of Tanzania.

The relevance of committal proceedings remains a valid issue that needs urgent determination given the powers of the subordinate courts during the committal proceedings. With the introduction of the preliminary hearing that meets the same ends with committal proceedings, clinging on the said procedure is self-defeating, where the same was abandoned in most Commonwealth jurisdictions.[149]

4.2 Limitation by Corruption within the Criminal Justice System

Although there exists a strong legal framework against corruption in Tanzania, however corruption in the criminal justice system remains a big challenge. In the Prevention and Combating of Corruption Bureau Mini Baseline Survey Report of 2017, the Judiciary was ranked second following the Police. [150] In courts of law, corruption may be perceived or actual. A delayed case will attract the feelings of unethical behaviour that are involved. A normal citizen, will not understand that he has been remanded in custody for two years, for example, because the subordinate court lacks jurisdiction in a murder case. Trials that are conducted in closed chambers where the public cannot access can also be perceived as hiding things that are not in order.[151] Corruption may lead to unmet requirements, rules broken, or procedures not being followed and finally cause the dismissal of the application.[152]

Recently, however, the Judiciary has intensified efforts in the fight against corruption. It has come out, openly and strongly against corruption. Transparency and openness have contributed to the enhancement of public trust and confidence. That is a step ahead, which should not go unnoticed. Indeed, in the user survey conducted in 2019, the majority of court users seem to have been satisfied with their court experiences. As a result, public satisfaction in the services rendered by the judiciary had gone up 78% compared to 61% in 2015.[153] Nevertheless, that is a battle-worn, the war is still fresh. Violation of the right remains persistent and the judiciary should do more to address the same.

4.3 Limitation by Recording of Evidence by Old Means

The majority of courts still use the old archaic means of recording evidence. Consequently, courts spend considerable time recording oral evidence. Undoubtedly it is a tedious exercise especially the length caused by the cross-examination of witnesses in criminal proceedings.[154] Although this can be explained by either the lack of mastery of proceedings on the part of Judicial Officers or the existence of poor technique of effective cross-examination among Advocates, States Attorneys and Public Prosecutors, that is the reality on the ground. In any case, Judicial Officers have to record all court proceedings using a pen and paper without missing any word.

In some cases evidence is prolonged due to the nature of law governing the production of evidence. In simple words, the law governing the production of evidence in Tanzania does not set the limits on the number of witnesses to be summoned to testify on behalf of either party.[155] There are some cases where the Prosecution may call even 200 witnesses in one case.

The Judiciary has realised the need to harness technology in case management. There are tremendous reforms that are ongoing in Judiciary where various systems have been put in place to assist case management. With the introduction of the Judicial Statistical Dashboard System (JSDS), the purchase of audio and visual recording instruments, the future seems bright. Addressing the need to use court technologies to manage cases, the International Consortium of Court Excellency stresses thus;

[149] Utamwa, J., H., K., *Investigation for promoting Fair Trials in Tanzania: The Case of Conducting Committal Proceedings and Preliminary Hearing Sequentially*, A thesis submitted for the Decree of Doctor of Philosophy in the University of Dar Es Salaam Tanzani, (2018)

[150] Prevention and Combating of Corruption Bureau, Mini-Baseline Survey Report Based on the Developed National Corruption and Anti-Corruption Effort Indicators, (2017).

[151] Genelin, M., E*nhancing The Capacity of the Judiciary*, Magistrates Training Program, Protea Courtyard, 11th to 23 August 2008, Dar Es Salaam, Page 31.

[152] *Ibid.*

[153] REPOA, *Court User Satisfaction Survey Follow Up*, (2019), Page 30

[154] The High Court Commercial Division remains the only divisions that has employed ICT in case management and recording of proceedings. Most of the proceedings in the Commercial Court are recorded by audio and video means.

[155] See section 143 of *the Evidence Act*, *Op. Cit.*

"A proper functioning of courts relies on high quality of data. To assess the quality and reliability of data and the use of information technology 'information audit tools' must be used…"[156]

It is without a doubt that digitization of the judicial service will enhance justice delivery by reducing much to be done manually so that Judges and Magistrates can focus on justice delivery.[157] Usually, the use of ICT in case management needs a lot of funds to be injected into the projects.[158] With a little fund that is always allocated to the Judiciary, rolling the reforms to all courts will need time. Until then, the old use of the system of recording proceedings will continue to cause challenges and limit the ability of disposition of the case. Judges and Magistrates will have to face human limitations in recording evidence, and indeed, delaying cases seems to be obvious. As indicated however, system challenges or few resources, cannot be used as a defense for violation of the right. As it appears, violation of the right to be tried without undue delays will persist, until of course, the judiciary is capacitated and adequately funded.

4.4 Limitations by Professional Challenges

Given the nature of criminal justice, impacts it carries and its effects on those affected, inevitably, it demands professionalism higher than normal. Unprofessional Judicial Officers and Advocates are likely to create another problem in the criminal of justice. The right to a timely trial can be well guaranteed by competent personnel. The competence of a Judicial Officer is manifested in controlling the proceedings before him, maintaining decorum in the courtroom, and commanding respect to himself and the Judiciary. On the contrary, unprofessional Judicial Officer can easily waiver and as a result give decisions, which are not reflective of the law and below expectations of litigants and the society. Additionally, unprofessional Officers are likely by default or design to infringe the right to a fair trial. Justice Lameck Mfalila observes that a highly qualified judge both in experience and intellect is likely to be more independent hence can safeguard the independence of the Judiciary. For this reason, to have judges and magistrates who are capable of interpreting the law and exercise their powers independently and professionally, their appointment should be based on no other consideration than merit, qualification, and integrity.[159]

Lack of mastery of laws will necessarily burden the higher courts when handling decisions emanating from lower courts. This may result in dismissing appeals for reasons related to the mishandling of cases in lower courts and ordering retrial of cases. A retrial of a case affects both the prosecution and the accused persons. The prosecution will face challenges in getting witnesses as some might be dead, moved to other places or forgot the substantial and crucial piece of evidence. On the other hand, the accused faces the dander being remanded further for offences, which are not bailable, and his case being delayed.

Carmel Ricard studied reports of court sessions in the Court of Appeal of Tanzania that were held between November 29, 2018 and December 14, 2018.[160] In her research, she came out with astonishing results on the outcomes of the cases during that period. In her findings, she observed that during this period, almost 30 criminal appeals were heard by the Court of Appeal. The results of the said appeals had by no means to raise an eye brow. It was established that out of 30 cases, 13 were thrown out because of the defects during the trial in the court below. What surprised the writer however were not the defects, but inaction on the part of the highest court of the country and judicial authorities.

The defects that she observed in the said appeal were numerous. In the said cases, the appeals had been thrown for lack of a conviction before sentencing.[161] Apparently in their judgement, the Justices of Appeal observed that it had been held repeatedly that failure to convict an accused person before sentencing was fatal and rendered the trial a nullity. The Court of Appeal had no other option than ordering the release of the appellant. However, one thing that should not go unnoticed is the fact that the appeal subject of this case was determined in 2014. The Court of Appeal set free the appellant on December 13, 2019. The period in which the accused had been in jail awaiting trial is more than imaginable. However, this was the period from the date the High Court passed its judgement confirming the decision of the lower court.

Following such defects that resulted in the dismissal of the appeal, the writer had the following to note;

"When you see half of the criminal appeals heard by a country's apex court lead to decisions that the trials were a nullity or fatally defective in some way and the conviction and sentence must be set aside, you know there is a problem. This is the situation in Tanzania…"[162]

As noted, professional competence of Judicial Officers is an indispensable attribute of an independent Judiciary. The right to a trial without undue delays in the above cases was compromised for failure by the lowers court to master their job.

---

[156] The International Consortium on Court Excellence.

[157] Ghosh, Y., Indian Judiciary: An Analysis of the Cyclic Syndrome of Delay, Arrears and Pendency, Asian Journal of Legal Education, SAGE Publications, (2017), Page 33-35

[158] Ghosh, Y., (2017), *Ibid.*

[159] Peter, M. C. *Et al,* (Eds), *Law and Justice in Tanzania: Quarter of a Century of the Court of Appeal*, Mkuki na Nyota, Dar Es Salaa, (2007), Page Page 87.

[160] Ricard, C, What is going on in Tanzania's Trial Court? Accesses on, https://africanlii.org/article/20190124/what-going-tanzanias-trial-courts, accessed on February 22, 2019.

[161] Mtangi Masele vs Republic, Crim Appeal No.115 of 2016, Court of Appeal, (Unreported)

[162] Ricard, C., *Ibid.*

4.5 Limitations Imposed by embracing Legal Technicalities

To ensure the dispensation of justice, the Constitution of the United Republic of Tanzania requires the courts to dispense justice without being tied up with rules of procedures or rather legal technicalities.[163] Despite this constitutional requirement, proof of innocence or guilt of the accused persons in Tanzania face legal technicalities in Courts of law which continue to be a stumbling block in the dispensation of justice. Interesting however is the role of the Bar in the disposition of cases on technical issues. Members of the Bar have become fond of technicalities. Fishing points of objection, even farfetched, has become part and parcel of the trade.

For instance, in Republic vs Tumwine,[164] the Court of Appeal of Tanzania declared the whole proceeding nullity with an order that the entire process should start afresh with the holding of a fresh committal. This was due to the fact that a proper committal order was missing and the High Court proceeded with the conduct of Preliminary Hearing without the committal order. It should be noted that, all other procedures had been complied with except that there was no proper committal order. This is a matter worthy public engagement as to whether it is the Constitution or the committal order that confers jurisdiction on the High Court to try a case. Notwithstanding, the position has caused untold suffering to many remandees who find themselves spending quite a long time in jail for justice to be delivered.[165] This is done although the Constitution dictates to the Judiciary to avoid technical procedures in the dispensation of justice.[166]

4.6 Limitation Imposed by Case Load and Inadequate Number of Judges

Although caseload or an inadequate number of judicial officers is not a justification for a violation of the right, the situation is alarming. The existing problem under the criminal justice system in Tanzania is that the institution of cases in the courts far exceeds their disposal. There are complaints raised on the increasing figures of pending cases in Courts of law in Tanzania. Despite this load of cases, little attention is paid to the issue of whether the existing number of courts has the necessary resources to cope with the over increasing caseload.

Because of many cases compared to the number of Judges, the result is an obvious creation of caseload and delays in the determination of cases. For example, at the end April 2019, there were 3292 appeals that were pending in the Court of Appeal with 21 Justices of Appeal. Usually Justices of Appeal determine appeals during the Court sessions where usually the maximum of 30 cases can be cause listed in one session for a Bench of three Justices. With only five practicable Panels in the Court of Appeal and an average of 200 cases per panel per year, appeals that are pending in the Court of Appeal demand not less than three years to be finalised. However, that is not the realistic assumption as appeals are continually filed in the Court of Appeal.

The same situation is applicable in the High Court. For example, in the High Court of Tanzania at Dar Es Salaam District Registry at the end of April 2019 there were 3,232 cases that were pending. Despite the disposal rate that was recorded in the said month, however the Judges were able to dispose of 54% of the cases that had been filed that month. At an average of 315 cases being filed monthly and the available number of eight Judges stationed at that Court, the backload creation is an unavoidable eventuality. As a result, delayed justice is not a myth but a reality.

Generally, the higher courts have fewer Judges compared to the workload. As of February 2020, the workload of Justices of Appeal was 847 while that on the High Court was 513 cases per Judge.[167] Every Judge is capable of disposing of an average of 220 cases per year. Given the figures of cases compared to the number of Judges, caseload, it seems, will be a usual phenomenon in the Judiciary. The obvious consequence however, is delaying trials. As observed, cases load or fewer Judges, cannot be a good ground to justify the violation of the right to be tried without undue delays.

4.7 Limitation Imposed by Inefficient Legal Framework

An effective and efficient criminal justice legal framework must be able to assist the court in balancing the scales of justice. Conversely, the present legal framework is a challenge to the guarantee of the right. For instance, section 225(5) of the Criminal Procedure Act (CPA) empowers the court to dismiss a charge if investigations are not completed within sixty days or on further extensions as provided under section 225(4) of the CPA. However, the same law renders such as dismissal a mockery of justice because Section 225(5) of the CPA provides that such dismissal of the charge does not bar the Republic from arresting the same accused person and charge him on the same charges. Moreso, section 225(4) and 225(6) exempt certain cases from the applicability of the sixty days rule.

4.8 Limitation Imposed by Endless Investigations

Generally, section 225 of the CPA limits adjournment of cases. Such a limitation is intended to ensure a case is finalised without delays. However, the same CPA in section 225(4)

[163] Article 107A 2 (e) of the Constitution of the United Republic of Tanzania.
[164] Criminal Revision No.01 of 2006, CAT, (Unreported).
[165] Makaramba, R.V., (2015). *Ibid.*
[166] Article 107A (1)(e) of the Constitution of the United Republic of Tanzania, 1977.
[167] See Juma, I.H., Speech of the Chief Justice of Tanzania at Law Day Celebrations in 2020. https://tanzlii.org/blog/hotuba-ya-jaji-mkuu-mhe-prof-ibrahim-hamis-juma-kwenye-kilele-cha-wiki-ya-elimu-na-siku-ya, accessed on March 31, 2020. The same thing was repeated in the Chief Justice's Law Day Speech of February 2019.

makes exemptions to the limitation of adjournment. As a result, investigation take as long time as it takes to complete.

While legal frameworks in other East African jurisdictions effectively enhance the right to a trial without undue delays, the position is fairly different from Tanzania's.[168] Investigation under the CPA remains open, at the discretion of the investigative organs. Except for the discharge envisaged under section 225 of the CPA, there is no other known remedy that a court or aggrieved person may invoke to assert his right to a trial without undue delays. The provisions of the above law however, do not cover all offences. Most of the accused persons that are remanded pending investigations face offences which are not subject to the application of section 225 of the CPA. In such circumstances, there is no any other remedy than waiting until the investigation agencies finalise investigations so that the accused is committed to the High Court.

4.9 Inadequate Funding of the Justice System

A proper running criminal justice system needs proper and adequate funding. Investigations need funds and prosecutions cannot be successful unless adequately funded. Besides, the trial of criminal cases without adequate funding is a nightmare. In Tanzania, trial of criminal cases will not materialise unless witnesses are summoned to appear and testify. Any witness whose testimony is needed must be facilitated by means of fare and upkeep so that he can testify in court. Criminal sessions that are held by the High Court, need a lot of funds to pay defense counsels who represent accused persons and judicial employees who are involved in the sessions.

The Judiciary Administration Act establishes the Judicial Fund. However, it is an open secret that the Judiciary is allocated little funds insufficient to run its activities. Allocations of funds are subject to the Treasurer's determination like any other Government Department. As a result, and of course, due to limited resources available for sharing, the judiciary ends with little.[169] The little that is allocated limits much operations of the Judiciary.[170] If there are no available funds to run sessions, criminal cases cannot be heard and the accused persons remain in custody pending trial. The same effect goes to the Police and the office of the DPP. This as well contributes greatly to the violation of the right.

