



**LEGAL
RESOURCES
FOUNDATION**

Haki Itawale



**INFLUENCE OF THE USE OF (I.T.)
INFORMATION TECHNOLOGY IN THE JUDICIAL
SYSTEM ON ACCESS TO JUSTICE IN
NAIROBI COUNTY**

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the European Union



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Special recognition goes to Mr. Henry Maina, a public, social policy analyst and governance specialist, who led the process in this research. Appreciation goes to all the staff members of Legal Resources Foundation Trust particularly Timothy Mwichigi, Milkah Gichamba and Salome Njuguna for providing technical support to make this work a reality. Gratitude goes to Mr. Eric Mukoya, Executive Director for his leadership, guidance, and editorial review throughout the process.

We recognize that Nairobi City County serves as a hub of the many justice sector actors and findings from this study could be extrapolated to the nation as an attempt to strike the right balance in protecting both the short and long-term rights and interests of parties and the public. We acknowledge this is a going concern amidst the COVID-19 pandemic. Collectively we have to be alive to potential challenges and opportunities raised by the roll out of ICT technology to stem the debilitating tide of COVID-19.



Mr. Eric Mukoya

Executive Director
Legal Resources Foundation

Foreword

Digital transformation (DT) and systems' automation within the Information Technology Communication (ICT) paradigm among Justice chain actors to dispense Justice just as other sectors, would not have come in at a better time. Covid-19 acted as a catalyser on an otherwise unsettled matter owing perennial challenges that chronically continue to constrict chances of inclusive and optimum justice especially for the indigent. This research is partly an outcome from interrogating concerns raised by various actors, more so the dissatisfaction often expressed by consumers of justice in their various capacities and stations of seeking justice. The other part is informed by the works of Legal Resources Foundation, alongside interventions of, together with experiences of paralegals, similarly to social justice centres whose role makes them first responders to those holding unmet justice claims.

The consequent recommendations are a sum of inclusive preferences from key service providers within the major justice chain institutions, in particular the Judiciary, Kenya Prison services (KPS), National Legal Aid Service (NLAS), Office of Director of Public Prosecution, National Police Service, Probation Services, Paralegal Society of Kenya (PSK), select members of public who have been through the Criminal Justice System (CJS) and other civil society organisations offering legal aid and assistance.

This research provides insights on three areas that are independent but mutually tied at the hip of justice. First, the study speaks to the inadequacies found in the existing digital infrastructure, particularly identifying institutional gaps in Kenya Prison services, despite being home to majority pretrial detainees, whose contact with the Court is not optional. The disparity, between the Judiciary, Office of the Director of Public Prosecutions on the one side and KPS and NPS on the other is not only depressing but fundamentally expressive of failed government support to promote justice equitably as an essential service within and out of pandemic circumstances. Secondly, the research reviews human resources, in positive and negative terms, such that absence or presence of relevant information technology equipment remains irrelevant since inadequate and sometimes lack of ICT expertise within institutions of justice institutions. Third are options available to the justice chain actors to obtain, replicate and escalate information Technology innovations which bring closer institutions of Justice, create easier process of expediting matters, and importantly secure realisation of justice in the true meaning of law and human rights.

With the findings of this research, LRF sets the ball rolling for interventions that primarily incite the state to provide enough monetary allocations to the main agencies of justice to ensure that process and outcomes that originate on the desire to have a country where Article 48 is a reality, are not threatened by practices of inequity. Further, it becomes a springboard on which National Council on Administration of Justice (NCAJ) and the affiliate membership, promote policy and practices that enhance a professional work ethic in the use of ICT to conduct matters in the justice system for actors, consumers, and service providers. This research opens and firms up debate on the urgency of developing social justice framework that may require reforms of specific laws in particular the Kenya Prisons Act, the Probation and After Care Act, the Criminal Procedure Code to ensure that pandemic like situations that call for IT innovations, are handled in a way that does not in any way threaten justice.

The need to invest in IT equipment and software that improves the readership link of the body language of court users especially the witnesses, parties and prosecution is urgent. These findings call for more substantive user-easy IT litigation practices in addition to the guidelines Issued to Courts in respect to e-Services, that not only bind the court, but comprehensively increase accountability of all users to enhance transparency. More so, the findings encourage employment of alternative Justice Systems, that have been appreciated when Covid 19 had technically and physically shut the courts from use.

In motivating readers, users, and justice service providers these findings show opportunities that were unavailable before the “pandemic driven IT justice system. There is growing need to develop a Social Justice Framework (SJF), including a more robust public participation to add value to the current operational frame of the Court Users Committee and partnerships across private and justice sector. Deeper review shows the need for further research, especially the changed aspects of legal aid, representation, and assistance. While human resource incapacities have turned to be a major hindrance to the realisation of functional justice system, the specificity of the inadequate competencies is required. We hope these findings create agency that is necessary to entrench a justice system that is inclusive and responsive.



Kimani Njogu (Ph.D)
Board of Trustees Chairperson

Abbreviations and Acronyms

ABA:	American Bar Association
ADR:	Alternative Dispute Resolution
AJS	Alternative Justice System
CA:	Communications Authority of Kenya
CAMP:	Court Annexed Mediation Project
CJ:	Chief Justice
CMCC:	Commercial Chief Magistrates Courts
COVID-19:	Coronavirus Disease caused by a novel coronavirus discovered in 2019
CSO:	Civil Society Organisation
e-Filing:	Electronic Filing
ELC:	Environment and Land Court
ELRC:	Employment and Labour Relations Court
EU:	European Union
HTTPS:	Hypertext Transfer Protocol Secure
ICTs:	Information and Communication Technologies
IEC:	Information Education Communication
IT:	Information Technology
JPIP:	Judiciary Performance Improvement Project
JSC:	Judicial Service Commission
KE-CIRT/CC:	National Kenya Computer Incident Response Team – Coordination Centre
KPLC:	Kenya Power and Lighting Company contemporary knows as Kenya Power
KPS:	Kenya Prisons Service
LRF:	Legal Resources Foundation Trust

LSK:	Law Society of Kenya
MoH:	Ministry of Health
NALEAP:	National Legal Aid Awareness Programme
NCSC:	National Center for State Courts
OB:	Occurrence Book
ODPP:	Office of the Director of Public Prosecutions
PC:	Personal Computer
PLEAD:	Programme for Legal Empowerment and Aid Delivery in Kenya
SGBV:	Sexual and gender-based violence
SJT:	Sustaining Judiciary Transformation
SOP:	Standard Operating Procedure
TV:	Television
UK:	United Kingdom
UN:	United Nations
UNDP:	United Nations Development Programme
UNODC:	United Nations Office on Drugs and Crime
USA:	United States of America
U.S.:	United States
WHO:	World Health Organisation.
WPA:	Witness Protection Agency

Working definitions

Backlog: Several things which have not yet been done but which need to be done.¹ In this survey report, it refers to the accumulation of cases which take too long to be resolved.

Digital divide : This is the gap between individuals, households, businesses, and geographic areas at different socio-economic levels with regard both to their opportunities to access ICTs and to their use of the Internet for a wide variety of activities.² Digital divide refers to the discrepancy in accessing the Information Communication Technology by individuals. It refers to the idea of potentially irreversible division between two groups, on the one hand those who benefit from the digital economy called the haves and on the other hand those who are excluded the have nots. Individuals fall in at least three categories, namely, digital natives, digital immigrants and digital fugitives.³ Digital natives were born after the widespread of digital technologies in the 1980s and are creative thinkers, believe in sharing of opinion and knowledge, most are job creators, they believe in network connection, and they are technology driven in nature. Digital immigrants are individuals born before the widespread adoption of digital technologies and were not exposed to digital technology during their tender age. Hence, they are less quick in response to adopt to the new technologies, they are migrating from the use of less technology to the use of high technology and operate by the principle of learning by doing. Lastly, digital fugitives are the ones who avoid the use of technology because at least they are comfortable with the traditional ways of operation such as filing hard copies as opposed to e-Filing.

Domino effect: This is the result of one site's password file being compromised by a hacker who then uses it to penetrate other information systems.

e-Filing: Used within the judicial precincts, electronic filing, according to a guidebook developed by the National Center for State Courts (NCSC), is the process of transmitting documents and other court information to the court through an electronic medium, rather than on paper.⁴ The process allows individuals to get more of their work done with their Personal Computers (PCs), to send and receive documents, pay filing fees, notify other parties, receive court notices, and retrieve court information.

Epidemic: This term refers to the occurrence in a community or region of cases of an illness clearly in excess of normal expectancy.⁵

1 Collins Online Dictionary, "Definition of 'backlog'." Accessed on 16th November, 2020, <https://www.collinsdictionary.com/dictionary/english/backlog#:~:text=A%20backlog%20is%20a%20number.Quiz%20Review>

2 OECD (Organisation for Economic Co-operation and Development). (2001). Understanding the digital divide. Accessed on 7th December, 2020, from <http://www.oecd.org/dataoecd/38/57/1888451.pdf>

3 Prensky, Marc. "Digital natives, digital immigrants." *On the horizon* 9, no. 5 (2001).

4 Electronic Filing: Assessing its feasibility for trade disputes administered by the Nafta secretariat An Analysis of the Issues Involved in the Successful Implementation of Electronic Filing. See: https://www.ncsc.org/_data/assets/pdf_file/0023/17096/lalonderobertcedpfinal0506.pdf Accessed on 20th November 2020

Equality: This is a term that proposes that all human beings should develop their personal abilities and get a chance to make choices without the limitations such as stereotype, rigid gender roles and prejudices. It is equal access to social goods, services, and resources; and equal opportunities in all spheres of life to all the people involved, be it men, women, adults, children, the rich or the poor. Equality focuses on creating the same starting line for all the people involved in something.

Equity: It is the process of allocating resources and decision-making positions fairly to various parties without any discrimination. Equity aims at providing all the parties involved with the full range of opportunities and benefits to achieve the same finishing line.

Pandemic: This is a large-scale outbreak of infectious disease that can greatly increase morbidity and mortality over a wide geographic area and cause significant economic, social, and political disruption. It is an epidemic occurring over a very wide area, crossing international boundaries, and usually affecting many people. Increased global travel and integration, urbanisation, changes in land use, and greater exploitation of the natural environment increase the likelihood of pandemics.⁶ Pandemics are also increasing in frequency because of the increasing emergence of viral disease from animals.

Paralegal: An individual trained in subsidiary legal matters but not fully qualified as a lawyer. The American Bar Association (ABA) defines a paralegal as a person qualified by education, training or work experience who is employed or retained by a lawyer, law office, corporation, governmental agency, or other entity and who performs specifically delegated substantive legal work for which a lawyer is responsible.⁷

5

Porta, Miquel, ed. A dictionary of epidemiology. Oxford university press, 2014.

6

Madhav, Nita, Ben Oppenheim, Mark Gallivan, Prime Mulembakani, Edward Rubin, and Nathan Wolfe. "Pandemics: risks, impacts, and mitigation." 2017.

7

What is a Paralegal? See: <https://www.paralegaledu.org/> Accessed on 16th November 2020

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About Legal Resources Foundation Trust (LRF)

Legal Resources Foundation Trust (LRF) has existed, harnessed experiences, and mentored for over 25 years as an independent, human rights organisation that promotes access to justice through human rights education, research, practical advocacy, policy dialogue and community organisation by way of paralegals. In living up to its mission, LRF has engaged various and diverse stakeholders in the criminal and civil justice sectors by developing, disseminating, replicating resources and strategies towards justice, equity, and resilience in communities as right holders, while navigating the fragile citizen-state relationship for duty bearers to remain relevant in a society that is largely sceptical of government services.

The research endeavoured to ring-fence the milestones so far achieved in the Justice sector around the country with a focus on Nairobi County where the Judiciary first rolled out the digital programme. Specifically, the study sought to achieve three broad objectives namely:

1. Assess the situation of the use of digital technologies, tools and procedures in the judicial system by also keeping a keen eye on the COVID-19 pandemic which has caused a myriad challenge in political, economic and social realms.
2. Provide recommendations on how to address the various findings to improve access to justice as the Judiciary embraces technology in service delivery.
3. Analyse perceptions of key judicial system stakeholders and clients about the use of digital technologies, tools and procedures in service delivery and quest for justice.



Chapter One

Chapter One:

Highlights of the Research Study

Abstract

This research report addresses a little discussed yet fundamentally important aspect of legal technological transformation: the rise of digital justice in the courtroom. Against the backdrop of the judiciary's current programme of transformation amidst the Covid-19 pandemic, it examines the implications of advances in courtroom technology for fair and equitable public participation, and access to justice.

The research contends that legal reforms have omitted any detailed consideration of the type and quality of citizen participation in newly digitised court processes which have fundamental implications for the legitimacy and substantive outcomes of court-based processes; and for enhancing democratic procedure through improved access to justice.

The research holds that although digital court tools and systems offer great promise for enhancing efficiency, participation, and accessibility, they simultaneously have the potential to amplify the scope of injustice, and to attenuate central principles of the legal system, including somewhat paradoxically, access to justice.

1.0 Executive summary

Reforms of courts and judicial processes generally occur at a glacial pace. Not only is law inherently conservative, but courts are also complex systems. The implications of change need to be carefully considered to ensure relevant protections are maintained and cherished objectives promoted.

All of this makes the breakneck transition to 'virtual courts' in response to COVID-19 at once terrifying, thrilling, concerning, and exciting. Necessity is forcing changes, particularly in the use of remote and online hearings that were impossible to imagine just last year. The challenge in such a transition is to find the right balance in protecting both the short –and long-term rights and interests of parties and the public. Not only may bad practices adopted in emergency conditions be difficult to wind back later, but vital protections may be unnecessarily denied as pandemic continues. On the other hand, the intense period of forced innovation may reveal how technology can make courts better. Some changes may be worth keeping.

This study, in general, sought to identify and discuss potential challenges and opportunities raised by the quick roll-out of courtroom technology amidst the COVID-19 pandemic. Specifically, this research sought to find out what the IT driven justice sector in Nairobi County looks like, the perceptions of key stakeholders and their clients on the technologies used. A particular focus was

to determine the usefulness of these technologies as far as fostering access to justice is concerned and identify weak links if any. In addition, the study makes some recommendations on how the system can be improved upon to enhance access to justice in Nairobi County.

COVID-19 pandemic has accelerated transformation from traditional courts to contemporary post-modern courts. Various stakeholders have resorted to using virtual meetings, as well as partner with the Judiciary in piloting the e-court system. This transformation on one hand is perceived as a plan to improve on service delivery while on the other hand is seen as one of mitigation measures to help curb the spread of the disease.

Therefore, this research on the Influence of the Use of IT in the Judicial System on Access to Justice in Nairobi County, looks at whether the use of technology can help address the challenges of backlog of cases, overcrowding in courtrooms and even the cost of accessing justice. It provides relevant information to the judiciary, their clients and key policy makers within and without the Kenya's capital city.

Back to COVID-19, there is the progress in the search for a vaccine that could not, have come at a better time. There are some promising successes with regards to development of vaccines with higher levels of potencies, ranging between 90 and 95%. Significantly, in the east, the U.S. pharmaceutical giant *Pfizer* together with Germany's biotechnology firm BioNTech are leading the charge, with approvals for their vaccine having been done in some jurisdictions. In December 2020, western countries have reported to have started vaccinations of their nationals to mitigate the scourge. On December 23, 2020, Health Canada approved Moderna's COVID-19 vaccine for use in the country, with 168,000 doses received by the end of the year 2019. The regulator announced the approval after completing a review of the Massachusetts-based biotechnology company's clinical trial data. Canada expects to receive 1.2 million doses from both *Pfizer* and Moderna by January 31, 2021. However, the economic devastation in Africa seems to slow the progress of most of its economies in acquiring and vaccinating people. Philanthropy coupled with bilateralism should ensure that weak economies are supported to ensure access to the vaccine. This is because countries need to leverage pandemic crises to build more inclusive and sustainable societies and move forward.

1.1 Summary of Findings

Common application software and tools used in the Justice sector

The common application software used in dispensation of justice in Kenya which participants of this research study identified and noted that they have at least interacted with them or used to access justice for themselves or on behalf of litigants and/ or used to deliver rulings on matters before court or utilised during virtual mediation sessions include Microsoft Teams, Zoom,

GoToMeet, Skype, WhatsApp Video Call, and Google Meet for video conferencing. One participant uses Digital Voice Recorder as a tool for electronic recording of evidence.

Technology expedites access to justice

Justice delayed is justice denied. A significant number of participants stated that the judicial procedures are easier thanks to technology.

D₁:

- **The IT devices and procedures have made it easy to track cases through the e-Filing platform**

E₂:

- **Easy to hold meetings as it is flexible enough to secure quorum for meetings unlike where physical attendance is required**

It is possible to work remotely

The use of technology allows the Judiciary members of staff and other stakeholders to work remotely as they offer judicial services or seek justice in the courtrooms and correctional centres.

E₂:

- **Ability to work away from the office. One needs not be physically in the office to work as one can work from home.**

C₁:

- **I am able to file documents in court registries in various parts of the country remotely**

D₂:

- **You can handle cases remotely.**

Minimise unnecessary movements

Unless litigants and advocates are required to appear in courtrooms in person, there is minimised movement removing tiresome journeys.

