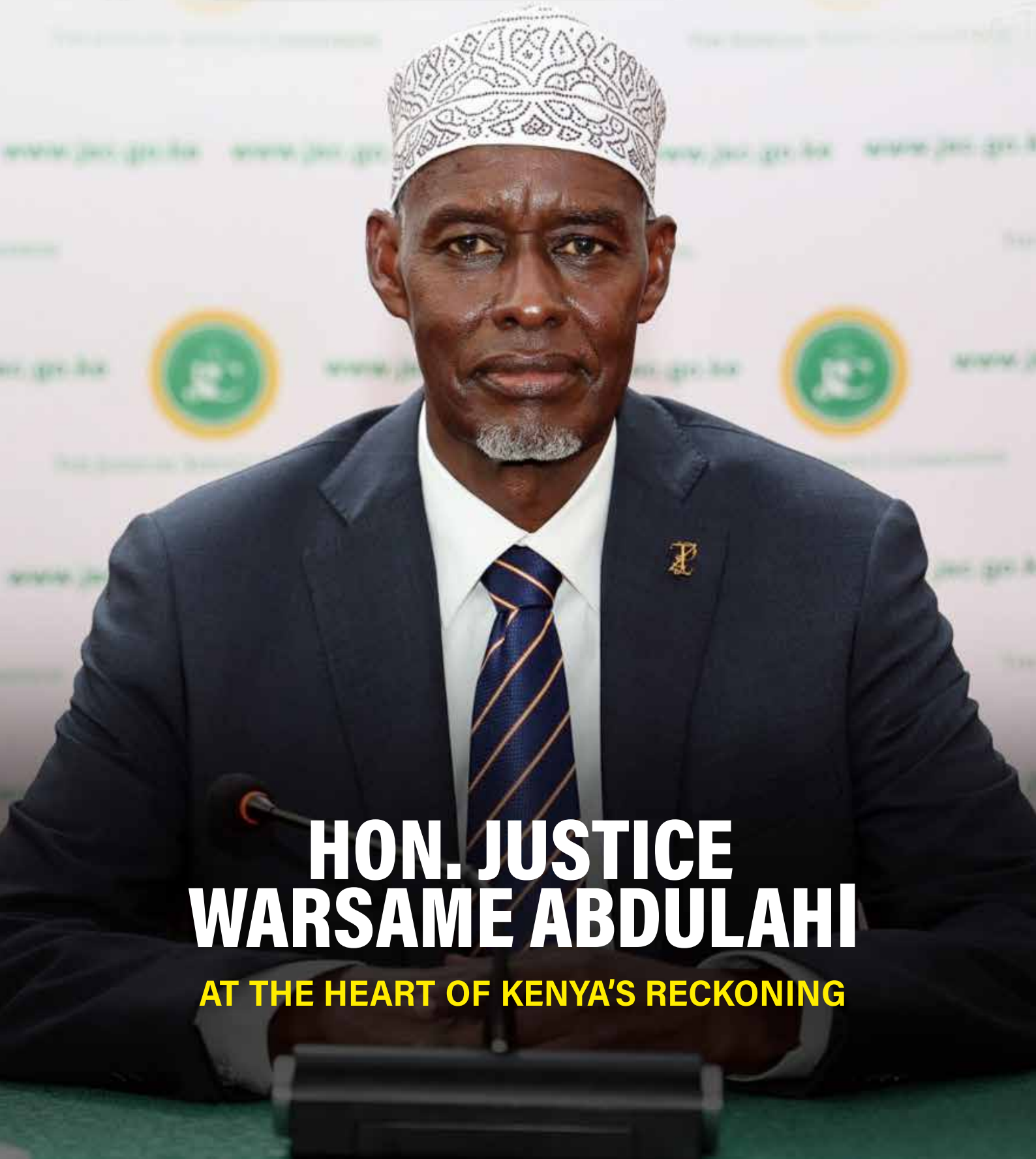


NUMBER 124, MAY 2026

THE PLATFORM

FOR LAW, JUSTICE & SOCIETY



**HON. JUSTICE
WARSAME ABDULAH**

AT THE HEART OF KENYA'S RECKONING

Invite in style for Every Occasion

Weddings, Birthdays, Baby Showers, Bridal Showers & Beyond.



Make your guests feel truly special

our unique handcrafted cards make every guest feel valued from the very first moment.





Award winning magazine

The Platform; your favourite publication for Law, Justice & Society was awarded Gold at the 2022 Digitally Fit Awards, in recognition of its online presence and impact online through our website and social media.

Platform Publishers Kenya Limited

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

All correspondence intended for publication should be addressed to:
editor@theplatformke.co.ke



Chair, Editorial Board and CEO
Gitobu Imanyara
gi@gitobuimanyara.com

Editor in Chief
Evans Ogada

Associate Editors
Ochiel Dudley, Emily Osiemo and Mary Mukoma

Executive Assistant to the Chair
Marangu Imanyara

Diaspora Chief Correspondent
Nyaga Dominic

Senior Editorial Assistant
Miracle Okoth Okumu Mudeyi

Junior Editorial Assistants
Muriuki Wahome and Sarah Kitanga

Guest Columnists
Joshua Malidzo Nyawa, Kennedy Ogeto, Christabel Mideva Eboso, Sarafin Cherono, Gethaiga Kibuka, Abigael Jemutai, Ouma Kizito Ajuong', Tioko Emmanuel Ekiru, Kirwa Michelle, Itoyo Khaisia

Advertising & Sales
Faith Kirimi

Design & Layout
George Okello

Office Administration
Marjorie Muthoni, Margaret Ngesa, Lillian Oluoch, Benjamin Savani and Faith Kirimi

To support this pro-bono effort published in the public interest use:

LIPA NA M-PESA

TILL NUMBER

7 6 7 8 9 5

THE PLATFORM
FOR LAW, JUSTICE & SOCIETY

Keep us Publishing by supporting us.



Exciting News for ABA Members!

Partnership with Baus Optical

Benefits

-  10% discount on all optical products
-  Free eye check-ups
-  Free spectacle cleaning
-  Free reading glasses for members aged 45+ (during ABA CSR events)
-  Optical health updates



How to Access

Present your LSK Membership Card + National ID at any Baus Optical outlet.



IN THIS ISSUE

- 7** Hon. Justice Warsame Abdulahi Mohammed: The Judge who might face Kenya's reckoning
- 10** Wronging the Rights: Rights without remedies and Futilitarian Constitutionalism in the Supreme Court's Tribunal Decision
- 36** Machine-made pleadings and Constitutional rights: An analysis of Nayan Mansukhlal Savla v Commission on Administrative Justice HCJR Misc/E120/2025
- 36** Deepening Integration, demanding Accountability: Key takeaways from the 25th EAC Summit
- 50** Climate change litigation and business accountability for Human Rights: A comparative analysis of Tort and Constitutional Law Approaches
- 60** The Jurisprudence of the Poisoned Thange River: Toxic harm, state failure and the price of environmental justice in Kenya
- 75** Beyond retirement: The Kibuka Transition Model and the rise of the crowning job
- 85** Incentivized Justice: Reforming Continuous Professional Development (CPD) requirements to mandate Pro Bono for license renewal in Kenya
- 92** There is Something in a "Mother Tongue": An Inclusive or Divisive Factor in Nation-Building?
- 95** Prof. Laban P.Ayiro ushers in the launch of David Musau Mumama Learning Complex to promote Kenya's legal education prospects for the future
- 98** The hidden tax: A feminist critique of Kenya's legal and fiscal framework
- 101** Martha Koome's Courting Courage: A Life of Law, Faith, Family and Reform

AFRICA LEGAL FORUM

Recent developments in Corporate, Commercial and Family Law



Steven Thiru
CLA President

Adv. Moïse Nkundabarashi
President Rwanda Bar Association

Co-hosted by the CLA and the Rwanda Bar Association, the Forum will explore the rapidly evolving landscape of legal practice, including technological disruption, regulatory change, cross-border investment, corporate governance, and the growing intersection between corporate and family law.

28-30
OCTOBER 2026

PARTICIPANTS CAN EXPECT:

- A dedicated Young Lawyers programme
- International speakers
- Interactive discussions across two streams
- Networking with Commonwealth colleagues



For further information regarding the conference, registration, sponsorship or speaking opportunities, please contact secretariat@commonwealthlawyersevents.com



RWANDA BAR
ASSOCIATION
Promoting the Rule of Law



Commonwealth
Lawyers Association

Hon. Justice Warsame Abdulahi Mohammed: The Judge who might face Kenya's reckoning

Justice Mohamed Khadhar Ibrahim sat on Kenya's Supreme Court from its very first day. He helped build the bench that would later nullify a presidential election. He died in Nairobi in December 2025 after a long illness. His death left a seat empty at the highest court in the land. Kenya has spent four months deciding who fills it.

On the evening of April 29, 2026, the Judicial Service Commission made its choice. Court of Appeal Judge Mohamed Abdulahi Warsame will go to President William Ruto for formal appointment to the Supreme Court of Kenya. Chief Justice Martha Koome announced the decision after two days of live, nationally televised vetting at Milimani Law Courts. Five candidates sat before the commission and only one name emerged.

Justice Warsame brings a career that spans more than three decades of judicial work. He joined the High Court bench in 2003 and moved to the Court of Appeal in 2012. His peers elected him their representative on the JSC under Article 171(2)(c) of the Constitution. He has handled commercial law, criminal law and judicial review. On paper the record is solid but the vetting sessions revealed something the resume does not capture. During his interview Justice Warsame levelled sharp criticism at Chief Justice Koome's reforms to judicial review. He used the phrase ***Koome-lization*** to describe what he sees as a distortion

of the Fair Administrative Action Act. That criticism went to the heart of how the court should supervise state power. It was not a neutral comment but a statement of judicial philosophy. Voters deserve to hear that philosophy debated openly. The JSC deserved to press harder on it.

There is a second question that deserves a direct answer. Justice Warsame served as a JSC commissioner while also being a candidate for a seat that the JSC was filling. That is not a technicality but a structural conflict. He sat in the same institution that sets the criteria, designs the process and ultimately picks the winner. The Constitution of Kenya demands institutional integrity at every level. The JSC must explain how this conflict was managed and why it did not disqualify his candidacy.

He was not alone in raising uncomfortable questions. Justice Katwa Kigen went before the commission and was confronted about his history as President Ruto's personal lawyer. He swore impartiality. His assurance was confident but also untested. The Supreme Court may yet sit in judgment of a Ruto election petition in 2027. The public has a right to more than a promise.

Next year is an election year and the reason this appointment carries exceptional weight. The Supreme Court holds the sole constitutional power to validate or nullify



Judge Mohamed Abdulahi Warsame

a presidential election result. That power defined Kenya in 2017 when the court annulled the election of Uhuru Kenyatta. Kenya is fourteen months away from its next general election. The court that will hear any dispute is being assembled right now.

Three Supreme Court seats are set to change before those elections. This vacancy is the first. The other two retirements follow mandatory age limits under Article 167 of the Constitution. By the time Kenyans vote in 2027 the court will have changed by nearly half its composition. A 42% turnover in the bench that decides the presidency is not a routine matter.

The ICJ-Kenya put it plainly in a memorandum to the JSC in March. Kenya needs a judge who is not learning on the job. It needs a judge who can absorb political pressure without bending. It needs someone who has already proved in a

courtroom and not in an interview room that the law means more than the powerful.

Justice Warsame's nomination now moves to President Ruto for formal appointment. Parliament will follow with its own approval process under the Constitution. Both steps must be more than ceremony. Parliament must ask the questions the JSC left unanswered. It must explore the conflict of interest. It must test the judicial philosophy. It must satisfy itself that the nominee will rule against the hand that signs his appointment if the law demands it.

The Supreme Court does not belong to the executive. It does not belong to the JSC and does not belong to the legal profession. It belongs to every Kenyan who will stand in a queue next year and drop a ballot into a box. Those Kenyans deserve a court they can believe in before the votes are counted and not only after.

The Advocates' Benevolent Association is the welfare arm of the Law Society of Kenya whose main objective is to assist distressed members.

Benefits of membership to the Advocates Benevolent Association:



1. Medical assistance capped at KShs. 150,000/=.



2. Last Expenses cover capped at Kshs. 80,000 for annual members & kshs 100,000/= for life members in the event of a member's demise.



3. Education assistance for children of deceased Advocates subject to limits set by the Board of Management.

- Nursery school – Kshs. 55,000/= per student per academic year
- Primary school – Kshs. 80,000/= per student per academic year
- Secondary school – KShs. 80,000/= per student per academic year
- Tertiary level – KShs. 100,000/= per student per academic year
- Kenya School of Law – Kshs. 190,000/=



4. Discounted psychological and counseling services offered in partnership with the Counsellors and Psychologists Society of Kenya (CPS-K).



5. Wakili Personal Retirement Benefits Scheme, a formal retirement savings plan for members of the Association and their non-Advocate employees.