[168] Article 23 (6) (b) of t*he Constitution of Uganda*, 1995, provide that a trial should start within One Hundred Twenty days in respect to an offence triable by the High Court or subordinate courts. Equally, Section 152 (1) of the C*riminal Procedure Act of Zanzibar*, 2018, provides that the hearing of a case, which is of non-bailable offence should commence within six months from date when a person so charged was arrested.

[169] https://www.habarileo.co.tz/habari/2018-12-045c062b5d04150.aspx, accessed on March 30, 2020

[170] https://tz.usembassy.gov/wp-content/uploads/sites/258/TANZANIA_HRR_2018_SWAHILI.pdf, accessed on March 30, 2020

5.0 Conclusion

Although the criminal justice legal framework in Tanzania to a certain extent provides for the right to a trial without undue delays, however the same is inefficient because of its inherent weaknesses that hinder minimal enjoyment of the right. Some provisions obstruct the practicability and realisation of the right. Equally, procedural technicalities have received much attention than the administration of justice. The entertainment of technical issues is preferred than the administration of justice. Although Tanzania is a party to various international human rights instruments that guarantee the right to be tried without undue delays, the realisation of the right in Tanzania remains but a luxury. Tanzania, as an independent state, must respect its international obligations, in law and practice by not only guaranteeing but ensuring enjoyment of the right in criminal justice.

6.0 The Way Forward

The significance of the right to be tried without undue delays cannot be overemphasised in a criminal justice legal framework that represents civilization. However, the persistent denial of the right in Tanzania is not a secret. Violation of the right presents consequences undesirable in modern criminal justice systems that represent the rule of the law. The protection and operationalisation of the right to a trial without undue delays should not be seen as a luxury but an obligation imposed on the internationally accepted minimum norms of the fair trial and internal appreciation of civilization. Thus, to enhance the right to a trial without undue delays in Tanzania, we find the following, though not exhaustive, but compelling reforms necessary.

6.1 Legal Reforms

The current legal framework governing the administration of criminal justice does not expressly provide for the right to be tried without undue delays. Thus, setbacks to the realisation and enjoyment of the right are inherent in the inefficient legal framework. Institutions involved in the administration of criminal justice cannot discharge their mandate in the manner that supports fair trial unless positive reforms are introduced in the existing laws. The laws governing criminal investigations, prosecution, and court proceedings are inadequate to realise the minimum recognised norms of a fair criminal trial.

Although Article 13 of the Constitution of the United Republic of Tanzania provides for some minimum norms of the right to a fair trial, however, the right to be tried without undue delays is not expressly provided by the same Article. This makes the enforceability of the right to be tried without undue delays as an internationally accepted norm of a fair criminal justice impossible. To safeguard the right to be tried without undue delays, it should be given constitutional recognition. We recommend amendment of Article

13 of the Constitution of the United Republic of Tanzania to expressly provide for the right to be tried without undue delays.

Sections 128(1) and 128(6) of the CPA and section 29 *the Economic and Organised Crimes Control Act* allow the institution of proceedings without investigations. It is thus recommended that these provisions be amended to show that filing of a case be after completion of investigations. Crimes should be investigated first before prosecution. Section 225 of the CPA should strictly limit the time within which investigations should be carried out and prosecution commenced. Like other East African jurisdictions, we recommend the maximum of six months' period to commence prosecution. If a trial cannot be commenced in six months, the charge should be dismissed without prejudice. This is possible, as it will compel the arresting and prosecuting authorities not to take hurried decisions or mounting vexatious and frivolous prosecutions.

Sections 244 to 265 of the CPA and sections 29 and 30 of *the Economic and Organised Crimes Control Act* recognise committal proceedings. We have shown how such proceedings have lost relevance. Since we have recommended that criminal prosecutions should commence after investigations have been completed, we see no relevance of the above provisions. Any person who is alleged to commit a crime should be arraigned direct before the court of the competent authority. Thus, we recommend that sections 244 to 265 of the CPA and sections 29 and 30 *the Economic and Organised Crimes Control Act* that recognise committal proceedings be removed from the statute books.

6.2 Increasing Funding

The right to a fair criminal trial is hindered by the lack of funds to effectively run the institutions involved in criminal justice. There are few Judicial Officers compared to the existing workload. The archaic method of recording evidence is not only inefficient but also tedious. Digitization of the judicial services needs funds that are not sufficiently allocated. Because of these shortcomings, cases are not determined timely thus affecting the right to a fair criminal trial in Tanzania.

Although section 52 of *the Judiciary Administration Act* establishes the Judiciary Fund, however, the law does provide an everlasting solution. As shown in section 52(2), the fund depends on the allocation by the Ministry of Finance. To address this problem, we recommend section 52(2) of the Judiciary Administration Act be amended such that it shows that a certain percentage of the national budget be allocated to the Judiciary and charged directly on the consolidated fund. If this recommendation would be anything meaningful, we would recommend that one percent of the national budget be allocated to the Judiciary. Likewise, the Office of the DPP and Police be allocated a budget sufficient to perform their duties. Funds allocated to these institutions be disbursed without any delays.

6.3 Provision of Remedies for Violation of the Right

Tanzania signed and ratified various international instruments which recognise for an effective remedy for violation of the right to a fair trial. However, in Tanzania, accused persons who spend many years behind bars only to be acquitted, or for other reasons released from jail get only the consequences of an iron hand of the state. Even those who are convicted after a long protracted trial, do not get any remedy for violation of the right. When a person is convicted of an offence under the Minimum Sentence Act, they cannot get a reduction of sentence equivalent to pre-trial detention.

Notwithstanding the international position, the Tanzanian criminal justice legal framework has no provision that recognises fair trial remedies. We recommend that there should be established a fund that will compensate for those becoming unfortunate of criminal justice. Criminal justice systems all over the world are not perfect. To mitigate such risks there should be fair compensation to victims of injustice. Further, we recommend that the legal framework should recognise pre-trial detentions as forming part of the sentence. Whoever is convicted, his sentence should include time spent in pre-trial detentions regardless of whether the offence is provided under the Minimum Sentence Act or otherwise.

CONTROL OF CLIMATE CHANGE THROUGH POLICIES AND LAWS IN THE EAST AFRICAN COMMUNITY

Oscar A. Angote*

Abstract

This paper seeks to explore how both the East Africa Community (EAC) and its Member States have sought to control climate change through laws, policies and strategies. It looks at the policies, laws and strategies that have been put in place by the EAC and the member states and the efficacy of the same in so far as complying with the international obligations in matters pertaining to climate change. The paper concludes that although the EAC and the member states have put in place laws and policies that seek to provide for adaptation and mitigation measures against climate change, climate change continues to threaten various sectors in the EAC thus hindering the objectives of the Community on development, poverty reduction and food security, amongst others.

Key words*: climate change, mitigation and adaptation.*

1.0 Introduction

As a result of the impact of climate change, over the past years, the laws and policies seeking to respond to climate change at the national, regional and international level have increased tremendously. The East African Community (EAC) is not an exception. The Intergovernmental Panel on Climate Change (IPCC) has predicted that the global mean temperature is likely to increase by 1°c by 2100 in the East African region, with the temperatures across Africa expected to increase by 2 – 6°c within the next 100 years, with rainfall variability, which will result in massive flooding, increasing.[171] In order to avert and control the impact of climate change within the EAC, the EAC has adopted a number of policies and laws regarding climate change. At the national level, the EAC requires the Member States to adopt measures that seek to control climate change.

At the national level, the adoption of climate change laws and policies vary. Kenya is currently the only country in the EAC to have enacted a climate change law in 2016 and established a specialized Environment and Land Court to resolve environmental disputes. Some countries in the EAC have addressed climate change through general environmental legislation by including climate change provisions in their statutes. However, other than South Sudan, all the other EAC countries have national climate change policies. It is surprising that despite the global concern about the effects of climate change, South Sudan does not have a legislation governing environmental protection or a national climate change policy.

2.0 Climate Change within the East African Community: A Brief Overview

The term climate change is currently the most uttered in environmental discourses. The need to control climate change has become one of the most critical issue to be addressed at the state and international level. When we talk about climate change, we are simply referring to the change in the climatic patterns caused by the rise of global temperature. Werndl has argued that in defining climate change, external conditions should not be held constant because they vary.[172] Climate change encompasses global warming, extreme weather conditions caused by human beings' activities and the rise in the sea levels. According to the United Nations Framework Convention on Climate Change (UNFCCC),[173]

The main characteristics of climate change are increases in average global

[171] * Hon. Justice Oscar A. Angote is a Judge in the Environment and Land Court, currently stationed at Machakos, Kenya. He holds an LL B and LL M from the University of Nairobi, and is currently studying for his PhD in Environmental Law at the Centre for Advanced Studies in Environmental Law and Policy (CASELAP), University of Nairobi.
Mike Hulme, et al, 'African Climate change:1900-2100,' (2001) 17 (2) Climate Research, 145

[172] C Werndl, 'Definitions of Climate and Climate Change Under Varying External Conditions' (2014) 5 Journal of Earth Systems Dynamics 683.

[173] United Nations Framework Convention on Climate Change (UNFCCC), *Climate Change: Impacts, Vulnerabilities and Adaption in Developing Countries* (UNFCC).

temperature (global warming); changes in cloud cover and precipitation particularly over land; melting of ice caps and glaciers and reduced snow cover; and increases in ocean temperatures and ocean acidity – due to seawater absorbing heat and carbon dioxide from the atmosphere.[174]

The Paris Agreement, which builds upon the UNFCCC,[175] recognizes that climate change is a common concern for humankind and parties should take measures to address it. State Parties to the Paris Agreement are required, in their efforts to combat global warming, to 'hold the increase in the global average temperature to well below 2°c above the pre-industrial level and pursue efforts to limit the temperature increase to 1.5°c above pre-industrial levels.[176] The objective of these provisions is to reduce global warming. The Paris Agreement calls upon State Parties to adapt to the adverse impacts of climate change, foster climate resilience and reduce the emission of greenhouse gases. [177] To achieve this, it stipulates that all countries should review their contributions to reducing greenhouse gases emissions every five years, with every new Nationally Determined Contribution (NDC) surpassing the last one.

In response to climate change, the Paris Agreement recognizes that States have common but differentiated responsibilities, depending on their respective capabilities and different national circumstances. Common but differentiated responsibility (CBDR) is a principle of international environmental law establishing that all states are responsible for addressing global environmental destruction, yet not equally responsible. The CBRD was formalized in international law at the 1992 United Nations Conference on Environment and Development in Rio de Janeiro.[178] CBRD is a principle of climate justice that recognises that those who are mostly affected by climate change are generally the least responsible for its cause and have the minimal or no capacity to mitigate.

The Paris Agreement therefore takes into account the level of development and the specific needs of particularly vulnerable countries. For example, while making financial commitments, industrialized countries are required to facilitate technology transfers, and more generally, adaptation to a low-carbon economy. The Agreement provides a system for tracking the national commitments (NDC) which is slightly flexible for less developed countries, as compared to industrialized countries which are considered the highest emitters of greenhouse gases.

Climate change is a threat to the very survival of human beings and biodiversity as a whole. It disrupts the earth's ecological systems. Climate change has caused extreme weather conditions which has led to an increase of droughts, floods and rise in the sea levels. Droughts and floods affect food security calling for the need to adopt crops that are resilient to climate change shocks.[179] The production of food relies on rainfall and hence, the changes in rainfall patterns leads to droughts and flooding which affects food production. Climate change has a negative effect on poverty reduction and development, especially in areas which are more vulnerable to climate change such as Africa.[180] Indeed, climate change affects all aspects of the economy and undermines sustainable development and all the efforts made towards attaining the same.

As a result of the threats of climate change on all aspects of the economy, the UN requires states to adapt to climate change, where 'societies make themselves better and able to cope with uncertain future'.[181] There are two policy responses which have been employed to counter climate change: adaptation and mitigation.[182]

Adaptation involves adopting the right measures that seek to reduce the negative impact of climate change. It involves measures that are required to be put in place to counter the effects of climate change.

According to the EU Commission, 'adaptation means anticipating the adverse effects of climate change and taking appropriate action to prevent or minimize the damage they can cause, or taking advantage of opportunities that may arise'.[183] Such adjustments may be preventive or reactive, private or public, autonomous or public. Approaches to climate change adaptation can be short-term, medium-term or long term and include using water resources more efficiently; building flood defenses; developing drought-tolerant crops, amongst other measures. Adaptation also include awareness-raising; information consolidation; research and; technology development.

Mitigation measures on the hand addresses the root causes of global warming by reducing human emissions of greenhouse gases or enhancement of sinks of greenhouse gases or both.[184] The Climate Change Act of Kenya defines mitigation as 'efforts that seek to prevent or slow down the increase of atmospheric greenhouse gas concentrations by limiting current or future emissions and enhancing

[174] Ibid p. 8.
[175] UNGA, 'Paris Agreement'< https://unfccc.int/sites/default/files/english_paris_agreement.pdf > accessed 16 May 2020.
[176] Ibid Article 2(a).
[177] Ibid Article 2(b).
[178] 1992 Rio Declaration on Environment and Development, UN Doc. A/CONF.151/26 (VOL.1), 31 ILM 874 (1992)
[179] P J Gregory, JSI Ingram and M Brklacich, 'Climate Change and Food Security' (2005) <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1569578/ > accessed 9 October 2019.
[180] Matthew C Nisbet, 'Knowledge into Action: Framing the Debates Over Climate Change and Poverty' in Paul D'Angelo and Jim A Kuypers (eds), *Doing News Framing Analysis: Empirical and Theoretical Perspectives* (Taylor & Francis Group 2008) 41.
[181] UNFCCC (n. 3) p. 10.
[182] See Richard Munang, Ibrahim Thiaw. Keith Alverson, Musonda Mumba, Jian Liu and Mike Rivington, 'Climate Change and Ecosystem-based Adaptation: A New Pragmatic Approach to Buffering Climate Change Impacts' (2013) 5 Current Opinion in Environmental Sustainability 67.
[183] EU Commission, 'Adaptation to Climate Change'< https://ec.europa.eu/clima/policies/adaptation_en >accessed 11 October 2019.
[184] OECD, 'Climate Change Mitigation: What Do We Do' (OECD 2008).

potential sinks for greenhouse gases.[185] Mitigation measures involve using renewable energy sources; increasing forest cover; ensuring access to low or zero carbon energy; reducing greenhouse gases emissions in the manufacturing sector and promoting best agricultural practices.

In addition to climate change adaptation and mitigation measures, countries are required to adopt legislations to make these policies enforceable, invest in research, adopt effective technologies and collaborate with other stakeholders such as the civil society, research institutes, and institutions of higher education[186] and strengthen their institutional framework. Being a global concern, states must cooperate to reduce the impact of climate change.