B₂:

- **Avoiding many road journeys since one can now connect to far away courts online.**

Relaxed yet extended working hours

With the use of technology, the Judiciary employees, advocates and other key stakeholders are able to work for long hours provided that they are comfortable with that arrangement. This means an individual can find time to complete tasks not completed during the normal Judiciary working

hours of 8a.m to 5p.m. This eventually leads to improved productivity if their performance is assessed in terms of tasks completed.

E₂:

- **Scattered working hours. With the use of IT, one is able to work outside the conventional 8a.m. to 5p.m. One can work even at night.**

Power outages disrupt online proceedings

Kenya Power is currently the sole electricity distribution company in Kenya and sometimes, it cuts supply of electricity without issuing a power outage warning to its clients who include the Judiciary. When there is a power blackout, court proceedings and E-mediation sessions are cut off.

B₂:

- **Blackouts**

H₁:

- **KPLC (Power outage).**

Gauging the credibility of witnesses is a lost opportunity

In the criminal justice system, a judge or a magistrate relies heavily on reading and interpreting paralanguage and the general body language of a witness or a litigant to establish their credibility. Virtual court sessions deny the bench such opportunity. In any given society, people communicate with more than just words. Most nonverbal elements of communication are uncontrolled and spontaneous and convey the emotional context of the message. Both para-language and body language are elements of non-verbal communication. Para-language are sounds that one makes in communication besides the actual words such as *mhhh!*, pitch, pauses, speed, laughing and mimicking.

Body language is nonverbal communication that involves body movement or in others words, these are conscious or unconscious physical behaviour, as opposed to words, used to express or convey the information. Important elements of body language are facial expressions, gestures, eye contact, normal gestures and posture. Facial expressions such as smiling or frowning help us understand how a person feels. You can know whether someone is expressing happiness, sadness, anger or fear. Gestures which are deliberate movement and signals, communicate meaning without words. Common gestures include using fingers to indicate numericals, waving to indicate greeting or pointing at someone and also nodding to agree with someone. Another important element of body language is eye contact which can be interpreted differently depending with someone's culture. To avoid facing some individuals directly may imply you are lying to them.

To maintain direct eye contact shows that what you are saying is or could be true. During court sessions, an advocate or a magistrate could face litigants to show that they demand genuine responses. Also, posture and movement convey a great deal of information. The way someone stands or moves communicates something. Leaning forward could mean someone is attentive, leaning backwards could mean that someone is relaxed or is inattentive depending on culture. Leg crossing and arm crossing are also examples of posture and movement. Some 12.5% participants felt reading body language of witnesses and litigants has been affected negatively with the use of technologies on criminal and civil procedures outcomes.

E₂:

- A witness may 'pose' for the camera hence denying the court the chance to pick up those salient *paralanguages* and body language.

C₁:

- It has affected negatively cross-examination which would be more effective when there is face to face meeting.
- Without eye contact and physical presence, the nonverbal communication of parties cannot be discerned.

Sensitive material and privacy concerns

The participants pointed out immediate concerns with virtual court proceedings especially transmission of sensitive files such as evidential material and even payment of court fees via platforms operated by third parties. These documents are transmitted to other parties and the court, and litigants must ask themselves if they are prepared to upload personal files or transmit fees via online court websites run both by government agencies and third parties. There are litigants and advocates who also feel that some matters need to remain private and online proceedings sometimes may not guarantee them this. A participant sees this as one of the problems associated with and encountered in handling the IT devices, tools and procedures.

C₁:

- Sharing documents which one did not intend to share

Intermittent faults including poor quality sound

There are audibility issues such that one party may not hear the counsel of the other party giving their submissions before court and also the same challenge when the Judicial officers are arguing something in court. This makes parties to struggle to follow proceedings. This causes ineffective communication and can bring about undesirable outcomes and unfair justice. Sometimes the software applications such as Zoom may malfunction at irregular intervals and also video conferencing may be affected by slow buffering such that the video and its sound fail to synchronise.

B₂:

- (Poor) **Audibility**

C₁:

- **Poor audio/ voice by other counsel and judicial officers hence struggle to follow proceedings.**

Some litigants fake technological glitches

Some clients whenever they have a case and the videoconferencing session is on, they fake challenges or pretend that a technological glitch has stopped them from being heard live. This disrupts virtual court sessions and virtual mediations.

A₂:

Others who fake challenges so as not to proceed

1.2 Summary Recommendations

Capacity building and sensitising clients

LRF calls upon the CSOs, NLAS and other multiagencies in the justice sector to do a lot of capacity building. They should also conscientise clients on technological changes. They should also build their personal qualitative development in this area. It is also important that clients learn appropriate SOP (protocol) on the use of IT in the dispensation of justice to avoid scenarios where some users embarrass the counterparts on a call and feign technical glitches.

NCAJ to conduct proper coordination for deployment of ICT infrastructure

NCAJ has the powers to oversee how various agencies in the judicial system implement measures taken collectively. This however depends on how the Council is dedicated to bringing on board these agencies to establish a framework to coordinate and constrict the difference in IT infrastructure. Such a multi-sectoral approach creates harmony, takes care of the standard operational procedures (SOPs) of justice sector users and as well specify required size of equipment and gadgets such as laptops, desktops, and smart TVs.

Administrators of videoconferencing platforms to avail login credentials on time

To avoid delivery of justice being delayed, administrators of various platforms facilitating virtual court proceedings need to avail login credentials to litigants and other clients early enough.

Forensic criminology to help address investigative and legal issues

There are clients who feel that technology helps the corrupt to find ways of enriching themselves at the expense of the poor or victims seeking justice. The use of technology also paves way for highly modified material to be presented in the court of law. It is therefore very important for the Judiciary to hire prudent forensic experts to deal with such malpractices.

A review of the mother law to change the management approach of prisons in Kenya

The findings of this report are insightful and point to the worrying trend of underfunding of the KPS. The prisons in Kenya over rely on foreign governments' backing, donor and NGOs' support. This calls for an opportunity to revamp Kenya Prison facilities since their IT support has largely been given by NGOs. A review of the mother law to change the management approach of prisons in Kenya would immensely help.

Improving ICT infrastructure

The Judiciary and the Ministry of ICT to ensure that the latest technologies are acquired and installed to serve the clients in a more timely and yet in a convenient way.

Integrate IT-driven payment systems

There is the need to coalesce the IT-driven payment systems so that once clients pay legal fees and fines, the transaction reflects and gets updated almost immediately. Such efficient payment systems not only help reduce people's stay in custody, but also remove silent transactional points of corruption.

Linking AJS/ ADR platforms to the mainstream system

There is the need for the Judiciary through IT to take recognition of AJS/ADR platforms and link them to the mainstream system to increase opportunities for enforcement, credibility and legitimacy. This is to ensure that the implementation of contemporary reforms in the Justice sector are symmetric as opposed to past reforms which were inclined towards the court system and sidelined the ADR platforms.

Collaborative effort of combating COVID - 19

Since COVID-19 is the common uninvited enemy who disrupted normal activities in almost all sectors including the Judicial system, the Judiciary must lean towards the

direction that addresses all the legal issues which if overlooked, would undermine efforts to curb the spread of novel coronavirus. The administrative wing of the Judiciary can liaise with the Health ministry officials to design educative materials targeting its staff members and the clients who include litigants and advocates. Kenya can borrow a leaf from China where the spread of COVID-19 was slowed down significantly through the effort of all contributors, including governments, non-governments, and civil society.

Develop a social justice framework.

LRF notes that community relationships are very important and therefore the Judiciary in conjunction and in partnership with various agencies and embassies must actively support a social justice framework beyond the end of an assessment of this report that shows there are disadvantaged groups in the use of technology in the justice sector to ensure transformative change. A social justice framework is a way of seeing and acting aimed at resisting unfairness and inequity while enhancing freedom and possibility for all. Therefore, there must be a sense of equity and equality where necessary to ensure that all the Judiciary's clients access justice.

Public participation

Before the digital technologies are rolled out in the Judicial system, the public, civil society organisations and other stakeholders should be engaged so that they can give their perspectives especially for the clients they handle.

Revising Prisons Act Cap 90 of the Kenya Laws

LRF recommends that Cap 90 is revised to consider different ownership and management framework for Prison facilities Kenya. The inadequacy of the Kenya prison service, who, unfortunately are custodians of all the pre-trial detainees, yet they are extremely underfunded, and have largely relied on CSOs thwart efforts to streamline the justice sector. More so, KPS being under the Executive reduces its functional capacity. Currently, the Minister for Interior and Coordination of National Government has excess powers to influence how prisons in the country are managed.

Chapter Two

Chapter Two: Literature Review

2.0 Introductions

The COVID-19 pandemic which was first reported in Wuhan in the Hubei Province in China in 2019 has now engulfed the whole world devastating and having raging effects across important sectors. The disease was first reported in Wuhan in December 2019, then spread in different parts of China, and gradually became a global pandemic in March 2020.⁸

2.1 Global context of access to justice integration with emerging digital technologies

In the U.S., the advantages of e-filing include fewer delays in filing, more convenient access to court documents, and more reliable court records. Additionally, the requirement by most courts that the attorneys have to use e-filing, has managed to increase access by supporting twenty-four hour filing while reducing the cost and time of scanning by the clerk.⁹ Many courts continue to operate by adopting the use of technology and prioritising cases based on ‘immediacy’, thus ensuring the right of access to justice even in these abnormal times when the world has been hit hard by the COVID-19 pandemic. The alternatives to in person dockets are all-virtual, limited in-person, or hybrid (virtual and limited in-person) formats in courts as a sustained effort to maintain operational continuity, while reducing transmission, and comply with health and safety directives.

In the UK, the Covid-19 lockdown accelerated the use of virtual court hearings. The UK has three distinct legal jurisdictions namely England and Wales, Scotland, and Northern Ireland. Each has its own court system. England and Wales court system is the largest of the three, serving 90% of the UK population. The Supreme Court is the final court of appeal for the whole of the UK. Thousands of court hearings in the UK have been replaced by virtual hearings, via telephone, or video conferencing links. It is a whole new experience for most judges and lawyers, who had to resort to working from home and connecting to the virtual courtroom through Skype, Zoom or the Kinly Cloud Video Platform.¹⁰ The challenge is that small children occasionally make surprise appearances in the virtual courtroom. There are also rumours that lawyers and even judges are now

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Shaw, Rajib, Yong-kyun Kim, and Jinling Hua. "Governance, technology and citizen behavior in pandemic: Lessons from COVID-19 in East Asia." *Progress in disaster science*(2020): 100090.

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Cabral, James E., Abhijeet Chavan, Thomas M. Clarke, and John Greacen. "Using technology to enhance access to justice." *Harv. JL & Tech.*26 (2012): 241 accessed on November 22, 2020, <http://jolt.law.harvard.edu/articles/pdf/v26/26HarvJLTech241.pdf>

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Fundación Fide, "In the UK the Covid-19 lockdown has accelerated the use of virtual court hearings, but will it bring permanent changes to the judicial process?," accessed December 16, 2020, https://www.fidefundacion.es/In-the-UK-the-Covid-19-lockdown-has-accelerated-the-use-of-virtual-court-hearings-but-will-it-bring-permanent-changes_a1359.html.

wearing business attire from the waist up, while dressed in jeans or even pyjamas where the laptop camera cannot see. In some cases, all those involved have participated remotely, while in others, judges have been present in the courtroom, with social distancing in operation, with some parties and/or witnesses and/or legal representatives participating remotely. In family cases in the UK, there are concerns that the lack of face-to-face contact make it difficult for participants to read the reaction of a party or witness and to communicate in a humane and sensitive way.

2.2 The Judiciary in Uganda and COVID - 19 mitigation measures

On March 19, 2020, the then Chief Justice of Uganda Bart Magunda Katureebe - who was succeeded by Alfonse Owiny-Dollo on August 22, 2020 - issued guidelines suspending court appearances for 32 days, following earlier presidential guidelines on the prevention and mitigation of COVID-19.¹¹ The CJ directed that courts would only adjudicate urgent matters, parties needed to file written submissions regarding cases in advanced stages, and judgments or rulings would be delivered online or via email where possible. The CJ said that during that time, prisoners and the accused persons on remand were not to be presented to court and where possible proceedings would be conducted via video link. Katureebe noted that courts were to continue handling certificates of urgency and taking plea for serious cases and bail applications and only the applicant, their lawyers and sureties were to be allowed in court. In his eight point directive, Katureebe also said that during that time, all Judicial Officers and staff members were to remain on duty but no open court appearances. During that period, the Judicial Officers pending judgments were directed to use that period to complete them. Where possible, judgments and rulings were to be issued to the parties online or via email. The CJ in the statement noted that all conferences,

workshops, meetings and training Programmes including local and foreign training programmes had been suspended for a period of 32 days. Also, the Judiciary staff members were not to go abroad unless there were exceptional circumstances. Katureebe added that sanitisers and other preventive measures had been put in place, but that digital thermometers were also being purchased and were to be deployed at various court premises. Once CJ Katureebe rolled out court activities in March, the Judiciary moved to install Zoom technology for both its Court of Appeal and Supreme Court judges, informed by the fact that judges of the Supreme Court and those of the Court of Appeal, which doubles as the Constitutional Court, work in panels. Considering the anti-Covid-19 measures against close human contact, Zoom technology would be the best platform for the judges to link up and discuss issues related to judgment writing, and administrative matters, among others. Privately, judges said it took a week for the 11 Supreme Court judges to acquaint

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Murungi, Edline and Tusiime, Diana Tracy, "Covid-19: Law and technology – why an electronic case management system is a necessity in Uganda," *Bowmans*, Published May 4, 2020, accessed December 26, 2020, <https://www.bowmanslaw.com/insights/covid-19-law-and-technology-why-an-electronic-case-management-system-is-a-necessity-in-uganda/>

themselves with Zoom video communications.¹²Fast forward to March 30, 2020, and a lockdown was declared with further restrictions announced including a ban on public and private transport. This led to further scaling down of court activities and made filing and service of court documents virtually impossible barring all but over-zealous lawyers and clerks willing to ride their own bicycles or motorcycles to court.

2.3 COVID - 19 pandemic and IT driven Justice sector in Nairobi County

In Kenya, the Minister of Health Mutahi Kagwe on a number of occasions during the ministry’s daily updates on the state of COVID-19 in the country, described this pandemic as a turning-point, especially that which marks an epoch that can be referred to as abnormal times. He tirelessly encourages Kenyans and other residents to adhere to health protocols to help curb the spread of the coronavirus. Since then, he insists that people must change their reckless lifestyle that makes them susceptible to COVID-19. He especially warned that to behave normally during these difficult times is to invite the disease to treat one abnormally.¹³ To ensure that it joins the consistent efforts aimed at confronting the COVID-19 crisis while maintaining an orderly functioning of public services especially the delivery of justice, the Judiciary embarked to the use of digital technologies and especially within Nairobi County as it continues to work with key partners and stakeholders to improve on service delivery. This shows that the Judiciary attempts to balance its own needs, operations, and available resources with new directives from the world bodies such as the WHO, the national government, county governments and other local authorities in order to control the impact of infection.

2.4 Background to the study

The promulgation of the Constitution in 2010 proclaimed a paradigm shift towards human rights driven and people centric governance, social justice, leadership, and consequent service delivery. The purpose included breaking and shying away from the many years of misgovernance, systemic discrimination, social and economic inequalities. This further provided an opportunity to entrench a culture of human rights, constitutionalism, and rule of law, besides creating mutually binding political ambience, largely driven by citizens’ aspirations. For this to be realised, access to justice, which is right guaranteed at Article 48 has to be promoted.

However, access to justice is not a right in isolation, so is its actualisation. It would be folly if discrimination before law and indignity, revulsed at Articles 27 and 28 are left standing. While

¹² “Digital migration: Is Covid-19 a turning point for the Judiciary?” *Daily Monitor* online, May 4, 2020, accessed December 27, 2020, <https://www.monitor.co.ug/uganda/special-reports/digital-migration-is-covid-19-a-turning-point-for-the-judiciary--1890360>

¹³ Ministry of Health, “Kenya reports eight more cases of Coronavirus,” March 22, 2020, accessed December 7, 2020 <https://www.health.go.ke/kenya-reports-eight-more-cases-of-coronavirus/>

systemic weaknesses and likely interventions have been identified by several actors, studies and programmes, the import of a highly IT driven justice sector has not been fully exploited, hence less understanding and appreciation of the opportunities and challenges. COVID-19 was precursor and a test of this reality. A health pandemic of this magnitude that behooved the state to expedite strict public health directives of social distancing, less crowded physical meetings, wearing of masks and hand sanitising. Individuals' lives, business operations and institutional procedures have significantly changed because of the pandemic. The effect has been enormous on Kenya's justice system. A quick shift to IT driven services in response to the public health directives, yet responsive to the fact that information technology is not a perfect spread and use among the many Kenyan poor.

We therefore seek to understand what it portends to have an extremely IT driven justice sector in Nairobi. The foregoing digitalisation of the justice system, with police piloting a digital crime occurrence book (OB), filing of matters being online and court sessions being carried out by way of the Internet, we seek to draw lessons to guide the course and discourse of justice, on the backdrop that the Criminal Justice system is skewed against the marginalised, poor, and vulnerable, whose shape and form may include women, children people living with disabilities (Audit Report of the Criminal Justice, 2017). We seek to understand how the humanitarian like situations such as COVID-19 impacts on service delivery in the justice sector, generating knowledge that can be extrapolated for posterity.