Wronging the Rights: Rights without remedies and Futilitarian Constitutionalism in the Supreme Court's Tribunal Decision



By Joshua Malidzo Nyawa

Prologue

More than a decade ago, Kenyans constructed a great ship and called it their 'new Constitution'. In its design, they assembled the finest timbers they could find. In doing so, they believed they had brought to an end a long, tedious, torturous, and painful chapter in their history; confident that they had forged not only a durable vessel, but the most sophisticated instrument in their constitutional journey, a clean bill of constitutional health (as aptly captured in the celebratory reflections of the High Court at promulgation).¹

Today, that great ship is being dismantled by the very institution entrusted with its protection: the Supreme Court of Kenya. The finest timbers are being splintered and, in their place, weaker substitutes quietly installed. The very institution tasked with enforcing the Constitution asks the lower courts (and judges) to 'shrug and turn their backs to intermittent lawlessness' by issuing ineffective remedies.²

As the Supreme Court drifts from its original trajectory as a guardian of the Constitution and edges toward an increasingly deferential posture to Parliament, its excesses, and an ever-expanding conception of separation of powers, the present moment begins to resemble a darker constitutional irony. It recalls the (in) famous observation by Joseph Goebbels: 'It will always remain one of the best jokes of democracy that it provides its own deadly enemies with the means with which it can be destroyed.'³ Recast for our purposes, replace 'democracy' with constitutionalism, and the warning becomes uncomfortably apt.

For what the Court now appears to be constructing is a jurisprudence in which the very institution entrusted with enforcing the Constitution systematically withdraws from that task. Under the guise of separation of powers, Parliament is increasingly being insulated from meaningful judicial scrutiny. The message that emerges, however subtly, is that constitutional commands may be deferred, diluted, or selectively implemented, with little fear of decisive judicial intervention.

Taken to its logical conclusion, this trajectory licenses a troubling possibility:

¹*Federation of Women Lawyers, Kenya (Fida-K) & 5 Others V Attorney-General & another* [2011] KEHC 2099 (KLR) at para 1.

²*Trump, President of the United States, et al v CASA, Inc., et al*, No 24A884 (US Supreme Court, 2024), opinion of Justice Jackson.

³Mark Chou, 'Sowing the Seeds of Its Own Destruction: Democracy and Democide in the Weimar Republic and Beyond' (2012) 59(133) *Theoria: A Journal of Social and Political Theory* 21.



The Supreme Court of Kenya is the highest court in the country and the final arbiter of the Constitution. It was established under the 2010 Constitution, replacing the Court of Appeal as the apex court. Its decisions are binding on all other courts in Kenya. The court is comprised of seven judges: the Chief Justice (President of the Court), the Deputy Chief Justice (Vice-President), and five other judges. It is properly constituted with a minimum of five judges sitting

that Parliament may, in effect, treat the Constitution as temporally optional: something to be implemented at its own pace, even if that pace stretches indefinitely. Courts, in turn, stand back, invoking restraint. In this setup, violations are acknowledged; however, effective remedies are withheld.

Yes, constitutionalism will suffer. Yes, democracy will erode, maybe not in a dramatic rupture, but in a slow, subtle disintegration. But most fundamentally, the Judiciary itself will not be spared. A court that normalises non-enforcement does not merely weaken another branch; it diminishes its own authority. For once,

if it becomes accepted that constitutional violations attract no meaningful consequence, the erosion will not stop at Parliament. It will, inevitably, return to the courts, and when it does, the language of restraint will offer no shield.

Introduction

On 31 March 2026, the Supreme Court of Kenya in the Tribunal decision⁴ continued blinking and, as I have observed before, carved out a large loophole for the recalcitrant Executive and Parliament to explore, and in the end, granted Parliament enough legroom to manoeuvre and even steal a march against the Constitution.⁵

⁴*Parliament of Kenya & another v Okiiti & 2 others* (Petition E016 & E017 of 2025 (Consolidated)) [2026] KESC 28 (KLR).

⁵See Joshua Malidzo Nyawa, 'A Constitutional Travesty – II: Unpacking the Kenyan Supreme Court's Finance Act Judgment' <https://indconlawphil.wordpress.com/2025/07/30/a-constitutional-travesty-ii-unpacking-the-kenyan-supreme-courts-finance-act-judgment-guest-post/>, Joshua Malidzo Nyawa, 'A Constitutional travesty-III: Unpacking the Kenyan Supreme Court's Finance Act Judgment: A Riposte to Kenson Mutethia' <https://joshuamalidzonymawa.wordpress.com/2025/09/20/a-constitutional-travesty-iii-unpacking-the-kenyan-supreme-courts-finance-act-judgment-a-riposte-to-kenson-mutethia/>.



Chief Justice Emertius David Maraga

The Supreme Court continues to do this in line with its newfound love for *institutional, dialogical and collaborative constitutionalism*. In such a framework, the apex court can be said to have acquired a new desire for establishing a ‘non-intrusive court’.

Put differently, the Koome’s court is slowly seeing institutionalism and the traditional conception of separation of powers as its overarching leitmotif. This marks a departure from the Courts of Mutunga and Maraga, which embraced transformative adjudication and recognised the expanded role of judges in a constitutional democracy. In those eras, the judiciary, led by the apex court, was tasked with midwifing the transformative Constitution.⁶ Consequently,

the traditional role of judges and orthodox notions of separation of powers had little place within that constitutional order (as this paper shows below). Only Justice Njoki Ndungu consistently took a different view. In her dissents, she called for a return to a more restrained judicial role, in which judges self-limit their powers. Whereas the Courts of Mutunga and Maraga resisted that impulse, Koome’s Court appears to have embraced it. The result is a gradual, almost imperceptible, departure from the ideological foundations of its predecessors.

Although this piece may not fully account for that transition, the classical Montesquieuan approach seems to be steadily reasserting itself. It is along these lines that I read the recent Tribunal decision, occasionally drawing on my earlier posts in which I described the Finance Act decision as a constitutional travesty. Taken together, these decisions suggest that the Court has now birthed what I term *futilitarian constitutionalism* and, in doing so, has effectively wronged both rights and the Constitution, culminating in a troubling reality of rights without remedies. To borrow Mia’s title writing after the Grootboom decision, the Apex Court has left out Kenyans in the cold, without an effective remedy.⁷

The Tribunal’s decision: Why it is wrong

The facts of the case are pretty straightforward. Pre-2010, tribunals were within the Executive.⁸ Their composition and functioning were therefore the responsibility of the executive. As expected, there was a challenge in suing government entities or officials before bodies run by the same

⁶*Communications Commission of Kenya & 5 others v Royal Media Services Ltd & 5 others* (Petition 14, 14A, 14B & 14C of 2014 (Consolidated)) [2014] KESC 53 (KLR).

⁷Mia Swart, ‘Left Out in the Cold? Crafting Constitutional Remedies for the Poorest of the Poor’ (2005) 21(2) *South African Journal on Human Rights* 215.

⁸*Parliament of Kenya & another v Okiiti & 2 others* (Petition E016 & E017 of 2025 (Consolidated)) [2026] KESC 28 (KLR).

respondents. Kenyans cured this by moving the adjudicative bodies to the judiciary. As part of the Judiciary, their composition and functioning were the responsibility of the Judiciary Service Commission. The constitution then asked Parliament to pass legislation to realise this shift (including the composition, jurisdiction, etc.). Parliament and the Executive resisted this change, and the Executive continued to appoint the members of the tribunals and to run them.

In 2018 (8 years after the promulgation of the Constitution), Petitioners moved to the High Court, arguing that the trend was unconstitutional. The existence of over 100 Tribunals under the Executive, operating without uniformity, violated the Constitution (rights to access justice, fair hearing, and the independence of the judiciary). Further, this violation persisted because the parliament failed to pass the required legislation. Parliament argued that there was no mandatory obligation to enact the legislation, and even if there were, there was no specific timeline for passing it.

This post focuses on the Court's findings regarding the passage of the legislation.

The High Court

The High Court agreed with the Petitioners that the prevailing situation was unconstitutional for various reasons.⁹ On the issue of remedies, the Court disagreed with the Parliament's argument that there was no timeline for passing the law. Since Parliament had taken the position that there was no obligation to pass the law and that it could take years, the Court held that a

structural interdict was needed to supervise the process. The High Court noted that:

101. The Constitution has by now been in place for the last 11 years. During that period, the progress, if any, has been very minimal. It is not clear, from the approach proposed by the 3rd respondent, how long it will take for the legislation to be put in place. This is, therefore, a case which, in my view, calls for the court's supervision in the nature of structural interdicts.

The High Court then relied on the Supreme Court's decisions on the issuance of structural interdicts such as *Mitu Bell*, *CCK*, and *Muruatetu* (Paras 103-110) where the apex court asked parties to report back to court post-judgment, noting that 'Accordingly, this court is vested with jurisdiction to issue structural and supervisory interdicts in order to uphold the Constitution.'¹⁰ In the end, the Court directed the Attorney General and Parliament to 'take proactive steps within their respective dockets towards propagating the Tribunals Bill with a view of transiting the local tribunals under article 169(1)(d) of the *Constitution* to the Judiciary. To that end, the Hon Attorney General and the Parliament shall file affidavits within 6 months of this judgment detailing the steps taken.'¹¹

The Court of Appeal

The High Court decision was appealed to the Court of Appeal.¹² In affirming the decision of the High Court, the Court of Appeal held that. One, it is true that the Constitution did not provide for a timeline for the enactment of the legislation, the Constitution requires that

⁹*Okoiti v Judicial Service Commission & 3 others* (Petition 197 of 2018) [2021] KEHC 461 (KLR).

¹⁰*Ibid.*

¹¹*Ibid.*

¹²*Attorney General v Okoiti & 3 others* (Civil Appeal E416 of 2021) [2025] KECA 309 (KLR).

the same be passed without unreasonable delay, and that:

43. The drafters of the Constitution, in our view, had in mind circumstances such as the one in hand when they inserted this article in the Constitution. We agree that more than 10 years delay in enacting a legislation geared towards the realisation of a constitutional right, in this case, the right of access to justice, is unreasonable and cannot be countenanced and the trial court was justified in compelling the 3rd respondent to undertake its constitutional obligation.¹³

Second, in light of the jurisprudence of the Supreme Court, the High Court had the jurisdiction to ensure that its decision was implemented by way of structural interdict and 'we find no reason to fault it on that score' (Para 50).

The Supreme Court

The dispute now arrives at the Supreme Court. Both the State and Parliament challenge the decisions of the lower courts. Mainly, that in crafting the remedy and the court of appeal upholding the same, the courts violated the doctrine of separation of powers. The Supreme Court affirmed the lower court's position that parliament is under a mandatory obligation to enact the legislation (Paras 61-65).¹⁴ Second, this obligation must be carried out without unreasonable delay. Further, 8 years (at the time when the petition was filed) constituted an unreasonable delay and the High Court could not be faulted (Para 66-69).¹⁵ Third, the court had to address parliament's

argument that it governs its own processes, which must be free from judicial interference. As such, the lower courts violated the doctrine of the separation of powers by imposing a timeline and requiring parliament to report back to the court. The Supreme Court, in answering this argument, reframes the issue and holds that the question before the court is not whether structural interdicts are available for the vindication of a violation of rights or constitutional obligations, but 'whether their deployment in this case satisfied the constitutional threshold of appropriateness and institutional comity' (para 95).¹⁶ The Court therefore raises the issue of institutional comity.

According to the Supreme Court, in supervising parliament and in requiring progress reports to the court, this raises 'separation-of-powers concerns taking into account that Articles 94(1) and 124 (1) of the Constitution vest legislative authority and procedural autonomy exclusively in the Houses of Parliament, including the power to regulate their internal proceedings through Standing Orders' (para 96).¹⁷ Further that:

Unwarranted intrusion risks undermining democratic governance and institutional autonomy. Courts exercising review jurisdiction must consequently observe restraint and avoid encroaching upon functions constitutionally reserved to the legislative arm of government (para 100).¹⁸

The Court then relies on Kent Roach and Geoff Budlender to hold that the supervisory reliefs are justified only in narrowly defined circumstances, specifically where duty

¹³Ibid.

¹⁴*Parliament of Kenya & another v Okiiti & 2 others* (Petition E016 & E017 of 2025 (Consolidated)) [2026] KESC 28 (KLR).

¹⁵Ibid.

¹⁶Ibid.

¹⁷Ibid.

¹⁸Ibid.

bearers have demonstrated incompetence, intransigence, or sustained inattentiveness in the discharge of constitutional obligations (para 100).¹⁹ To this end, the Supreme Court was of the view that:

*Absent a finding that Parliament was unwilling, incapable, or persistently indifferent to its constitutional duty, particularly where legislative processes were demonstrably underway, the justification for imposing a structural interdict supervising the legislative process becomes considerably attenuated. The availability of less intrusive remedies, such as declaratory relief affirming Parliament's obligation under Article 169(2), suggests that the issuance of a supervised interdict was not the least intrusive or most proportionate means of vindicating the Constitution in this case.*²⁰

The Supreme Court, therefore, says that there was no finding that parliament was unwilling, incapable or persistently indifferent to its constitutional duty. This is despite its earlier observation that:

*53. We have established that the 1st respondent's petition alleged constitutional violations. We are also alive to the appellants' consistent submission that the 1st appellant is under no mandatory constitutional obligation to enact the contemplated legislation.*²¹

But the Supreme Court demanded more, something close to a miracle, to be convinced that Parliament was unwilling to act. It was not enough that, sixteen years after the promulgation of the

Constitution, Parliament had failed to enact the required legislation. It was not enough that Parliament had repeatedly denied the existence of any such obligation, insisting that there was no constitutional timeline for action. It was not even enough that, since the litigation commenced, the Bill had languished in legislative limbo, making no meaningful progress.