2.1 Climate Change Concerns in the EAC

The EAC is made up of Kenya, Uganda, Tanzania, Burundi, Rwanda and South Sudan. While these countries are located within the eastern Africa region, they possess varied ecosystems, economic activities and natural resources.[187] However, agriculture remains the backbone economic activity within the region and relies on the rains. Any change in the rain patterns in the region therefore affects food production and poverty reduction efforts. Another unique feature about the EAC is that there exist transboundary natural resources shared by two or more Member States, such as: Lake Victoria Basin (Kenya, Uganda, Burundi, Rwanda and Tanzania), Nile River Basin (Burundi, Rwanda, Tanzania and Kenya); and the Serengeti Mara Ecosystem (Kenya and Tanzania). It for the very reason of the shared resources amongst the EAC countries that environmental law scholars such as Odote,[188] Muigua,[189] and Sewagude,[190] have emphasized that climate change is likely to undermine the sustainability of the trans-boundary natural resources which may lead to conflicts. They have called upon the EAC countries to cooperate and embrace mechanisms geared towards the control of climate change.[191]

[185] Government of Kenya, *The Climate Change Act No.11 of 2016* (Government Printers 2016) Section 2.

[186] Navroz K Dubash, Markus Hagemann, Niklas Höhne and Prabhat Upadhyaya, ,Developments in National Climate Change Mitigation Legislation and Strategy' (2013) 13(6) Journal of Climate Policy 649.

[187] S Eriksen, K O'Brien and L Rosenttrator, 'Climate Change in Eastern and Southern Africa: Impacts, Vulnerability and Adaptation' (GECHS Report 2008).

[188] Collins Odote, 'Public Interest Litigation and Climate Change: An Example from Kenya' in Oliver C Ruppel, Christian Roschmann and Katharina Ruppel Schlichting, *Climate Change: International Law and Global Governance* (Nomos Verlagsgesellschaft mbH 2013) 805-830.

[189] Kariuki Muigua, 'Managing Transboundary Natural Resources in Kenya' (2018)

[190] SM Sewagudde, 'Lake Victoria's Water Budget and the Potential Effects of Climate Change in the 21st Century' (2009) 12 African Journal of Tropical Hydrobiology and Fisheries 22.

[191] Samuel Kerunyu Gichere, 'Climate Change and Its Effect on Cities of East African Countries' (2010) Climate Change and Sustainable Urban Development in Africa and Asisa 211.

The EAC economy is dependent on natural resources.[192] The current extreme weather conditions are negatively affecting its production and economic development. Threats of climate change in East Africa are evidenced by extreme weather events. There is a decrease in rainfall and when it rains, floods occur leading to the loss of crops, livestock and sometimes human life. The presence of recurrent droughts and floods across the member States of the East African Community is a clear indication that the impact of climate change is evidenced by the extreme weather events.

For instance, in 2018, nine people were feared dead in Tanzania as a result of flooding.[193] Kenya has had a share of flooding leading to deaths, displacement and destruction of property,[194] with over 237 people having died this year from floods.[195] Flooding in itself is a big hindrance to good health because it results to poor sanitation and waterborne diseases such as typhoid. In Tanzania, it is estimated that the average annual temperature has increased by 1.0ºC since 1960 and the mean annual temperature is projected to increase by 1.0 to 2.7°C by the 2060s, and 1.5 to 4.5°C b y the 2090s'. [196]

Uganda has made great efforts in fighting climate change effects.[197] Yet, Uganda still remains susceptible to rise in temperatures, droughts and floods.[198] These climate change conditions are likely to be exacerbated if sufficient strategies are not put place. [199] In the semi-arid areas of Uganda, for example, temperatures are rising, the ice caps of Mount Ruwenzori have reduced, there is reduced rainfall in the area and when it rains, uncontrolled flooding occur.

While Rwanda is determined to ensure that it implements the green economy, it has also faced the threats of climate change. In its National Adaptation Plan Action (NAPA), Rwanda has recognized that the extreme phenomena of droughts, floods, abnormalities in temperatures and the variability of Lake Kivu levels are some of the climate change threats facing the country.

[192] DS Ward and NM Mahowald, 'Contributions of Developed and Developing Countries to Global Climate Forcing and Surface Temperature' https://iopscience.iop.org/article/10.1088/1748-9326/9/7/074008/pdf accessed 11 October 2019.

[193] Flood List, 'Many African Countries are Flooding, Risking Decades of Development if they Do Not Adapt' <http://floodlist.com/africa/african-countries-floods-risk-decades-development> accessed 10 October 2019.

[194] Flood List' Kenya: Over 1000 Displaced by Floods in North'< http://floodlist.com/africa/kenya-floods-marsabit-mandera-october-2019 >accessed 10 October 2019.

[195] Daily Nation Newspaper, http://www. nation.co.ke>accessed on 16.05.2020

[196] Irish Aid, *Tanzania Country Cliamte Change Assessment Report* ()5.

[197] Republic of Uganda, 'Climate Change Profile: Uganda' (Ministry of Foreign Affairs 2018).

[198] LTS International, 'Climate Change in Uganda: Understanding the Implications and Appraising the Response' (2008).

[199] Michal Nachmany, Sam Fankhauser, Jana Davidová, Nick Kingsmill, Tucker Landesman, Hitomi Roppongi, Philip Scgleifer, Joana Setzer, Amelia Sharman, C Stolle Singleton, Jayaraj Sundaresan and Terry Townshend, 'Climate Change Legislation in Uganda' (Ab Excerpt from the 2015 Global Climate Legislation Study: A Review of Climate Legislation in 99 Countries).

Burundi experiences frequent famines and hail storms.[200] Burundi has also continued to experience floods leading to destruction of property and loss of lives.[201] South Sudan's climate change conditions has been attracting international attention in the recent. The United Nations Development Programme (UNDP) has called upon the international community to give priority to South Sudan's climate change situation, which has been made worse by the frequent political instability in the country.[202] The Climate Change Vulnerability Index, ranks South Sudan amongst the last five worst performing in terms of climate change vulnerability and warns that its global warming will be felt more than twice that felt at the global average.[203]

While climate change is a global concern and international efforts having been put in place to adapt and mitigate its impact,[204] the EAC also has taken institutional and structural measures to deal with those threats. Having recognized that indeed climate change is evident in the EAC and continues to negatively impact on the development agenda of the region, the EAC has sought to adopt laws and policies at both the regional and national level to control climate change.

3.0 Laws and Policies adopted by the EAC to control climate change

Article 126 (2) (b) of the EAC Treaty provides that party states shall through their appropriate national institutions take all necessary steps to harmonise their national laws appertaining to the community. The duty to control climate change is well embedded in the aspirations of the Treaty establishing the EAC. Article 5 (3) (c) of the EAC Treaty requires the EAC to ensure 'the promotion of sustainable utilization of the natural resources of the Partner States and the taking of measures that would effectively protect the natural environment of the Partner States.

The EAC Treaty, Chapter 19, further requires that member states should cooperate in environment and natural resource management. To be specific, Article 111(1) of the EAC Treaty requires Partner states to: agree to take concerted measures to foster cooperation in the joint and efficient management and sustainable utilization of natural resources within the Community; undertake, through environmental management strategy, to cooperate and coordinate their policies and actions for the protection and conservation of the natural resources and environment against all forms of degradation and pollution arising from developmental activities; undertake to cooperate and adopt common policies for control of transboundary movement of toxic and hazardous waste including nuclear materials and any other undesirable materials; provide prior and timely notification and relevant information to each other on natural and human activities that may or are likely to have significant trans-boundary environmental impacts and shall consult with each other at an early stage; and develop and promote capacity building programmes for sustainable management of natural resources.

All actions related to the environment must seek to protect, preserve and enhance the quality of the environment and its sustainability. The EAC countries are therefore required by the provisions of the Treaty to ensure sustainable utilization of natural resources, and especially transboundary natural resources. Article 100 of the EAC Treaty obligates member states to 'cooperate and support each other in all activities of the World Meteorological Organization (WMO) affecting the interests of the Community especially the monitoring of the atmospheric and climatic changes on the planet'. The member states have actualised the provisions of the Treaty dealing with the conservation and utilization of transboundary resources in a sustainable manner, and specifically on how to address the issue of climate change in the region, through various policies and strategies.

4.0 EAC Protocol on Environment and Natural Resources Management (EAC Protocol on Environment)

While the EAC Treaty does not specifically refer to climate change, the EAC Protocol on Environment and Natural Resources Management (EAC Protocol on Environment) does. The EAC Protocol on Environment defines climate change as: a change of climate which is attributed directly or indirectly to human activity that alters the composition of the global atmosphere and which is in addition to natural climate variability observed over comparable time periods.[205]

Article 24 requires the EAC member states to 'develop and adopt an integrated approach to address the effects of climate change in the Community'. These strategies include developing and harmonizing laws, policies and strategies that seek to mitigate climate change threats and in the end benefit from the 'Clean Development Mechanisms under the Kyoto Protocol and other similar climate change adaptation and mitigation activities and strategies.[206] Further, EAC countries are required to develop and strengthen education and training programmes, in order to enhance human and institutional capacities on climate change at the national level. [207]

[200] J Baramburiye, M Kyotalimye, TS Thomas and M Waithaka, 'Burundi' in IFPRI, *East African Agriculture and Climate Change*

[201] Netherlands Commission for Environmental Assessment, 'Climate Change Profile: Burundi' (2015).

[202] UNDP, 'Confronting Climate Change in South Sudan' (UNDP 2017).

[203] Philip Omondi and Elliot Vhurumuku, 'Climate Risk and Food Security in South Sudan: Analysis of Climate Impacts on Food Security and Livelihoods' (World Food Programme 2014).

[204] See the UNFCCC, the Kyoto Protocol and the Paris Agreement

[205] Article 1; Article 24

[206] See Article 24 of the EAC Protocol on Environment.

[207] Ibid Article 24(b).

Technology mitigation strategies have also been recognised as fundamental in addressing climate change within the EAC. The Protocol requires that countries cooperate and at the national level 'develop strategies for the transfer and adaptation of relevant technology to alleviate the pressure on fragile ecosystems and natural resources and contribute to mitigation of climate change'.[208]

3.1 EAC Climate Change Policy (EACCCP)

The EAC Climate Change Policy,[209] was adopted in 2010 to address the impact of climate change on key economic drivers in the region- agriculture, energy, transport, health, forestry, wildlife, land and infrastructure among others. The presence of severe droughts, floods, high temperatures and extreme weather conditions were recognised as factors hindering the achievement of the EAC integration.[210] Therefore, the EAC Climate Change Policy seeks to address the climate change effects through the implementation of adaptation and mitigation strategies.

The adaptation policies include:

> *... strengthening meteorological services and improving early warning systems, increasing preparedness for disaster risk management, scaling up of efficient use of water and energy resources, irrigation, crop and livestock production, protection of wildlife and key vulnerable ecosystems such as wetlands, coastal, marine and forestry ecosystems, improving land use, soil protection, tourism, infrastructure and human settlement; intensify diseases, vectors, and pests control.*[211]

The Adaptation strategies in the policy seek to manage climate risk to a certain acceptable limit. This is in line with Article 4 of the UNFCCC which requires the member states to formulate and adapt National Adaptations Plans of Action (NAPA). Kenya,[212] Uganda,[213] Tanzania,[214] Rwanda,[215] Burundi,[216]and South Sudan have adopted the NAPAs.[217] These NAPAs not only indicate the adaptation strategies put in place to address climate change, but also provide for priority areas which mainly focus on agriculture, environment and water resources.

The mitigation measures have also been recognized in the Policy, and include: afforestation; reforestation; promotion of energy efficiency; efficient crop and livestock production systems; and efficient transport systems, waste management while capturing opportunities in emission reductions in the region. [218]

The policy further requires member states to set out their objectives on the energy sector which is to increase availability and access to sustainable, reliable and affordable renewable energy sources. The EACCCP requires that State parties adopt policies, legislative and institutional framework that seeks to address climate change and implement the EACCCP. The EACCP continues to drive climate change policies in the region. The EAC Climate Change Strategy was adopted to guide the implementation of the EACCCP.

3.2 EAC Climate Change Programs

The EAC has continued to play a key role in adopting adaptation measures to climate change, especially in areas where its member states share resources. For instance, through the East African Community Transboundary Ecosystems Act, a Commission established under the Act is required to ensure that in the utilization of the shared transboundary ecosystem, the impacts of climate change are taken into consideration. These transboundary projects include the Mt. Elgon Regional Ecosystem Conservation Programme, which seeks to protect the Mt. Elgon Forest through climate change adaptation and mitigation. The Programme on Climate Change Adaptation and Mitigation in the Eastern and Southern Africa (COMESA-EAC-SADC) Region,[219] and the Planning for Resilience in East Africa through Policy, Adaptation, Research and Economic Development (PREPARED) seek to enhance EAC resilience to climate change. The EAC has also continued to hold regional climate change technical working group meetings such as the one held in Nairobi in 2018 to discuss the implementation of the EAC adaptation and mitigation actions.[220] Control of climate change is therefore at the core of EAC priority areas.

---

[208] Ibid Article 24(c).

[209] EAC, *EAC Climate Change Policy* (EAC 2010).

[210] Bernard Namanya, 'Towards Harmonization of the East African Community (EAC) Climate Change Policies, Laws and Institutions' (Paper for presentation at the 3rd Global Climate Policy Conference, Ledger Plaza, Bahari Beach Hotel, Dar es Salaam, Tanzania, 13-14 July 2016).

[211] Ibid p. ii.

[212] Republic of Kenya, *Kenya National Adaptation Plan 2015-2030: Enhanced Climate Resilience Towards the Attainment of Vision 2030 and Beyond* (Ministry of Environment and Natural Resources 2016).

[213] Mary Nyasimi, Maren Radeny, Catherine Mungai and Corneliaus Kamimi, 'Uganda's National Adaptation Programme of Action: Implementation, Challenges and Emerging Lessons' (Climate Change, Agriculture and Food Security 2016; Bwango Apuuli, J Wright, C Elias and I Burton, 'Reconciling National and Global Priorities in Adaptation to Climate Change: With an Illustration from Uganda' (2000) 61(1) Journal of Environmental Monitoring and Assessment 145.

[214] United Republic of Tanzania, *National Adaptation Programme of Action* (Division of Environment 2007).

[215] Republic of Rwanda, National Adaptation Programmes of Action Climate Change (Ministry of Lands 2006).

[216] Republic of Burundi, National Adaptation Plan of Action to Climate Change (2007).

[217] Republic of South Sudan, *Republic of South Sudan's National Adaptation Programme of Actions to Climate Change* (Ministry of Environment 2007).

[218] Ibid.

219 Available at https://www.sadc.int/files/9613/5293/3510/COMESA-EAC-SADC_Climate_Change_Programme_2011.pdf accessed 12 May 2020.

[220] Gloria Namande, 'East Africa holds a Regional Climate Change Technical Working Group Meeting' (2018)

4.0 Laws and Policies Adopted at the National Level to Control Climate Change

At the national level, Member States, in addition to the EAC climate change obligations, have also signed international conventions and treaties that seek to control climate change. All the EAC countries have signed the UNFCCC and the Paris Agreement.