2.5 Literature review

The courts can utilise technology in a number of ways to better serve their customers. The following 18 ways are just some of the areas where it can be harnessed for the betterment of lives. Firstly, technology can be used to enable customers to obtain information and court services using their smartphones. Secondly, it can be used to enable customers to present photos, videos, and other information from their smartphones in the courtroom. Next, it can be used to enable customers to appear in court by telephone or video conference. Then, it can be used to enable parties to schedule hearings at their convenience. Fifth, technology can be used to enable parties to pay fees, fines, and other financial obligations online. Next, technology can be used to enable wayfinding, that is, through the website, a customer is able to obtain a map and instructions for getting to a courtroom and also with the use of the interactive displays in the courthouse lobby,

customers are able to obtain directions to a particular destination within the courthouse as it is a norm in courthouses such as the Fourth Judicial District in Hennepin County (Minneapolis), Minnesota and the First Judicial District Court in Santa Fe, New Mexico in the US. The same technology can be used to enable customers to obtain information and forms remotely. The next point is that technology can be used to simplify the process of forms completion. The ninth point is that it can enable self-represented litigants to file documents electronically. The tenth point is that technology enables for the creation of an order or judgment at the close of a hearing or trial. Next, it creates an online triaging portal for every jurisdiction. The twelfth way technology can be

used by courts to serve customers is enabling online dispute resolution. The last six ways are enabling automated court messaging to customers, using messaging to guide customers through their court case, using technology to simplify the service of process, eliminating notarisation requirements for court filings because most courts now accept a typed name in place of the filer's signature for eFiled documents, maintaining a list of each customer's personal needs, and implementation of a component model case management system.¹⁴

The COVID-19 pandemic has exposed challenges related to the testing samples, availability of basic care, tracing of contacts, quarantine and isolation procedures, and preparedness outside the health sector, including global coordination and response mobilisation. While the judicial digital transformation journey started before the COVID-19 pandemic struck, the disease and the challenges it posed to humanity forced courts across the world to swiftly adopt the use of technology. The reason is because the novel coronavirus is highly contagious and there was urgent need to ensure people maintain social distance, sanitise, wear facemasks and where possible stay at home so as to avoid overcrowded social places. The International Bar Association, in its June 2020 report assessed the impact of COVID-19 on court operations and litigation practice in which one contributor revealed that in Austria, courts operated with severely reduced staff, with a significant number of judges working from home. The report established that oral hearings in that country were postponed to July 2020, and even later. The pandemic also caused the piling of cases meaning that litigants, advocates and court judges and magistrates have to work around the clock to have the previously postponed court hearings completed. Notable is that where it has been necessary to avert danger to life and physical integrity or to prevent irreparable harm, court hearings have been scheduled at the normal pace during the COVID-19 lockdown. In terms of how

COVID-19 impacted on the enforcement of judgments, in Austria the deadlines in enforcement proceedings were interrupted from March 22 to April 30, 2020. Also, the compulsory auction of a property must be postponed without the imposition of a security, if the obligated party has gotten into economic difficulties as a result of the COVID-19 crisis and if the consequence of an enforcement would destroy such party's economic existence. And in order to prevent people in the current situation from becoming homeless through eviction, it was possible to postpone the eviction of persons from their dwellings, but this grace period was lifted on June 30. However, for other types of enforcement, the COVID-19 crisis does not constitute a reason for postponement.

In the U.S., nearly every court in the country saw its operations impacted by the COVID-19 public health crisis, including the United States Supreme Court, which heard oral argument via teleconference for the first time in the Court's history on May 4, 2020. The court does not allow cameras in its courtroom, has never allowed simultaneous audio broadcasts and only rarely allows tapes of its hearings to be released the same day. A transcript and recording of the proceedings were later posted on the court's website.¹⁵ In the first weeks of moving proceedings online, many

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Greacen, John M. "Eighteen Ways Courts Should use Technology to Better Serve Their Customers." *Family Court Review* 57, no. 4 (2019): 515-538.

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courts across the U.S. turned to videoconferencing platforms. As of the end of April, Iowa is using GoToMeeting; New York, Oregon, and Puerto Rico are using Skype for Business; Oregon and Wyoming are using Microsoft Teams; Colorado, New Hampshire, Oregon, Pennsylvania, Tennessee, Utah, and Virginia are using WebEx; and Alabama, Michigan, New Jersey, Tennessee, and Texas are using Zoom. Courtcall which is litigation-focused platform and one of the most frequently used teleconferencing platforms prior to the COVID-19 pandemic, saw a sharp increase in requests for remote hearings in March and April. Courtcall users have access to audio and video conferencing capabilities, as well as choosing between “Open Court” and “Privacy” mode. Immediate concerns raised in the US on the use of virtual court proceedings are, but not limited to many litigants and defendants lack the hardware and or the Internet connectivity to participate, there are significant privacy threats from the integrated recording capability on many video conference platforms and courts must account for the digital divide as well as security vulnerabilities, potential fraud, and the risk of manipulated audio and video in evaluating online courts.

Locally, a 2015 research analysed the impact of ICT in enhancing access to justice in the Kenyan judiciary. It looked at the use of these technologies in the country’s judicial system nationally at the time when there was no a pandemic that would later to a larger extent force litigants to argue cases remotely. The researcher used quantitative approach and that is why LRF researchers in this study opted to apply the mixed methods approach. Immediately after the GoK embraced ICT, there came a need to have it introduced in the various government arms, including the Judiciary.

It was seen as a formidable way of solving the various challenges in the justice sector such as poor case and record management, underdeveloped and insufficient ICT capacity and inadequate research material. There was the need to automate the Judiciary to improve case-flow management and systems and that gave birth to The Judiciary Transformation Framework, 2012-2016 that was anchored on four pillars. These are People Focused Delivery of Justice, Internal Human Resource Capacity, Infrastructure and Resources and ICT as an enabler. In line with the fourth pillar - ICT as an enabler - the Judiciary Information Technology Committee (JICT) was established on October 15, 2008, to oversee the digitisation of court records, creation of a document management system, development of ICT policy and strategic plan, establishment of communication infrastructure and acquisition of ICT hardware and software. The committee was also tasked with giving progress reports on their successes, challenges, and areas of improvement to ensure that the ICT system developed would meet its purpose.¹⁶ This researcher noted that one of the main reasons why it became necessary to introduce the use of ICT in the Judiciary was so as to enhance the access to justice. Therefore, the question of concern was whether or not the use of ICT in the justice sector had enhanced access to justice. To demystify this, the 2015 report highlighted that before

Barnes, Robert. “Supreme Court takes modest but historic step with teleconference hearings.” *The Washington Post*, May 5, 2020. Accessed December 12, 2020. https://www.washingtonpost.com/politics/courts_law/supreme-court-teleconference-hearings-bookingcom/2020/05/03/f5902bd6-8d76-11ea-a9c0-73b93422d691_story.html

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Kagucia, Priscilla W. "A critical analysis of the impact of information and communication technology in enhancing access to justice in the Kenyan judiciary." PhD diss., University of Nairobi, 2015.

then, the judges and magistrates would record proceedings and write judgments in long hand then their secretaries would type them out. The bar would then edit and proof read to ensure that they were correctly done. Preparation of any document was therefore time consuming. Sometimes the aggrieved litigants had to wait even for a year to have the typing of proceedings done so as to prepare the record of appeal and another challenge was when a judge was transferred and the typing of proceedings had to be done afresh where the handwriting was illegible for another judge to read. Regrettably, in the findings, it was established that the use of ICT in the Judiciary is still a work in progress that had not fully met its objective because over 50% of the participants in the 2015 research disagreed and strongly disagreed with all the statements regarding the issue of whether the use of ICT had enhanced the performance of the judiciary. It is against this backdrop that LRF saw the need to look at the use of IT in the justice sector and access to justice in Nairobi County during an epoch of COVID-19 pandemic since it is when technology is needed more than ever. On the extent to which the use of ICT has enhanced access to justice the assumption by the proponents of use of ICT in the judiciary was that it was the ultimate solution to the myriad of challenges it was facing in an effort to improve its performance and on this, 36.6% and 58.7% of the participants agreed that ICT had improved the delivery of services and the timely access to legal materials respectively. 60.9% of the participants agreed that it had improved the access to courts, implying that ICT had improved access to justice because legal materials were readily available through the Internet which can also be accessed from any location across the country.

However, there was a significant group of participants who held a contrary opinion on whether ICT had reduced the cost of litigation where 22.2% and 48.1% strongly disagreed and disagreed respectively with that statement. This therefore means that ICT cannot on its own counter all the challenges in the Judiciary in improving access to justice. On March 20, 2020, the Practice Directions on Electronic Case Management were gazette and the same are to come into force on a date to be determined. The Judiciary management noted that the directions are progressive and need to be operationalised for the courts that are ICT compliant as other courts upgrade their ICT systems. Where all parties are legally represented hearings can be conducted remotely through video conferencing.

2.6 IT driven Justice: How it works

Kenyans still experience tremendous backlog of cases. Complainants, especially in metropolitan areas such as Nairobi lodge cases, but most of them take years to be resolved, while others remain unresolved forever. Some cases are stymied by bureaucracies that have become a norm in manual court procedures and proceedings. The legal maxim mentioned more often “Justice delayed is justice denied” means that if legal redress is available for a party that has suffered some injury, but is not forthcoming in a timely fashion, it is effectively the same as having no redress at all.¹⁷ Before the promulgation of the

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Gibson, G. M. (2016). Justice Delayed is Justice Denied: The Lord Nelson Case. *Ontario History*, 108 (2), 156–188. <https://doi.org/10.7202/1050593ar> Accessed on 16th November 2020

2010 Constitution, most cases in civil courts in Kenya took an average 24 months to conclude, largely because of the limited number of magistrates and judges available to hear them, but also because of the long distances between courts and the places where plaintiffs live. For a long period of time, the problem ailing Kenya's judiciary has been massive backlog of civil cases, prompting it to explore alternatives. The revised Constitution in 2010 allowed the judiciary to explore and promote alternative dispute resolution mechanisms, including mediation and most recently, the use of digital technologies. Alternative Justice Systems (AJS) refer to the administration of justice by the people using their culture, customary law, practices and beliefs to resolve disputes. AJS aims to ensure social inclusion and is generally more affordable, participatory and expeditious than court processes. The alternative justice processes help reduce the burden on courts and are meant to strengthen the links between formal and informal justice systems rather than replace the reliance on courts. AJS are expeditious and are effective mechanism for reducing case backlog. Former CJ Maraga while launching the AJS Baseline Policy on August 27, 2020, explained that while justice dispensed by the courts occupy the centre-stage in the administration of justice, the reality is that the vast majority of disputes, as much as 90%, among Kenyans are resolved through justice systems that are outside the formal court process. UNODC and UNDP through Programme for Legal Empowerment and Aid Delivery in Kenya (PLEAD) offer technical assistance. These measures are crucial in mainstreaming AJS. UNDP supports Justice Centres by offering technical assistance and resources including stationery and case documentation materials as well as to strengthen the paralegal approach and support for use of alternative dispute resolution envisaged under Article 159 (2)(c) of the Constitution.¹⁸ The Constitution thus requires that the Judiciary promotes alternative mechanisms of alternative dispute resolution (ADR). This is further given effect by the Civil Procedure Act (Chapter 21 of the Laws of Kenya).

Several agencies in the judicial sector have benefitted from PLEAD with Witness Protection Agency (WPA) as an example where its over 40 officers were trained on standard operating procedures. PLEAD also supports the use of digital technology make sure that witnesses who are at threat or under protection can also give their testimony digitally during the COVID-19 pandemic period and this has contributed to more efficient court proceedings. At the start of July 2020, the judiciary arm of government in Kenya embraced digital court, doing away with the physical filing of cases. Chief Justice David Maraga who is expected to proceed to terminal leave on December 12, 2020, before he formally retires on January 12, 2021, launched the e-filing platform. This is an electronic system that requires parties to register themselves through the e-filing court platform for them to be able to log into the Judiciary System. These parties include members of Law Society of Kenya (LSK), Office of the Director of Public Prosecutions (ODPP), police officers and members of the public. The litigants do not need to visit the court premises to file cases or banking halls to pay

¹⁸ United Nations Office on Drugs and Crime (UNODC), "Plead Verdict: Newsletter of the Programme for Legal Empowerment and Aid Delivery in Kenya – Plead Issue No.5, 2020," accessed February 15, 2021, https://www.unodc.org/documents/easternafrika/Criminal%20Justice/PLEAD_Verdict_Dec_2020.pdf

court fees. The key components of the system are E-Case Registration, E-Payment, E-Case Search, E-Calendar, and finally E-Service. To be able to use the system, an individual should have a valid email address, soft copies of all case documents, preferably in PDF format and properly named as say Affidavit or Annexures, and finally sufficient money to pay court fees via M-Pesa which is a mobile phone-based money transfer service, payments and micro-financing service, launched in 2007 by Vodafone Group plc and Safaricom. The judiciary adopted the system as a key part of its efforts to increase use of technology in all its functions and achieve higher levels of efficiency and convenience to its stakeholders.

To access the e-filing system a client needs a valid username and password to successfully log in to the E-filing system. To Sign up for the e-filing system, one has to choose the type of user (whether a law firm, organisation or individual). The party must enter the contact details and the log in details, that is, the desired password. Next is to confirm the details after which an email notification will be sent directly to the email address for account activation. Once the account is ready, it is now possible to file cases from the comfort of the person's office and pay court fees. Note that one can also log-in via E-citizen account.

When filing a case on the e-filing system, the person will log in with one's username and password. One has to check the file new case button before choosing the court station, court division, case category, and case type after which he or she is good to go by proceeding to capture case party details. The details on parties must include party type, name, nationality, gender, and phone number. A brief summary of the case is required. The documents to be e-filed are selected before choosing the party filing the document type to enable the system to auto-assess the requisite fee to be paid. To Upload Case Documents one has to click on add files on the party filing and then clicks on choose file to locate the file to be uploaded. One needs to click on the browse button to be directed to the drive whereby he or she will be able to select the files to be uploaded. The next step is to review and submit to complete case registration.

2.6.1 Making payment

Once Court Fee payment advice has been generated, a prompt with payment instructions is availed. Payment should be made against the PRN No-Customer Reference number. Payment of the correct amount assessed is done via the MPESA Pay Bill Number 553388 and the Unique Account Number indicated on the Invoice (Starting with letter "E"). Case Number is automatically generated once the Kenya Commercial Bank (KCB) receives the payment.

2.6.2 E - service

This platform allows litigants to serve parties online. They need to click to initiate E-Service, and then proceed to choose the mode of service and provide the details. They then need to review the documents to be served and submit.

2.6.3 Support for technical issues

In case of any issues, be it general inquiries or technical glitches, the Judiciary Customer Service desk can be reached via the contact numbers: +254 730 181581, +254 730181582, +254 730181583 or via email address: customerservice@court.go.ke. The designated judiciary staff members are on that desk from 8 am to 5 pm weekdays only.

2.7 Matters before court

The litigants whose cases are already before court have to be tech-savvy. They are especially required to go to the Kenya Law website to check cause list.¹⁹ Other navigation links on the homepage of the website are Home, Laws of Kenya, Case Search, Tribunals, Parliament, Kenya Gazette, Publications, Blog, and Elections. From the Cause List menu, the litigants are able to learn when the cases are to be heard, the magistrates or judges presiding over matters, the specific courtrooms, and the time. Having a prior knowledge allows the litigants enough time to prepare before the cases are heard. Most importantly, the cause list has a link which allows them to log in and virtually follow the court proceedings. Within the Cause List, there are quite a number of quick links with important information. These sub-menus include Vacation Notices, Supreme Court, Court of Appeal, High Court of Kenya, Employment and Labour Relations Court, Chief Magistrates Court, Kadhis' Court, Tribunals, Licensed process servers, and Cause List Archive.

The Vacation Notices allows one to download important documents, for instance, High Court Christmas Recess Notice for December 2020. This recess was done under Gazette Notice 8595 where Principal Judge Lydia Achode issued a notice, pursuant to Article 165 (1) of the Constitution of Kenya and section 10 (1) (2) (a) of the High Court (Organisation and Administration) Act, 2015, that the Christmas Recess of the High Court and Courts of Equal Status was to commence on December 21, 2020 and terminate on January 13 2021, both days inclusive. Such notices are very important and the fact that she clarified that Recess Duty Judges shall be appointed to hear and try matters arising during Recess in accordance with the High Court (Practice and Procedure) Rules, it rubberstamps the need for individuals to be on the lookout for any information from the courts.