Still, the Court found comfort in abstraction. In its view, all this institutional inertia could be cured by a simple, bare, ritualistic and naked declaration that Parliament was under a duty to enact the legislation within a 'reasonable time'. That, apparently, was sufficient. I contend, with respect, that the Supreme Court committed a constitutional sin and violated the Constitution that it was meant to protect, and this is the clearest expression of what I call futilitarian constitutionalism: a jurisprudence that acknowledges constitutional violations yet withholds the means to remedy them; that proclaims duty while insulating disobedience; that performs the language of enforcement while ensuring its futility. Faced with a demonstrably recalcitrant Parliament, the Court chose symbolism over supervision, a declaration over supervised direction, thereby transforming a binding constitutional command into little more than a polite suggestion.

Here is how the Court erred:

a) Crafting appropriate remedies

Article 23 of the Constitution imposes a constitutional commandment on the Courts. The Court is enjoined to grant an 'appropriate relief. The Constitution does

¹⁹Ibid.

²⁰Ibid, para 102.

²¹Ibid.

not define what amounts to appropriate relief, but the provision is similar to section 38 of the South African Constitution. The courts of South Africa have interpreted the provision to mean an effective remedy. The Constitutional Court of South Africa in **Fose v Minister of Safety and Security** defined an appropriate remedy as 'appropriate remedy must mean an effective remedy.'²²The Court further stated that 'courts have particular responsibility and are obliged to 'forge new tools and shape innovative remedies.'²³ Ackerman J put an accent on the sensibility of transformative remedies, founded on the notion of just and equitable remedies, in the following excerpt:

In our context, an appropriate remedy must mean an effective remedy, for without effective remedies for breach, the values underlying the rights entrenched in the Constitution cannot properly be upheld or enhanced. Particularly in a country where so few have the means to enforce their legal rights through the courts, it is essential that on those occasions when the legal process does establish that an infringement of an entrenched right has occurred, it be effectively vindicated. The courts have a particular responsibility in this regard and are obliged to forge new tools and shape innovative remedies, if needs be, to achieve this goal.²⁴

The Supreme Court has endorsed Fose in *CCK, Wamwere, Mitu Bell, CMM, Musembi*

and *EPZ*.²⁵ The obligation, therefore, rests on courts to formulate a remedy to wipe every tear from every eye, to fashion a suitable remedy for each circumstance. In the words of Justice Chacha Mwita, 'this court is called upon to grant a relief that will effectively strike at the source of the violation as a way of enforcing the Constitution and strike a blow to any future incentives for any state organ, state officer or public officer to violate, infringe and or frustrate a legitimate constitutional or legal process.'²⁶

Both Fose and our decisions tell us that an effective remedy must be vindicating and deterrent. They must be able to sanction government inertia and kickstart the process. A remedy is not effective if it incentivises a government entity to violate or frustrate a legitimate constitutional or legal process.

This, therefore, means that if the rights are to amount to anything more than pieces of paper, they need a different judicial philosophy and not the pre -2010, or in other words, the potential of change through the Constitution cannot amount to much unless the courts live up to the task in the adjudication of rights and their enforcement in real cases. Such a task cannot be a 'timorous and unimaginative exercise of the judicial power of constitutional interpretation leaves the Constitution a stale and sterile document.'²⁷ But it requires judges to be self-aware of the critical role that has been accorded to them.

²²*Fose v Minister of Safety and Security* (1997 (3) SA 786 (CC).

²³*Fose* *ibid*.

²⁴*Ibid*.

²⁵See *Communications Commission of Kenya & 5 others v Royal Media Services Ltd & 5 others* (Petition 14, 14A, 14B & 14C of 2014 (Consolidated)) [2014] KESC 53 (KLR); *Wamwere & 5 others v Attorney General* (Petition 26, 34 & 35 of 2019 (Consolidated)) [2023] KESC 3 (KLR); *Mitu-Bell Welfare Society v Kenya Airports Authority & 3 others* (Petition 3 of 2018) [2021] KESC 34 (KLR); *CMM (Suing as the Next of Friend of and on Behalf of CWM) & 6 others v Standard Group & 4 others* (Petition 13 (E015) of 2022) [2023] KESC 68 (KLR); *Musembi & 13 others v Moi Educational Centre Co. Ltd & 3 others* (Petition 2 of 2018) [2021] KESC 50 (KLR) and *Export Processing Zone Authority & 10 others (Suing on their own behalf and on behalf of all residents of Owino-Uhuru Village in Mikindani, Changamwe Area, Mombasa) v National Environment Management Authority & 3 others* (Petition E021 of 2023) [2024] KESC 75 (KLR).

²⁶*Law Society of Kenya v Attorney General & another; Warsame & another* (Interested Parties) (Petition 307 of 2018) [2019] KEHC 10881 (KLR).

²⁷*Njoya & 6 others v Attorney-General & 5 others* (Miscellaneous Civil Application 82 of 2004) [2004] KEHC 2645 (KLR) (25 March 2004).

Courts have been accorded broad powers to fashion and structure remedies to ensure that the intention of the Constitution's framers is realised. This court must fashion remedies to ensure that other branches of government, such as the legislature and the executive, take steps that lead to fundamental change. As such, 'the court is not merely a passive, disinterested umpire or onlooker, but has a more dynamic and positive role with the responsibility for ... moulding relief and - this is important - also supervising the implementation thereof'.²⁸

Although declarations are constitutional remedies, their limitation have already been overemphasised. They are improper and unfit when dealing with institutional inertia. To this end, courts have been asked to, and have, issued other innovative remedies, such as supervisory orders. This is because the supervisory interdicts 'go where prohibitory and mandatory interdicts dare not go'.²⁹ A clearer distinction between mere declarations and supervisory interdicts (broadly encompassing complex remedies such as meaningful engagement and structural interdicts) is evident in the adjudication of socio-economic rights, particularly in South Africa.

Dennis Davis, while writing on the use of declarations, noted that the Constitutional Court had surrendered its power to sanction government inertia and, as a direct result, 'litigants have not obtained the shelter or drugs that the judgments promised in such a clear fashion'.³⁰ He argued that the declaratory reliefs that were issued in *Grootboom* and *TAC* were ineffective, and a supervisory remedy would have achieved a

purpose. The Constitutional Court's refusal to grant structural relief that would empower courts to supervise the implementation of their own orders had produced unfortunate results, as the government had done little to produce the tangible benefits that victorious litigants are entitled to expect from their success.³¹ This means that the limited nature of declarations entrenches rights without remedies.

Back to the Tribunal's case, by the time it reached the Supreme Court, the Constitution was about to turn 16. When the petition was filed at the High Court, the Attorney General informed the Court that a bill was in Chambers seeking to give effect to the constitutional provision. The Parliament, on the other hand, argued that there was no obligation to pass legislation and, even if there were, no timeline. The Supreme Court upholds the lower courts' findings that failure to pass the legislation violated rights and the Constitution. However, it sets aside the structural remedy and argues that a declaration was sufficient. The Supreme Court argues that, for a structural remedy to be issued, it must be shown that parliament was *unwilling, incapable, or persistently indifferent to its constitutional duty*. The court says that this is in line with the conditions advanced by Kent Roach and Geoff Budlender of 'incompetence, intransigence, or sustained inattentiveness' to fulfilment of a constitutional obligation.³²

Several questions arise here, and at the risk of repeating myself, what more, something close to a miracle, did the Supreme Court want in order to be convinced that

²⁸*Sheela Barse v Union of India* (1988) 4 SCC 226 (SC).

²⁹Mia Swart, 'Left Out in the Cold? Crafting Constitutional Remedies for the Poorest of the Poor' (2005) 21(2) *South African Journal on Human Rights* 215.

³⁰Dennis Davis, 'Socio-Economic Rights in South Africa: The Record after Ten Years' (2004) 2 *New Zealand Journal of Public and International Law* 47.

³¹*Ibid* at pg. 56.

³²Kent Roach and Geoff Budlender, 'Mandatory Relief and Supervisory Jurisdiction: When Is It Appropriate, Just and Equitable?' (2005) 122 *South African Law Journal* 325.



Chief Justice Martha Koome

Parliament was unwilling to act? Was it not enough that, sixteen years after the promulgation of the Constitution, Parliament had failed to enact the required legislation? Was it not enough that Parliament had repeatedly denied the existence of any such obligation, insisting that there was no constitutional timeline for action? It was not even enough that, since the litigation commenced, the Bill had languished in legislative limbo, making no meaningful progress. Was it not enough that the various bills introduced in 2015, 2017, and 2023 were left to die a natural death? Was it not enough that now there is a 2025 bill with nothing happening to it?

What more did the Supreme Court require to be convinced that Parliament was *unwilling, incapable, or persistently indifferent to its constitutional duty*? Was the

public plea of the Chief Justice not enough? In 2024, while launching the Tribunals' Shared Service Infrastructure, Website, and Tribunal Registry Manual, Martha Koome expressly urged the National Assembly to expedite the legislative process, which had already stalled. She acknowledged the Cabinet's approval of the Tribunals Bill, but pointedly called on Parliament to bring the process to 'its full conclusion'.³³

If that was insufficient, what then of her renewed appeal on 12 May 2025 in Kisumu? On that occasion, the Chief Justice again urged Parliament to fast-track the enactment of the long-pending Tribunals Bill, emphasising its centrality to the proper functioning of tribunals. The Judiciary itself recorded this intervention as a call to address a legislative delay that had become both visible and entrenched.³⁴

What clearer evidence of intransigence, or at the very least sustained inattentiveness, could there be than this public acknowledgement from the head of the Judiciary that the Bill had been long pending? When the Chief Justice is compelled to repeatedly call upon Parliament to act, the failure is no longer speculative; it is institutional, persistent, and undeniable. Yet even this did not suffice. What is clear is that the Supreme Court decided to 'put on blinders and take a see-no-evil stance' with respect to the harmful conduct by parliament.³⁵

If sixteen years of legislative delay is not enough; if the repeated introduction and quiet death of successive versions of the Bill is not enough; if Parliament's own

³³Chief Justice Martha Koome, 'CJ urges MPs to provide legislative framework to streamline Tribunals operations' *The Judiciary of Kenya* <https://judiciary.go.ke/cj-urges-mps-to-provide-legislative-framework-to-streamline-tribunals-operations/>

³⁴Chief Justice Martha Koome, 'Chief Justice urges Parliament to fast-track Tribunals Bill' *The Judiciary of Kenya* <https://judiciary.go.ke/chief-justice-urges-parliament-to-fast-track-tribunals-bill/>

³⁵*Trump, President of the United States, et al v CASA, Inc., et al*, No 24A884 (US Supreme Court, 2024), opinion of Justice Jackson.

insistence before the Court that it bears no obligation to enact the legislation is not enough; if its further claim that there exists no constitutional timeline for compliance is not enough; and if, finally, the public appeals of Martha Koome on multiple occasions are still not enough, then it becomes difficult to imagine what would ever meet the Supreme Court's threshold for the issuance of structural interdicts against Parliament.

At that point, the conclusion is unavoidable. The Court has, in effect, constructed a standard so exacting that it insulates Parliament from meaningful remedial supervision. No litigant will ever meet it. What emerges is not restraint, but abdication; not deference, but disengagement. This is the slow, deliberate erosion of structural interdicts in Kenya, a jurisprudential retreat that leaves constitutional obligations formally intact while rendering their enforcement practically unattainable.

Eventually, Kenyans will live in a world of declarations, and the lower courts, as Roach once warned, will find themselves dependent on the legislative and executive branches of government to provide remedies for rights.³⁶ This is because 'declarations proceed on the assumption that governments will take prompt and good faith steps to comply with the court's declaration of constitutional entitlement.'³⁷

Where the High Court and the Court of Appeal grasped the nettle and made a genuine jurisprudential advance by adopting an effective remedy, thereby compelling the political branches to act, the Supreme Court retreats. It constricts the

Constitution's remedial imagination and, in doing so, grants a judicial imprimatur to legislative and executive inertia. One might describe this as a constitutional failure, even a constitutional distortion, but this goes further. It is a constitutional betrayal of a deeper kind: not the denial of what the Constitution forbids, but the judicial foreclosure of what it permits. There is no worse example of constitutional failure than when courts, through their decisions, block or neutralise things that the Constitution actually allows.

b) Structural interdicts as part of a dialogical constitutionalism

What is even more perplexing is the Apex Court's assertion that the structural interdict issued against Parliament was unduly intrusive on the basis that it entailed supervision of Parliament's internal workings. With respect, this reflects a fundamental misunderstanding of dialogical constitutionalism.

Structural interdicts are not alien to dialogical constitutionalism; they are one of its clearest institutional expressions. Precisely because they are supervisory in nature, they enable a structured engagement among the branches of government in the realisation of constitutional obligations. They do not displace legislative authority; they discipline its exercise by ensuring that constitutional commands are not indefinitely deferred. As Justice Didcott reminded us, courts must fashion remedies suitable to the circumstances to address the exigencies and meet the special demands of constitutional litigation.³⁸

³⁶Kent Roach, 'The Challenges of Crafting Remedies for Violations of Socio-Economic Rights' in Malcolm Langford (ed), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (Cambridge University Press 2009) 46.

³⁷*ibid*

³⁸*Fose v Minister of Safety and Security* (1997 (3) SA 786 (CC)).