4.1 Kenya

The right to a clean and healthy environment is now a recognized right in Kenya.[221] Kenya is the first and only country in the region which has enacted a climate change Act. [222] The main objective of the Act is to develop, manage, implement and regulate mechanisms to enhance climate change resilience and low carbon development for the sustainable development in the country.[223] The Act applies to all sectors of the economy. It provides for the: policy, coordination and oversight; climate change response measures and actions; duties relating to climate change; public participation and access to information. The Act establishes the Climate Change Council chaired by the president.[224]

The Climate Change Act mandates the Cabinet Secretary to formulate a National Climate Change Action Plan (NCCAP) that shall prescribe measures to address climate change, including those related to mitigation of climate change. The Climate Change Directorate is mandated to establish and manage a national registry for appropriate mitigation actions by public and private entities. The Act also establishes the Climate Change Fund for financing actions to address climate change.

The country has developed a four-year National Climate Change Action Plan (NCCAP) (2018-2022) as required under the Paris Agreement. The NCCAP provides the actionable plan by Kenya in its efforts to reduce greenhouse gases emissions. To that end, Kenya has taken advantage of its renewable energy resources and invested in geothermal, wind, solar and biofuel energy.[225] The country's overall mitigation plan is to abate its greenhouse gases emission by 30% by 2030.[226] The country has domesticated its conditional Nationally Determined Contributions (NDC) which are at the heart of the Paris Agreement.[227]

In addition to the Climate Change Act, the Environmental Management and Coordination Act (EMCA),[228] provide a strong basis for controlling climate change. Indeed, Section 56A of the EMCA requires the Cabinet Secretary for environment, in consultation with relevant lead agencies, to issue guidelines and prescribe measures on climate change. In addition to the laws governing climate change, Kenya has a green Constitution which seeks to enhance environmental governance in many ways which, if implemented fully, will control climate change in many ways.[229] These includes provisions such as: the removal of standing in environmental litigation; the right to a clean and healthy environment; public interests litigation; and the application of international environmental law and principles in Kenyan law.

As stated earlier on, Kenya is the only country in the EAC that has established a specialized Environment and Land Court (ELC)[230]. Kenya also hosts the United Nations Environment Programme (UNEP) which is currently running a project known as the Nairobi Work Program on Impacts, Vulnerability and Adaptation to Climate Change.[231] At the policy level, Kenya has adopted the National Climate Change Action Plan 2018-2022[232] and the National Climate Change Strategy 2010.[233] All these laws and policies seek to control climate change in the country, by putting in place both mitigation and adaptation measure.

4.2 Uganda

Article 245 of the Constitution of Uganda protects the environment and natural resources. [234] The Ugandan citizens have a constitutional duty to create and protect a clean and healthy environment.[235] The right to a clean and healthy environment, which is the ultimate outcome of controlling climate change, enjoys a constitutional standing in Uganda.[236] Uganda does not have a specific climate change statute. However, it has ratified the UNFCCC, the Kyoto Protocol and the Paris Agreement. In addition, the existing environmental legislation, the National Environment Act 2019,

[221] Article 42 of the Constitution of Kenya provides that 'Every person has the right to a clean and healthy environment, which includes the right to have the environment protected for the benefit of the present and future generations through legislative and other measures.'

[222] Climate Change Act, 2016

[223] Climate Change Act Section 3(1).

[224] Ibid Section 5.

[225] See Kenya's Intended Nationally Determined Contribution (INDC), 2015, p 2

[226] IRENA, 2015. Analysis of Infrastructure for Renewable Power in Eastern and Southern Africa, p.1

[227] Kenya submitted her Intended Nationally Determined Contribution on 28/12/2016 when it deposited its instrument of ratification of the Paris Agreement under the UNFCCC

[228] Republic of Kenya, The Environmental Management and Coordination Act No.8 of 1999 (Government Printers 1999)

[229] See Oscar Amugo Angote, 'Environmental Litigation in Kenya: A Call for Reforms' (2019) 3 Journal of Conflict Management and Sustainable Development CMSD 54; Oscar Amugo Angote, 'The Role of the Environment and Land Court in Enforcing Environmental Law: A Critical Analysis of the Environmental Caseload' (LLM Thesis University of Nairobi 2018).

[230] Article 162 (2) (b) of the Constitution of Kenya provides that Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to the environment and the use and occupation of, and tittle to land; Section 4 of the Environment and Land Court Act establishes the Environment and Land Court.

[231] https://unfccc.int/topics/adaptation-and-resilience/workstreams/nairobi-work-programme-on-impacts-vulnerability-and-adaptation-to-climate-change accessed 27 September 2019.

[232] Republic of Kenya, *National Climate Change Action Plan 2018-2022, Volume 3: Mitigation Technical Analysis Report* (Ministry of Environment and Forestry 2018).

[233] See Government of Kenya, 'Cimate Change Action Plan' http://www.kccap.info/index.php?option=com_phocadownload&view=category&id=36 accessed 10 October 2019.

[234] Republic of Uganda, *Uganda National Climate Change Policy* (2015);

[235] Constitution of Uganda, Article 17(j).

[236] Ibid, Article 39.

has specific provisions relating to the control of climate change. [237]

The National Environment Act, 2019 defines climate change as 'a change of climate which is attributed directly or indirectly to human activity that alters the composition of the global atmosphere and which is in addition to natural climate variability observed over the comparable time periods.[238] The National Environmental and Management Authority (NEMA) is mandated to provide for emerging environmental issues, including climate change.

Climate change is a priority in Uganda. NEMA is required to ensure that 'the implementation of public and private projects and the approaches that increase both the environment and people's resilience to impacts of climate change are prioritized.'[239] This means that all development projects in Uganda must undergo Environmental Impact Assessment, which is a tool that is used to mitigate any environmental impact that may arise due to the proposed development, including how to reduce greenhouse gas emissions, if any. In 2018, the Ugandan government was sued by a local Non-Governmental Organization (NGO) Greenwatch, for failing to put in place mitigating measures to protect them from climate change.[240] This case, among others, shows that the people of Uganda are aware of their environmental rights vis a vis the effect that climate change has on the environment and their lives. This proactive actions by the members of the public in respect to protecting the environment enhances public participation in environmental governance.

At the policy level, Uganda has a national climate change policy.[241] This policy seeks to transform climate change through adaptation and mitigation. The adaptation policy priority areas include: agriculture and livestock; water; fisheries and aquaculture; transport and works; forestry; wetlands; biodiversity and ecosystem services; health; energy; wildlife and tourism; human settlements and social infrastructure; human settlements among others. The priority mitigation policy areas include: forestry; land use and land-use change; reduced emissions from deforestation and forest degradation; wetlands; energy; waste management; and industrial sector amongst others. The climate change policy of Uganda recognizes the need for a legal and regulatory framework to translate the policy priorities into implementable actions. [242]

[237] Republic of Uganda, *The National Environment Act No. 5 of 2019* (UPCC 2019).

[238] Ibid Section 2.

[239] Ibid Section 5 (2) (s).

[240] Client Earth, 'Ugandan Government to Face Court in the Country's First Climate Change Case' https://www.clientearth.org/ugandan-government-to-face-court-in-the-countrys-first-climate-change-case/ accessed 30 September 2019.

[241] Republic of Uganda, *Uganda National Climate Change Policy* (Ministry of Water and Environment 2015).

[242] Bernard Namanya and Onesmus Mugyenyi, 'Shaping National Climate Change Legislation in Uganda' (Environmental Management for Livelihood Improvement Bwaise Facility 2015).

Climate change in Uganda is also addressed under its 2016-2021 National Development Plan and Vision 2040.[243] Climate change therefore remains a threat to the attainment of the Vision 2040 and development plans such as infrastructure, food security and fishing, amongst others. At the institutional level, the Climate Change Department (CCD), which was previously known as the Climate Change Unit (CCU), was established in 2008 under the Ministry of Water and Environment, and is the focal climate change institution in Uganda.[244]

The 2019 National Environment Act at Section 69, stipulates that the lead agency, in consultation with NEMA, shall manage the climate change impacts on ecosystems. In addition to its advisory role, its required to improve the resilience of the ecosystems, promote low carbon development and reduce emissions resulting from deforestation and forest degradation. Section 69(2) also requires the lead agency to issue guidelines and measures that seek to control climate change including adaptation and mitigation measures.

4.3 Rwanda

Article 22 of Rwanda's Constitution protects the right to a clean environment. Everyone is required to protect, safeguard and promote, as a constitutional duty, the environment as stipulated under Article 53. The State has a constitutional obligation to adopt a law that seeks to provide modalities for conserving, protecting and promoting the environment. Therefore, protection of the environment which leads to the control of climate change is well underpinned under the Rwanda Constitution.

Rwanda has not adopted specific climate change legislation. The Organic Law Determining the Modalities of Protection, Conservation and Promotion of the Environment in Rwanda,[245] is the general environmental law that seeks to protect, safeguard and promote environmental governance and protection in the country. This law, unlike in Uganda, does not have provisions relating to climate change. However, the law addresses environmental related issues that are caused by climate change such as pollution. At the international level, Rwanda has signed and is a party to various international environmental treaties including: the Convention on Biological Diversity, UNFCC, Vienna Convention on Ozone Layer Protection, Stockholm Convention on Persistent Organic Pollutants, the Kyoto Protocol and the Paris Agreement.

At the policy level Rwanda, has adopted the National Environment

[243] Republic of Uganda, *Second National Development Plan (NDPII) 2015/16-2019/20* (2015) 58

[244] Uganda Ministry of Water and Environment, 'Climate Change Department'< http://ccd.go.ug/ > accessed 30 September 2019.

[245] Republic of Rwanda, *The Organic Law Determining the Modalities of Protection, Conservation and Promotion of the Environment in Rwanda* No.04/2005 of 08/04/2005 (

and Climate Change Policy.[246] This policy is linked to the Constitution of the Republic of Rwanda, Vision 2050 Aspirations, the National Strategy for Transformation, Green Growth and Climate Resilience Strategies, [247] National Determined Contributions and sectoral policies and strategies.[248] These policies and strategies recognize that indeed Rwanda is highly vulnerable to climate change as it is reliant on agriculture and hydropower, and is likely to be affected by extreme weather conditions.

Rwanda has indeed adopted a strategy that articulates the country's actions to reduce greenhouse gas emissions in energy, transport and agricultural sectors.[249] The country's efforts are geared towards reduction of greenhouse gases emissions in energy, transport and agriculture.[250] Rwanda's current ongoing activities towards a low carbon economy include establishment of new grid connected renewable electricity generation capacity in the form of large scale hydro power plants and solar PV power,[251] amongst other efforts.

[246] Republic of Rwanda, *National Environment and Climate Change Policy* (Ministry of Environment 2019).

[247] Republic of Rwanda, *Green Growth and Climate Resilience: National Strategy for Climate Change and Low Carbon Development* (2011).

[248] Ibid p. 16-18

[249] Rwandas National Strategy on Climate Change and Low Carbon Development, 2011; see also Rwanda's Intended Nationally Determined Contribution (INDC), 2015, pp13-17

[250] Ibid

[251] Ibid

The Climate Change Unit was established in 2009 under the Rwanda Environment Management Authority (REMA). To implement the National Strategy on Climate Change and Low Carbon Development, the Centre for Climate Knowledge for Development (CCKD) and the Technical Coordinating Committee were established. The two institutions compliment the already existing institutions, including the Climate Change Unit under Rwanda Environment Management Authority and the National Fund for Climate Change and the Environment (FONERWA). The fund, named FONERWA, is the primary mechanism through which Rwanda accesses programmes and disburses and monitors international and national budgetary climate and environment finance.

4.4 Tanzania

The 2004 Environment Management Act is the law that governs environmental governance in Tanzania. Provisions pertaining to climate change are stipulated under Section 75 of the Act. The Minister for Environment is required, in consultation with other relevant sector Ministries, adopt measures that address climate change and particularly impacts of climate change and adaptation measures. The Ministry also issues periodical guidelines on climate change.

At the policy level, Tanzania National Development Plan (2016/17-2020/21) recognizes climate change interventions as key to its development agenda. The climate change interventions anticipated under the policy include: Combating climate change and its impacts; integrating, harmonizing and coordinating environmentally sustainable policies and strategies for growth in key growth sectors, including climate change adaptation and mitigation; mitigating and adapting to climate change, including supporting research programs to improve and develop new technologies, quality seeds, pest control, and agronomic practices.

Tanzania's overall mitigation ambition is to reduce greenhouse gases emissions by between 10-20% by 2030 relative to the business-as-usual (BAU) scenario on condition that it receives international funding.[252] Tanzania has a national climate change fund that seeks to finance the mitigation and adaptation measures. [253] At the national level, the Vice President's Office (VPO), Division of Environment, is responsible for all climate related activities. Theres is also an established Natinal Climate Change Steering Committee which prvides policy guidance to the National Climate Focal Point to ensure coordinated actions and participation within various sectors.[254]

4.5 Burundi and South Sudan

[252] See Tanzania's Intended Nationally Determined Contribution (INDC), 2015, pp. 6-7

[253] Irish Aid, *Tanzania Country Cliamte Change Assessment Report*

[254] See National Climate Change Strategy (2012), pp. 50-51

Burundi and South Sudan have not yet adopted climate change laws. These two countries do not also have specific environmental laws. However, Burundi has an environment code, forestry code, mining and petroleum code. The Ministry of Water, Environment and Urban Planning has recognized the need to amend the Environment Code to enable it address various issues such as 'prevention and management of natural disasters, the issue of climate change, invasive species, and so on'.[255] In Burundi, the Ministry for Environment implements and controls all environmental issues.

Under its commitment agenda in the reduction of greenhouse gases, Burundi's unconditional mitigation contribution is to reduce greenhouse gas emissions by 3% compared to the business-as-usual (BAU) scenario by 2030, while its conditional mitigation contribution is to reduce the greenhouse gases by 20% beginning in 2016. [256] South Sudan does not have a legislation on climate change or a national climate change policy. However, the country's National Environment Policy (2015-2025) and the National Energy Policy (2015-2025) enacted in 2016 have a few chapters on climate change.

[255] Government of Burundi, 'Media Release Consecutive to the Cabinet Meeting Held on Wednesday 08 and Thursday 09 November 2017' <http://burundi.gov.bi/spip.php?article3005 > accessed 15 October 2019.

[256] See Burundi's Intended Nationally Determinant Contribution (INDC), 2015 p8. The conditional mitigation is subject to the provision of financial support by developed countries

5.0 Climate Change Litigation in East Africa and the Way Forward

Climate change litigation as a tool to strengthen climate action is increasing.[257] Climate change legislation is critical in addressing climate change because it creates duties, rights and sanctions which can be enforced by the court. That is why international environmental instruments on climate change require State Parties to put in place both policy and legislative measures to control climate change.