Another initiative, the Court Annexed Mediation Project (CAMP), introduced in April, 2016, is supported by the World Bank's Judiciary Performance Improvement Project (JPIP) and has been adopted in many countries around the world. In Kenya, the origin of it can be traced back a few years to Kenya's revised Constitution in 2010. The judiciary adopted the court-annexed mediation process to speed up case resolution. In an interview with *The Star*, Deputy Mediation Registrar Caroline Kendagor explained the process stating that while in litigation, the responsibility lies with the magistrate who is expected to come up with a solution to the dispute between the parties by way of judgment or ruling, in mediation, the parties are given the chance to solve their dispute(s). Mediation is less tedious than litigation. In court-annexed mediation, conflicting parties are only expected to attend court mentions for the purpose of monitoring the progress of mediation,

¹⁹ Kenya Law, "Where Legal Information is Public Knowledge," accessed December 8, 2020, <http://kenyalaw.org/kl/>

which is unlike in litigation, where parties are expected in court rooms on numerous occasions before the matter is concluded. Mediation is a faster process compared to litigation because matters in the former are expected to be concluded in 60 days, while the average time taken to conclude matters in the latter is three years. This makes mediation a less tedious process than litigation.²⁰ The COVID-19 pandemic has totally changed the dynamics of operations in the judicial system and as such, the judiciary commenced virtual mediation in order to mitigate the challenges posed by the disease. Accredited mediators now use technology to facilitate resolution of disputes between parties without the need for in-person appearances, a move that is in line with the health protocols in place to help curb the spread of the highly contagious novel coronavirus. Its communicability has the potential to overburden the health care system if extensive precautions are not taken. As a result, the impact of the COVID-19 pandemic has been far reaching, negatively affecting the day-to-day operations of nearly all businesses and social institutions

2.8 How virtual dispute resolution under court annexed mediation works

The secretariat reaches out to parties in matters which had already been referred to mediation process to confirm willingness to participate in virtual mediation before directions are made. Courts may refer suitable new or pending matters to virtual mediation. The conflicting parties may request the court to refer their matter to virtual mediation. The secretariat, in consultation with the parties, appoints a mediator from the MAC Register. The secretariat and mediator liaise with the parties on suitable technology platforms for the conduct of the mediation process.

The access links for the agreed upon platform for the virtual mediation are shared in advance to avoid wasting time once the mediation process or rather the meeting is called to order. Note that parties are encouraged to share their case summaries via email prior to the scheduled mediation sessions. The secretariat conducts regular bring up of referred matters and offer any assistance as may be required. E-Mediation Sessions are private and are attended only by the Mediator, Parties and individuals identified pursuant to the Practice Directions (Paragraph7) on mediation.

There is no formal record or transcription of the mediation sessions. Where parties reach agreement, they may record such settlement agreement in such form as they agree. The settlement agreement shall be forwarded to court for adoption as an order of the court. Where parties fail to reach settlement, the file is forwarded for adversarial trial process.

The things required for the successful mediation are contact details for parties and advocates; email address, mobile number and or platform user name where applicable. Smartphone, desktop or laptop with stable Internet connectivity and camera are also important. The required gadget features are real time streaming video, online chat functionality, document sharing and electronic signature capability.

²⁰ Kadida, Jillo. "Mediation is a viable method of dispute resolution — Registrar." *The Star*. October 28, 2019. Accessed November 16, 2020. <https://www.the-star.co.ke/news/big-read/2019-10-28-mediation-is-a-viable-method-of-dispute-resolution--registrar/>

There are benefits of virtual mediation key amongst them being that it facilitates access to dispute resolution for all; there are no geographical restraints; parties are able to proceed from familiar surroundings that put them at ease; it is time saving and convenient because connection can be done anywhere provided that one has access to the Internet, and it affords parties flexibility of time, as sessions can be held during weekends and even past the normal working hours.

2.9 KPS situation

Various departments in the Ministry of Interior benefit from ICT equipment and PPE donated by the U.S. Embassy. On August 11, 2020, the Embassy presented PPE to Ms. Florence Omundi, Assistant Commissioner of Prisons to have the equipment distributed to prisons across the country, especially maximum and remand prisons where demand is greatest, such as Kamiti Prison, and Industrial Area Remand which are included in this research, and Shimo la Tewa among others.²¹ In May 2020, the EU Ambassador to Kenya, Mr. Simon Mordue handed over to Commissioner-General of Prison Service, Wycliffe O. Ogallo 18 laptops funded by the EU through PLEAD and procured by UNODC for immediate use by KPS in enabling links between prison stations and presiding judges and other parties during virtual court hearings. Other actors like LVCT Health donated various protective and preventive equipment to the Prisons Department. The donations included face masks, face shields, temperature measuring equipment, and sewing machines. In 2020, United Nations Office on Drug and Crime (UNODC) assisted key criminal justice institutions in Kenya to promote safe practices at courts and offices by producing 32,805 social distancing stickers and posters.

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U.S. Embassy in Kenya, "United States Donates Ksh 63 million of PPE and ICT Equipment to Ministry of Interior," Published August 25, 2020. Accessed February 15, 2021, <https://ke.usembassy.gov/united-states-donates-ksh-63-million-of-ppe-and-ict-equipment-to-ministry-of-interior/>

Chapter Three

Chapter Three: Approach and Assignment delivery

3.0 Research methodology

Legal Resources Foundation, in this research study used questionnaires, observation and secondary sources especially review of relevant literature of previous studies on IT and justice sector. Mixed research method approach was applied. This approach combines getting the general understanding and indepth study of a phenomenon in its natural setting by including qualitative and quantitative data in a single research study. It is therefore a multi-methodology approach since it integrates qualitative and quantitative data collection and analyses in a single study or a programme.

The main features of mixed method approach are that the researcher collects and analyses both qualitative and quantitative data, the researcher may give priority to one or both forms of data depending on what the researcher emphasises on, the procedures can be in a single study or multiple phases of a programme of study and importantly, the researcher combines procedure into specific research designs. LRF researchers opted to use Mixed method research approach because, firstly, it enabled them to use pictures, illustrations and narrative and words to add meaning to numerical data. Secondly, it was possible to use numbers to add exactness to words and pictures. Next, the research answered a broader and a complete range of research questions. Loopholes in one method were sealed by another method and lastly, convergence and corroboration of findings formed a basis for strong evidence for a conclusion.

The qualitative aspect was important and especially reconstructing the personal perspective on the IT driven justice sector while the quantitative aspect was crucial as this formed centre stage for researchers as they sought to investigate the statistical picture of Kenya's IT driven justice sector. The key factor was to expand the depth and range of the research study because the use of different methods and different ways of inquiry resulted in more comprehensive results. Questionnaires were constructed and subsequently fielded. Observation was also important in this research study since it is "the systematic description of events, behaviour, and artefacts in the social setting chosen for study".²² It enabled LRF researchers to describe existing situations using the five senses – smell, touch, hearing, sight, and taste –thus providing a "written photograph" of the situation under study.

The data collected has been analysed in this report and presented. The analysis procedure includes preparing data, reviewing and exploring data, analysing data, and finally representing data. For quantitative data, preparing data was done by coding data and assigning numeric values and recording data to prepare computer analysis. Qualitative

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Marshall, Catherine, and Gretchen B. Rossman. "Designing qualitative research sage publications." *Newbury Park, California* (1989).

data was organised. Reviewing and exploring data was done in such a way that there was descriptive analysis looking for trend and distribution of quantitative as well as reading data to develop qualitative codes. Quantitative data was analysed using computer programmes with statistical functions and looking at intervals while qualitative data was analysed by coding it and assigning levels, grouping data and looking for related themes. And to effectively represent data the researchers used tables, graphs and figures for quantitative data while qualitative data was represented using discussion, that is, text form to represent themes.

Ethical considerations were respect for participants, to minimise the risks, LRF researchers ensured the questionnaires contained just enough questions and not too many. They also showed utmost respect for the Judiciary and correctional centres.

3.1 Scope of the study

What holds true throughout this study are the content framed within the precincts of use of digital technologies amidst the coronavirus pandemic. Content entails all the questions captured in the questionnaire.

The context scope looks at the site of the study, in this case Nairobi County. Methodology scope is about the research paradigms, the type of study and also how participants were selected and the methods of data analysis. This study was guided by the interpretivist and ontological research paradigms.

The participants were selected from seven categories. These include the bench; court registrars and other court officers; prisons officers; advocates; prosecutors; civil society organisations; officers from the National Legal Aid Service established under section 5 of the Legal Aid Act 2016 with the mandate to provide legal aid services to indigent, marginalised, and vulnerable persons; establish a legal aid scheme to assist the indigent to access legal aid; promote legal literacy and legal awareness; support community legal services by funding justice advisory centres, education, and research; and promote the use of alternative dispute resolution methods that enhance access to justice.²³

NLAS is a legal and institutional framework for legal aid in Kenya giving effect to Article 19(2), 48, 50 (2) (g) and (h) of the Constitution. NLAS is a successor to the National Legal Aid and Awareness Programme (NALEAP). Currently, NLAS has a presence in five counties in Kenya, namely Mombasa, Kisumu, Uasin-Gishu, Nakuru and Nairobi. Its notable activities it conducted in the five counties during the FY2019/2020 are provision of legal aid services, self representation training, Stakeholder Engagement, resource mobilisation, dissemination of IEC materials and internship programmes. Some of the

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Office of The Attorney General and Department of Justice, "National Legal Aid Service," accessed December 13, 2020, <https://statelaw.go.ke/departments/national-legal-aid-service/>

key responsibilities of state counsels at NLAS include:

- Offering legal advise on criminal and civil matters
- Drafting pleadings
- Conducting mediations

The prisons officers were selected from Nairobi Industrial Area Prison, Lang'ata Women's Prison, and also Kamiti Maximum Security Prison which despite it being associated - in terms of location – with the neighbouring Kiambu, it is considered as an institution within Nairobi County.

The participants were asked personal details including their names, physical address, phone contact numbers, email addresses and asked about work details especially area of specialisation and station of work. This also included some adjustments to include the organisation a participant worked for, the position one held and the type of work one was doing.

They were then asked about an individual's interaction with the IT devices, tools and procedures. They were asked if they had attended meetings or sessions via video conferencing where they were to indicate the Video Conferencing Application used. They were also asked about the Electronic Recording of Evidence, Online proceedings, Online submissions to court, Official state Websites for updating cases and new judicial matters, Voice distortion for Witnesses giving evidence on behalf of the state, Face distortion for witnesses giving evidence on behalf of the state, Automatic Language Translation for those who speak local languages or any other technology. The participants were also asked their personal experiences on the operation of the IT devices, tools and procedures where they were to indicate how well they manage to use or rather operate the IT devices, tools and procedures by selecting one option from the choices well, very well, fairly complicated, and too complicated.

In case of any challenges when using the digital technologies or handling the devices, they were required to indicate the problems they encountered. Next, they were asked to indicate a number of ways in which the IT tools, devices, and procedures help them discharge their respective duties and help their clients access justice. They were also asked to describe the effects the digital technologies have had on criminal procedures and outcomes. Also, the participants were asked about the personal experiences of the accused persons and witnesses when interacting with the digital technologies and procedures in criminal proceedings. Specifically, they described how well the accused persons and witnesses interact with the technologies starting from well, very well, and they have a lot of difficulties.

In case of any difficulties, they were to indicate such strains. This research also attempted to elucidate the attitudes of accused persons and witnesses towards specific digital

technologies and here the participants were required to indicate the technology and procedure if any that the litigants and witnesses have made a comment about and the comments made. The benefits that have been enjoyed by accused persons and witnesses by the existence and usage of digital technologies was also an area this research sort to capture including the technology and or procedure and the benefit if any. Participants were asked to state ways the use of the digital technologies in the judicial system can be improved upon in Kenya. The participants were also asked the digital technologies or procedures they considered as the most used, embraced and easily understood by the people including the reasons for the answers they provided. This research study also assessed the client patterns, attitudes and knowledge of the digital technologies especially how well the participants' clients were aware of these technologies. There were three options where participants were to indicate if most are aware, most are aware of the existence but not the operation, and most are neither aware of the existence nor the way they operate.

The participants were also asked to comment on the effect the factors such as gender, economic status and education level have on the ability of a client to know of and know how to utilise the technologies and also and give reasons. In this study, gender was used to mean sex even though these two terms differ in ideal gender and sexuality contexts. For the purposes of understanding, the term gender is used to refer to the feelings, attitudes, and certain behaviour that specific culture associates with a person. It is the psychological and social manifestations of being male or female.

The term gender refers to the learnt behaviours or culture associates with male or female. Sex on the other hand refers to biological status based on sexual organs and hormones either male or female. Sex refers to biological status based on sexual organs and hormones either male or female. This is determined by presence of XX chromosomes for females and XY chromosomes for males. Despite this, what holds true in this research is that gender has been used to refer to male and female. The research also assessed the participants' responses on the attitudes of their clients towards digital technologies in the judicial system especially whether they are sceptical or see them as a complimentary.

3.2 Rationale for the study

This report is important because other previous global pandemics have had a major influence on access to justice and greatly affected normal activities in such places as prisons. Literature material show that correctional institutions across the U.S. were instructed to respond to H1N1 (colloquially referred to as "swine flu") in the years 2009 and 2010 much the same way they are responding to COVID-19 pandemic. These measures include limiting and canceling visitation where the situation forces, quarantining and isolating symptomatic prisoners. Law enforcement agencies at the local level were instructed to plan and take precautions as necessary should an outbreak of H1N1 occur within their jurisdiction. In addition, some courts developed or were instructed to

develop strategies, consistent with the law, which included methods of social distancing to eliminate unnecessary close contact, advanced sanitation procedures, and the use of technology, electronic communications and documents, and electronic means of conducting court operations.

3.3 Limitations of the study

This research study was conducted at the time when COVID-19 – a disease caused by novel coronavirus - has plunged the world into the most challenging crisis since World War II. This pandemic threatens people in every country, and has caused scaling down of activities bringing about a recession that probably has no parallel in the recent past. It envisaged scenarios where participants would shun away from closely and freely mingling with the researchers and even refusing to accept questionnaires availed in hard copy. The researchers fielded questionnaires. Most as they adhere to the Ministry of Health protocols and directives to curb the spread of the coronavirus, avoided close contact with the researchers and as such, it is opportunity missed to understand the illocutionary acts, and emotions.

There were time constraints. The research project had timelines and the requirement to have the report presented to the panel within a specific date made it a tall order; especially where participants delayed to submit the completed questionnaires once they had availed their responses. Personal bias and the researchers' own imaginations possibly influenced the findings discussed in the final report. Therefore, this can easily form overarching patterns that most likely affected the data analysed.

3.4 Delimitations of the study

To overcome the limitations, first, where the participants agreed to complete the questionnaires sent to them via email, there were prior discussions between the researcher and them so that a decision was reached on, especially pertaining to the longevity of time to be taken to avail the responses.

To ensure that the research study is completed within the set timeframes, LRF-T researchers established rapport with research participants and tirelessly made follow up phone calls reminding them about the questionnaires and that they had to avail their responses to questions in the questionnaire.

Peer-review was important as it helped overcome the limitation of biasness.

3.5 Theoretical framework

This research report was guided by two theories; Technological Media Determinism Theory and Consequentialism Theory. The two relate to this research as explained hereunder.

3.5.1 Technological media determinism theory

An American economist and sociologist Thorstein Veblen coined the term 'technological determinism' espousing that technology in any given society defines its nature since it is the

driving force of culture in a society and it determines its course of history.²⁴In Marshall McLuhan's Media Determinism; Technological Determinism or Global Village Theory, the most important inventions that changed lives are identified. These are the phonetic alphabet and the telegraph. The phonetic alphabet made visual dependence possible; meaning that people adjusted to communication through writing from traditional literacy. The invention of Gutenberg Press facilitated printing and led to the widespread distribution of knowledge through books, newspapers, and magazines. The telegraph refers to system in which information is communicated over a wire in form of electrical signal and it facilitates distance communication. The four periods of communication inventions are tribal age (smoke, use of horns, drums), literate age (basic reading and writing say of vowels such as *a,e,i,o,u*), print age (widespread distribution of books, newspapers, magazines), and electronic age (reduction of power of print and formation of Global Village).

The print age also known as Gutenberg Galaxy, refers to a society characterised by detached individualism, value of logic, rationality and argumentation, linear models of thoughts and social organisation, mechanisation of labour, centralised and social and economic organisation, nationalism, a system of competitive national state, and highly specialised and fragmented culture. The print age is named after Gutenberg, the inventor of moveable printing press that facilitated large scale multiplication of books. Book printing enforced visualisation, with the invention of the printing press in 1400s. It was possible to standardise national languages and convert personal writing into technical printing. To understand this theory better, one can analyse Marshall McLuhan's infamous quote: "We become what we behold. We shape our tools and thereafter our tools shape us." The new technologies radically alter the entire way individuals use their five senses, the way they react to things and therefore the entire society.

It can be argued that contemporary telecommunication facilities improve human capabilities because they affect the scale and rhythm of people's lives and become essential to the modern global economy. The common six emerging trends in media and communications are over the top (OTT) communication, consumers are building their own communication links, wearable devices such as smartwatches and Google glass are becoming common. There is also a new trend of flexible TV where online is expanding viewer options. Multi-screening is now becoming the mainstream and TV despite the disruption by the technology still serve as the main news source even as the platforms shift. Scientists have created new interfaces which are quickly changing the forms of interaction. A user interface of a particular piece of computing software refers to its presentation on the screen and how easy it is to operate the gadget.

The common changing forms of interaction today are the artificial intelligence, robots, and virtual reality. It does not matter what the content of a medium like TV is, the medium is the message.