Liebenberg summarises the nature of structural interdicts adequately as follows:

Meaningful engagement-style remedies offer a promising vehicle for reconciling these two principles. These remedies aim to stimulate participatory agreement on the precise policy measures required to remedy the rights violation identified by the courts at the merits stage. The court explicitly refrains from prescribing specific policy solutions to the parties, but instead requires them to work out through deliberative engagement a detailed plan of action to give effect to the court's merits findings. Organs of state are accorded a broad discretion to work out, in partnership with rights beneficiaries and stakeholders, the policy measures required to remedy the rights violation. Participatory, engagement-style remedies thus represent a departure from a traditional "command and control" style of judicial remedy. Their primary objective is to stimulate the responsible organs of state to engage the rights beneficiaries, experts and other stakeholders to design an effective remedial plan of action.³⁹

When the Court suggests that requiring Parliament to submit progress reports amounts to an impermissible intrusion into the legislative sphere, it collapses the distinction between supervision and control. A reporting requirement does not direct how Parliament must legislate; it merely requires that it act and account for

that action. That is not an abandonment of restraint, but a recalibration of it in the face of demonstrated non-compliance. And as Bilchitz would rightly note about the Supreme Court, "A failure to retain such a supervisory element in the order rather displays an undue deference by the Court to the other branches of government and evinces an unwillingness on its part to retain responsibility for the effectiveness of its orders"⁴⁰

This, then, is not the dialogical or collaborative constitutionalism we recognise. It is a distorted variant, one that invokes the language of institutional respect while stripping the judiciary of the very tools that make such dialogue meaningful. In the end, what is preserved is not comity, but impunity. Dialogical constitutionalism, as we know it, is evident in South Africa's *Mwelase* decision. The Constitutional Court lays down important principles (Paras 46-49).⁴¹ One, 'the courts and government are not at odds about fulfilling the aspirations of the Constitution.'⁴² Two, 'Nor does the separation of powers imply a rigid or static conception of strictly demarcated functional roles.'⁴³ The two principles mean that the three arms of government share a common goal, which is that they 'share commitment to the Constitution's vision' and are 'engaged in a shared enterprise of fulfilling practical constitutional promises to the country's most vulnerable.'⁴⁴ This means there is no complete isolation, but all organs work towards a common goal.

³⁶Kent Roach, 'The Challenges of Crafting Remedies for Violations of Socio-Economic Rights' in Malcolm Langford (ed), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (Cambridge University Press 2009) 46.

³⁷*ibid*

³⁸*Fose v Minister of Safety and Security* (1997 (3) SA 786 (CC)).

³⁹Sandra Liebenberg, 'Remedial Principles and Meaningful Engagement in Education Rights Disputes' (2016) 19 *Potchefstroom Electronic Law Journal* (PER/PELJ) 1.

⁴⁰David Bilchitz, 'Towards a Reasonable Approach to the Minimum Core: Laying the Foundations for Future Socio-Economic Rights Jurisprudence' (2003) 19(1) *South African Journal on Human Rights* 1.

⁴¹*Mwelase and Others v Director-General for the Department of Rural Development and Land Reform and Another* (2019 (6) SA 597 (CC)).

⁴²*ibid*.

⁴³*ibid*.

⁴⁴*ibid*.

Third, in crises and times of egregious infringements, Courts are called upon to 'explore the limits of separation of powers jurisprudence,' and courts have little choice in their duty to provide effective relief. To this end:

[49] The vulnerability of those who suffer most from these failures underscores how important it is for courts to craft effective, just and equitable remedies, as the Constitution requires them to do. In case of extreme rights infringement, the ultimate boundary lies at court control of the remedial process. If this requires the temporary, supervised oversight of administration where the bureaucracy has been shown to be unable to perform, then there is little choice: it must be done.⁴⁵

Supervised oversight of legislation as the circumstances of the tribunal decision demanded due to the reluctance of parliament to pass the law, which is part of that dialogical constitutionalism, and it cannot be said to be an intrusion into parliamentary business. To do so, as the Supreme Court did, divorces the judiciary from the shared enterprise of fulfilling practical constitutional promises and runs counter to Mhlope's caution against self-censorship.⁴⁶ The Supreme Court should remember that 'the outer limits of a remedy are bounded only by considerations of justice and equity,'⁴⁷ and when circumstances cry for a remedy due to a failing institutional functionality, the court should have upheld the structural interdict as it sought to remedy an institutional dysfunction and a blockade. This was the most effective and participatory remedy, giving effect to dialogical constitutionalism.

c) Separation of Powers

The Supreme Court says that requiring parliament to report back to the court after a certain time is controlling parliament, and that violates the separation of powers. The Supreme Court says that the mere act of asking parliament to report to court is an intrusion into parliament's procedural autonomy. The Supreme Court seems to be emphasising Montesquieu's strict conception of the separation of powers, one that advocates doctrinal purity.

However, our Constitution does not countenance such an approach. Our idea of separation of powers is combined with the twin checks and balances. The principle of checks and balances, what Barendt calls the 'partial' separation theory, unlike the 'pure' separation theory, recognises that each of the three branches has a core function and that it is most critical to maintain separation around these core functions.⁴⁸ Unlike the 'pure' version, it posits that overlap beyond the core functions is necessary and even desirable. Each institution of the state is given some power over the others; their functions are deliberately designed to overlap. It presupposes that a specific function is assigned primarily to a given organ, subject to a power of limited interference by another organ to ensure that each organ keeps within the sphere delimited to it. It requires that each branch of government be able to check the exercise of powers by the other branches, either by participating in the functions conferred on it or by subsequently reviewing those powers. And that is what the Kenyan constitution sought to do.

⁴⁵Ibid.

⁴⁶*Electoral Commission v Mhlope and Others* 2016 (5) SA 1 (CC) (14 June 2016).

⁴⁷Ibid at para 83.

⁴⁸Eric Barendt, *An Introduction to Constitutional Law* (Clarendon Law Series, Oxford University Press, 1998).

The Constitution deliberately designed the functions to overlap. It places checks and balances on each and every institution, and the three arms 'should assert checks and balances on each other in a harmonious cycle of mutual frustration.'⁴⁹ The three branches are not 'hermetically sealed' from one another and exhibit some overlap.⁵⁰ In Justice Frankfurter's words, *[t]he areas are partly interacting, not wholly disjointed*.⁵¹ In this set-up, it is to be recognised that none of the several governmental organs functions in splendid isolation. Separation of powers needs adjustment and pruning. As Justice Cardozo correctly held:

*The doctrine of 'separation of powers' is not a doctrinaire concept to be made use of with pedantic rigor. There must be sensible approximation; there must be elasticity of adjustment in response to the practical necessities of government which cannot foresee today the development of tomorrow in their nearly infinite variety.*⁵²

Ours, therefore, is what I would call an overlapping-separation-of-powers doctrine. Our system of government is not disjointed or one that entails the absolutism of each branch within its own sphere. The principle of checks that underlies the modern separation of powers holds that the judicial branch has the final authority, in cases of dispute, to determine the bounds of authority and the legality of the activities of the other branches. The Supreme Court told us in *Re IIEC, 2011*, that in our system of separation of powers, the organs play

'mutually-countervailing roles' and as such 'none of the several governmental organs functions in splendid isolation.'⁵³

In this overlapping separation of powers doctrine, as Khobe observes, separation of powers is not a license for the branches to violate the law; rather, it means that each branch is independent within its zone, so long as it acts in accordance with the law.⁵⁴ So, when there is a violation of the law, other branches of government in the overlapping separation of powers step in to remedy the situation and restore the situation to normalcy, where the constitution is observed.

The Constitution, therefore, mandates the courts to ensure that the parliament does not transgress its constitutional mandate or engage in the illegal exercise of power. The apex Court has held as such in *Speaker of the Senate* that the apex court cannot invoke 'institutional comity to avoid its constitutional duty'.⁵⁵ When Parliament exercises its legislative authority, it must act in accordance with, and within the limits of, the Constitution, and the supremacy of the Constitution requires that 'the obligations imposed by it must be fulfilled'.⁵⁶ The Constitution requires courts to ensure that all branches of government act within the law and fulfil their constitutional obligations. When the Judiciary determines that the Executive branch deviated from its authority or exercised it illegally and thus invalidates the action, it does not infringe upon Executive authority. It does not violate the

⁴⁹Morris K Mbondenyi and John Osogo Ambani, *The New Constitutional Law of Kenya: Principles, Government and Human Rights* (LawAfrica Publishing 2013).

⁵⁰*Tlouamma and Others v Mbethe, Speaker of the National Assembly of the Parliament of the Republic of South Africa and Another* 2016 (1) SA 534 (WCC).

⁵¹*Youngstown Sheet & Tube Co et al v Sawyer* 343 US 579 (1952) (US Supreme Court).

⁵²*Panama Refining Co et al v Ryan et al; Amazon Petroleum Corp et al v Ryan et al*, 293 US 388 (1935) (US Supreme Court), Cardozo, dissenting.

⁵³*In the Matter of the Interim Independent Electoral Commission (Applicant)* (Constitutional Application 2 of 2011) [2011] KESC 1 (KLR), para 54.

⁵⁴Walter Khobe Ochieng, 'Separation of Powers in Judicial Enforcement of Governmental Ethics in Kenya and South Africa' (2022) 3(1) *Kabarak Journal of Law and Ethics* 37.

⁵⁵*In the Matter of the Speaker of the Senate & another* (Advisory Opinion Reference 2 of 2013) [2013] KESC 7 (KLR).

⁵⁶*Ibid.*

principle of separation of powers.⁵⁷ Although it might be said that the Judiciary prescribed a strong medicine, this is the medicine that the Constitution prescribes. After all, the lesson from TAC is that *'In so far as that constitutes an intrusion into the domain of the executive, that is an intrusion mandated by the Constitution itself'*.⁵⁸ Doctors for Life, on the other hand, reminds us that *'Courts are required by the Constitution 'to ensure that all branches of government act within the law and fulfil their constitutional obligations'*.⁵⁹

So, in this overlapping separation of powers, how was the High Court wrong to ask Parliament, which had already violated the law, to report back to the court on the progress of the legislation? The High Court did not even for a moment lay out the contents of the legislation, but only retained a supervisory role so as to cure the now 16-year delay. Contrary to what the Supreme Court said in *Re Senate*, it invoked institutional comity to avoid its constitutional duty.⁶⁰ The Supreme Court finds solace in its *Mate* (2017) decision, where it held that courts 'must exercise restraint and avoid directing other arms of government on how to perform their constitutional mandate'.⁶¹ For starters, *Mate* was an impeachment decision and should be read as such. Second, even if it were read as an authority on non-interference (even in other non-impeachment scenarios), the Supreme Court in 2022 put the brakes on an expansive interpretation and application of its *Mate* decision. In *Sonko*, the Supreme Court held that the legislative branch enjoys *Mate* protection only if it acts in accordance

with the law.⁶² But they lose that protection when violations arise:

*113. In that sense, and in the exercise of these wide political powers, both the County Assembly and the Senate cannot act outside the confines of the Constitution and the law. For to do so would invariably invite the court's intervention. To borrow the example given by the United States Supreme Court in Nixon v United States, 506 US 224 (1993); "[i]f the Senate were to act in a manner seriously threatening the integrity of its results, convicting, say, upon a coin-toss, or upon a summary determination that an officer of the United States was simply a "bad guy" ... judicial interference might well be appropriated. In such circumstances, the Senate's action might be so far beyond the scope of its constitutional authority, and the consequent impact on the Republic so great, as to merit a judicial response despite the prudential concerns that would ordinarily counsel silence". Courts are thus permitted to intervene where matters of constitutional violations arise.*⁶³

Properly understood, therefore, *Mate* does not stand for a blanket prohibition against judicial supervision of the legislative process. It is a context-specific caution against undue interference, not a license for constitutional default. The Supreme Court itself clarified that position in *Sonko*, where it recognised that legislative bodies enjoy deference only so long as they act within the confines of the Constitution. Once they depart from those confines, that deference

⁵⁷Ibid at para 55.

⁵⁸*Minister of Health and Others v Treatment Action Campaign and Others* (No 2) 2002 (5) SA 721 (CC).

⁵⁹*Doctors for Life International v Speaker of the National Assembly and Others* 2006 (6) SA 416 (CC).

⁶⁰*In the Matter of the Speaker of the Senate & another* (Advisory Opinion Reference 2 of 2013) [2013] KESC 7 (KLR).

⁶¹*Mate & another v Wambora & another* (Petition 32 of 2014) [2017] KESC 1 (KLR).

⁶²*Sonko v County Assembly of Nairobi City & 11 others* (Petition 11 (E008) of 2022) [2022] KESC 76 (KLR).

⁶³*Sonko* Ibid.

falls away and judicial intervention becomes not only permissible, but necessary.

In the present context, Parliament's prolonged and admitted failure to fulfil a constitutional obligation placed it squarely outside the protective shield contemplated in *Mate*. The High Court's limited supervisory order, requiring progress reports without dictating legislative content, was therefore entirely consistent with the logic of *Sonko*. By rejecting that approach, the Supreme Court did not apply its own precedents; it inverted them. What emerges is a doctrine of restraint unmoored from constitutional violation, one that extends deference even in the face of illegality, and in doing so, undermines the very justification upon which that deference rests.