There has been an increase in the agitation by the public of the importance of the States in taking measures to control climate change. This is evidenced by the increasing litigation of climate change cases around the world as provided by the United Nations, The *Status of Climate Change Litigation: A Global Review*.[258] This report identifies some of the issues that arise in the climate change litigation that the EAC Member States must take into consideration when adopting laws and policies that seek to address climate change. They include justiciability (this encompasses standing and the balance of power between the arms of governments); application of international laws and principles; human rights, especially the right to a clean and healthy environment; common law application; statutory authority and national public policy; and duty of care.[259]

The UN has taken cognizance of the fact that litigation has enabled legislators and policymakers to be more ambitious and thorough in their approaches to climate change. In addition, litigation has sort to fill the gaps left by legislative and regulatory inaction. As a result, courts are adjudicating a growing number of disputes over actions—or inaction—related to climate change mitigation and adaptation efforts. [260]

In the case of *Urgenda Foundation V The State of the Netherlands*,[261] the Urgenda Foundation and more than 900 Dutch citizens sued the Dutch government and asked the court to compel the government to reduce gas emissions. The Dutch government argued that it can choose between adaptation and mitigation measures. [262] On appeal, the Supreme Court affirmed that indeed, adaptation measures are not enough and that the Dutch government must also adopt the mitigation measures, which includes reduction of the emission of greenhouse gas.

[257] Joana Setzer and Rebecca Byrnes, 'Global Trends in Climate Change Litigation: 2019 Snapshot' (Policy Report 2019) http://www.lse.ac.uk/GranthamInstitute/wp-content/uploads/2019/07/GRI_Global-trends-in-climate-change-litigation-2019-snapshot-2.pdf accessed 18 May, 2020.

[258] UN, *The Status of Climate Change Litigation: A Global Review* (UN Environment Programme 2017).

[259] Ibid p.27-39.

[260] Ibid p.4

[261] [2015] HAZA C/09/00456689 (June 24, 2015); aff'd (Oct. 9, 2018)

[262] Jaap Spier, 'There is no Future Without Addressing Climate Change' (2019) 37(2) Journal of Energy and Natural Resources Law 181-204.

The Court also applied international environmental laws and principles in reaching its decision by stating that the Dutch government had the duty of care and should reduce the greenhouse gases emissions by 25% by 2020. The court stated that by doing so, the government should employ environmental principles, including the precautionary principle, the causality principle and the climate engineering principle.[263] At the national law, the court applied the Dutch Civil Code and directed the Dutch government, while fulfilling its duty of care to its citizens, to adopt proactive and effective climate policies.[264]

In Austria, the court, in the case of *In Re Vienna-Schwechat Airport Expansion,* overturned the government's decision to build a third runway at the airport on the ground that it would lead to more gas emissions contrary to the government's national and international obligations in mitigating the threats of climate change.[265] In Pakistan,[266] the Court found that due to the rising temperatures in the country, which affected the poor farmers, the government had failed to implement its 2012 National Climate Policy and Framework.

In Africa, climate change litigation is picking up. In the case of *Earthlife Africa Johannessburg v Minister of Environmental Affairs and Others,*[267] the parties asked the court to review the decision of the Minister of Environmental Affairs in granting environmental authorization of a coal-fired power plant (the Thabametsi Power Project) and for the Minister to consider climate change impacts of the project.[268] It was argued that the project was to operate for 40 years and that during this period, it would emit greenhouse gases to an area that was vulnerable to climate change. The court, while holding that climate change impact assessment was necessary and relevant, found that this was in tandem with South Africa's obligations under the Paris Agreement and the National Determined Contributions (NDC).[269]

Nigeria has also had climate change cases. In the matter of *Gbermre v Shell Petroleum Development Company of Nigeria Ltd,*[270] the applicants argued that the burning of gas by flaring the same in their community contributed to 'adverse climate change as it emits carbon dioxide and methane

[263] Jonathan Vershuuren, 'The State of the Netherlands v Urgenda Foundation: The Hague Court of Appeal Upholds Judgment Requiring the Netherlands to Further Reduce Its Greenhouse Gas Emissions' (2019) 28 (1) Review of European, Comparative and International Environmental Law 94-98.

[264] Urgenda Case Para 73.

[265] See Austria's Climate Protection Act of 2011.

[266] *Leghari v. Federation of Pakistan, W.P No. 25501/2015*

[267] [2017] ZAGPPHC 58 (2017) 65662/16.

[268] Jean-Claude N Ashukem, Setting the Scene for Climate Change Litigation in South Africa: Earthlife Earthlife Africa Johannesburg v Minister of Environmental Affairs and Others [2017] ZAGPPHC 58 (2017) 65662/16' 13/1 Law' (2017) Environment and Development Journal 37.

[269] See Donald A. Brown and others, 'South Africa and Climate Change Ethics' in Tracy-Lynn Humby and others (eds) *Climate Change Law and Governance in South Africa* (Original Service 2016).

[270] (2005) AHRLR 151 (NgHC 2005)

which causes the warming of the environment, pollutes their food and water'.[271]

In Kenya, the application of the Climate Change Act was interrogated in the case of *Save Lamu & 5 others v National Environmental Management Authority (NEMA) & Another*[272] in which the National Environmental Tribunal (NET) affirmed that the Climate Change Act must be considered in all development projects. The Tribunal held as follows:

> *Climate change issues are pertinent in projects of this nature and due consideration and compliance with all laws relating to the same should be observed The omission to consider the provisions of the Climate Change Act 2016 was significant even though its eventual effect would be unknown.*[273]

In the case of *African Network for Animal Welfare (ANAW) Vs The Attorney General of The United Republic of Tanzania*, Reference No. 9 of 2010, the East African Court of Justice restrained the Tanzanian government from implementing a road project across the Serengeti National Park because 'the effects would be devastating both for the Serengeti and neighbouring parks like the Maasai Mara in Kenya.' Although the court did not make reference to the effects that the construction of the bitumen road across the Park would have on climate change, it's obvious that depletion of vegetation within the Park would reduce the much needed carbon sinks, which are an important component in climate change mitigation.

The above cases show that, indeed, climate change litigation continues to be an invaluable strategy that seeks to enforce climate change laws and policies. The EAC countries should embrace climate change litigation by providing favorable constitutional and statutory provisions to allow people to seek redress and compel the state parties to take measures to control climate change.

6.0 Conclusion

The impacts of climate change globally, and in East Africa in particular, is real. Climate change has affected the ecosystem, human health, infrastructure, food and water. Climate change undermines the attainment of Sustainable Development Goals (SDGs) and the objectives of the EAC integration. It will be impossible to eradicate poverty as contemplated under Sustainable Development Goals number one as long as climate change persists. This is so because climate change affects the economy of a country and destabilizes development in the region. The agriculture sector, which is the backbone of the Member States of the EAC, is the one that is likely to be most affected, thus impacting on food security and undermining any efforts to reduce poverty. There is a lot that the EAC and its Member States must do to address the climate change conditions in the region.

Some of the measures that the EAC can take into consideration to mitigate and adapt to the effects of climate change include: timely dissemination of information on seasonal forecast by the metrological institutions; adaptation and mitigation measures at both the national and the EAC level; coordination amongst various stakeholders; bilateral aid and civil society organizations; enhance public participatory climate change adaptations; adopt crop and livestock varieties that are suitable for the extreme weather conditions; and strengthen early climate change projections.

Indeed, the laws, policies, programs and strategies that have been put in place by the Member States of the EAC shows that there are immense opportunities for the development of renewable energy and clean energy, which, if implemented, will significantly reduce the greenhouse gases. This will go a long way in checking global warming, which is the cause of climate change.

---

[271] Ibid Para 7. Bukola Faturoti, Godswill Agbaitoro and Obinna Onya, ' Environmental Protection in the Nigerian Oil and Gas Industry and Jonah Gbemre v. Shell PDC Nigeria Limited: Let the Plunder Continue' (2019) 27(2) African Journal of International and Comparative Law 225; Mazeedah Hassan, 'The Right to a Clean Environment in Nigeria: Casestudy of Jonah Gbemre vs. SPDC' <https://www.academia.edu/34166455/the_right_to_a_clean_environment_in_nigeria_casestudy_of_jonah_gbemre_vs._spdc > accessed 12 May, 2020.

[272] Tribunal Appeal No.NET 196 of 2016, National Environmental Tribunal at Nairobi.

[273] Ibid para 138-

PLEA BARGAINING AND CRIMINAL JUSTICE DISPENSATION: THE TANZANIA PERSPECTIVE

Dr. Damas Daniel Ndumbaro[274*] **&**
Kassian Clemence Mshomba[275*276*]

[274] *LL. B, LL.M, (University of Dar es Salam, Tanzania), PhD in Law (The Open University of Tanzania), Legal Researcher, Legal Practitioner [Registered Arbitrator Tanzania Institute of Arbitrators, Advocate of the High Court of Tanzania and Zanzibar, Notary Public & Commissioner for Oaths], Academician (UDSM and OUT), Member of Parliament of the United Republic of Tanzania (Songea Urban Constituency), Deputy Minister Foreign Affairs and East African Cooperation in the United Republic of Tanzania, EX – Senior Lecturer, Post Graduate Coordinator in the Faculty of Law, Associate Dean Faculty of Law and Dean Faculty of Law in the Open University of Tanzania.

[**] LL. B (Hons) (University of Dar es Salaam – UDSM), (LLM – International Law with International Relations (Tumaini University Makumira), (PhD Candidate – O.U.T), Resident Magistrate, also; an Advocate of the High Court of Tanzania and subordinate Courts save for Primary Courts.

[275] Kassian Clemence Mshomba

[276] Kassian Clemence Mshomba

Abstract

"Plea bargaining" has been an existent phenomenon in Tanzanian Penal Statutes. A significant address on "plea bargaining" has been made vide the Written Laws (Miscellaneous Amendments) (No. 4) Act, 2019 that amended the Criminal Procedure Act specifically section 194 of the Act. The amending Act empowers the Director of Public Prosecution to enter into "plea bargaining" with accused persons upon agreeable conditions covering certain categories of offences. Notably; criminal justice in Tanzania has been through prosecution of suspects ending up with: nolle prosequi, dismissal of charges, acquittal or conviction. The introduction of "plea bargaining" thus leads into a paradigm shift in the Tanzanian criminal justice.

The notion vide the new amendment has been considered in comparison to the existent "plea bargaining". This study caters for some of the advantages and risks in invoking "plea bargaining" in the Tanzania jurisprudence regarding criminal justice considering the existing laws, rules, regulations and practice with some recommendations by way of conclusion. This focuses on having effective implementation of the renaissance new "plea bargaining" but without hampering the ends of criminal justice to all involved. This study will trigger further critical discussions towards more beneficial criminal justice in the new paradigm.

1.0 Introduction

Criminal justice is an old phenomenon from time medieval. General criminal Statutes cover the Penal Code[277] and the Criminal Procedure Act[278] in creating offences and procedures respectively. Apart from the two key Statutes, there are also numerous penal Statutes addressing specific aspects. "Plea bargaining" phenomenon has been defined in various jurisdictions whereas in Australia, "plea bargaining" has been referred to as informal process involving the prosecuting authority and defense counsel discussing and reach consensus to the charge(s) against the accused.

Upon consensus, concessions are made by parties regarding sentencing covering execution modalities towards a mutual agreement between parties with the accused pleading guilty[279]. Notably; there is no ''plea bargaining'' if there is an absolute denial of the charges on part of the accused. "Plea bargaining" is a practice where an accused agrees to plead guilty to lesser offences thus freed from earlier high charges or offences. In Tanzania, "plea bargaining" has been defined under the Written Laws (Miscellaneous Amendment) (No. 4) Act[280] as follows:

> ***"Plea bargaining" means a negotiation in a criminal case between a prosecutor and the accused whereby the accused agrees to-***
>
> ***(a) Plead guilty to a particular offence or a lesser offence or to a particular count or counts in a charge with multiple counts; or***
>
> ***(b) Cooperate with the prosecutor in the provision of information that may***

[277] Penal Code, Cap. 16.

[278] Criminal Procedure Act, Cap. 20.

[279] Asher Flynn, *"Fortunately we in Victoria are not in that UK Situation: Australian and United Kingdom legal perspectives on plea bargaining reform",* 16 Deakin Law Review 361, 371 (2011).

[280] The Written Laws (Miscellaneous Amendments) (No. 4) Act, 2019, s. 15.

lead to a discovery of other information relating to the offence or count charged, in return for concession from the prosecutor which may lead to a lenient sentence or withdrawal of other counts."

Countries strive to improve Criminal Justice and address congestion of prisoners and suspects towards timely, effective criminal justice. Generally, the adjudication of crimes vis-à-vis the allocated resources in Tanzania is unproportionate. According to the Crime and Traffic Incidents Statistics Report[281], from January to December, 2016; reported cases countrywide in all Police Stations reached 2,850,013 compared to 1,909,685 reported in the same period in 2015 marking an increase of 940,328 cases equivalent to 49.2%. Advanced offences were 75,487 in 2016 compared to 68,814 in 2015 marking an increase of 6,673 cases equivalent to 9.7%. Regarding traffic cases; 2,210,739 total offences were reported from January to December, 2016 comparing to 1,390,482 cases in the same period in 2015 that is, an increase of 820,257 cases equivalent to 59%. Advanced offences were 10,297 comparing to 8,777 cases in the same duration in 2015, that is, an increase of 1,520 incidents equivalent to 17.3%. Most of the cases were filed in Court for adjudication.

[281] Crime and Traffic Incidents Statistics Report, January to December, 2016; January, 2017 Edition, pp. 4 & 5.

Furthermore; in an official speech by the Chief Justice[282], generally; the Judiciary has a total staff of 6,096 out of the required 24,643 that is, 24.7% of the required staff. The Chief Justice[283], briefed that at the High Court level; by end of 2017, a total of 19,187 cases were pending whereas in 2018, a total of 18,284 cases were instituted making a total of 37,471 cases whereas 17,046 cases were determined with pending 20,425 cases. From the availed statistics, by December, 2018, the High Court had 66 Judges in which each Judge had a load of 309 cases while each required to dispose a minimum of 220 cases yearly. According to statistics from the Judiciary of Tanzania[284], the total number of pending cases was: the Court of Appeal (3,523), High Court (19,528), Resident Magistrates' Courts (11,011), District Courts (18,838) and Primary Courts (17,435). All these cases are subjected to speedy mechanisms towards timely criminal justice dispensation. These statistics have led into various mechanisms focusing dispensation of criminal justice.

[282] Professor Ibrahim Hamis Juma – Chief Justice of Tanzania, Speech during Law Day dated 6th day of February, 2019 at Julius Nyerere International Conference Centre, p. 10.

[283] Professor Ibrahim Hamis Juma – Chief Justice of Tanzania, Speech during Law Day dated 6th day of February, 2019 at Julius Nyerere International Conference Centre, p. 17.

[284] Judiciary of Tanzania, Directorate of Case Management (DCM) through Judicial Statistics Dashboard System (JSDS) as of 31st August, 2019.