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Communication Theory, "Technological Determinism," accessed December 13, 2020, <https://www.communicationtheory.org/technological-determinism/>

They elaborate further to state that be it oral, written, or electronic, the primary channel of communication changes the way of audiences' exposure and use of communicated messages and that the dominant medium of any age no doubt dominates people. McLuhan said that the new technologies would collapse space, time, and boundaries. While man invents these technologies to improve life, this research report argues that pandemics accelerate the adoption and the digital transformation in various sectors including the judicial system.

3.5.2 Consequentialism theory

According to consequentialists, the judgment of whether an action is morally right or wrong depends on the action consequences. The approach of utilitarianism proponents Jeremy Bentham (1748-1832) and John Stuart Mill (1806-1873) was to ask if there is intrinsic value and assess the consequences of an action or whether there is any instrumental value. By intrinsic value, these philosophers meant that a thing or a certain move has value for itself such that individuals value it even if it will not get them anything else. On the other hand, instrumental value is when a thing may get an individual what they want. John Stuart Mill came up with the greatest happiness principle expressed as "actions are right in proportion as they tend to promote happiness." This research therefore assessed whether litigants and other stakeholders in the Judiciary have a feeling of satisfaction in the use of technology as they seek or administer justice amidst the COVID-19 pandemic that disrupted the immemorial paper filing of cases and conventional courts where court room used to be crowded with advocates, litigants, bundles of documents, files and briefs.²⁵

3.6 Discussions and highlights of data collected

3.6.1 Challenges facing the IT driven Justice Sector

Low connectivity of the Internet

B₂:

- **Internet connectivity issues**

E₁:

- **Lack of proper connectivity**

H₂:

- **Data/ No Internet: Lack of internet**

A *Business Daily* court reporter whose peer review was sought, noted that most lawyers appreciate the IT driven litigation process, but are complaining about the technological hitches and glitches including, but not limited to the Internet downtime and slow network buffering.²⁶ If a lawyer was following the live court proceedings using technologies such as Microsoft Teams, Zoom and

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Kakkalameeli, Manjunath. "Virtual Court versus Physical Court: Its feasibility & legality." *Latest Laws.com*, June 29, 2020. Accessed December 13, 2020. <https://www.latestlaws.com/articles/virtual-court-versus-physical-court-its-feasibility-legality/>

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Telephone interview with a *Business Daily* court reporter on 12th November, 2020

Skype, the Internet downtime and slow network buffering make it difficult for one to communicate effectively.

Power blackouts

Some regions in Nairobi County still experience consistent power outages. This affects the effective delivery and administration of justice. Respondents regretted that most court sessions at Makadara Law Courts are interrupted by blackouts.

The challenge of heavy files

In their responses to the questionnaires sent to them, most advocates said while it is a good thing to have cases and court files stored in an online database system, uploading some heavy files take too long, sometimes the whole day, thus wasting productive time. They said while digital paradigm is the way to go, the manual system was such that around six court officers could take one through the whole process of filing cases and within some minutes, one is cleared.

C1:

- **When filing documents that are bulky, the system took a bit long.**

The challenge of interoperability and compatibility

In Nairobi, the challenge of interoperability and compatibility was pointed out; almost similar to threats posed elsewhere. The e-filing software used at different courthouses is not always fully compatible, raising problems. In LRF peer review sessions with court reporters, it was established that sometimes case-hearing sessions and mentions are delayed because there is the challenge of downloading files from the ODPP on court computers and other electronic devices used by magistrates and judges.

Difficulty of bringing to the limelight matters of public interest

E-filing and online court hearing sessions only allow a few individuals to follow court proceedings, specifically to the persons whom the link was sent to them. The role of the DPP is to institute and undertake prosecutions. Vincent Monda from the ODPP was a panelist in an event organised by the Media Council of Kenya (MCK) on November 2, 2020. He said he has been asked by court reporters on several occasions how they can manage to capture such proceedings, especially those where the accused are public figures and matters are of public interest.²⁷The work of prosecutor most times entails going to the courts and as a result, some of them despite adhering to COVID-19 health protocols, contracted the disease. Within Nairobi, in some stations almost three quarters of the prosecutors were infected. If things were to continue like this, most of the criminal cases would not move forward.

There was closure of courts for a period of two weeks. The closure of courtrooms, reduction, or adjustment to their operations can negatively impact the provision of timely and fair hearings,

27
Media Council of Kenya, "Panel 1: Journalism in the Covid-19 Era – Safety Concerns and Experiences," accessed December 17, 2020, <https://www.facebook.com/MediaCouncilofKenya/videos/348792099548091>

contribute to increased case backlogs, and lead to increased length of judicial and administrative proceedings.²⁸To react to the challenge, they had to fully resort to technology. When the prosecutors receive police files from the Inspector General of Police, they have the Case Management System. The office transmits its documents via e-filing to the Judiciary. There is a change where now there is minimal or no use of charge sheets.

- Nowadays we only have the accused person, the court prosecutor and the magistrate
- DPP is doing e-filing, not just for charge sheets; even disclosure of evidential materials

In most of cases the judiciary is going online.

Technology a hindrance of access to justice for many

CSOs argue that the scaling down of open court activities and digitisation of judiciary services make it difficult for most Kenyans and residents to access justice. Kituo Cha Sheria, a human rights organisation headquartered in Nairobi, filed a petition at the High Court seeking to compel CJ Maraga and the National Council on Administration of Justice to reopen the courts, the *Daily Nation* reported on November 30, 2020.²⁹According to Kituo Cha Sheria, many individuals are suffering from technological barriers and as such, using technologies such as the e-Filing of documents and use of video links in open court, frustrate the majority who cannot access digital devices and the Internet services in order to be heard by a magistrate or a judge remotely.

A participant regretted that the use of digital technologies complicates issues to some members of the society.

D₂:

- **It has complicated the procedures further for poor clients.**

The disabled and the less fortunate groups

The disabled in the society and less fortunate groups including certain groups of women, children, refugees, persons in asylum settings or detention centres, are disproportionately affected by court closures and or the shift to online modes of delivery. That this category of individuals already face considerable challenges in asserting their rights, obviously these problems are now more exacerbated in the current climate. Kituo Cha Sheria deplores the massive use of technology because its worry is that women, the poor, rural populations and other marginalised groups are impacted negatively. It is a concern because these groups form the larger part of the population that has no access to the Internet, electricity and digital devices. The Programmes Manager at Kituo Cha Sheria John Mwariri argues that even where the Internet network is available, the cost

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Ensuring Access to Justice in the Context of COVID-19 See: https://www.unodc.org/documents/Advocacy-Section/Ensuring_Access_to_Justice_in_the_Context_of_COVID-191.pdf Accessed on 24th November 2020

29

Wangui, J. (2020, November 30th). Group sues Maraga in a bid to force reopening of courts. *Daily Nation*, pp 56

Wangui, Joseph. "Group sues Maraga in a bid to force reopening of courts." *Daily Nation*, November 30, 2020. Accessed November 30, 2020. <https://nation.africa/kenya/news/group-sues-maraga-in-a-bid-to-force-reopening-of-courts-3213666>

of digital devices – smartphones, tablets, desktop and laptop computers – lock out the poor.

Increased domestic violence amidst COVID-19 pandemic

President Uhuru Kenyatta on the July 6, 2020, ordered an investigation into reports of sexual and gender based violence (SGBV) against women and girls; including rape, domestic violence, female genital mutilation (FGM) and child marriage, which came rampant during lockdown and other coronavirus restrictions. The measures to curb the spread of COVID-19 regrettably fuelled an upsurge in gender-based violence across the world, with women and girls more isolated and vulnerable to abuse and exploitation. In Kenya, calls to helplines surged more than 10-fold since lockdown measures were imposed in late March 2020.³⁰ The surge of such cases piles pressure on the Judicial system which is already overwhelmed as it tries to navigate through the technological advances to be able to serve better individuals seeking justice.

Interference from the Executive arm of the government

Maraga decried of interference from the Executive. He regretted that President Kenyatta failed to appoint the 41 judges. He said he was apolitical and holds the Head of State in high regard, but cautioned that the President's decision was tantamount to taking Kenya back to the old days when the Judiciary was just but an appendage of the Executive. Despite clear provisions in the Constitution and three court orders, the President has failed to appoint the 41 judges — now 40 because one of them has since died — recommended to him by the JSC.³¹ The outgoing CJ observes that the disregard for court order does not bode well for the country's constitutional democracy and is potentially recipe for anarchy.³² The president therefore cannot cherry-pick the judges from a list of nominees. He thanked Kenyans saying that it was his singular honour to serve Kenyans. He said he had seen God's hand throughout his four-year tenure.

Buildings incapable of fully supporting ICT infrastructure

Lack of a Supreme Court Building is a big challenge. The Court is housed at a building designated as a national monument. The same structure is shared with the Court of Appeal and the Judiciary's administration head offices. The building which was built in 1935 can be renovated, but the terms of the partnership between the Judiciary and the National Museums of Kenya hinder the structural adjustments. And taking the technological aspect into consideration, the building's architecture is incapable of fully supporting state-of-the-art security features, installation of audio-visual recording equipment and ICT infrastructure. A participant observed that it would be prudent idea to ensure the courts are modernised.

30 Thomson Reuters Foundation, "Kenya orders probe into rise in violence against women and girls during pandemic," accessed on November 22, 2020, <https://news.trust.org/item/20200706165923-pey3m/>

31 Otieno, Steve. "Maraga to Uhuru: You let us down." *Daily Nation*, November 28, 2020. Accessed November 28, 2020. <https://nation.africa/kenya/news/maraga-to-uhuru-you-let-us-down-3212296>

32 Musau, Nzau. "Maraga, the only man who stopped Uhuru remains defiant to the end." *The Standard*, November 28, 2020. Accessed November 28, 2020. <https://www.standardmedia.co.ke/kenya/article/2001395446/maraga-the-only-man-who-stopped-uhuru-remains-defiant-to-the-end>

F₁:

- **Modernising our courts to accommodate technological advancement**

3.6.2 Participants' profiles

This survey report drew participants from the Office of the Director of Public Prosecutions (ODPP), judges, magistrates, court registrars, court clerks, officers from civil society organisations, officers from National Legal Aid Service, members of the bar – advocates – and prison officers. These participants understand court procedures and are aware of and familiar with the digital transformation journey in the justice sector. The mandate of ODPP is derived from Article 157 of the 2010 Constitution. The office was established under the Office of the Director of Public Prosecutions Act, 2013. The ODPP comprise of the Director appointed in accordance with Article 157 of the Constitution and section 8 of the Act; Deputy Directors appointed under the Act; Secretary of Prosecution Services; Prosecution Counsel; technical staff; and such other members of staff of the Office as may be appointed from time to time.³³

The DPP has powers to direct the Inspector-General to investigate any information or allegation of criminal conduct; assist or guide in the investigation of a crime and successful prosecute cases. The DPP's sub-ordinates are very important and are to help the holder of office to deliver the specific roles. The ODPP is an independent office just like the Judiciary. Prion and Police are domiciled in the Ministry of Interior and Coordination of National Government. Each of these agencies has its internal procurement procedures and budget. This definitely causes the infrastructure differences that impede dispensation of justice.

The ODPP, Prison, Police and Judiciary together with other agencies and actors have members in The National Council for the Administration of Justice (NCAJ) which is a multi-agency body that addresses the responsive and precautionary needs and distress calls from people. NCAJ is chaired by the Chief Justice and the Chief Registrar is the secretary to the council and thereby provides an important link between the Judiciary and the other players in the justice sector that come together under the umbrella of the NCAJ to ensure a coordinated approach to matters justice. Section 35 of the Judicial Service Act, No. 1 of 2011 which establishes the NCAJ, requires justice sector institutions to ensure the effective administration of justice.

33

Office of the Director of Public Prosecutions Act, 2013 See:

<http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/OfficeoftheDirectorofPublicProsecutionsNo2of2013.PDF> Accessed on 23rd November 2020

³⁴ The NCAJ's ad hoc committee appointed on March 15, 2020, monitored the coronavirus situation and advised the NCAJ. After receiving advice from this specific-purpose committee, the NCAJ on March 19, 2020, announced further measures to be taken.³⁵ The measures included directions advising advocates to adopt e-filing in the High Court Commercial and Tax Division as well as the Chief Magistrate's Commercial Court to avoid visiting the courts.

Judges were consequently advised to consider electronic delivery of ruling, where appropriate. The ad hoc committee reported on eight measures summarised as the High judges to review 19,000 prison files in a bid to ease congestion in prisons by releasing deserving inmates who at the time had less than six months to serve, advocates to adopt e-filing to avoid visiting the courts that were operating with few essential staff, judges to consider electronic delivery of ruling, and a High Court judge and a Court of Appeal judge to be on call every day to deal with urgent matters and registries to remain open albeit with few staff to receive documents that are either urgent or time bound by law or by court orders. Other four measures were to halt prison visits, DCI to stop new applications for Certificate of Good Conduct which attract large numbers of people, police cease to issue warrants of arrest for a period of two weeks, but instead enhance patrols, and lastly all the justice sector institutions were required to scale down their normal operations and adopted sanitising and hand washing protocols in their respective premises.³⁶

To ensure commonality in the implementation of these and other mutually-agreed measures as may be decided time by time, NCAJ keeps a keen eye on each Agency in the Justice sector, including the Prisons, the Police and the ODPP. Its specific roles include overseeing justice sector reforms, peer-to-peer learning and lesson sharing among the agencies – state and non-state actors - and ensuring public participation in the administration of justice. The Council is required to meet after every three months and to submit an annual report of the activities of the Council.

34

The National Council on the Administration of Justice (NCAJ), "State of the Judiciary and the Administration of Justice Annual Report 2018/2019, accessed February 15, 2021, https://ncaj.go.ke/wp-content/uploads/2020/01/SOJAR-REPORT-2018-_-2019.pdf

35

The Centre for Intellectual Property and Information Technology Law (CIPIT), Strathmore University, "Technology and COVID-19 in the Kenya Judicial System," Published April 28, 2020. Accessed February 15, 2021, <https://cipit.strathmore.edu/technology-and-covid-19-in-the-kenya-judicial-system-2/>

36

National Council on the Administration of Justice, "Measures implemented by the justice sector to prevent the spread of the Coronavirus," Published March 19, 2020. Accessed February 15, 2021, <https://ncaj.go.ke/measures-implemented-by-the-justice-sector-to-prevent-the-spread-of-the-coronavirus/>

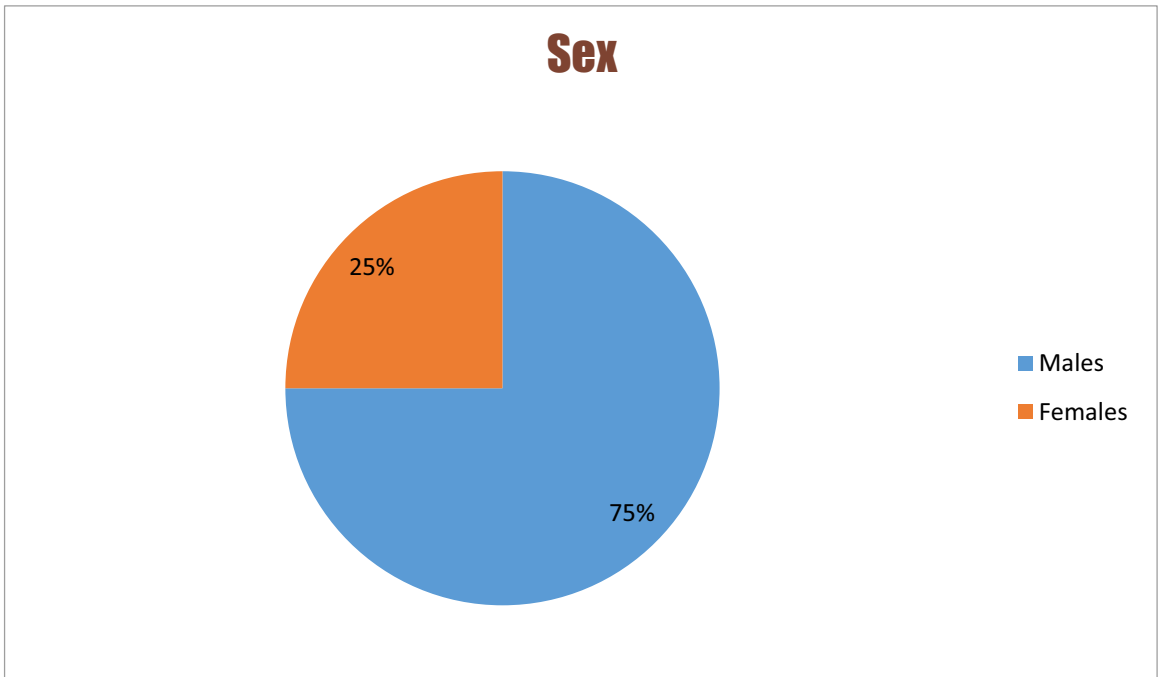
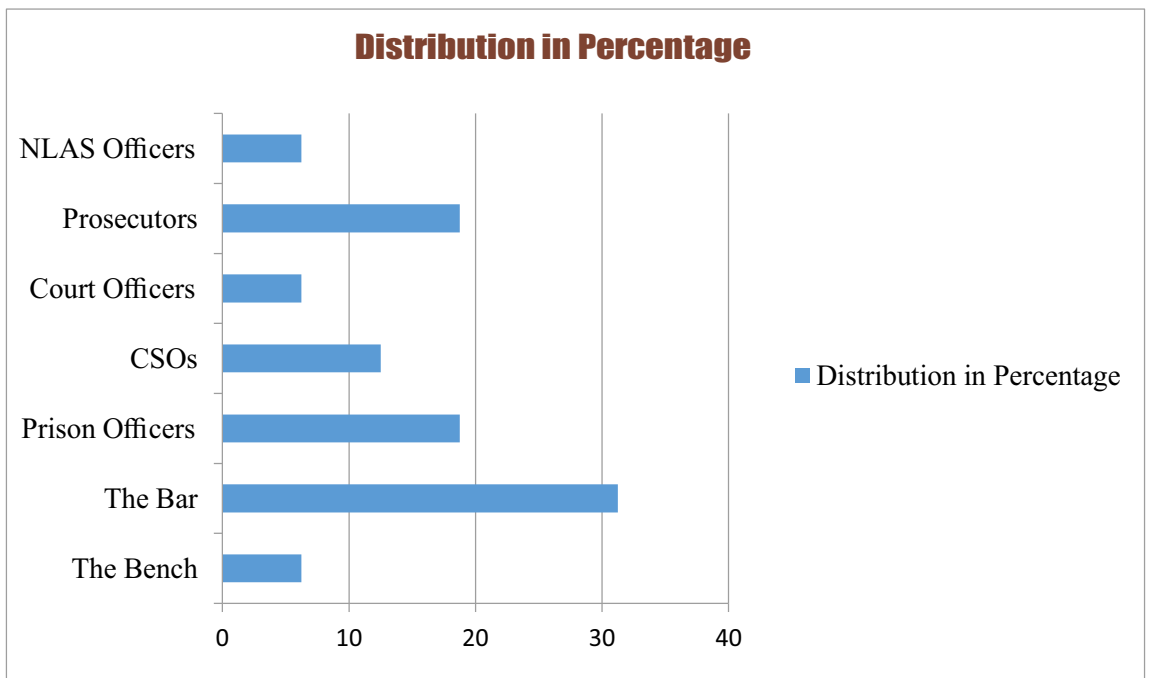


Figure 1 : Pie chart showing percentage of participants in terms of sex

In terms of participants' distribution according to their specific roles, look at the bar graph below.