But if the High Court erred by requiring Parliament to report back to the Court on the progress of legislation, what then are we to make of the Supreme Court's own decision in *Muruatetu*? In that case, the Court did not merely issue a supervisory order; it went further and substantively shaped the legislative agenda.⁶⁴ It expressly recommended that the Attorney General and Parliament develop legislation defining what constitutes a life sentence, even suggesting possible policy directions, including minimum terms and the conditions under which whole life sentences might apply.⁶⁵ It grounded this directive in constitutional obligations, including Article 2(6), thereby linking legislative action to Kenya's international commitments.⁶⁶

More striking still were the remedies. The Court required the Attorney General, the

Director of Public Prosecutions, and other relevant agencies to undertake a detailed professional review and to report back to the Court within twelve months. It further directed that the judgment be transmitted to the Speakers of the National Assembly and Senate, the Attorney General, and the Kenya Law Reform Commission, accompanied by a signal of 'the utmost urgency' for legislative reform (majority of which were non-parties).

If such measures did not amount to impermissible intrusion into the legislative sphere, it is difficult to see how the High Court's far more restrained order could be so characterised. The contrast is quite telling. In *Muruatetu*, the Supreme Court embraced supervision, and even normative guidance, as legitimate tools of constitutional enforcement. In the present case, it recoils from even the modest requirement of progress reporting.

In the end, a demonstrably reluctant Parliament is left effectively unchecked, met not with meaningful judicial supervision but with little more than a declaratory rebuke. The conclusion is simple: what the Supreme Court presents as restraint is nothing of the sort. It is, in substance, acquiescence, a judicial imprimatur on constitutional violation.

In the next part, I attempt to show the court's precedents endorsing the overlapping separation-of-powers doctrine and instances in which the Court issued more intrusive remedies. At some point, the Court even set out the contents of the legislation. I use that part to show that the Court's jurisprudential mindset may be shifting.

⁶⁴*Muruatetu & another v Republic; Katiba Institute & 5 others* (Amicus Curiae) (Petition 15 & 16 of 2015 (Consolidated)) [2017] KESC 2 (KLR)

⁶⁵*Muruatetu* ibid, para 96.

⁶⁶*Muruatetu* ibid, para 97.

d) A moving Court

In *Re IIEC*, the Supreme Court rejected the pure separation-of-powers ideology in favour of a partial separation of powers, or what I call the overlapping separation-of-powers doctrine. It noted that 'the essence of separation of powers, in this context, is that the totality of governance-powers is shared out among different organs of Government, and that these organs play mutually-countervailing roles. In this set-up, it is to be recognised that none of the several governmental organs functions in splendid isolation.'⁶⁷

In *Re Senate* (2013), the Supreme Court moved further and laid down our conception of separation of powers. It told us that 'our perception of the separation-of-powers concept must take into account the context, design and purpose of the Constitution; the values and principles enshrined in the Constitution; the vision and ideals reflected in the Constitution.'⁶⁸ To this end, the Court laid down a proper interpretative framework. Our idea of the separation of powers is not abstract; it serves a higher purpose. Although the Court appreciated the need to respect institutional comity and that it would not engage in unwarranted intrusions into the workings of one arm by another,⁶⁹ the Court quickly limited this general rule. It held that it would not invoke institutional comity to avoid a constitutional duty and that the Constitution mandates the courts to ensure that Parliament acts within it. When a court does so, it does not violate the doctrine of separation of powers. It is



Justice Kalpana Rawal

simply performing its solemn duty under the Constitution ⁷⁰. Writing separately, Justice Kalpana Rawal endorsed the view that Courts can intervene when Parliament does not act in accordance with the law. Rawal, while endorsing the view of the East African Court of Appeal, was more emphatic that if 'Parliament is to claim and protect its powers and internal procedures, it must act in accordance with constitutional provisions which determine its composition and the manner in which it must perform its functions.'⁷¹

But in the Tribunal's decision, the Court quickly relies on para 61 but forgets about para 62. But the reason is bare! The *Re Senate* decision does not support this recent finding. But as I have noted in the past, when the Court wants to depart, it

⁶⁷*RE IIEC, Supra.*

⁶⁸*Re Senate, Supra, para 49.*

⁶⁹*Ibid, para 61.*

⁷⁰*Ibid, para 62.*

⁷¹*Ibid, Concurring Opinion of Justice Rawal.*

does not do so expressly. I have argued that it engages in what I call the *under-the-table overruling of precedents or departure sub silentio*.⁷² I observed that 'Shockingly, the court picks sentences and paragraphs from its past decisions to show that the subsequent decisions align with those decisions, while, in the real sense, they do not.'⁷³ It is wrong for a court to read para 61 of its own decision and then ignore what it said in the latter paragraphs.

It is only Justice Njoki who, while dissenting, advocated for the view taken by the Supreme Court in the Tribunal decision. She held that the executive and parliament are elected and their powers are regularly tempered and safeguarded through elections. On the other hand, the judiciary was unelected, and they should self-regulate.⁷⁴ To her, the Court had violated the separation of powers by questioning the legislature's internal workings.⁷⁵ She concluded by noting that:

*283. This Court, I humbly submit, may not go further than to suggest this, as to delve into further details would border dangerously on giving direction to a different arm of Government on its internal processes. This would fly in the face of the doctrine of separation of powers.*⁷⁶

It is this same reasoning that the Supreme Court has now endorsed in the Tribunals case. That the court cannot give 'directions to a different arm of government'. In the Tribunals case, the Supreme Court is big on

internal processes, as Justice Njoki was in 2013.

In 2015, while still following the *Re Senate*, the Supreme Court in *Re NLC* reaffirmed the principle that separation of powers does not mean absolute separatism.⁷⁷ But rather:

This apportionment of responsibility does not invalidate the doctrine of separation of powers, but rather, redefines and consolidates the essential principle that separation is not the goal in itself, but is a vital means to assert checks upon each organ of Government, so as to achieve constitutionally-restrained governance.

The Supreme Court then endorsed a position by the High Court as follows:

210. This is well depicted in the High Court decision in the CDF Case. The Court, while taking into account the Supreme Court decision in In the Matter of the Interim Independent Electoral Commission, held (paragraph 127) that: The principle of separation of powers is at the heart of the structure of our Government; each organ is independent of [the] [others] but acting as a check and balance to the [others] and also working in concert [with the others] to ensure that the machinery of the state works for the good of Kenyans."

*211. Collaboration between different State agencies is essential, as it ensures that no State organ doubles up as implementer and overseer of operations.*⁷⁸

⁷²Joshua Malidzo Nyawa, 'Judicial Humility and Kenya's Supreme Court "Under the Table" Overruling of Precedents' (2024) 101 *The Platform for Law, Justice and Society*.

⁷³*Ibid.*

⁷⁴*Re Senate* *Supra*, Dissenting opinion of Justice Njoki Ndungu, Paras 249, 250

⁷⁵*Ibid*, para 250.

⁷⁶*Ibid.*

⁷⁷*In the Matter of the National Land Commission* (Advisory Opinion Reference 2 of 2014) [2015] KESC 3 (KLR)

⁷⁸*Ibid.*

The Supreme Court's boldest expression of separation of powers was in 2017 when it nullified the presidential election results.⁷⁹ In the end, it asked IEBC to go on a soul-searching mission, and if not, 'this court, whenever called upon to adjudicate on a similar dispute, will reach the same decision if the anomalies remain the same, irrespective of who the aspirants may be. Consistency and fidelity to the Constitution is a non-wavering commitment this court makes.'⁸⁰ It is this paragraph that reminded Justice Njoki of the *Re Senate* ghost that kept haunting her. In her dissent, she expressed her problem with this paragraph that '704. This paragraph, to my mind, is unfortunate – it is injudicious and imprudent. I reiterate, in the strongest terms, the following observation obtaining from my dissenting Judgement in *Speaker of the Senate*' where she had spoken of judicial restraint in order to avoid what she called judicial tyranny.⁸¹

It was, however, in 2020 that Justice Njoki Ndungu's quest to persuade the Court to depart from *Re Senate* became unmistakably clear. In *In the Matter of the Council of Governors*, the Court addressed the recurring impasse over the Division of Revenue Bill between the two Houses of Parliament.⁸² The question was what ought to happen in the interim. The Supreme Court proceeded to prescribe a course of action, even directing the National Assembly on what to do. The majority rendered itself as follows:

81. The National Assembly shall, for the purpose of meeting the expenditure



Justice Njoki Ndungu

necessary to carry on the services of the County Government during that year until such time as the Division of Revenue Act is assented to, authorize the withdrawal of money from the Consolidated Fund.

81. It is our view that in the event of an impasse, the percentage of the money to be withdrawn be based on the equitable allocation to Counties in the Division of Revenue Act of the preceding financial year. In keeping with the spirit of article 222 (2) (b) of Constitution, the money to be withdrawn shall be 50% of the total equitable share allocated to the Counties in the Division of Revenue Act.

82. Assuming for purposes of argument, that 50% of the total equitable share

⁷⁹*Odinga & another v Independent Electoral and Boundaries Commission & 2 others; Aukot & another (Interested Parties); Attorney-General & another (Amicus Curiae)* (Presidential Election Petition 1 of 2017) [2017] KESC 42 (KLR)

⁸⁰*Ibid.*

⁸¹*Ibid.*, Dissenting opinion of Justice Njoki Ndungu.

⁸²*In the Matter of Council of Governors & 47 others* (Reference 3 of 2019) [2020] KESC 65 (KLR).

allocated to Counties in the preceding year exceeds the total equitable share proposed in the Division of Revenue Bill, then the percentage to be withdrawn from the Consolidated Fund shall not be less than 15% of all revenue collected by the National Government.

83. It is our perception that this way forward, safeguards the functionality of County Governments, while affording Parliament an opportunity to resolve the impasse through a second mediation under article 113 of Constitution. It preserves the authority of Constitution by protecting its principles and values. Finally, it promotes the doctrine of separation of powers by locating the solution to a potential impasse squarely within the arena of Parliament. Our opinion in this regard, is inspired by a contextual reading of the provisions of Constitution as a living Charter.⁸³

Here, then, was a Court sufficiently assertive to intervene in the face of an impasse squarely within Parliament's domain. Revenue allocation is not a judicial function; it is fundamentally a legislative one and, given its political character, it inevitably implicates the Executive as well. Yet the Supreme Court did not hesitate to direct the National Assembly on what to do, even indicating that its guidance was binding. Still, this was not regarded as an impermissible intrusion into Parliament's domain. Rather, the Court maintained that its decision promoted the separation of powers.

So when did it become acceptable for the Supreme Court to tell Parliament what to

do, how to share revenue, how to authorise withdrawals from the Consolidated Fund, and even what percentages to apply? And when did it become so objectionable for the High Court merely to require Parliament to report back on the progress of legislation that it had taken an inordinately long time to enact?

The answer may lie in Justice Njoki Ndungu's dissent. She was forthright that the majority had gone beyond what she described as the limits of judicial power and ventured into the domain of the political branches. First, she urged the Court to revisit *Re Senate*, a decision she had consistently taken issue with. Second, she argued that the majority's proposal was untenable because, "in the simplest terms, such a proposal renders itself as a major breach of the doctrine of separation of powers" (para 193).⁸⁴ Third, she maintained that the allocation of revenue falls within the remit of the Executive and Parliament, and that the Court's directive was not 'only an attempt to amend the Constitution, but is tantamount to supervising the work of Parliament and endangering the institutional comity between the three arms of government.'⁸⁵

Justice Njoki concluded as follows:

194. It therefore follows that although the bench-majority are of the view that they are protecting Constitution, they are in fact, in my opinion, re-writing Constitution and dare I say, for lack of a better term, meddling, with a political and budgetary process in which they have no expertise. The simple solution for this issue is to point out to Parliament that

⁸³Ibid.

⁸⁴Ibid, Dissenting opinion of Justice Njoki Ndungu.

⁸⁵Ibid, Para 193.

*they need to solve this with finality by enacting relevant legislation, including - if necessary - by amending Constitution. The Supreme Court cannot supplant this Parliamentary role through a judgment edict of its own.*⁸⁶

She went further and characterised the decision as 'woefully misinformed'.⁸⁷

The idea of strict functional exclusivity and the unrestrained isolation of the three arms did not, therefore, find favour with the majority of the Supreme Court. Put differently, the notion that any exercise of checks and balances amounts to impermissible meddling, and that the Court should adopt a posture of rigid judicial restraint, was largely rejected by the majority and found favour only with Justice Njoki. It is she who most clearly advanced a Montesquieuan conception of separation of powers. For the majority, however, the Court could nudge and, where necessary, steer the other arms back toward constitutional compliance. In doing so, they insisted, the Court was neither supervising nor controlling the political branches, much to Justice Njoki's chagrin, but merely ensuring that 'the machinery of the state works for the good of Kenyans'.⁸⁸ This position rests on the premise, as observed above, that the three arms are not 'hermetically sealed' from one another, but instead operate with a degree of functional overlap. The Majority's conception of separation of powers has also been repeated in several other decisions,

including the more intrusive *Muruatetu* (discussed above),⁸⁹ *Shahbal*,⁹⁰ *Langat*,⁹¹ *Katiba* (Njoki dissenting),⁹² *LSK* (Njoki dissenting)⁹³ and *Sonko*.⁹⁴

In CDF, 2022, the Supreme Court endorsed the modern conception of separation of powers.⁹⁵ Separation of powers is never conceived as a perfect, hermetically sealed division of responsibility among the three branches of government. Further, the doctrine of separation of powers ought not to be treated or viewed as an end in itself but aimed at the fulfilment of the form of governance and vision of the state that Kenyans aspired to, as represented in the national values and principles of governance under Article 10 of the Constitution.⁹⁶ The test on whether the doctrine of separation of powers had been violated was then said to be two-fold:

- a. Whether the mandate, functions or powers of the subject state agency, or institution, unjustifiably strays into the nucleus, core functions, or pre-eminent domain that are the exclusive competence of another branch of government from a functional point of view? And
- b. Whether the exercise of the subject assigned mandate, functions, or powers will harm or threaten the realisation of the national values and principles articulated in the Constitution?