2.0 Expediting Criminal Justice Dispensation and the Concept of "Plea Bargaining"

Basing on limited resources, Tanzania has invoked procedural and substantive mechanisms in the administration of criminal justice. Fair procedural mechanisms certainly encourage parties to resort into such options instead of concentrating on mechanisms which are unlikely to timely materialize. Such implementation mechanisms should be capable of accelerating disposal instead of dragging back justice. Before the current amendments, "plea bargaining" has been in situations where suspects charged with capital offences for instance, "murder" or "assault causing grievous harm" by offering lesser offences "manslaughter" and "assault" respectively. In other words, what they as such offer is plea to have committed a lesser offence cognate to the charged capital offences thus reducing time in disposing cases and serving costs for calling witnesses.

According to Ronald J. Allen, Timothy Fry, Jessica Notebaert & Jeff Van Dam[285], involved criminal justice dispensation mechanisms are evidentially with implicated costs decreasing the number of disposed cases, thus, "plea bargaining" preferred as a remedial redress. Additionally; Judges and Magistrates have been offering lenient sentences in reducing congestion of inmates. "Plea bargaining" has been argued to be a paradigm shift in complement to the establishment of the Corruption and Economic Crimes Court. The Corruption and Economic Crimes Court was established vide the Written Laws (Miscellaneous Amendment) Act[286] against transnational crimes and other offences sabotaging the economy. Establishment of the Corruption and Economic Crimes Court as a result of CCM Manifesto,[287] set into operation by the President of Tanzania Dr. John Pombe Joseph Magufuli after swearing in office as President through the Written Laws (Miscellaneous Amendments) Act.[288] The establishment of the Court through articles of the CCM Manifesto[289] specifically introduced an effective implementation against illicit drugs.

Though the Corruption and Economic Crimes Court in 2016 focuses at expeditious adjudication of corruption and economic cases, yet; there are challenges in addressing already filed cases before the establishment of the Corruption and Economic Crimes Court still pending in the High Court.

[285] Ronald J. Allen, Timothy Fry, Jessica Notebaert & Jeff Van Dam, "Reforming the Law of Evidence of Tanzania (Part II): Conceptual overview and practical steps", Boston University International Law Journal, [Vol. 32:1], 2014 p. 29.

[286] The Written Laws (Miscellaneous Amendment) Act No. 3 of 2016.

[287] CCM Election Manifesto for 2015 – 2020 General Election.

[288] The Written Laws (Miscellaneous Amendments) Act No. 3 of 2016.

[289] CCM Election Manifesto for 2015 – 2020 General Election, article 155(d).

The Corruption and Economic Crimes Court was among deliberate efforts to comply with the requirements of the International community in combating illicit drugs. Parliamentary discussions through documented Hansards have revealed that the Corruption and Economic Crimes Court aims at combating grand corruption and illicit drugs within the priorities set under the CCM Manifesto.

"Plea bargaining" received momentum through amendments to the Criminal Procedure Act vide the Written Laws (Miscellaneous Amendments) Act[290]. Where influx of bargaining regarding matters with economic interest rocked the jurisdiction. The amending Act[291] reads:

> ***"The principal Act is amended in section 3, by inserting in their appropriate alphabetical order the following new definitions:***
>
> ***"Plea agreement" means an agreement entered into between the prosecution and the accused in a criminal trial in accordance with sections 194A, 194B and 194C;***
>
> ***"Plea bargaining" means a negotiation in a criminal case between a prosecutor and the accused whereby the accused agrees to-***
>
> ***(c) Plead guilty to a particular offence or a lesser offence or to a particular count or counts in a charge with multiple counts; or***
>
> ***(d) Cooperate with the prosecutor in the provision of information that may lead to a discovery of other information relating to the offence or count charged, in return for concession from the prosecutor which may lead to a lenient sentence or withdrawal of other counts."***

The amending Act[292] as well provides for the procedural requirements to be observed in the course of "plea bargaining". In that regard, the amending Act reads:

> ***"The principal Act is amended by adding immediately after section 194 the following:***
>
> ***194A.-(1) A public prosecutor, after consultation with the victim or investigator where the circumstances so permit, may at any time before the judgment, enter a plea bargaining arrangement with the accused and his advocate if represented or, if not represented, a relative, friend or any other person legally competent to represent the accused.***
>
> ***(2) The accused or his advocate or a public prosecutor may initiate a plea bargaining and notify the court of their intention to negotiate a plea agreement.***
>
> ***(3) The court shall not participate in plea negotiations between a public prosecutor and the accused.***
>
> ***(4) Where prosecution is undertaken privately, no plea agreement shall be concluded without the written consent of the Director of Public Prosecutions".***

In maintaining the earlier spirit enumerated in Tanzanian jurisdiction before the advent of the present "plea bargaining", the said amending Act[293] provides that:

> ***"194B. Where consequent to a plea-bargaining arrangement, a plea agreement is entered into between a public prosecutor and an accused person -***
>
> ***(a) The public prosecutor may charge the accused with a lesser offence, withdraw other counts or take any other measure as appropriate depending on the circumstances of the case;***
>
> ***(b) The accused may enter a plea of guilty to the offence charged or to a lesser offence or to a particular count or counts in a charge with multiple counts in exchange for withdrawal of other counts; or***
>
> ***(c) The accused may be ordered to pay compensation or make restitution or be subjected to forfeiture of the proceeds and instrumentalities that were used to commit the crime in question".***

Furthering the said procedural requirements, the amending Act clarifies what should be captured in the plea agreement with all the terms made clear and accepted by the accused. Besides; in case of involvement of prosecutor, any agreement should be entered into with prior consent from the Director of Public Prosecutions in writing as the Act[294] reads:

> ***"194C.-(1) A plea agreement shall be in writing witnessed by advocate of the accused or, if not represented, a relative, friend or any other person legally competent to represent the accused, and shall-***
>
> ***(a) State fully the terms of the agreement, the substantial facts of the matter and all other relevant facts of the case and any admissions made by the accused person;***

[290] The Written Laws (Miscellaneous Amendments) (No. 4) Act, 2019.

[291] The Written Laws (Miscellaneous Amendments) (No. 4) Act, 2019, s. 15.

[292] The Written Laws (Miscellaneous Amendments) (No. 4) Act, 2019 s.16.

[293] The Written Laws (Miscellaneous Amendments) (No. 4) Act, 2019 s.16.

[294] The Written Laws (Miscellaneous Amendments) (No. 4) Act, 2019 s.16.

(b)Be read and explained to the accused person in a language that he understands;

(c) Accepted by the accused person; and

(d) Be signed by the prosecutor, the accused person and his advocate, if represented or, if not represented, a relative, friend or any other person legally competent to represent the accused.

(2) Where an accused person has negotiated with a prosecutor through an interpreter, the interpreter shall certify that he is proficient in that language and that he interpreted accurately during the negotiations and in respect of the contents of the agreement.

(3) Without prejudice to the requirements set out under subsections (1) and (2) A plea agreement shall not be entered between a prosecutor and accused, without prior written consent of the Director of Public Prosecutions or any other officer authorized by him in writing".

The amending Act[295] goes further tackling the aspect of voluntariness which stands a critical part that needs to be addressed. The law requires the Court to "satisfy itself" that the agreement was made voluntarily but without putting into place a mechanism. Need to seek for "voluntariness" carries with it the spirit of ensuring that none is forced towards in "plea bargaining" processes.

"194D.-(1) Any plea agreement entered into in accordance with the provisions of sections 194A and 194B shall be registered by the court.

(2) The court shall, before it registers any such agreement, satisfy itself that the agreement was voluntarily obtained and the accused was competent to enter into such agreement.

(3) The court may pronounce a decision based on plea agreement or make such other orders as it deems necessary including an order to reject the plea agreement for sufficient reasons, except that, such rejection shall not operate as a bar to any subsequent negotiations preferred by the parties.

(4) Where the court accepts a plea agreement-

(a) The agreement shall become binding upon the prosecution side and the accused; and

(b) The agreement shall become part of the record of the court.

(5) Where a plea agreement entered into in accordance with sections

194A and 194B is accepted by the court, the court shall proceed to convict an accused person accordingly".

[295] The Written Laws (Miscellaneous Amendments) (No. 4) Act, 2019 s.16.

Under new section 194D (5), "plea bargaining" is followed by a conviction as the Act[296] reads:

"Where a plea agreement entered into in accordance with sections

194A and 194B is accepted by the court, the court shall proceed to convict an accused person accordingly".

3. Jurisprudence of "Plea Bargaining" in Criminal Justice Dispensation

"Plea bargaining" determines criminal justice through bargaining in lieu of prosecution. Under plea bargaining, upon the prosecution agreeing with the accused, an agreement is signed and filed in Court. Notably; the said agreement leads to plea of guilty now with a lesser offence of duty to repay a certain amount but with the Court retaining its right to impose sentence. Practically, Courts of law have been lenient in imposing sentences including imprisonment despite having such powers under the respective laws which is contrary to the governing laws which are specific by imposing custodial sentences instead of just relying on the agreed fines by the parties.

Some exceptions falling under "plea of guilty" should be observed regarding offences/charges resulting from "plea bargaining". Plea is captured under the new section 194E of the Criminal Procedure Act whereas in the process, the accused will give his plea under oath/affirmation. The oath signifies that the process is mini trial and, in that regard, waiving the long full trial processes which would follow if at all the matter did not resort to "plea bargaining" hence the said mini trial. The said new section 194E of the Criminal Procedure Act[297] reads:

"194E. Before the court records a plea-

(a) The accused shall be placed under oath; and

(b) The court shall address the accused person in court in a language he understands and shall inform him of his rights and that-

(i) By accepting a plea agreement, he is waiving his right to a full trial;

(ii) By entering into a plea agreement, he is waiving the right to appeal except as to the extent or legality of sentence; and

(iii) The prosecution has the right, in the case of prosecution for perjury or false statement, to use any statement that he gives in the agreement against him".

Challenging such plea also is catered for under section 194G of the new Criminal Procedure Act on allegations that the plea was secured through misrepresentation, hence, involuntary. The said provisions of the new

[296] The Written Laws (Miscellaneous Amendments) (No. 4) Act, 2019 s.16.

[297] The Written Laws (Miscellaneous Amendments) (No. 4) Act, 2019 s.16.

Criminal Procedure Act[298] read that:

> **"194G.-(1) The Director of Public Prosecutions may, in matters relating to plea bargaining and in the public interest and the orderly administration of justice, apply to the court which passed the sentence to have the conviction and sentence procured on the grounds of fraud or misrepresentation pursuant to a plea agreement be set aside.**
>
> **(2) An accused person who is a party to a plea agreement may apply to the court which passed the sentence to have the conviction and sentence procured involuntarily or by misrepresentation pursuant to a plea agreement be set aside".**

Furthermore; the said amending Act introduces another crucial aspect of offences which shall not fall in the category of offences worth to be entertained under "plea bargaining". That is through the newly introduced section 194F of the Criminal Procedure Act[299] that reads:

> ***"194F. Plea agreements shall not be entered into in any of the following offences-***
>
> ***(a) Sexual offences whose punishment exceeds five years or involving victims under eighteen years;***
>
> ***(b) Treason and treasonable offences;***
>
> ***(c) Possession or trafficking in narcotic drugs whose market value is above twenty million shillings;***
>
> ***(d) Terrorism;***
>
> ***(e) Possession of Government trophy whose value is above twenty million shillings without the consent, in writing, of the Director of Public Prosecutions; and***
>
> ***(f) Any other offence as the Minister may, upon consultation with other relevant authority and by order published in the Gazette, prescribe".***

From the list, the excluded offences are heinous which degrade humanity covering rape and defilement, also; treason, illicit drugs offences, terrorism and possession of Government trophy. Awkwardly, though that section has extended powers to the responsible Minister for Legal Affairs in consultation with other relevant authorities to extend the list, the same ought to have included other capital offences such as murder and armed robbery. The two are capital offences but since express exclusion, until the responsible Minister publish it in the Government Gazette, shall still fall under "plea bargaining". Proof on this is the current position where murder can be bargained from murder to manslaughter. This should be cautiously considered though understandably, currently; in Tanzania "plea bargaining" has been considered even in murder cases.

Though certain categories of murder can be considered under "plea bargaining", certain types of murder such as those resulting from "armed robbery" and the like, should be excluded from such redress category. The amending Act requires under section 194H for the Chief Justice to make rules and issue directives for better carrying out the provisions of the new amending Act especially regarding the introduced "plea bargaining" phenomenon as the Act[300] reads:

> ***"194H. Subject to the provisions of this part, the Chief Justice may make rules and give directives for better carrying out the provisions of this Part relating to plea bargaining."***

4. Advantages and Disadvantages of "Plea Bargaining"

The main advantages of "plea bargaining" is early disposition of cases and recovery of some proceeds of crimes. Apart from such an advantages, yet; such approach ruins the primary objective and jurisprudence of criminal justice. The concept of criminology covers "causes", "response" and "methods of prevention" of crimes and extends to cover punishment and deterrent philosophies as preventive measures. Essentially, taking a complainant back to his original position is a crucial redressive approach. Some of the associated advantages include: clears uncertainties regarding guilty of an accused for the best conviction is that arrived at from the perpetrator, it serves costs for witnesses and time to both Court and other players in criminal justice dispensation.

This mechanism suit decongestion of cases. Following plea of guilty by an accused, reduction in a sentence has been an incentive encouraging option for "plea bargaining". Cases under "plea bargaining" have been ending without appeals to higher Courts thus conclusive determination. This is both advantageous and disadvantageous in jurisprudence for appeals lead to the development of jurisprudence by the higher Courts of record. On part of the disadvantages of "plea bargaining", arguments have been that emphasize is on economic interest where "big fishes" who real wrong doers have been pleading guilty through "plea bargaining". Another disadvantage in "plea bargaining" possibilities of some accused persons compromising criminal justice fearing to face long sentences thus resorting to "plea bargaining" in compromise.

[298] The Written Laws (Miscellaneous Amendments) (No. 4) Act, 2019 s.16.

[299] The Written Laws (Miscellaneous Amendments) (No. 4) Act, 2019 s.16.

[300] The Written Laws (Miscellaneous Amendments) (No. 4) Act, 2019 s.16.

5.0 Conclusion

Introduction of the new "plea bargaining" concept in Tanzanian jurisprudence vide the referred miscellaneous amendments mark another milestone in consideration to administration of criminal justice. Such introduction has led into shift of paradigm in the administration of justice despite its existent for formerly it was not associated with recovery of proceeds of crimes. Conscience in the administration of justice is crucial in a harmonized society in hand with compliance to the long-established principles in criminal justice administration. Despite such a positive move, this study has made some recommendations which their incorporation will enhance positive development to the Tanzanian criminal justice and jurisprudence through the contemporary approach.