Chapter Four

Chapter Four:

Discussions originating from the data collected

4.0 Data analysis

Data analysis is the process of making sense to the generated and the compiled data. The process varies depending on research focus and often it involves transcribing, collating, editing, coding and reporting the data in a manner that makes it sensible and accessible to reader and researcher for the purpose of interpreting and making a decision.

4.1 Qualitative data analysis from secondary sources

The Judiciary uses social media platforms to give important updates

The Judiciary has been successful in using social media networking sites, especially Twitter, and Facebook. The social media platforms are essential tools for businesses and individuals and their use are very widespread. The Judiciary has a Twitter account *The Judiciary Kenya @Kenyajudiciary* and this is the social media platform it uses to share timely key information. For instance, on December 15, 2020, it updated information about training of data entry and scanning officers.

- Tribunals' ICT Officer Peter Ochola training data entry and scanning officers from Stepwise, a Business Processing Outsourcing Company in conjunction with AJIRA and Ministry of ICT.
- The officers will take part in a 90 day programme that will involve data entry and scanning of all court documents to the Case Tracking System (CTS) .This is part of the digitisation process that was launched by Chief Justice David Maraga.
- The officers will then be posted to various court stations and Tribunals where they will carry out the exercise under the supervision of Programme Implementing Committees (PIU) in the Courts/Tribunals. The training took place at the Co-operative Tribunal.

New Guidelines Issued to Courts in respect to e-Services

The Judiciary on December 24, 2020, through the Judiciary Media Service issued a notice with the title 'New Guidelines Issued to Courts in respect to e-Services' in which it clearly stated that it embarked on a bold digital transformation journey that has grown in leaps and bounds during the COVID-19 pandemic period. The notice added that the judges and magistrates have been empowered with equipment, facilities and training to deliver justice digitally and non-stop despite the limited physical court appearances. Its flagship project, the digital transformation of Nairobi courts which went completely paperless on July 1, 2020, made it possible for clients to access services such as e-filing, e-service, and e-payment which are exclusively offered online. Since then, courts across the country have adopted technology and many judgments and rulings have been rendered online. Consequently, the Judiciary acknowledged and thanked its stakeholders, and especially the advocates and the ODPP for joining hands with it to ensure that digital transformation is a success story that can be replicated in every court countrywide. The serpent under the programme of this magnitude include technological and financial challenges.

The Judiciary regretted that some of the challenges encountered are beyond its control, like unstable internet or lack of electricity in parts of the country. It is at that juncture that the Judiciary, after reviewing feedback from clients, particularly advocates and litigants frustrated with the rigidity of the system, issued new guidelines on e-filing to all courts. It directed Heads of Stations clearly on what to do in the event of system failure. They were advised on the circumstances under which manual documents may be accepted. In particular, the Judiciary was confident such measures would go a long way in addressing the issues of delay or denied services. It also emphasised that that was not a reversal to the manual system, but rather a move that was providing solutions that resonate with clients and are in line with the Constitutional provision that justice should be administered without undue regard to technicalities. It finally stated that it remains on course in the digitisation journey and assured stakeholders and the general public that despite the challenges there will be no turning back.

COVID -19 dynamics

The work of prosecutor most times entails going to the courts and as a result, some of them despite adhering to COVID-19 health protocols, contracted the disease. Within Nairobi, in some stations almost three quarters of the prosecutors were infected. If things were to continue like this, most of the criminal cases would not move forward. There was closure of courts for a period of two weeks. The closure of courtrooms, reduction, or adjustment to their operations can negatively impact the provision of timely and fair hearings, contribute to increased case backlogs, and lead to increased length of judicial and administrative proceedings.³⁷To react to the challenge, they had to fully resort to technology. When the prosecutors receive police files from the Inspector General of Police, they have the Case Management System. The office transmits its documents via e-filing to

the Judiciary. There is a change where now there is minimal or no use of charge sheets.

- Nowadays we only have the accused person, the court prosecutor and the magistrate
- DPP is doing e-filing, not just for charge sheets; even disclosure of evidential materials

In most of cases the Judiciary is going online.

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Ensuring Access to Justice in the Context of COVID-19 See: https://www.unodc.org/documents/Advocacy-Section/Ensuring_Access_to_Justice_in_the_Context_of_COVID-191.pdf Accessed on 24th November 2020

Interference from the Executive arm of the government

Maraga decried of interference from the Executive. He regretted that President Uhuru Kenyatta failed to appoint the 41 judges. He said he was apolitical and holds the Head of State in high regard, but cautioned that the President's decision was tantamount to taking Kenya back to the old days when the Judiciary was just but an appendage of the Executive. Despite clear provisions in the Constitution and three court orders, the President has failed to appoint the 41 judges — now 40 because one of them has since died — recommended to him by the JSC.³⁸ The now retired CJ observes that the disregard for court order does not bode well for the country's constitutional democracy and is potentially recipe for anarchy.³⁹ The president therefore cannot cherry-pick the judges from a list of nominees. He thanked Kenyans saying that it was his singular honour to serve Kenyans. He said he had seen God's hand throughout his four-year tenure.

Cyber Threat Attacks

The Communications Authority of Kenya (CA) First Quarter Sector Statistics Report for the Financial Year 2020/2021 (July - September 2020) shows that data subscriptions rose by 4.8% to 43.5 million, up from 41.5 million subscriptions recorded in the preceding three months.⁴⁰ CA observed that the rise is primarily as a result of the shift from manual practices to the use of digital platforms as various sectors attempt to navigate the challenges brought about by the highly contagious novel coronavirus. Thus, the data market experienced positive growth with rising dependence on digital platforms for work, learning, healthcare, shopping and entertainment. The report reveals that mobile data is still preferred by Kenyans for their use of the Internet services, accounting for 98.5% of the total data subscriptions, while fixed fibre optic cable connections, popular for businesses and home use, made up just 0.9% of the subscriptions. Therefore, the Internet market experienced an upward trend as more and more people preferred to work, transact and gain access to services including Justice remotely. The downside of the increased online activity were the threats of cybercrime which posed the danger of litigants and other consumers of

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Maraga to Uhuru: You let us down See: <https://nation.africa/kenya/news/maraga-to-uhuru-you-let-us-down-3212296> Accessed on 28th November 2020

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Maraga, the only man who stopped Uhuru remains defiant to the end See: <https://www.standardmedia.co.ke/kenya/article/2001395446/maraga-the-only-man-who-stopped-uhuru-remains-defiant-to-the-end> Accessed on 28th November 2020

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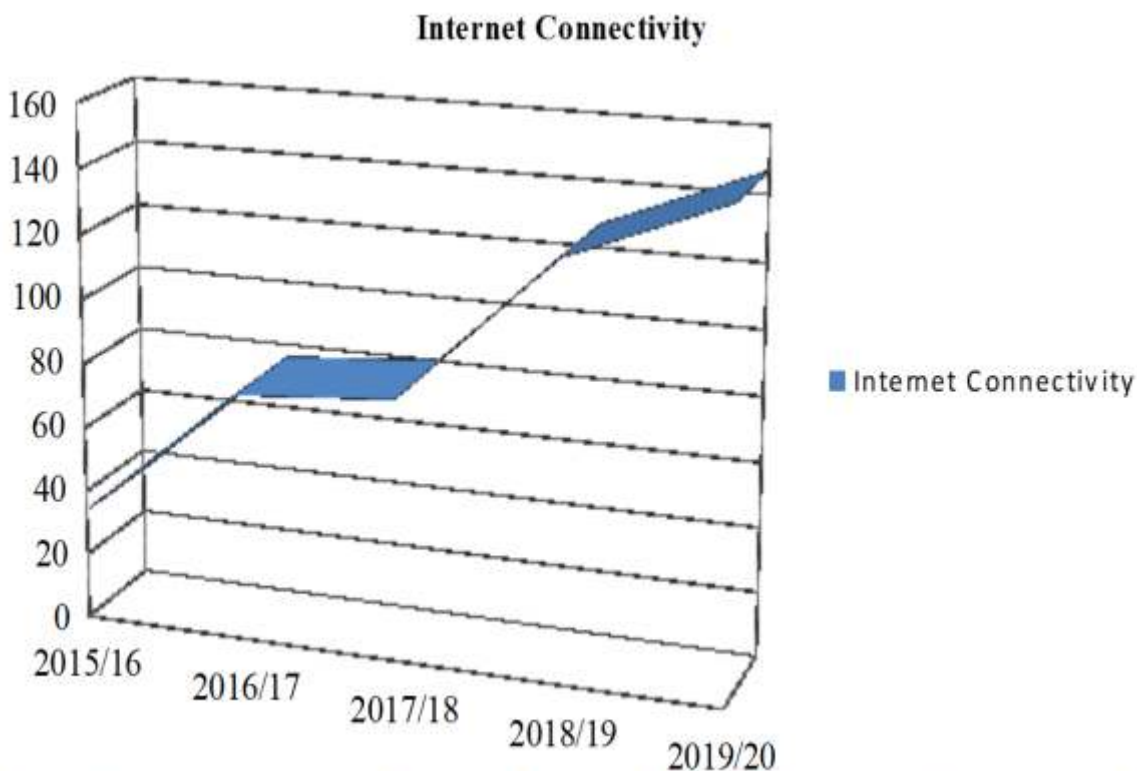
Communications Authority of Kenya, "First Quarter Sector Statistics Report for the Financial Year 2020/2021 (July - September 2020)," accessed January 1, 2021, <https://ca.go.ke/wp-content/uploads/2020/12/Sector-Statistics-Report-Q1-2020-2021.pdf>

the Internet services having their critical personal and corporate data, including those of law firms and civil society organisations compromised. For instance, the CA’s cyber security management framework, the National Kenya Computer Incident Response Team – Coordination Centre (KE-CIRT/CC) detected 35.2 million cyber threats between July and September 2020 representing a 152.9% increase from 13.9 million cyber threats recorded in the previous quarter. Working remotely and increased uptake of e-commerce and other e-Services may be desirable, but attract cyber threat attacks, increasing the vulnerability of organisations and businesses to cyber criminals who target remote working systems and tools, and e-commerce sites for fraudulent gains. Working from home may leave key data systems vulnerable without strong office cyber protection systems.

4.2 Quantitative analysis of data from secondary sources

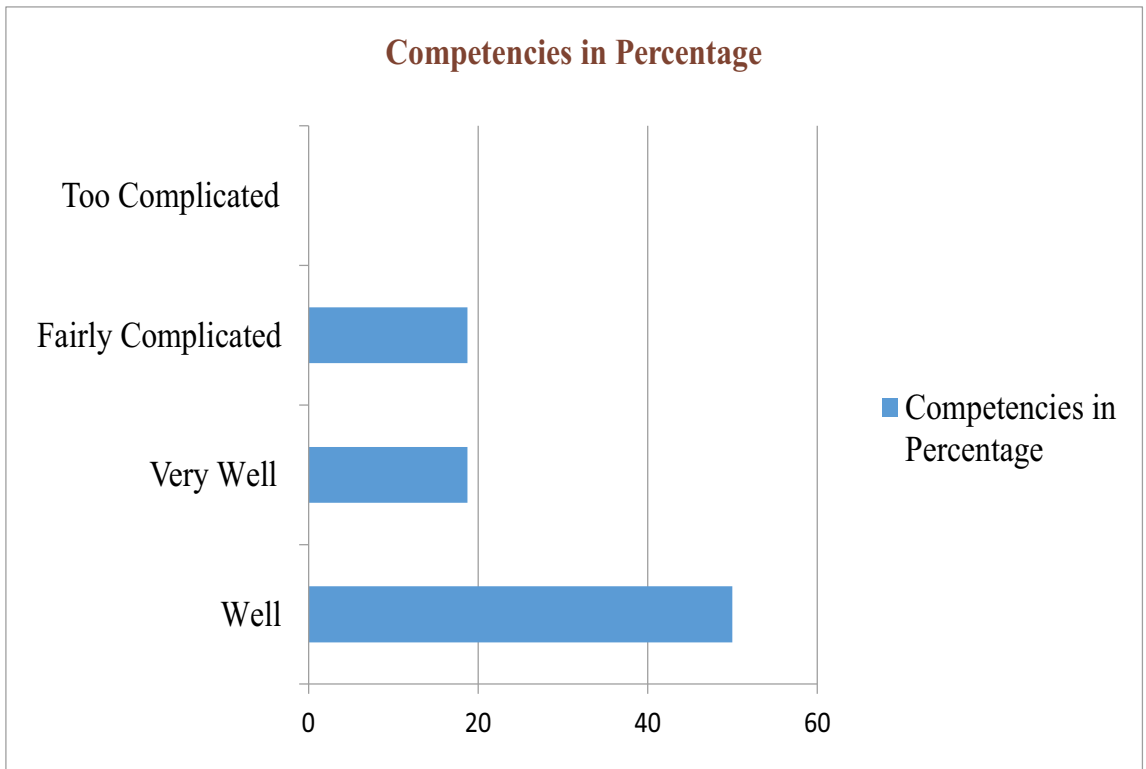
The improved number of courts with the Internet connection

Former CJ Maraga noted that the number of courts with the Internet connection rose steadily from 34 in FY 2015/16 has since grown to 147 in FY 2019/20. The Judiciary remains optimistic that the implementation of the ICT Masterplan will lead to more improvements in harnessing technology for service delivery. The below line graph shows the Trend on growth of internet connectivity in courts as captured in the State of the Judiciary Report 2019-20.