⁸⁶Ibid, Para 194.

⁸⁷Ibid, Para 225.

⁸⁸*In the Matter of Council of Governors & 47 others* (Reference 3 of 2019) [2020] KESC 65 (KLR).

⁸⁹*Muruatetu* supra.

⁹⁰*Shahbal v Independent Electoral and Boundaries Commission & 3 others* (Petition 21 of 2014) [2014] KESC 1 (KLR)

⁹¹*Langat v Kericho County Assembly Committee on Appointments & 2 others* (Petition 28 of 2019) [2020] KESC 34 (KLR)

⁹²*Katiba Institute v Attorney General & 9 others* (Petition 17 of 2020) [2023] KESC 47 (KLR)

⁹³*Law Society of Kenya v Attorney General & 4 others* (Petition 45 of 2019) [2023] KESC 19 (KLR)

⁹⁴*Sonko v County Assembly of Nairobi City & 11 others* (Petition 11 (E008) of 2022) [2022] KESC 76 (KLR)

⁹⁵*Institute for Social Accountability & another v National Assembly & 5 others* (Petition 1 of 2018) [2022] KESC 39 (KLR)

⁹⁶Ibid.



Karl Loewenstein

The proper question, as laid down in CDF, is not whether there is a strict separation of powers, but rather what scheme of separation of powers is consistent with the Constitution's underlying goals. Viewed from this perspective, it is difficult to see how the High Court strayed into Parliament's exclusive domain. In all honesty, requiring Parliament to report back to the Court cannot qualify as straying into another's exclusive domain.

Second, it is equally unclear how such reporting could harm the realisation of

national values and principles. On the contrary, requiring progress reports would promote, rather than undermine, those values. It would help to revive a stalled legislative process and, in doing so, entrench accountability, transparency, good governance, and the protection of human rights.

The Supreme Court's Tribunal decision, therefore, lacks a firm jurisprudential foundation. Its own precedents do not support the outcome it reached. One is left with a troubling impression: that the dissenting voice of yesterday has become the majority voice of today. What we are witnessing is a moving Court, one that appears to be retreating from the modern, functional conception of separation of powers it once endorsed, and edging back toward a rigid, Montesquieuan model.

The consequence is that the Supreme Court will oversee the demolition of the Constitution and what it stands for. It will preside over the emptying of the Constitution's transformative promise and the weakening of the institutional mechanisms designed to secure accountability. But the Judiciary itself will not be spared when the Constitution is hollowed out. Its Montesquieuan model of restraint will not save it.

As Karl Loewenstein warned in 1937, the tolerant features of a constitutional order can become 'the Trojan horse by which

⁸⁶Ibid, Para 194.

⁸⁷Ibid, Para 225.

⁸⁸*In the Matter of Council of Governors & 47 others* (Reference 3 of 2019) [2020] KESC 65 (KLR).

⁸⁹*Muruatetu* supra.

⁹⁰*Shahbal v Independent Electoral and Boundaries Commission & 3 others* (Petition 21 of 2014) [2014] KESC 1 (KLR)

⁹¹*Langat v Kericho County Assembly Committee on Appointments & 2 others* (Petition 28 of 2019) [2020] KESC 34 (KLR)

⁹²*Katiba Institute v Attorney General & 9 others* (Petition 17 of 2020) [2023] KESC 47 (KLR)

⁹³*Law Society of Kenya v Attorney General & 4 others* (Petition 45 of 2019) [2023] KESC 19 (KLR)

⁹⁴*Sonko v County Assembly of Nairobi City & 11 others* (Petition 11 (E008) of 2022) [2022] KESC 76 (KLR)

⁹⁵*Institute for Social Accountability & another v National Assembly & 5 others* (Petition 1 of 2018) [2022] KESC 39 (KLR)

⁹⁶Ibid.

the enemy enters the city.⁹⁷ Paraphrased for present purposes, an uncritical fidelity to judicial restraint risks playing exactly that role. And once the enemy is within the gates, it will not matter whether the goat is fat or skinny, or whether the target is sheep or cow; all will be consumed, the Judiciary included. Even if the enemy, for Christ's sake, spares the Judiciary, Kenyans who are obtaining victories in court with no meaningful effect or tangible benefit will soon realise that their rights and the Constitution have been rendered illusory by the judiciary, and this can only 'contribute to the long-term illegitimacy of the very constitutional enterprise' with which Kenya engaged in 2010.⁹⁸ So, in these circumstances, I hope, against hope, that the Court will correct course before the irreversible harm happens.

The dangers of Koome's court's conception of collaborative constitutionalism

As observed in the introduction, Koome's Court presents a danger to constitutionalism as we know it. It adopts a highly unrestrained and unbridled version of dialogical, institutional, and collaborative constitutionalism. Those who advocate for collaborative constitutionalism appreciate that the theory means only that there are no supremacy battles and that the organs share the role of realising the constitution. At its core, the theory advocates a middle ground between pro-courts and pro-legislatures. But this theory is not without limits. Kavanaugh, one of the mothers

of this theory, argues that some have misunderstood it (and I add, including the Supreme Court of Kenya). The theory does not mean 'cosy, consensus, nor does it mean abandoning robust, independent judicial review.'⁹⁹

Gardbaum, on the other hand, argues that the theory does not take note of the 'continuing growth and appeal of authoritarian populism and democratic backsliding around the world.'¹⁰⁰ The theory assumes that all branches act in good faith and are inclined to do good. It does not account for a captured parliament in an 'executive declining' set-up. In such a set-up, the idea of collaborative constitutionalism becomes limited, and courts are asked to be less deferential. The Constitutional Court of Colombia, for instance, observed in 1992 that in such a setup, the courts play a 'compensatory role' by strengthening judicial power.¹⁰¹

In Kavanaugh's terms, the courts are presented as a 'catalyst,' foregrounding the idea of 'judge as nudge.'¹⁰² In such a set-up, the courts use judicial alerts, prods and pleas, soft suggestions, and judicial advice. This by all means does not mean what the Supreme Court wants us to believe that the nudging only stops at asking the Parliament to pass a bill. The nudging and prodding must also include retaining the jurisdiction to ask, how far? Why have we stalled? What can we do to help? This is collaborative constitutionalism since the Judiciary remains a helpful institution to the legislature in the joint enterprise!

⁹⁷Karl Loewenstein, 'Militant Democracy and Fundamental Rights I' (1937) 31(3) *American Political Science Review* 417.

⁹⁸Dennis Davis, 'Socio-Economic Rights in South Africa: The Record after Ten Years' (2004) 2 *New Zealand Journal of Public and International Law* 47.

⁹⁹Aileen Kavanagh, 'Defending the Collaborative Constitution' (2024) 35(3) *King's Law Journal* 555

¹⁰⁰Stephen Gardbaum, 'Collaborative and Abusive Constitutionalism' (2024) 35(3) *King's Law Journal* 551.

¹⁰¹*Decision T-406/92, Writ for the Protection of Constitutional Rights filed by José Manuel Rodríguez Rangel v Enrique Chartuny González, Manager of the Public Works of Cartagena* (Colombian Constitutional Court, 1992).

¹⁰²Aileen Kavanagh, 'Courting Collaborative Constitutionalism' in Aileen Kavanagh, *The Collaborative Constitution: Post-Sovereign Constitutionalism in Practice* (Cambridge University Press 2023) ch 10.

Collaborative constitutionalism does not remove the interdependence as the Supreme Court does. Neither does the collaborative enterprise reduce the role of judges to that of 'an assistant to carry out mundane, mechanical tasks, rather they are capable of performing their own distinct tasks in a joint endeavour.'¹⁰³ What it does is replace the concept of constitutional showdowns with a constitutional slowdown. Constitutional showdowns focus on frictions, while the orientation to constitutional slowdowns asks 'the key actors to channel their actions through the required institutional pathways, and discipline their disagreements by respecting the constitutional rules of the game.'¹⁰⁴ It cannot be said that asking parliament to report back to court on the status of the bill is a constitutional showdown. The High Court correctly limited itself by leaving Parliament to determine the bill's content, and, as part of the constitutional slowdown, asked to be updated on that progress. This aligns with the theory of collaborative constitutionalism.

So, even though Koome's court might seem to promote a collaborative, dialogical constitutionalism or even be institutionalist, its conception is a bit off. It is a Montesquian court. In this Court, comity is given an upper hand over contestation. Yet in a constitutional collaborative enterprise, Comity and contestation are not mutually exclusive activities and checks and

balances are partly constitutive of that collaborative enterprise.¹⁰⁵ The static conception of separation of powers (pure view) adopted by the Koome's Court is not part of collaborative constitutionalism as we know it. In a joint enterprise, javascript:;separation of powers has dual dimensions: division of labour and checks and balances. These dimensions are both underpinned by the value of coordinated institutional effort in the service of good government.¹⁰⁶ This is the separation of powers in a joint enterprise.

Conclusion: The Reign of Futilitarian Constitutionalism

Reading the Finance Act Judgment, where the Supreme Court asked lower courts to mandatorily consider suspending a declaration of invalidity any time they issue a declaration and where there will be *chaos* or the 'government disadvantaged'¹⁰⁷ and then now combining it with its new finding in the Tribunal decision that Courts should not issue structural interdicts that require parliament to report back (or timelines) to control because this will be intruding into the internal affairs of parliament marks a sad turn events, the death of constitutional remedies in Kenya. Kenson has described this consequence as follows:

Once we remove timelines from suspended declarations, and we cannot retain them if a structural interdict could

¹⁰³Masrur Salekin, 'Collaborative Constitutionalism and Courts as Partners in the Joint Enterprise of Governing' (2023) 34(2) *Dhaka University Law Journal* 115.

¹⁰⁴Aileen Kavanagh, 'Collaborative Constitutionalism as Practice and Principle' (5 November 2025) SSRN <https://ssrn.com/abstract=6076866>

¹⁰⁵Aileen Kavanagh, 'Introduction: The Call for Collaboration' in *The Collaborative Constitution* (Cambridge University Press 2023) 1.

¹⁰⁶Aileen Kavanagh, 'The Constitutional Separation of Powers' in David Dyzenhaus and Malcolm Thorburn (eds), *Philosophical Foundations of Constitutional Law* (Oxford University Press 2016).

¹⁰⁷I write about the Finance Act decision in a three part series: Joshua Malidzo Nyawa, 'A Constitutional Travesty: Unpacking the Kenyan Supreme Court's Finance Act Judgment (Part 1) (Guest Post)' (7 November 2024) *Constitutional Law and Philosophy* <https://indconlawphil.wordpress.com/2024/11/07/a-constitutional-travesty-unpacking-kenyas-supreme-court-finance-act-judgment-part-1/>; Joshua Malidzo Nyawa, 'A Constitutional Travesty - II: Unpacking the Kenyan Supreme Court's Finance Act Judgment (Guest Post)' (30 July 2025) *Constitutional Law and Philosophy* <https://indconlawphil.wordpress.com/2025/07/30/a-constitutional-travesty-ii-unpacking-the-kenyan-supreme-courts-finance-act-judgment-guest-post/> and Joshua Malidzo Nyawa, 'A Constitutional Travesty III: Unpacking the Kenyan Supreme Court's Finance Act Judgment: A Riposte to Kenson Mutethia' (20 September 2025) *Joshua Malidzo Nyawa (WordPress blog)* <https://joshuamalidzonyma.wordpress.com/2025/09/20/a-constitutional-travesty-iii-unpacking-the-kenyan-supreme-courts-finance-act-judgment-a-riposte-to-kenson-mutethia/>

*not issue in the Tribunals transition case, then both structural interdicts and suspended declarations deployed to legislative processes become hollow reliefs without any practical consequence. At that point, we cannot, at least in good conscience, any longer call them effective, or God forbid, appropriate remedies under Article 23 of the Constitution. To do so undermines the integrity of the Constitution.*¹⁰⁸

I go on to say that the Supreme Court has now given birth to what I call a futilitarian constitutionalism because it 'flips the Constitution on its head' for its promises are essentially nullified.¹⁰⁹ By futilitarian constitutionalism, I refer to a jurisprudence that acknowledges constitutional violations yet withholds the means to remedy them; that proclaims duty while insulating disobedience; that performs the language of enforcement while ensuring its futility. In essence, the Constitution provides for rights, and the court acknowledges violations but leaves them unaddressed. This is what the Chief Justice Emeritus Maraga meant when he said that if a constitution provides for the respect of rights but has no effective mechanism for implementing and enforcing those rights, it is a 'hollow Constitution with no constitutionalism.'¹¹⁰

The concept of a hollow constitution without constitutionalism, or what I term futilitarian constitutionalism, is a sin that is antithetical to the purpose of the Constitution, which mandates that courts fashion remedies when constitutional infringements occur.

As such, we cannot have rights without remedies. Justice Frank Shields, operating under the former restrictive constitutional dispensation, rejected the idea of futilitarian constitutionalism, despite the constitution severely limiting the remedial function of Judges. He held that '*the Constitution of this Republic is not a toothless bulldog, nor is it a collection of pious platitudes. It has teeth and, in particular, those (teeth) found in Section 84.*'¹¹¹ How can the Supreme Court, operating under a better constitutional dispensation, walk us back to the Nyayo constitutional era?