Among legal and philosophical objectives in imposing sentences is deterrence. The imposition of "plea bargaining" may endanger and ruin criminal justice administration generally. On the other hand, if at all the law allows the resort to "plea bargaining" with an option for plea to lesser offences and without in place legal road map or rather guidelines and with a rude rider of the horse the same may ruin the objectives in introducing "plea bargaining". In a nutshell, "plea bargaining" is still virgin calling for the establishment of mechanisms capable of addressing such issues especially when involving cases with serious economic impacts regardless of whoever in the ride.

Cautious consideration will address the likelihood of some innocent people compromising their rights in fear of the consequences of capital sentences as also recommended by Christopher Slobogin[301]. Unchecked "plea bargaining" may lead into overcharging an accused knowing that the accused will be tempted for a lesser offence thus distorting the concept of criminal justice. Also; concentration to cases with economic interest will ultimately ruin the administration of criminal justice for "plea bargaining" will be forum for the rich while "full trial" will be for the poor and the unwilling rich thus discriminatory for the poor have no practical option for "plea bargaining".

6.0 Recommendations

According to statistics, over 70% of cases are instituted in Primary Court. No law provides for mechanisms enabling parties in Primary Courts in resorting to "plea bargaining." Henceforth, the Magistrates' Courts Act and its resultant subsidiary pieces of legislation should as well be amended for the sake of uniformity in addressing the whole concept of criminal justice. Some accused are fearful of the impacts of convictions to serious offences compared to those associated with a conviction on minor offences thus triggering an influx of "plea bargaining". Broad address to "plea bargaining" will be effective upon consideration of substantive laws and procedures.

"Plea bargaining" should guarantee fairness to parties unlike being figured out as trap and sword against an accused and in ruining administration of criminal justice. That will address "uncertainties" for amongst creeds of the law are to be capable of detecting the intended outcome, results and consequence instead of leaving it in the realms of some individuals. In summary from all the above discussions, despite all the revolving positives regarding "plea bargaining", the denominator should always be the interest of the general public without hampering well established principles in the global regarding criminal administration and its jurisprudence in Tanzania.

[301] Christopher Slobogin, "*Plea Bargaining and the Substantive and Procedural Goals of Criminal Justice: from Retribution and Adversarialism to Preventive Justice and Hybrid-Inquisitorialism*", 57 Wm. & Mary L. Rev. 1505 (2016) pp. 1546 & 1547. Available at: https://scholarship.law.wm.edu/wmlr/vol57/iss4/12 (Accessed on 31/10/2019).

A COMPARATIVE ANALYSIS OF THE LEGAL FRAMEWORK FOR INCLUSION OF WOMEN IN TRADE

Nancy Namisi Siboe[302*]

[302] *A Lecturer in Constitutional Law at ICP (University of Portsmouth, UK), Senior Doctoral Candidate in Law at the University of Portsmouth and an Advocate of the High Court of Kenya as well as Commissioner for Oaths. Holder of a Master of Laws (LLM, International Law) from the University of the West of England, UK, MBA (Strategic Management) from Daystar University, Kenya and an undergraduate degree in Law from Moi University in Kenya as well as certification in Public Private Partnerships from the IP3 Institute in Virginia, Arlington USA. Formerly worked as the Head of Legal Services at the Tourism Fund, a state corporation in the Republic of Kenya and as Associate Advocate at Miller & Company Advocates in Nairobi, Kenya. Research interests include humanitarian intervention (use of force) in civil wars, Public Law, International Trade and Investments Law and the use of Artificial Intelligence in the legal profession.

Abstract

At the United Nations Sustainable Development Summit in September 2015, world leaders adopted the 2030 Agenda for Sustainable Development, which included 17 Sustainable Development Goals (SDGs). The inclusion of a standalone goal (Goal 5) on women's equality, as well as the mainstreaming of gender and inclusion through the other goals, is a key achievement for the international community.

It is on this backdrop that the author seeks to discuss the legal and institutional framework of the rights of women in trade, reasons *for* exclusion and marginalization of women for many decades and an increase in inclusion by creation of relevant legislation and structures to gain active participation in trade. A comparative analysis approach is taken from best practices in the United Kingdom vis a vis Kenya a developing economy with a lot of room in which policymakers can improve participation of women in trade. The author opines that the inclusion of women is possible, despite the many prejudices. Based on theoretical research, evidence shows that Kenyan women are currently participating in informal business contribution processes, despite their exclusion in formal processes.

Keywords: Gender/ Women/Trade

1.0 INTRODUCTION

1.1 Background and Context

Effective gender equality legislation is crucial in guaranteeing the equal rights and opportunities of women and men in all spheres of life as well as in preventing systemic discrimination against women. [303]Gender equality is a critical component of trade, development and economic growth. Indeed women are almost half of the world's population and have an immense capability and role to play in creating a better and prosperous world.[304] Laws govern the world internationally, regionally and locally. The legal system is meant to equally distribute justice and provide guidance as well as a deterrent mechanism for non-observance. It is almost a century since the full admission of women to the legal profession in the United Kingdom; almost 90 years since the right to vote was granted to all women; almost half a century since the implementation of equal pay and anti-discrimination legislation, and today, female participation in the labour market is increasing rapidly. Yet for all the gains made, inequality between women and men persists and what has been achieved appears easily dismantled.[305]

While there is data to support that closing the gender gap would increase the Gross Domestic Product of countries around the world and advance sustainable development globally, women continue to face a range of legal barriers to trade and economic empowerment.[306] According to the World Bank's Women, Business and the Law 2016, almost 90 percent of 173 countries researched have at least one legal barrier restricting women's empowerment. Bringing down these

[303] Legislation Online: Gender Inequality https://www.legislationline.org/topics/topic/7 accessed on 19 July 2019

[304] CIA Fact Book". The Central Intelligence Agency of the United States.

[305] Confronting Gender Inequality (LSE Knowledge Exchange 2019).

[306] United Nations Global Impact, 'Bringing Down Legal Barriers to Women's Economic Empowerment: An Economic and Business Imperative' (16 January 2020) https://www.unglobalcompact.org/take-action/events/1021-bringing-down-legal-barriers-to-women-s-economic-empowerment-an-economic-and-business-imperative.

barriers is an economic and business imperative and critical to achieving a range of Sustainable Development Goals (SDGs), most notably, SDG5 and SDG16.

2.0 GLOBAL LEGAL & INSTITUTIONAL FRAMEWORK

i. The United Nations Charter

The United Nation Charter (UN Charter) [307] is the foundational treaty of the United Nations came into being in 1945 after the end of World War II. It was signed on 26 June 1945 at San Francisco and entered into force on 24 October 1945, after being ratified by the original five permanent members of the United Nations Security Council (China, France, UK, Russia and USA). It articulates the place and rights of all people regardless of status. In article 1 that, "*To achieve international co-operation ... in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion*." Gender equality is at the very heart of human rights and United Nations values and protecting and promoting women's human rights is the responsibility of all States.[308]

ii. Commission on the Status of Women

On 21st June 1946, the Economic and Social Council (ECOSOC) established its Commission on the Status of Women, as the principal global policy-making body dedicated exclusively to gender equality and advancement of women. CSW consists of one representative from each of the 45 Member States elected by ECOSOC based on equitable geographical distribution: 13 members from Africa; 11 from Asia; 9 from Latin America and Caribbean; 8 from Western Europe and other States and 4 from Eastern Europe. Among its earliest accomplishments was ensuring gender-neutral language in the draft Universal Declaration of Human Rights. The Commission meets every year, at the United Nations Headquarters in New York to evaluate progress on gender equality, identify challenges, set global standards and formulate concrete policies to promote gender equality and advancement of women worldwide. It is one of the UN Commissions that do not limit participation in forums to only states. The Commission has drafted several conventions and declarations. This includes the Declaration on the Elimination of Discrimination against Women in 1967 and women-focused agencies such as the United Nations Development Fund for Women in December 1976 (UNIFEM) and the United Nations International Research and Training Institute for the Advancement (INSTRAW) in 1979.

[307] The Charter of the United Nations (also known as the UN Charter) of 1945.

[308] Women's Human Rights and Gender Equality (United Nations Human Rights Office of the High Commissioner) < https://www.ohchr.org/EN/Issues/Women/WRGS/Pages/WRGSIndex.aspx accessed on 19 July 2019>.

iii. Universal Declaration of Human Rights

At its 183rd session on 10 December 1948, United Nations General Assembly adopted the landmark declaration at the Palais de Chaillot in Paris, France.[309] The declaration firms states that "*All human beings are born free and equal in dignity and rights*" and that "*everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, birth or other status*." In Articles 1 and 2, the declaration establishes the basic concepts of dignity, liberty, equality, and brotherhood as key to humanity wellbeing and development.

iv. The United Nations Conference for Trade and Development (UNCTAD)

UNCTAD was established by the UN General Assembly in 1964 and it reports to both the UN General Assembly and United Nations Economic and Social Council. UNCTAD is the part of the United Nations Secretariat dealing with trade, investment, and development issues. The organization's goals are to maximize the trade, investment and development opportunities of developing countries and assist them in their efforts to integrate into the world economy on an equitable basis. It has continued to encourage countries can put better policies in place to address gender inequalities and bring women further into the workforce. In its 2017 report titled East African Community Regional Integration: Trade and Gender Implications, UNCTAD analysed the impact of regional integration on women's employment and quality of life in the five East African Community (EAC) countries of Burundi, Kenya, Rwanda, United Republic of Tanzania and Uganda and South Sudan which joined in 2016. Gender equality is not a natural outcome of the development process and there is a need to proactively promote gender equality policies.[310]

[309] A/RES/217(III) Universal Declaration of Human Rights 10 December 1948.

v. International Women Year

As the international feminist movement began to gain momentum during the 1970s, the General Assembly declared 1975 as the International Women's Year and organized the first World Conference on Women, held in Mexico City. It resulted in the Declaration of Mexico on the Equality of Women and Their Contribution to Development and Peace. Subsequently, the years 1976-1985 were declared as, the UN Decade for Women, and established a Voluntary Fund for Decade.

vi. The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)

The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) was adopted by the UNGA in 1979, which is often

[310] UNCTAD Secretary-General Mukhisa Kituyi.

described as an International Bill of Rights for Women. In its 30 articles, the Convention explicitly defines discrimination against women and sets up an agenda for national action to end such discrimination. The Convention targets culture and tradition as influential forces shaping gender roles and family relations, and it is the first human rights treaty to affirm the reproductive rights of women.

vii. Second World Conference in Copenhagen

Second World Conference on Women was held in Copenhagen in 1980. The resulting Programme of Action called for stronger national measures to ensure women's ownership and control of property, as well as improvements in women's rights with respect to inheritance, child custody and loss of nationality

viii. World Conference to Review and Appraise the Achievements of the United Nations Decade for Women: Equality, Development and Peace

In 1985, the World Conference to Review and Appraise the Achievements of the United Nations Decade for Women: Equality, Development and Peace, was held in Nairobi. It was convened at a time when the movement for gender equality had finally gained true global recognition, and approximately 15,000 representatives of non-governmental organizations (NGOs) participated in a parallel NGO Forum.

ix. Beijing Conference

The Fourth World Conference on Women: Action for Equality, Development and Peace was the name given for a conference convened by the United Nations in5 September 1995 in Beijing, China. The Conference went a step further than the Nairobi Conference by asserting women's rights as human rights and committed to specific actions to ensure respect for those rights. [311]

x. World Trade Organization (WTO)

The WTO officially commenced on 1 January 1995 under the Marrakesh Agreement, signed by 123 nations on 15 April 1994, replacing the General Agreement on Tariffs and Trade (GATT), which commenced in 1948. It is the largest international economic organization in the world.[312] WTO members and observers have endorsed a collective initiative to increase the participation of women in trade. In order to help women reach their full potential in the world economy, 121 WTO members and observers agreed to support the Buenos Aires Declaration on Trade and Women's Economic Empowerment, which seeks to remove barriers to, and foster, women's economic empowerment.

[311] O'Barr, J. F. "United Nations Fourth World Conference on Women, Beijing, China (1995) Global Framework of the Platform for Action", in DeLamotte, Eugenia; Meeker, Natania; O'Barr, Jean F. (eds.), *Women imagine change: a global anthology of women's resistance from 600 B.C.E. to present* (New York: Routledge, 1997) pp. 502–510.

[312] WTO – Understanding the WTO – The GATT years: from Havana to Marrakesh". <*www.wto.org*>.

At the launch of the Declaration on 12 December 2017, Director-General Roberto Azevêdo stated that this declaration "provides guidance from the members to the WTO for the way forward and the WTO will play its full part. It will be a vital element in the WTO's work to make trade more inclusive."

The WTO's Technical Assistance plan 2018-2019 includes a section on gender providing a mandate for the WTO to develop a training module on trade and gender. The objective of the module is to focus "on trade policy with the aim to raise awareness and enhance the aptitude of policy makers to incorporate gender considerations in their analysis and trade policy development or negotiations".

xi. UN Women

On 2 July 2010, the United Nations General Assembly unanimously voted to create a single UN body tasked with accelerating progress in achieving gender equality and women's empowerment. It merged four of the world body's agencies and offices: the UN Development Fund for Women (UNIFEM), the Division for the Advancement of Women (DAW), the Office of the Special Adviser on Gender Issues, and the UN International Research and Training Institute for the Advancement of Women.

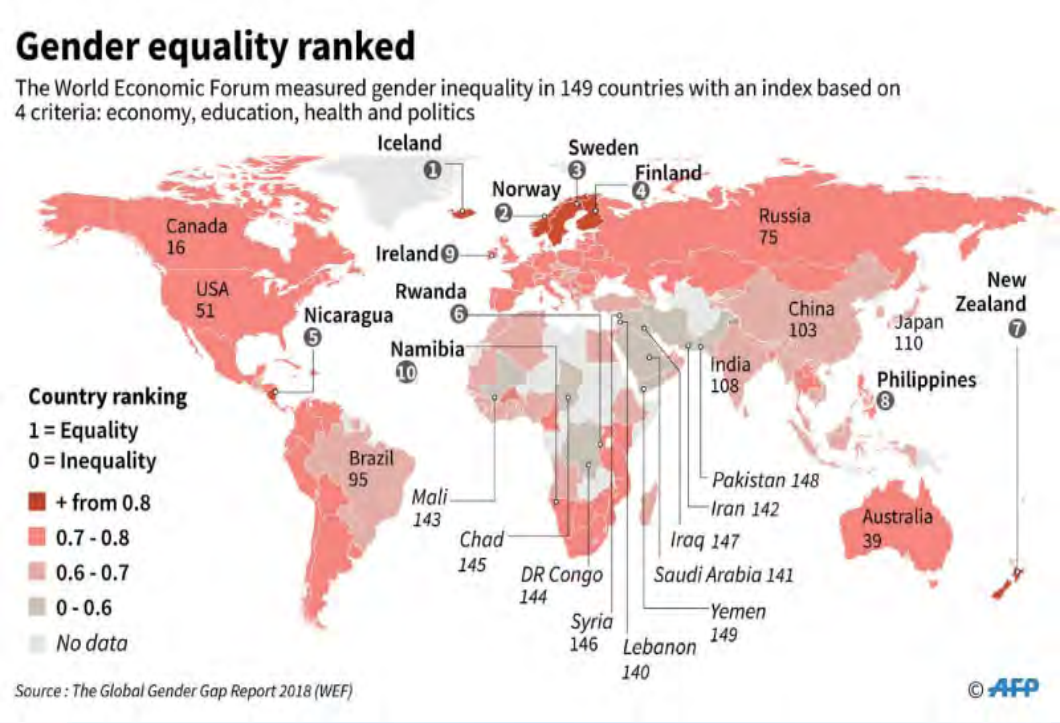
xii. High-Level Panel on Women is Economic Empowerment

Subsequently, the High-Level Panel on Women is Economic Empowerment, was established by Mr. Banki Moon when he was the United Nations Secretary-General in 2016. The role of the Panel is to implement a global agenda that accelerates women's economic empowerment in support of implementing the 2030 Agenda for Sustainable Development. **The Work and Opportunities for Women** (WOW) Fund supports initiatives that drive forward the Action Agenda of UN High Level Panel on Women's Economic Empowerment (UNHLP). The £1.8 million Fund supports select, strategic initiatives, which promote long-term change in women's economic empowerment. The Fund complements the wider activities of the WOW programme, which works directly with global supply chains and with DFID and other HMG programmes to support improved women's economic empowerment (WEE) outcomes.