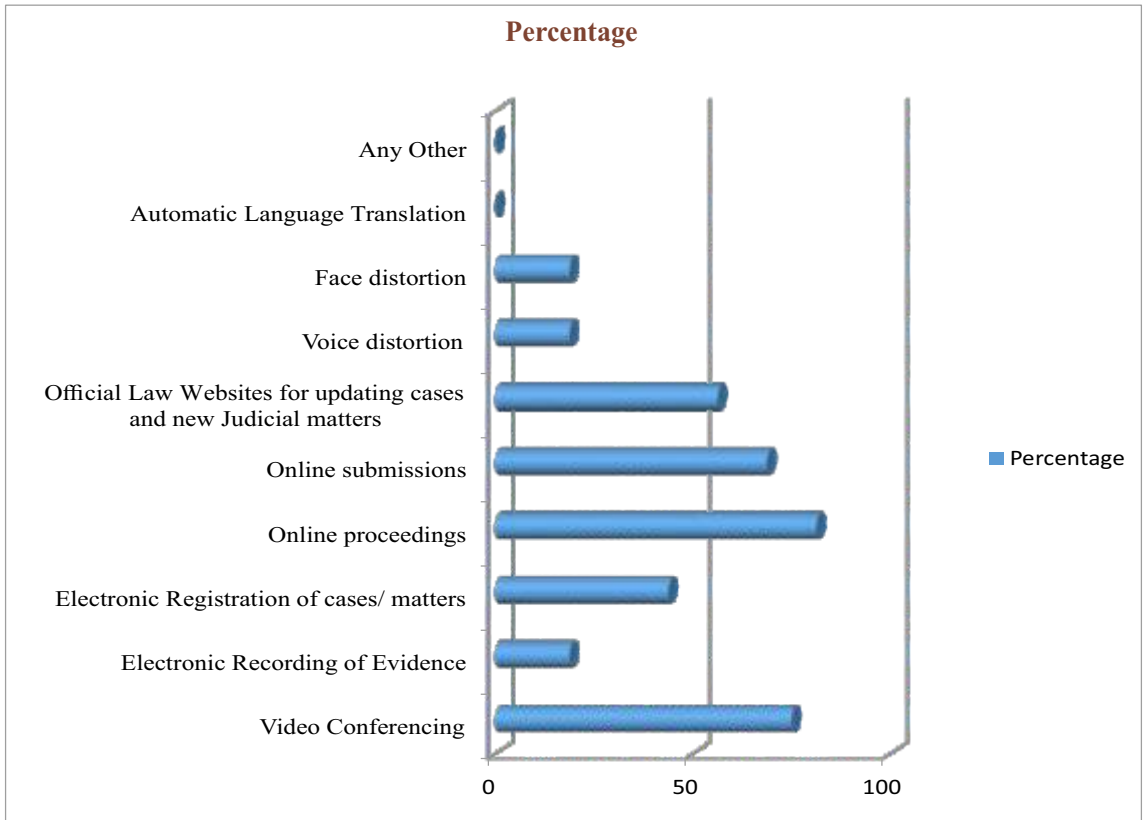
4.3 Quantitative analysis of data collected from participants

This study sought to establish the participants' competencies in usage and how well they manage to operate the IT devices, tools and procedures. Here is a further analysis of their responses done using a Likert scale of four options ranging from Well, Very Well, Fairly Complicated, to Too Complicated and came up with a clustered bar. Participants representing 12.5% of sample size failed to avail their responses on this question.



4.4 Participants' personal interaction with IT devices, tools and procedures

This study shows that the most participants use digital technologies in the dispensation of justice or while accessing the Judiciary services. Video conferencing and online proceedings are the most predominant as shown by the percentage of users in the horizontal cylinder bar graph below.



4.5 Qualitative analysis of data collected from participants

4.5.1 Usefulness of IT tools, devices and procedures

A₂:

- It is time saving
- It is convenient
- It reduces opportunity for corrupt practices

A₂:

- Working from the comfort of my home
- Saves time/ resources,
- Cases move fast,
- It is an advanced way of administering justice.

B₁:

- Facilitated online courts for both remand and convicted prisoners
- Helpful in interviewing of clients by the advocates and probation officers
- Helped in decongestion of prisons
- Minimal delay in court appearances

B₂

- Witness attendance is easier especially for witnesses who are far away from the court station
- Avoiding many road journeys since one can now connect to far away courts online

C₁

- I am able to file documents in court registries in various parts of the country remotely
- I am able to attend hearing of cases from the office hence saves time
- The clients can attend court sessions especially civil cases from their houses or in my office

D₁

- The IT devices and procedures have made it easy to track cases through the e-Filing platform
- The courtroom process has become more efficient
- The devices and procedures have increased availability of information
- The IT devices and procedures have helped me improve the records

D₂

- You can handle more than one hearing.
- You can handle cases remotely.
- You are protected from COVID.
- It is cheap at times compared to travelling.

E₁:

- **The tools enable me to represent the clients even when they are not around.**
- **Save one time**
- **The record can be retrieved**
- **The record is accurate**

E₂:

- **Ability to work away from the office. One needs not be physically in the office to work as one can work from home.**
- **Easy to hold meetings as it is flexible enough to secure quorum for meetings unlike where physical attendance is required.**
- **Increased confidence in working during this COVID-19 times by assurance that no physical documents are handled. (sic)**
- **Scattered working hours. With the use of IT, one is able to work outside the conventional 8a.m. to 5.p.m. One can work even at night.**

F₁:

- **Computers help in typing submissions**
- **Photocopying and printing of witness statements**
- **Internet is used for research**
- **Help(s) in keeping records and day to day returns**

F₂:

- **Simple and efficient**
- **Minimise use of resources**
- **Service delivery is efficient**

H₁ During Covid period:

- **To discharge duties efficiently**
- **To comply with MoH directives on social distancing**
- **To reduce backlog**
- **To dispense justice**

H₂:

- **Help(s) during court hearing done via virtual link**
- **Computers help during preparing pleadings and printing**
- **The software help(s) in converting Word documents to PDF**
- **Filing and accessing E-filing Judiciary System**
- **Easy payment method**

4.5.2 Benefits realised by individuals seeking services in the IT-driven justice sector

B₁:

- **The advocates and the probation officers have been able to interview their clients with ease despite not visiting them in prison due to COVID-19 protocols.**
- **It has been cost effective for them as they are able to connect to their clients from the comforts of their homes and offices.**
- **Facilitation of justice has been effective since the clients are able to attend court online and air their concerns to the respective magistrates.**
- **The Judiciary is able to send clients copies of the proceedings, witness statements via email upon requests without having to bring them physically.**

F₁:

- **Computer Internet- Most mentions in custody over the Covid period were conducted via computer on GoToMeeting without meeting physically**
- **Most can now know their hearing dates on a touch of a button using the computer**
- **It is easy to know how many witnesses have testified each day**
- **It is easier to know the bond terms given to the accused**

G₂:

- **Reduced interaction of people during the Covid period**
- **Helped in reducing travel costs for victims/ witnesses who are far away**



H₁:

- Faster dispensation of justice
- Ease of access to accused in remand.
- Ease of applications filed online
- Ease of interaction between court, prosecution and accused.

4.5.3 The effects of digital technologies on criminal and civil procedures and outcomes

This study established that the digital technologies have had both positive and negative effects on criminal and civil procedures, and outcomes.

Positive effects of digital technologies

A₂:

- Expedite dispensation of justice

B₂:

- E-Filing protects court records and pleadings. Physical files could be lost easily.

C₁:

- The technology has simplified civil procedure cases as submissions can be filed remotely.

D₁:

- It has led to amendment of civil procedures rules to allow service of pleadings through email, WhatsApp etc

F₁:

- They have eased preparation of cases
- Helped in diarising matters
- Have helped in faster disposal of cases
- Led to more quality prosecutions

H₁:

- Faster outcome of cases
- Reduction in backlog.
- Proper utilisation of resources.

H₂:

- Simplified work; no travelling/ going to court
- Simplified payment via MPESA
- Tracking/ retrieving is easy
- Efficient access to court proceeding
- Saves time

Negative effects of digital technologies

B₂:

- Currently the system is still undergoing teething problems to the extent that it hasn't had any major positive effect.

C₁:

It has affected negatively cross examination which would be more effective when there is face to face meeting

- **Without eye contact and physical presence, the nonverbal communication of parties cannot be discerned.**

D₁:

- **Delayed some matters because it is not possible to hear witnesses through the platforms especially where there is production of documents**

D₂:

- **It has complicated the procedures further for poor clients.**
- **Encouraged corruption to obtain services.**
- **Locked out poor clients.**
- **Inaccessible to many ordinary Kenyans.**

4.6 Client patterns, attitudes and knowledge of the digital technologies

Most participants especially from the advocate category, those from NLAS and some from CSO category responded that most of their clients are aware of the existence of the digital technologies in the Justice sector, but not the operation. They were to avail statistics, but it is only one who availed a specific figure.

H₂:

- **40% of clients**

One participant just stated, “most clients.” This research went further to try to understand the digital technologies and procedures clients are most aware of and comfortable with.

C₁:

- **Virtual hearings – Clients are aware that due to COVID infections, it is safer to hold meetings online for their safety.**
- **Filing of documents online.**

D₁:

- **The E-filing platform in Nairobi and all Courts of Appeal**

D₂:

- **Phone court hearings:**
 - **Easy to set up for client**
 - **Easily accessible for clients compared to laptops, tablets e.t.c**

B₂:

- **None, most must be directed on how to use Microsoft Teams and other applications**

There is a participant who regretted that most clients are neither aware of the existence nor the way the digital technologies operate.

4.7 Attitudes of the clients towards digital technologies and procedures in the Judicial system

According to data collected from various participants, LRF finds that there are those clients who embrace digital technologies while at the same time there are those who fear and are even skeptical about such technologies.

4.7.1 Why some clients are skeptical

A₁:

- **They believe that system may be open to abuse since there is no physical presence**

C₁:

- **Yes, they are skeptical because of the confidentiality and connectivity challenges.**

D₂:

- **Yes:-They lack the**
 - Education and skills to use.
 - Lack finances to purchase devices and Internet.
 - Most want the court to hear them without gadgets.

E₁:

- **Skeptical because of ignorance, skeptical for lack of resources, some are skeptical because of conservatism, some are skeptical due to socialisation**

Participants from the *prosecutor category* observed that most accused persons and witnesses have a lot of difficulties interacting with digital technologies and procedures in criminal proceedings because of mainly the Internet issues and technological challenges. Even though there is a good attitude towards such procedures and technologies, there are some comments made.

G₂:

- **They feel the process is slow and doesn't assist to meet the ends of justice.**

H₁:

- **Phones/ Laptops: access is difficult.**

4.7.2 Why some clients see digital technologies as a complimentary

- **They save on time, they leave a permanent record, record is retrievable.**

B₂:

- **They feel that it will assist especially in witness attendance. Most travel from far to attend court.**

4.8 Demographic factors visa visa the ability of client to know of *and know how to utilise the technologies*

Factors such as gender, economic status and education level tend to have various effects on the ability of a client to know of and know how to utilise the technologies. Participants gave some of their reasons as captured here.

4.8.1 Gender

B₂:

- **It is not a factor (determining factor)**

C₁:

- **Both genders (male and female) have same capacity to know of existence of technology depending on exposure levels.**

D₂:

- **Most women are poor and lack technological know-how.**

E₁:

- **Men are always first to benefit in technology.**

4.8.2 Economic status

B₂:

- **It is a factor, the higher the economic status, the more likely one is exposed to IT devices**

C₁:

- **The people who are well off and able to afford the equipment will be more knowledgeable and able.**

D₁:

- **Most people do not have access to (the) Internet and electricity**
- **Lack of IT devices**

D₂:

- **Most clients are poor.**

E₁:

- **Those without financial capability are always left behind**

4.8.3 Education Level

B₂:

- **Education level has the effect. The more educated the more aware.**

C₁:

- **The highly educated persons will be more aware of the technology and thus able to use without challenges.**

D₂:

- **Most of our clients are uneducated.**

E₁:

- those without sound education will be left out in any technological advancement

4.9 Problems encountered in handling the IT devices, tools and procedures

A₁:

- Internet challenge leading to disruption of proceedings due to connectivity
- Lack of suitable gadget by other users/ opponents

A₂:

- Network/ Internet challenges
- Court officers/advocates who don't know how to use the gadgets
- Others who fake challenges so as not to proceed
- Witness coaching by advocates

B₂:

- Internet connectivity issues
- (Poor)Audibility
- Blackouts (Power)
- Witness presentation (whose) explanation in open court is better and more effective than in an online court session.

C₁:

- When filing documents that are bulky, the system took a bit long.
- Poor audio/ voice by other counsel and judicial officers hence struggle to follow proceedings.
- Poor Internet connectivity
- Interactivity is not proper because of the nature of equipment used.
- Sharing documents which one did not intend to share

D₁:

- Internet coverage is unevenly distributed, so you get a lot of disruptions in court proceedings
- Most people in the platform are not familiar with the technology devices
- Litigants appearing in person have a problem filing documents through the e-Filing platform
- The e-Filing platform sometimes is too slow

D₂:

- Most clients lack electronic devices
- Most clients lack finances for Internet

E₁:

- Lack of proper connectivity
- Lack of training of some of our clients
- Lack of similar technologies between clients and our offices
- General disruption by internet providers

E₂:

- Internet connectivity issues where there would be disruptions and a lot of buffering.
- Lack of availability of logging in credentials or the same being availed late. That is, occasionally, the link may be unavailable or availed late.
- Being forgotten in being admitted into a meeting and/or proceedings. That is, where one joins a session, but for one to finally participate in the proceedings the administrator has to admit them. This admission sometimes takes long.
- Gaps in following proceedings where a person talking may inadvertently mute his/her microphone, hence details lost.

F₁:

- Unreliable power
- Intermittent internet connection
- Lack of skills
- Outdated devices

F₂:

- Network issues
- (Poor) knowledge in IT

H₁:

- Internet connection issues.
- KPLC (Power outage).

H₂:

- Lack of cameras:-Cannot see the magistrate and the client too cannot be seen by the magistrate
- Lack of microphones:-The magistrate cannot hear the client
- Lack of scanners:- The clients are so vulnerable hence they don't afford cyber expenses

4.10 Participants views on how the use of digital technologies in the Judicial system can be improved upon in Kenya to enhance access to justice

A₁:

- Have stable and reliable Internet and IT system
- Improve on the e-Filing system

- Capacity building for IT personnel
- Constant feedback and processing of online documents

A₂:

- The system is expensive and a lot of funding is required
- Training of judicial officers and staff on how to use the gadgets and the systems
- Training of other stakeholders on how the system works
- Sensitising members of public on the importance of the online procedures. Majority love physical court appearances

B₁:

- To be provided with enough computers/ printers
- To be provided with office furniture e.g. computer table and chairs
- Provision of unlimited internet connection
- Provision of headphones to enable facilitation of more than one court session and at the same time to avoid background noises.
- Provision of backup generators in case of a power outage while online courts are in progress.

B₂:

- Investment in high-tech gadgets – computers and cameras
- Investment in good internet connectivity
- Investment in streamlining the online filing process
- Investment in hiring standby IT personnel

C₁:

- Expand infrastructure for ICT to allow easy and stable connectivity
- Education of the court users and publicity on the available technology
- Enhance accessibility to the videoconferencing equipment through reduced taxes on equipment

D₂:

- Through public participation.
- Better service delivery; like phone calls should not be engaged.
- Ensuring that there is an alternative in case of failure of the electronic system.
- Establishment of mechanisms that would ensure that the poor access justice through the digital system.

E₁:

- By training judicial officer and other Judicial staff
- By implementing IT in a way it involves the people
- By demystifying the Judiciary
- By having sound equipment for the Judiciary

E₂:

- **Availing (the) Internet connectivity to the litigants, by say setting up IT centres in the various court stations or designated places.**
- **Investing in more equipment for Judicial officers and staff. Not all staff of the Judiciary have access to IT equipment.**
- **Continuous training for members of the Judiciary on use of technology.**
- **Continuous update of the available technology.**

F₁:

- **Availing of IT equipment**
- **Training of staff on how to use the equipment**
- **Modernising our courts to accommodate technological advancement**

F₂:

- **Fixing proper network systems**

G₂:

- **Improve the Internet connectivity**
- **Provide computers and modern touchscreen devices**

H₁:

- **Better Internet coverage**
- **Training of judiciary, prosecution, prisons officers**
- **Better devices that connect to (the) Internet.**
- **Stable electricity companies.**

H₂:

- **Provide free WiFi/ Internet access to the public**
- **Educate the public on Internet/ communication rights**
- **Reduce cost of computers/ smartphones**
- **Accessibility of technology to remote areas**

Additional comments by participants

31.25% of participants had a number of additional comments to make. Some called for a multi-disciplinary approach, cooperation amongst key stakeholders and for the Judiciary to partner with human rights and humanitarian agencies to realise the dream of a well-functioning IT driven justice sector. Others warned that technology should not be seen as an independent island and an all-inclusive package required in the dispensation of justice. The reason provided was that in some cases, physical court attendance remains the most ideal option. One opined that the Judicial system still has a long way to go to be considered as a technology oriented justice sector.

- B1:** The availability of your support will enable us in achieving the success of promoting access to justice through virtual courts for convicted prisoners and *unconvicted* prisoners from our security facility.
- C2:** I have used Zoom to participate in matters outside areas of interest in your research. It seems to me that the Questionnaire is designed to get information from a litigation practitioner's perspective rather than general application of IT in other dimensions.
- E2:** Technology is not the silver bullet for realisation of access to justice. For some cases, physical court attendance remains the most viable option. Therefore, technology should be tempered with conventional physical court attendance and access to justice. There are some aspects of a matter that may be lost in the total use of technology.
For instance, in criminal justice system, the judge loses the golden opportunity to gauge the credibility of a witness through such things like body language which are critical. A witness may 'pose' for the camera hence denying the court the chance to pick up those salient paralanguages and body language.
- G2:** We are not yet there in terms of use of technology.
- H2:** Provide WiFi – (Hotspots) for the public

Analysis of data collected through observation

Chief Magistrate Hon. Heston N. Nyaga of the Makadara Law Courts issued a notice in April 2020 with copies glued on court premises and the Office of the DPP at the station giving directions that due to the challenges posed by the COVID-19 pandemic, it was important for individuals within the station to ensure that they put on facemasks at all times they are within the premises and also regularly wash their hands with soap and clean water and sanitise. The Chief Magistrate also emphasised the 1.5 Metre Rule therefore advising clients to keep social distance as a measure to curb the spread of coronavirus. This is a must because if one fails to adhere to it, risks missing access to service.