The call in this paper is not unbounded judicial adventurism. No. Courts must remain attentive to institutional limits. They must avoid overreach. They must respect the roles of other branches. But they must also fulfil their constitutional mandate. Where rights are violated, they must provide effective remedies. I dare say that the Supreme Court should not return us to what in the Constitutional law world is known as the *Lochner problem*, when, in reaction to the *Lochner* decision, judges embraced unmatched judicial restraint.

What the Supreme Court, however, does is that it 'kneecaps the Judiciary's authority' to stop violations effectively, hamstring the Judiciary to stop the executive and parliament's illegal actions effectively, and entrenches the idea that the Judiciary should fold its arms and watch as the Executive and Parliament mock the Constitution.¹¹² But this exceedingly deferential, handoff approach lacks

¹⁰⁸Kenson Mutethia, 'Hollowing the Essence of Deploying Structural Interdicts and Suspended Declarations in Legislative Processes: A Critique of the Tribunals Transition Case' (15 April 2026) *Constitutional Law and Philosophy* <https://indconlawphil.wordpress.com/2026/04/15/hollowing-the-essence-of-deploying-structural-interdicts-and-suspended-declarations-in-legislative-processes-a-critique-of-the-tribunals-transition-case-guest-post/>

¹⁰⁹Trump, President of the United States, et al v CASA, Inc., et al, No 24A884 (US Supreme Court, 2024), opinion of Justice Jackson.

¹¹⁰David Maraga, 'Chief Justice Maraga's Speech at the 2019 Oxford Union Conference' (4 June 2019) *The Elephant* <https://www.theelephant.info/documents/chief-justice-maragas-speech-at-the-2019-oxford-union-conference/>

¹¹¹*Marete v Attorney-General* [1987] KEHC 85 (KLR)

¹¹²Trump, President of the United States, et al v CASA, Inc., et al, No 24A884 (US Supreme Court, 2024), opinion of Justice Sotomayor.

any support in the Constitution. It is the Supreme Court's self-limitation of the powers of the judiciary. The Supreme Court had an opportunity in this case to reaffirm the centrality of remedies. It could have clarified the conditions under which structural interdicts are warranted, while preserving their practical availability. It could have engaged more deeply with the nature of the violation and the history of non-compliance. It could have crafted a remedy that balanced institutional concerns with the need for enforcement. It did not. Instead, it chose restraint over effectiveness and deference over accountability. In the end, the Supreme Court effectively and surreptitiously stymied the Judiciary's core duty to protect and defend constitutional rights.¹¹³

The danger here is futilitarian constitutionalism, and in the words of Chief Justice Marshall, the Supreme Court has allowed the Constitution itself to become a solemn mockery.¹¹⁴ Courts will not refuse to recognise rights. It is that they will recognise them, and then decline to make them matter. In setting aside the structural interdict, the Supreme Court affirms a constitutional violation while withdrawing the only remedy capable of addressing it. In other words, the Supreme Court separates the violation from the remedy. The result is a form of constitutionalism that is rhetorically robust but practically hollow. Although rights are proclaimed, they are not enforced.

This is what I call the wronging of rights: not through outright denial, but through the quiet erosion of remedies. To borrow from Justice Kenyatta Nyirenda of Malawi,

'let us give constitutionalism a chance to work in Malawi. Do not try to be clever and half.¹¹⁵ Read Kenya for Malawi. We must resist the temptation to be clever by halves. Either the Constitution is taken seriously, or it is not. What must not be permitted is a jurisprudence that preserves the form of rights while extinguishing their force. That is the essence of futilitarian constitutionalism.

In the end, as Roach warned while writing about America,¹¹⁶ I end with that plagiarised warning that: If the rule of law dies in Kenya and authoritarianism takes root, the story will be told in no small part through the death of remedies, and the Supreme Court of Kenya will bear no small measure of responsibility for both the death of remedies and the birth of futilitarian constitutionalism.

This is so because the Supreme Court appears to ignore Justice Robert Jackson's 1952 enduring warning that even if the institutions meant to preserve a free government may be 'destined to pass away.' But 'it is the duty of the Court to be last, not first, to give them up.'¹¹⁷ The Supreme Court has, however, made the tragic choice of being the first to give them up, and for that reason, this piece is a necessary call for the Court to return to first principles.

Joshua Malidzo Nyawa is an Advocate of the High Court of Kenya and a Litigation Counsel for Rule of Law and good Governance at Katiba Institute.

¹¹³Ibid.

¹¹⁴*United States v Peters* 9 US (5 Cranch) 115, 136 (1809) (US Supreme Court).

¹¹⁵*State (oao Lin Xiaoxiao & Ors.) v The Director General - Immigration and Citizenship Services & Anor.* (Judicial Review 19 of 2020) [2020] MWHC 5 (3 April 2020).

¹¹⁶Kent Roach, 'Book Review: A World Rich in Rights but Poor in Remedies' (2022) 19(1) *Journal of Law & Equality* 71

¹¹⁷*Youngstown Sheet & Tube Co et al v Sawyer* 343 US 579 (1952) (US Supreme Court)



Bespoke Thank You Cards for **Businesses**



In business, trust and reputation matter. **A handwritten thank you card is a simple, powerful way to leave a lasting impression.** Show your clients and partners you value them.

At **Soin Studio**, we create **elegant, personalised cards** that convey genuine **appreciation** and reinforce your commitment to relationships. Our cards are **perfect for closing a sale, sealing a deal, or simply showing ongoing appreciation.**



In a world of emails, a handwritten note still seals the deal.

Machine-made pleadings and Constitutional rights: An analysis of *Nayan Mansukhlal Savla v Commission on Administrative Justice* HCJR Misc/E120/2025



By Kennedy Ogeto, SC

“The forms of action we have buried, but they still rule us from their graves.”

— F W Maitland, *The Forms of Action at Common Law: A Course of Lectures* (2nd edn, Cambridge University Press 1965) 2.

1. Introduction

On 16th April 2026, Justice J. Chigiti (SC) of the Milimani High Court delivered a ruling that became, almost overnight, one of the most discussed judicial pronouncements in recent Kenyan legal history. The case, *Nayan Mansukhlal Savla v Commission on Administrative Justice* HCJR Misc/E120/2025,¹ arose from a judicial review application concerning alleged failures by the Commission on Administrative Justice (CAJ) to respond to the respondent's access to information complaints. What began as a relatively contained procedural



Justice John Chigiti

dispute concerning service of process and CAJ's prolonged inaction transformed into something quite different when the court elected to treat the respondent's admitted use of AI and digital research tools as the decisive issue in the litigation.²

The ruling set aside a judgment delivered on 23rd December 2025, struck out the respondent's pending application dated 20th January 2026, condemned the

¹Nayan Mansukhlal Savla v Commission on Administrative Justice HCJR Misc/E120/2025 (Milimani High Court, Chigiti J, 16 April 2026).

²ibid.

respondent to pay costs, and imposed a personal bar prohibiting him from filing any machine-generated pleadings in any court in Kenya unless there is a law in Kenya allowing or providing for the drafting using artificial intelligence tools.³ This article examines that ruling on its constitutional and doctrinal merits.

The court's concern about the integrity of judicial proceedings and the accuracy of court documents is entirely legitimate. However, those concerns do not support the specific conclusions that the ruling reaches. The holding that AI-assisted drafting per se constitutes an abuse of court process in the complete absence of any identified fabrication, false citation and demonstrated prejudice is unsupported by Kenyan law. The order imposing a Kenya-wide personal bar on the respondent overshoots the jurisdictional authority of a single High Court judge by a considerable margin. And the court's treatment of Article 48 of the Constitution of Kenya 2010 on the right of access to justice inverts that provision against its own constitutional purpose. The questions raised by HCJR Misc/E120/2025 are not narrow ones. They go to the conditions under which unrepresented citizens may participate meaningfully in litigation and the extent to which procedural rules may be construed to exclude tools that were unknown at the time of their enactment. These are questions of genuine constitutional significance.

2. Facts, procedural history, and holding

2.1 Background and proceedings

The respondent, a self-represented litigant, had filed numerous complaints with CAJ

under the Access to Information Act and its administrative justice mandate. When those complaints remained unresolved to his satisfaction, he initiated judicial review proceedings at the Milimani High Court in September 2025. His originating motion was dated 24th September 2025 where he subsequently filed an amended originating motion on 3rd December 2025, following the court's grant of leave to amend.⁴

CAJ was served electronically, via its official email addresses on 8th October 2025. The commission acknowledged receipt by email on 9th October 2025. Despite that acknowledgment, CAJ filed no response within the court's directed timelines. The amended originating motion was similarly served on 4th December 2025 by email to CAJ's official addresses. CAJ again filed nothing. On 23rd December 2025, the court delivered judgment in the respondent's favour in CAJ's absence.

CAJ appeared through counsel on 10th February 2026 and received directions on filing timelines in the post-judgment phase. It still filed no response. On 17th March 2026, CAJ filed a Notice of Motion seeking to set aside the December 2025 judgment and to stay all proceedings, including the respondent's pending application of 20th January 2026. The motion was filed only after the court had fixed the ruling date on the respondent's pending application, a timing the respondent characterised as strategically calculated to derail imminent relief.

2.2 The AI issue arises

CAJ's supporting affidavit which was sworn by Daniel Mwangi Karomo on

³*Savla v CAJ* (n 1), paras 91 and 98.

⁴*Savla v CAJ* (n 1), para 3.



AI-drafted pleadings refer to legal documents—such as statements of claim, defences, petitions, affidavits, or submissions—that are generated or assisted by artificial intelligence tools rather than written entirely by a human lawyer.

17th March 2026, included an allegation that the respondent had generated his pleadings through artificial intelligence. The respondent did not deny using digital tools. He acknowledged that he had used ordinary digital tools including legal research tools to assist in drafting, but emphasised that he had personally reviewed, edited, and adopted every document, and that he remained personally responsible for the accuracy of all citations and factual statements on oath. He further demonstrated that his pleadings contained no fabricated cases, no false citations, and no invented quotations.

Despite CAJ's failure to produce any forensic analysis, expert report, or identified inaccuracy, the court elected to treat the AI allegation as its primary basis for relief. The substantive grounds of the set-aside application, whether CAJ had been properly served and whether its months of inaction

constituted sufficient cause, were largely displaced.

2.3 The holding

Chigiti J made the following orders and findings. First, the court held that drafting pleadings using AI tools or unknown tools not provided for under the Civil Procedure Rules amounts to an abuse of court process. Second, the court set aside the judgment of 23rd December 2025 in its entirety and struck out the respondent's application. Third, the court issued a personal bar prohibiting the respondent from filing any machine-generated pleadings in any court in Kenya unless there is a law in Kenya, allowing or providing for the drafting using artificial intelligence tools. Fourth, the respondent was condemned to pay costs.

The court acknowledged in its closing paragraph that technology is a powerful social economic growth tool when it is harnessed within a legal framework and invited the Rules Committee to consider amending the Civil Procedure Rules to embrace technology and artificial intelligence drafting rules through public participation. The tension between that acknowledgment and the preceding blanket prohibition is one of the ruling's most striking features.

3. The court's reasoning on AI-drafted pleadings

3.1 The Civil Procedure Rules framework

Chigiti J anchored the court's reasoning in Order 2 of the Civil Procedure Rules. Order 2 governs the formal requirements of pleadings. Paragraphs are to be numbered consecutively, each allegation should be contained in a separate paragraph, and a pleading must set out material facts in summary form without incorporating

the evidence by which those facts are to be proved.⁵ The court treated these requirements as establishing a universal standard that all litigants must observe and as providing the normative basis for prohibiting the use of tools not contemplated by the rules. The court opined that the Civil Procedure Rules set the only permissible drafting standard, those rules do not mention AI or digital drafting tools and therefore, any use of such tools departs from the only permissible standard and is unlawful. The reasoning does not withstand scrutiny.

3.2 The Constitutional framework invoked

Chigiti J drew on three constitutional provisions. Article 10, which enshrines the rule of law and good governance as national values, was cited to support the proposition that uniformity of pleading standards serves constitutional democracy.⁶ Article 27, which guarantees equality and freedom from discrimination was invoked in support of the proposition that allowing a self-represented litigant to use AI tools gives him an unfair advantage over the institutional party represented by trained advocates.⁷ Article 48, the right of access to justice was also deployed as a ground for restricting the respondent's use of available digital tools, on the basis that AI drafting amounts to an affront to access to justice.⁸

3.3 The comparative materials relied upon

The ruling drew on two foreign decisions and a secondary commentary. In *Park v*

Kim, 91 F.4th 610 (2d Cir 2024), the United States Court of Appeals for the Second Circuit sanctioned an attorney who had cited non-existent cases generated by ChatGPT without reading or verifying the authorities cited.⁹ In *Usherson v Bandshell Artist Management*, the court held that sanctions could not be imposed under the court's inherent authority absent clear and convincing evidence that the party had knowingly submitted materially false or misleading material.¹⁰ The court also quoted commentary by Anthony Petruzzi and Helena Guye in Reuters on the capabilities of generative AI in legal practice.¹¹

Chigiti J concluded that the court had been misled into embracing pleadings which were machine generated and that a judgment flowing from this illegal process cannot stand. The court added that the respondent had stolen a match against CAJ and had insulted the court by failing to disclose his use of AI at the outset.