3.0 WORLD ECONOMIC FORUM REPORT 2018

The World Economic Forum (WEF) was founded in 1971 as a not-for-profit organization.[313] WEF's mission "committed to improving the state of the world by engaging business,

[313] It was granted "other international body" status in January 2015 by the Swiss Federal Government under the Swiss Host-State Act (International Organization status requires multiple governments).



political, academic, and other leaders of society to shape global, regional, and industry agendas"

The WEF hosts an annual meeting at the end of January in Davos, Switzerland. The meeting brings together approximately 2,500 business leaders, international political leaders, economists, celebrities and journalists for up to four days to discuss the business deals. Beside meetings, the organization claims to provide a platform for leaders from all stakeholder groups from around the world – business, government and civil society – to come together. It also produces a series of reports and engages its members in sector-specific initiatives.[3]

According to the Report, Pakistan is the second worst country in the world in terms of gender parity, ranking 148 out of 149 countries in the 'Global Gender Gap Index 2018' report. The Geneva-based organisation's annual report tracked disparities between the genders across four areas: education, health, economic opportunity and political empowerment.

Women, WEF observed, were significantly under-represented in growing areas of employment that require science, technology, engineering and mathematics skills. It decried the particularly low participation of women within the artificial intelligence field, where they made up just 22pc of the workforce.

Projecting current trends into the future, it added that the overall global gender gap would close in 108 years across the 106 countries covered since the first edition of the report. It said that the most challenging gender gaps to close were the economic and political empowerment dimensions, which would take 202 and 107 years to close, respectively. Across the 149 countries assessed by the report, there were just 17 that currently had women as heads of state, while on average just 18pc of ministers and 24pc of parliamentarians globally were women.

With an average remaining gender gap of 34.2pc, South Asia was the second-lowest scoring region on this year's Global Gender Gap Index, ahead of the Middle East and North Africa and behind Sub-Saharan Africa.

4.0 CASE STUDIES

The United Kingdom and Kenya have been carefully selected as the case studies for this comparison, the later having been a colony of the former and has retained the common law system. The UK scores highly in international indexes of female entrepreneurship, which assess environment, ecosystem and aspirations. An innovation-friendly business environment, universal education, SME training programmes and a high level of acceptance of women in business help contribute to high UK ratings. Kenyan women spend excessively much time at minimally productive ventures but are not involved greatly in tangible trade activities. They work longer hours but are still low in terms of placement in the trade sector compared to men do. It worsens even more when the pay gap between men and women continues to be an issue that needs to be addressed. While UK has legislated the Equal Pay Act, the Kenya law is still complacent and has hidden clauses within the legal system that are not keenly operationalized, most of the times.

4.1 Legal Framework in the United Kingdom

As a developed economy, the UK has achieved almost universal primary and secondary education for girls and boys (an important target for the SDGs). Girls enjoy higher educational achievements but there remain some areas where outcomes are not equitable. There is not much sharp gender segregation in the subjects chosen by girls and boys at secondary and postsecondary level, with little progress on encouraging more girls into better-paid career paths or into the growth area of STEM (science, technology, engineering and mathematics) – particularly the mathematical- and technology-related fields. In Kenya, This presents a challenge to meeting the SDG target to eliminate gender disparities in education. Sustained programmes to change cultural expectations and pervasive gender stereotypes, beginning at a young age, will be key to achieving equality in this area.

The UK is the start-up capital of Europe, with a 5.1% growth rate in the number of new businesses in 2013-2017. Over 1,100 new businesses

are set up in the UK each day. UK companies attract more venture capital than any other European country. They also reflect government efforts over the past 15 years to foster female entrepreneurship, such as the Strategic Framework for Women's Enterprise in 2003 and initiatives prompted by the 2015 Burt report.

Gender equality in the UK has taken huge steps forward in the last century with women securing legal rights: to vote, to stand for public office, to equal pay for equal work, the right to education, to participate in sport and culture, and the right to be safe. Currently, the United Kingdom ranks 16th on the Gender Inequality Index (GII). The GII is built on the same framework as the IHDI—to better expose differences in the distribution of achievements between women and men. It measures the human development costs of gender inequality.

4.1.1 Legislation

i. Equality Act 2010

When UK joined the European Union (then referred to as the European Community) in 1972, it effectively subscribed to the provisions of the Treaty of the European Community which states that. 'Each Member State shall ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied.'

United Kingdom employment equality law legislates against prejudice-based actions in the workplace. As an integral part of UK labour law it is unlawful to discriminate against a person because they have one of the "protected characteristics", which are, age, disability, gender reassignment, marriage and civil partnership, race, religion or belief, sex, and sexual orientation. The Equality Act brought together over 116 separate pieces of legislation into one single Act.

There are nine protected characteristics under the 2010 Equality Act which are age, disability, gender reassignment, race, religion or belief, sex, sexual orientation, marriage and civil partnership and pregnancy and maternity. Section 106 of the Equality Act requires political parties to report the diversity of their candidates. At the moment, this hasn't been commenced. Equality between the sexes is covered under the Equality Pay Act 1970 and the Sex Discrimination Act 1975.

ii. Statutory Maternity Pay

Eligible employees can be paid for up to 39 weeks, usually as follows: the first 6 weeks: 90% of their average weekly earnings (AWE) before tax, the remaining 33 weeks: £148.68 or 90% of their AWE (whichever is lower). An employee's employment rights (like the right to pay, holidays and returning to a job) are protected during maternity leave.

iii. Statutory Maternity Leave

Eligible employees can take up to 52 weeks' maternity leave. The first 26 weeks is known as 'Ordinary Maternity Leave', the last 26 weeks as 'Additional Maternity Leave'. The earliest that leave can be taken is 11 weeks before the expected week of childbirth, unless the baby is born early.

iv. Female Members of Parliament

There are now 208 women in the Commons, up from 191 in 2015. This takes female representation in the Commons to a new high. Overall 32% of MPs are women but ofcourse there still are significant variations between parties. Originally debate centred on whether women should be allowed to vote and stand for election as Members of Parliament. The Parliament (Qualification of Women) Act 1918 gave women over 21 the right to stand for election as a Member of Parliament.

v. Institutional Support

The British Chambers of Commerce (BCC) is focused on trade support and trade facilitation: helping businesses get their certificates of origin, navigating regulations in other jurisdictions, or understanding how to find partners in a different market. There are more than 350 people working in these areas in the BCC. The majority of them are women, and many of them exemplify characteristics that will change women's economic future.

The data released by the Office for National Statistics[314] shows that the total amount of female construction workers shot up 9.9% year on year to hit 277,000 in December 2015. This is clear evidence that construction projects, tasters and on-site placements for women and girls to enter the industry are opening the doors to a more diverse workforce.

Despite the UK scoring highly in gender equality indexes, 0nly 15 per cent of primary school teachers in England are male but this rises to 38 per cent at secondary level. Scotland has even fewer male primary teachers, at nine per cent, although 13 per cent of primary heads are male. Only 1 in 3 UK entrepreneurs is female: a gender gap equivalent to ~1.1 million missing businesses. Female-led businesses are only 44% of the size of male-led businesses on average, in terms of their contribution to the economy, and male SMEs are five times more likely to scale up to £1million turnover than female SMEs.

There is still a long way to go to increase the diversity of women and girls working in the construction industry. It is key to step up construction projects that support more women and girls into the industry. In particular investing further to enable women to progress into STEM subjects and women returners to work. The Work and Opportunities for Women (WOW) programme is a new flagship programme funded by

[314] Office for National Statistics 2018.

UK's Department for International Development (DFID).

4.2 Legal Framework in Kenya

The women of Africa and more specifically Kenya make a sizeable contribution to the continent's economy. They are more economically active as farmers and entrepreneurs than women in any other region of the world. It is the women who grow most of Africa's food, and who own one-third of all businesses.

What is more, there have been many recent advances on women's empowerment on the continent, including many changes in laws to promote equal rights for women. Many African countries have closed the gender gap in primary education. In 11 African countries, women hold close to one-third of the seats in parliaments, more than in Europe.

However, Kenyan women are held back from fulfilling their potential by many constraints, whether as leaders in public life, in the boardroom, or in growing their businesses. This in turn holds back the potential of the continent's economy.

4.2.1 Legislation

i. The Constitution 2010

Article 27 (3) states that 'Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.[315] However, women in Kenya are not yet able to fully benefit from the opportunities offered by the Constitution because of the country's cultural norms, lack of access to resources, education levels, and their family responsibilities.

A report by the Federation of Women Lawyers (FIDA Kenya) highlights a number of important political gains made by women during the 2017 general elections. For the first time in Kenya's history, women were elected to serve as governors and senators, and 29 percent more women ran for office than in the previous election — a fact that led to the largest number of women ever seated at all levels of the Kenyan government. Women now hold 172 of the 1,883 elected seats in Kenya, up from 145 after the 2013 elections.

Despite these gains, the report makes clear that significant obstacles remain for women seeking elective office. Although Kenya's constitution mandates that all appointed and elected bodies contain at least one-third women, women's actual representation often falls short of that threshold. Women account for just 23 percent of the National Assembly and Senate — a figure that includes seats reserved exclusively for women representatives.

ii. Maternity leave and pay

The Kenyan Employment Act stipulates three months maternity leave with full pay. On expiry of a female employee's maternity leave, the female employee shall have the right to return to the job which she held immediately prior to her maternity leave or to a reasonably suitable job on terms and conditions not less favorable than those which would have applied had she not been on maternity leave. The employee may be required to produce a certificate from a medical practitioner to proof delivery.

[315] Constitution of Kenya 2010.

iii. Kenya Vision 2030

It is the nation's long-term development plan, which aims at developing an efficient and competitive domestic market and become an export-led and globally competitive economy. Vision 2030 emphasizes policies aimed at empowering vulnerable groups such as women to enable them to fully take part in nation building. Activities in this area include strategy and legislation development, training for gender officers, recommendations for affirmative action, and improvement of collection and analysis of gender-disaggregated data.

iv. Political System

The Institute of Economic Affairs' (IEA) latest report on the socio-economic status of women in Kenya says women have made minimal strides in their quest to bridge the inequality gap. However, this state of affairs is not blamed solely on women but on the prevailing political system.

The report titled *Profile of Women's Socio-Economic Status in Kenya* shows low education levels among women in comparison to men. On primary school participation, the overall enrolment rate of boys is higher than that of their female counterparts but North Eastern Province still lags far behind compared to the other provinces in Kenya by recording the lowest figures for girls' enrolment in school. The figure stands at 27.6% followed by Nairobi recording a percentage of 40.1%.

v. Labour force

In the labour force, women constitute 30% of the overall wage employment. The highest percentage is recorded in the education sector (45%) while the lowest is in the building and construction industry (7%), manufacturing 18%, electricity and water 18%. More women tend to venture into the small micro enterprises (SMEs). Although women operate 54% of the total enterprises in the country where they dominate wholesale and retail businesses, rural manufacturing and urban agriculture sectors. Men are well represented in such sectors as urban manufacturing, transport, financial and social services.

vi. Bills of Law

The motion seeking to have two third Gender Bill implemented flopped in the Kenyan parliament due to lack of requisite quorum. Only 174 members were present in the House. This is the fourth time the bill has been differed in Parliament since the promulgation of the new constitution in 2010. The passage of the Bill is meant to give women a fair chance in a male-dominated domain. Despite

the 2010 Constitution providing for equal representation of both genders, it has failed to demonstrate how the gender rule is to be effected, perhaps explaining the reason why it has remained an uphill task**.** Consequently, women only constitute 20 percent of parliament and raising a quorum to establish the framework to aid the passage the bill is nearly impossible.

Equally, article 81 (b) of the constitution, which closely relates to this issue, did not provide guidelines on how to achieve the two-thirds gender ration. But history has not helped the case of those in favour of the bill.

5.0 CONCLUSION

Gender inequality in most spheres of development remains a major barrier to human development. Girls and women have made major strides since 1990, but they have not yet gained gender equity. The disadvantages facing women and girls are a major source of inequality. All too often, women and girls are discriminated against in with negative consequences for development of their capabilities and their freedom of choice.

The importance of cultural expectations and pervasive gender stereotypes, beginning at a young age, in setting gendered paths to further study and thence occupational segregation. Despite more women than men completing tertiary education, the education sector itself remains both horizontally and vertically segregated by gender.

The United Kingdom, a country that has been ranked 16 in the world according to the 2018 Gender Inequality Index has indeed put in place legislative structures as well as structural support and funding leading to the leaner gap in the gender inequality matrix. On the other hand, Kenya, which has been ranked number 68 on the same index, has made great strides in developing policies for women participation in trade, there still is a lot to be done. The inclusion of women is possible, despite the many prejudices. Based on theoretical research, evidence shows that Kenyan women are currently participating in informal business contribution processes, despite their exclusion in formal processes. By relying on past successes of women trade negotiation processes and with the support of the international and local communities, women can be active participants in trade.

6.0 RECOMMENDATIONS

While the UN has set the pace for equality, it is upon sovereign states to implement the requirements and pace set to promote women in trade. The following are some of the recommendations for a more robust women inclusive trade industry:-

i. Political goodwill is key in any economy to foster equal rights and implementation of laws, structures and systems aimed at growing of trade and development especially among women;

ii. Gender-sensitive macroeconomic policies are necessary for sustainable and inclusive development;

iii. To close the education gender gap and improve skills training so women can compete more for higher-paying jobs. Another is to create a regional credit mechanism to support women entrepreneurs.


EAST AFRICAN MAGISTRATES' AND JUDGES'
ASSOCIATION
EAMJA