LRF researchers observed that the correctional centres have embraced technology in a positive way. Apart from the use of digital technologies, the Prisons Department has evidently ensured that there are water points and soap dispensers starting from the entrances of prisons to the outside and inside the offices and other common points within those centres. At any particular working hour, there is an officer with an infrared thermometer to screen clients entering the Prisons Headquarters premises. There is also a room just immediately after the main entrance where clients first stop for enquiries. In this room, since COVID-19 struck, there is always a bottle of hand sanitiser labelled 'NOT FOR SALE' distributed by the United Nations Office on Drugs and Crime (UNODC) and funded by the European Union (EU). On that bottle, there is a sticker with the tagline, "Delivering Justice Safely."

Chapter Five:

Chapter Five:

Conclusions and Recommendations

5.0 Conclusions

Institutions established within the society to instil a sense of orderliness continue to explore various avenues to improve on service delivery and the judicial system is part of that change. In Kenya, the use of technology to improve and streamline the judicial procedures is an ongoing process that requires the government and other stakeholders to work together to ensure that there is timely access to justice. The parliamentarians must commit reasonable resources to the Judiciary including those anchored on digital transformation. There is also the need to avoid reprisals when courts decide cases against the powers that be.

It is also important to understand that viruses such as the novel coronavirus mutate all the time and it is vital to keep a laser focus on whether this specific virus is changing behaviour. Already there is a new variant called B.1.1.7, that has been linked to the UK. It was first detected in September 2020 and in November around a quarter of cases in London were the new variant. This reached nearly two-thirds of cases in mid-December. This variant is attracting attention because it is rapidly replacing other versions of the virus, it has mutations that affect part of the virus likely to be important, and some of those mutations have already been shown in the lab to increase the ability of the virus to infect cells. The first known case of this new variant was discovered in Colorado in the U.S. on December 29, 2020, where the infected was a man in his 20s and appeared to have no travel history.

Variant B.1.1.7 has also been found in Canada, Italy, India and the United Arab Emirates. South Africa also has a new variant of the coronavirus, 501.V2 that is more contagious and has quickly become dominant in many areas of the resurgence in that country. As Kenya puts measures to combat the spread of COVID-19 and it continues to ensure that its key sectors including the Judicial system remain operational, the fact remains that pandemics and epidemics are a fact of life. What is required is a sense of preparedness because these dynamics point to the fact that COVID-19 pandemic is likely not the last such crises. On the 27th day of the month of December every year, starting from 2020, the world will be marking the International Day of Epidemic Preparedness.

The UN General Assembly invited all Member States, organisations of the UN system and other global, regional and subregional organisations, the private sector and civil society, including non-governmental organisations, academic institutions, individuals and other relevant stakeholders to observe the International Day of Epidemic Preparedness annually in an appropriate manner and in accordance with national contexts and priorities, through education and awareness-raising activities, in order to highlight the importance of the prevention of, preparedness for and partnership against epidemics. The UN system, in particular the WHO, plays a pivotal role in coordinating responses to epidemics, in accordance with its mandate, and in supporting national,

regional and international efforts to prevent, mitigate and address the impacts of infectious diseases and epidemics. Therefore, an investment in public health supported by governments and society is vital to ensure the world is safer, more resilient and more sustainable. The COVID-19 pandemic has taught the world a lesson and to heal, investment in preparedness capacities is a must, not just in the health sector, but rather it should take an "all-of-government and all of society approach."

5.1 Recommendations

The Judiciary should launch more digital-oriented services

LRF recommends the Judiciary to launch more digital-oriented services and Technology that can be particularly helpful in providing disabled persons meaningful access to information and the courtroom. We identify for instance, screen readers which allow visually impaired persons to use the Internet by reading a website's text aloud. This means that an individual no longer has to rely on a friend's kindness to read his or her information about how to file a case. One can simply navigate to a court's web page on his or her own. Videoconferencing is a powerful tool for hearing impaired people when used to provide sign language interpreters in rural courts.

Formulating a digital access policy

We advise the Judiciary to formulate a digital access policy to ensure technology allows all court users to have impartial and effective access to justice. Failure to do so, LRF envisions a system where all persons, including those with challenges, are required to use complicated e-filing systems that charge parties for access without providing fee waivers or access to support staff.

Availing access code for meetings and teleconference lines on time

This especially saves time because the parties are able to plan in advance and in case of any envisaged challenges, one gets to be at a low risk place or environment to get connected and follow the live court proceedings.

Balancing austerity measures with access to justice to low-income litigants

On the November 4, 2019, Maraga, the then CJ, decried of the budget cut for Judiciary by the National Treasury saying the situation had crippled operations in courts across the country with mobile courts being the most affected. He said that unless the budget cuts are reversed, the judiciary lacked money for fuel, they were not going to have mobile courts, they were not going to have the court of Appeal circuits, and that it posed the danger of them being unable to pay for Wi-Fi for the e-filing and e-payment.⁴¹ When there are cutbacks in funding for legal services and courts, the Judiciary identifies increased use of technology as a source of savings and efficiency. Conversely, this also raises the menace of a digital divide that cements a two-tiered system incapable of delivering appropriate justice to low-income citizens and residents.

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Maraga decries Judiciary budget cut, discrimination from other State organs. See: <https://www.pd.co.ke/news/national/maraga-decries-judiciary-budget-cut-discrimination-from-other-state-organs-12114/> Accessed on 22nd November 2020

Strengthening the ICT infrastructures

The COVID-19 pandemic poses a threat to justice, yet provides an opportunity for the justice sector to examine ways in which the Judicial system can become more efficient and agile, with long-term impact that can last beyond the crisis period. LRF advises the justice sector to strengthen information, communication, and technology (ICT) infrastructures and fully support the digitalisation of case management systems to better identify and manage priority caseloads to ensure quick delivery of justice.

Added layer of security to allow private communications in mediation

To ensure the success of remote mediation, an added layer of security is needed to allow private communications to take place between each party and the mediator, and between each party and their advisers. This is because eavesdropping can affect the mediation process. Remote mediation is that which is conducted by video or telephone conference and is gaining prominence since lockdown restrictions were imposed.

Bridging the digital divide gap

Since some groups perceive the use of technology as a move causing untold frustration, concerns and sufferings to individuals seeking to be heard in court and get services, the Judiciary in its digital transformation journey must consider ordinary citizens. The Judiciary should move swiftly to live up to its promise that the e-filing would be convenient to a section of users. It should also initiate programmes such as the establishment of IT support centres, accredited cyber cafés and training of specific cyber café operators. If these pertinent issues are not addressed, the digitisation programme cannot succeed as envisioned by the Judiciary because those with the financial muscles are going to step all over the oppressed who still lack familiarity of complex court procedures including the digitised and electronic judicial system. Furthermore, the government should support the Judiciary to ensure it gets resources in an attempt to bridge the digital divide.

Giving access to computers and the Internet is not enough. Since skills become obsolete with new technologies, an understanding of the underlying concepts is necessary for individuals to continue to expand their knowledge and adapt to new information technologies. Therefore, computer skills training should be emphasised so that it is not just a one-time training, but one that is on-going. Essentially, there should be sensitisation to help those who are technologically challenged so that they can move with the new world communication. There is need for the advocates to do PowerPoint presentations as they help bridge the gap. The ICT ministry should seamlessly work with key stakeholders to ensure that communication service providers reduce the cost of the Internet access and prices of the communication gadgets including smartphones and tablets. The Judiciary should allocate resources to computer lessons programmes so that judges, magistrates, court registrars, advocates, and the public can fully get equipped.

Allow for public participation

Since the decision to digitise court procedures was not subjected to public participation, according to some key stakeholders, doing so would help immensely.

State-of-the-art court premises

LRF urges the three arms of government to cooperate and come up with an implementable plan, budgeted for, to ensure that the Court gets a stand-alone building, to be the principal seat of the Court. The premises must be of post-modern status; capable of supporting state-of-the-art security features, installation of audio-visual recording equipment and ICT infrastructure to propel the IT driven justice sector. Therefore, these efforts should focus on coming up with avant-garde premises.

Legislature must commit reasonable resources to the Judiciary

The Judiciary, on record, requested for an allocation of at least 3.7% of the national budget and the money to be immediately deposited in the Judiciary's accounts. The CJ in his last official speech before retirement, demanded that the Judiciary development vote be allocated at least between Sh5 billion and Sh10 billion every year to construct appropriate courts that are of avant-garde across the country. Maraga argued that it is only through such vote heads that the Judiciary would be inoculated against the idiosyncrasies of short-term political interests expected of the political branches of the government.

Changing passwords frequently

All the users who have access to the Judiciary digital system must change passwords frequently. They should do so because password theft is a danger to the information system in which a password is compromised. What is more, password theft can threaten other information systems. Where the Judiciary officers and other stakeholders have multiple password-protected accounts and they often reuse these identical passwords repeatedly, hackers can more easily gain access to other accounts. For instance, cyberhackers can gain access to a poorly protected server in the Judiciary and the passwords are compromised. These passwords can be used to gain access to a more securely protected system in the judiciary in what is referred to as "domino effect".

Audit trails

An audit trail, also called audit log, refers to a series of records of computer events, about an operating system, an application, or user activities which in conjunction with appropriate tools and procedures, can assist in detecting security violations, performance problems, and flaws in applications used in the Judiciary. A computer system may have several audit trails, each devoted to a particular type of activity.

Using secure HTTPS since most applications are web-based

Individuals utilising digital technologies need to be conversant with the terms *web-based applications* and *standalone applications*. Web-based applications run on a centralised application server, as opposed to standalone applications which have to be installed on each device separately. This means that using the maintenance parameter, web based applications need to be installed only once whereas standalone applications are to be installed separately on each computer. HTTPS is the protocol where encrypted HTTP data is transferred over a secure connection such as Transport Layer Security or Secure Sockets Layer to maintain the privacy and integrity of data and validate the authentication of websites. Therefore HTTPS ensures data security over the network especially the risky public networks like Wi-Fi. This is important because HTTP is not encrypted and is vulnerable to attackers who are eavesdropping and can gain access to website database and sensitive information. Case files and other information in the Judiciary database are important and sensitive at the same time.

Role-based access control (RBAC)

There is need to restrict the Judiciary's digital system access to authorised users. There is an ease of administration when access control is defined in two stages such that roles are defined and are associated with sets of permissions, and users are assigned roles. This is important because roles in the Judiciary are more stable as they are associated with job functions, while holders of the offices and various positions change dynamically. RBAC ensures that the data and system functions are not compromised in case of personnel change.

Co-browsing to allow litigants and other clients access support personnel

LRF recommends that litigants need to install computer programmes such as TeamViewer so that "co-browsing" can be possible. This is where a user gives the court staff member access into the user's computer so that the staff member can show the user how to navigate to different parts of the court's website. If this is done safely with parties upholding ethical standards, the litigants who initially had problems are going to find it easy to access court services.

Moulding a morally upright society

By moulding individuals whose consciences are clear, the scenarios where some litigants pretend that they are facing certain technological challenges that are beyond their hands are going to reduce significantly. The deontological ethical principle guides individuals to always do what is morally right. Therefore, feigning or pretending that one is experiencing technological challenges when they are not is morally wrong. A morally upright person guided by the deontological ethics always has to remember that at least some acts are morally demanded regardless of their consequences for human welfare. Individuals must learn to be virtuous and avoid vicious attributes. Therefore, expressions as "duty for duty's sake," "virtue is its own reward," and "let justice be done though the heavens fall" are very important.

The Judiciary must acquire alternative energy sources

Since most participants regret that abrupt and unexpected power outages disrupt virtual court proceedings and mediations, the Judiciary must find alternative energy sources to power the IT systems and other useful gadgets during such sessions. A good alternative is Solar Photovoltaic (PV) panels which provide clean energy. Solar PV panels offer both economical viability and environmental sustainability. A photovoltaic cell or a solar cell is an electronic component that generates electricity when exposed to photons, or particles of light. This conversion is called the photovoltaic effect, which was discovered in 1839 by French physicist Edmond Becquerel.

APPENDIX 1: VIRTUAL VIDEO LINKS



REPUBLIC OF KENYA

THE JUDICIARY



HIGH COURT CIVIL, DIVISION VIRTUAL COURT LINKS

S/NO	NAME OF JUDGE /JUDICIAL OFFICER/REGISTRY	COURT ROOM	VIRTUAL COURT LINK	CONTACT
1.	Hon. Mr. Justice A. Mbogholi Msagha	Court 21	https://cutt.ly/YhBIWVD	0724-102474
2.	Hon. Mr. Justice Joseph Sargon	Court 26	https://cutt.ly/9hBISXo	0726-168 112
3.	Hon. Lady Justice C.W. Githua	Court 28	https://cutt.ly/ahBzMQK	0702-619 887
4.	Hon. Lady Justice B.T Jaden	Court 22	https://cutt.ly/ehBeNHj	0726- 168 112
5.	Hon. Lady Justice Christine Meoli	Court 30	https://cutt.ly/9hBvEDJ	0717-097 360
6.	Hon. Mr. Justice Said Chitembwe	Court 29	https://cutt.ly/QhBv83n	0720-857 633
7.	Hon. L.A. Mumassabba	Chamber 129	https://cutt.ly/ChBbH3S	0722-684 302
8.	Hon. Lydiah Mbacho	Chamber 130	https://cutt.ly/DhBmEEq	0712 – 056 893
9.	Civil Registry Date fixing	-	https://cutt.ly/khBvOvz	0710940-040
10.	Civil Appeals Registry Date fixing	-	https://cutt.ly/KhBtENq	0727 229946

DATED AND PUBLISHED AT NAIROBI THIS 21ST DAY OF DECEMBER, 2020.

DEPUTY REGISTRAR
CIVIL DIVISION
21ST DECEMBER, 2020

APPENDIX 2: MATTERS CONCLUDED VIRTUALLY PER DIVISION (MILIMANI)

MATTERS CONCLUDED VIRTUALLY PER DIVISION (MILIMANI)

LRF Researchers accessed this document on November 16, 2020

FAMILY DIVISION	CHILDREN DIVISION
SETTLED - 5	SETTLED - 3
PARTIAL AGREEMENT 2	PARTIAL AGREEMENT 2
NOT SETTLED - 7	CONSENT - 3
NON-COMPLIANCE - 3	NOT SETTLED - 10
TERMINATED - 6	NON-COMPLIANCE - 2
	TERMINATED - 7
CMCC DIVISION	CIVIL DIVISION
SETTLED - 2	SETTLED - 2
PARTIAL AGREEMENT - 1	NOT SETTLED - 1
CONSENT - 1	TERMINATED - 1
NOT SETTLED - 2	
NON-COMPLIANCE - 2	
TERMINATED - 1	
COMMERCIAL DIVISION	ELC DIVISION
SETTLED - 5	SETTLED - 6
NOT SETTLED - 12	NOT SETTLED - 2
NON-COMPLIANCE - 3	NON-COMPLIANCE - 8
TERMINATED - 1	TERMINATED - 7
ELRC DIVISION	
SETTLED - 22	
PARTIAL AGREEMENT 2	
CONSENT - 2	
NOT SETTLED - 15	
NON-COMPLIANCE - 6	
TERMINATED - 6	

APPENDIX 3: HAND SANITISER



APPENDIX 4: NEW GUIDELINES ISSUED TO COURTS IN RESPECT TO E-SERVICES



REPUBLIC OF KENYA



THE JUDICIARY

December 24, 2020.

NEW GUIDELINES ISSUED TO COURTS IN RESPECT TO E-SERVICES

The Judiciary has embarked on a bold digital transformation journey that has grown in leaps and bounds during the Covid-19 pandemic period. Judges and magistrates have been empowered with equipment, facilities and training to deliver justice digitally ensuring that the wheels of justice don't grind to a halt despite the limited physical court appearances.

Among the flagship projects was the digital transformation of Nairobi courts which went completely paperless on July 1, 2020. Services such as e-filing, e-service, e-payment are now exclusively offered online. Courts across the country have all adopted technology and many judgements and rulings have been rendered online. The Judiciary would like to acknowledge and thank our stakeholders, particularly the advocates and the Office of the Director of Public Prosecutions for joining hands with us to ensure that digital transformation becomes a reality and is replicated in every court country-wide.

In the same breath, we acknowledge the challenges that we have been facing, with the novel system. A program of this magnitude will no doubt have challenges including technological and financial. Some of the challenges are outside the purview of the Judiciary, like unstable internet or lack of electricity in parts of the country

To this end, our clients, particularly advocates and litigants have given us feedback, which we have considered seriously and taken into account. The feedback includes their frustrations with the rigidity of the system. When the e-system is down for example, some clients have been turned back resulting in great inconveniences for both advocates and litigants. Indigent clients have also had challenging times when owing to financial or technological problems they have been unable to access services

In the light of all of the above, the Judiciary has today issued new guidelines on e-filing to all courts directing Heads of Stations clearly on what to do in the event of system failure. Among other directions, they have been advised under what circumstances manual documents may be accepted. We believe that the new guidelines will go a long way in addressing the issues of delay or denied services.

It is emphasized that this is not a reversal to the manual system, but rather providing solutions that resonate with clients and are in line with the Constitutional provision that justice should be administered without undue regard to technicalities.

The Judiciary remains on course in the digitization journey and would like to that assure our stakeholders and the public that despite the challenges, there will be no turning back.

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