3.4 The personal bar

The most remarkable element of the ruling is the prospective order at paragraph 98, directing that the respondent is hereby barred from filing any other pleadings in any court which are machine generated, unless there is a law in Kenya, allowing or providing for the drafting using artificial intelligence tools. This order was issued without identifying any jurisdictional authority for a single High Court judge to impose such a prohibition.

⁵Civil Procedure Rules 2010 (Legal Notice No 151 of 2010), Order 2 rules 2 and 3.

⁶Constitution of Kenya 2010, art 10(2)(a)-(c).

⁷*ibid*, art 27.

⁸*ibid*, art 48.

⁹*Park v Kim* 91 F.4th 610 (2d Cir 2024) 612-16.

¹⁰*Usherson v Bandshell Artist Management* No 19-CV-6368 (JMF), 2020 WL 3483661 (SDNY 26 June 2020).

¹¹Anthony Petruzzi and Helena Guye, 'The perils of dabbling: AI and the practice of law' Reuters Legal News (11 September 2023) <<https://www.reuters.com/legal/legalindustry/perils-dabbling-ai-practice-law-2023-09-11/>> accessed 24 April 2026.

4. Critical analysis: Constitutional and procedural concerns

4.1 The Regulatory Vacuum Cannot Suspend a Constitutional Right

The Chigiti ruling adopts what may be called a *legislative permission standard* for constitutional rights. At paragraph 85, the court reasons that because the Rules Committee has not amended the Civil Procedure Rules to accommodate AI-assisted drafting, and because no Kenyan statute expressly permits such use, the respondent's reliance on AI tools is impermissible.¹² The position is repeated at paragraph 98, where the respondent's future ability to file machine-generated pleadings is conditioned on there being a law in Kenya, allowing or providing for the drafting using artificial intelligence tools.¹³ This logic inverts the constitutional hierarchy. Rights under the Bill of Rights belong to individuals and are not granted by the State. They apply to all law, bind all State organs, and must be enjoyed to the greatest extent consistent with their nature.¹⁴ Article 20(3)(a) directs courts to develop the law where existing provisions do not give effect to rights, and Article 21(1) imposes an immediate duty on all State organs to observe, respect, protect, promote and fulfil those rights.¹⁵ On the face of the constitutional text, enjoyment of rights does not await legislative indulgence.

The limitation clause in Article 24 confirms this structure. A right or fundamental freedom shall not be limited except by law, and even then only where the limitation is

reasonable and justifiable in an open and democratic society.¹⁶ Any restriction must be assessed with reference to the nature of the right, the importance and extent of the limitation, the prejudice to others and the availability of less restrictive means. Treating legislative silence as a de facto prohibition is conceptually the opposite of a limitation by law. The absence of a statute mentioning AI-assisted drafting is not a legal limit on the respondent's access to the courts. In *Coalition for Reform and Democracy (CORD) & 2 others v Republic of Kenya & 10 others* the High Court was explicit that the State cannot abrogate or restrict constitutional rights by mere inaction or failure to enact legislation which means a regulatory gap is not a lawful limitation.¹⁷ Substantive limits on rights require affirmative legislative action that meets the Article 24 test, not the failure of a rule-making body to keep pace with technology.

Kenyan jurisprudence after 2010 has consistently treated constitutional rights as self-executing. In *Njoya & 6 others v Attorney General & 3 others* the High Court held that the Constitution, as the supreme law, is not to be interpreted as an ordinary statute and that the absence of a procedural framework does not render a constitutional right non-justiciable.¹⁸ The Court of Appeal in *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* underscored that the main requirement in constitutional litigation is precision in identifying the right allegedly violated, not proof that Parliament has enacted an implementing statute before the right may be relied upon.¹⁹ The Supreme

¹²*Savla v CAJ* (n 1), para 85.

¹³*ibid*, 98.

¹⁴Constitution of Kenya 2010, art 19(3)(a).

¹⁵*ibid* art 20(3)(a).

¹⁶*ibid* art 24(1).

¹⁷*Coalition for Reform and Democracy (CORD) & 2 others v Republic of Kenya & 10 others* eKLR paras 56–58.

¹⁸*Njoya & 6 others v Attorney General & 3 others* Misc Civ Appl No 82 of 2004 eKLR.

¹⁹*Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* eKLR (CA) para 41, applying *Anarita Karimi Njeru v Republic* eKLR.

Court in *Communications Commission of Kenya & 5 others v Royal Media Services Ltd & 5 others* applied constitutional rights directly to a dispute involving broadcast technology in circumstances where the regulatory regime was incomplete.²⁰ These authorities rest on a shared premise: regulatory incompleteness is not a bar to constitutional adjudication.

4.2 The absence of legal basis for the finding

The threshold objection to the ruling is that its main holding is not supported by any Kenyan law. The Civil Procedure Rules, including Order 2, do not prohibit the use of digital tools in preparing pleadings. They prescribe formal requirements for the content and structure of pleadings. A pleading drafted with the assistance of a word processor, a legal research database, a spell-checker, and a generative AI tool either meets those requirements or it does not. The rules do not address the method of production.

The law requires demonstrated prejudice arising from the impugned content, and the mere disclosure of the method of drafting, absent any actual falsehood or fabrication, cannot in law find a basis for striking out pleadings or setting aside a judgment.²¹ Chigiti J made no finding of any specific falsehood or invented quotation. The respondent brought this to the court's attention repeatedly and the court did not contradict it.

Treating the tool of production as equivalent to a defect in the product conflates two

entirely different legal questions. The operative question in any allegation of pleading abuse is whether the document contains material that is false. That question was never answered in the affirmative.

4.3 Article 48 inverted against its own purpose

Perhaps the most constitutionally troubling aspect of the ruling is its treatment of Article 48 which states that the State shall ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice.²² The article sits within Chapter Four of the Constitution, which establishes the Bill of Rights and calls for a purposive and generous interpretation of each right.

The purpose of Article 48 is to remove obstacles to judicial participation. Kenyan courts and scholars have interpreted Article 48 as obliging the State, which includes the judiciary, to take positive steps to make judicial processes practically accessible to all persons, particularly those without legal representation. This can be seen in cases such as for example in *Kituo cha Sheria v Kenya National Commission on Human Rights* and related access-to-justice scholarship from authors such as Gikonyo Wachira and others.²³ A self-represented litigant who uses available digital tools to research the law and present submissions coherently is doing precisely what Article 48 envisions.

To deploy Article 48 as authority for the proposition that such a litigant commits an abuse of process is to read the provision

²⁰*Communications Commission of Kenya & 5 others v Royal Media Services Ltd & 5 others* eKLR (SC) para 211.

²¹Rebecca Crootof and Matthew Kugler, 'Rule 11 Is No Match for Generative AI' (2024) (Stanford Law School Working Paper).

²²Constitution of Kenya 2010, art 48.

²³Gikonyo Wachira and others, 'Law Clinics and Access to Justice in Kenya' (2014) *International Journal of Clinical Legal Education* 20(1) 107; Kenya National Commission on Human Rights, 'Access to Justice as a Human Right for the People of Kenya' (public lecture, 27 April 2012).

backwards. The court took a constitutional guarantee designed to lower barriers to justice and used it to erect a new barrier against a person without legal representation. No authority in the judgment supports this inversion.

4.4 The equality argument runs in the opposite direction

Chigiti J invoked Article 27 of the Constitution which guarantees every person equal protection and equal benefit of the law and placed it in support of the proposition that AI tools give the self-represented litigant an unfair advantage over the institutionally represented party.²⁴ This reasoning deserves careful examination. CAJ was represented at various stages by trained advocates with access to legal research platforms and drafting software, none of which are expressly mentioned in the Civil Procedure Rules.

Legal practitioners in Kenya routinely use digital tools, AI-enhanced legal research platforms, and automated document assembly software.²⁵ None of this usage has attracted judicial condemnation. To prohibit an unrepresented litigant from using the same category of tools on the ground that such use confers an unfair advantage inverts the equality argument. The party who genuinely lacks resources and professional support is told that the use of readily available technology to compensate for that disadvantage is impermissible,

while the professionally represented party's use of superior tools remains unexamined. That result is inconsistent with the equal protection guarantee in Article 27(1), which requires equal benefit of the law for all persons.²⁶

4.5 The blanket bar exceeds the court's jurisdiction

The order issued at paragraph 98 exceeds the jurisdictional authority of a single High Court judge sitting in judicial review. A judge has power to make orders that dispose of the dispute before the court. The power to impose a permanent, nation-wide ban on an individual litigant's use of a category of tools in all future litigation in all courts requires legislative authority and, at the very least, an explicit jurisdictional basis. Neither was identified in the ruling.

Under Article 94 of the Constitution, legislative authority is vested in Parliament.²⁷ Under Article 160, judicial authority is to be exercised in a manner that is independent but confined to the adjudication of disputes within the court's jurisdiction.²⁸ A judge who makes an order of indefinite and universal scope, binding on courts other than his own, applicable to matters not before him, and targeting an individual without a hearing on the specific terms of that prohibition crosses the line between adjudication and legislation.

There is a further practical difficulty. The order is unenforceable in any coherent

²⁴Constitution of Kenya 2010, art 27(1)-(2).

²⁵Sheria AI, '5 Everyday Tasks Lawyers Can Automate With AI in Kenya' (31 December 2022) <<https://www.sheria.org/front-pages/blog/post/5-everyday-tasks-lawyers-can-automate-with-ai-in-kenya>> accessed 24 April 2026; CR Advocates LLP, 'Artificial Intelligence Law Firm in Kenya' (10 November 2024) <<https://www.cradvocatesllp.com/practice/artificial-intelligence-law-firm-in-kenya/>> accessed 24 April 2026; Africanews, 'Smart Justice: Kenya's Legal System Embraces AI in a Rapid Digital Shift' (15 April 2025) <<https://www.africanews.com/2025/04/16/smart-justice-kenyas-legal-system-embraces-ai-in-a-rapid-digital-shift/>> accessed 24 April 2026; Nucamp, 'Top 10 AI Tools Every Legal Professional in Kenya Should Know in 2025' (8 September 2025) <<https://www.nucamp.co/blog/coding-bootcamp-kenya-ken-legal-top-10-ai-tools-every-legal-professional-in-kenya-should-know-in-2025>> accessed 24 April 2026.

²⁶Constitution of Kenya 2010, art 27(1).

²⁷ibid, art 94.

²⁸ibid, art 160.

sense. Courts have no mechanism to verify whether a filing was machine generated. The concept, as used in the ruling, was never defined. A litigant who uses a grammar-checking tool, a voice-to-text application, and an AI-assisted legal research database cannot know with confidence whether the prohibition applies.

4.6 The review jurisdiction was distorted

Section 80 of the Civil Procedure Act (Cap 21, Laws of Kenya) confers the right to seek review of a decree or order, and Order 45, rule 1 of the Civil Procedure Rules 2010 confines the grounds of review to discovery of new and important evidence not previously available despite due diligence, mistake and error apparent on the face of the record or any other sufficient reason, provided that the application is brought without unreasonable delay.²⁹

In *Samba t/a Samba & Co Advocates v Mengich citing Republic v Advocates Disciplinary Tribunal ex parte Apollo Mboya*, the court confirmed that any other sufficient reason must be read in the context of the enumerated grounds and cannot be a gateway for re-litigation of matters properly decided.³⁰ In *Republic v Public Procurement Administrative Review Board & 2 others* eKLR, it was emphasised that review is restricted to the three specified grounds and that applications must be made without unreasonable delay³¹

The AI issue, introduced by CAJ for the first time in March 2026, does not fall naturally within any of the review grounds. It is not newly discovered evidence and the

question of how the respondent drafted his pleadings was available as a matter of inquiry from the outset of proceedings. It is not an error apparent on the face of the record. The pleadings show no identified falsehood. It is a belated collateral attack raised to obscure the real issue which is CAJ's months of unresponsiveness after service and notice.

5. Comparative and Policy Perspectives on AI in Litigation

5.1 The Comparative Cases: What They Actually Decided

The comparative materials relied on by Chigiti J do not support the conclusions drawn from them. *Park v Kim* is a case about an attorney who, without reading or verifying the authorities she cited, submitted a brief containing a reference to a non-existent case generated by ChatGPT.³² The Second Circuit was clear that the sanction arose because the attorney had certified, under Rule 11 of the Federal Rules of Civil Procedure, that her legal contentions were warranted by existing law, a certification that was objectively false. The decision stands for the proposition that knowingly or recklessly citing fabricated authorities violates professional obligations. It does not stand for the proposition that AI-assisted drafting where no fabricated authority is cited, is impermissible.

Usherson v Bandshell concerned an attorney who had filed multiple frivolous copyright claims, made misrepresentations to the court, and violated court orders none of which involved AI tools at all.³³

²⁹Civil Procedure Act (Cap 21, Laws of Kenya) s 80; Civil Procedure Rules 2010 (Legal Notice No 151 of 2010) Ord 45 r 1.

³⁰*Samba t/a Samba & Co Advocates v Mengich* (Misc Application 7 of 2022) KEHC 26977 (KLR) (citing *Republic v Advocates Disciplinary Tribunal ex parte Apollo Mboya* eKLR).

³¹*Republic v Public Procurement Administrative Review Board & 2 others* (2018) eKLR.

³²*Park v Kim* 91 F.4th 610 (2d Cir 2024) 612-16.



ChatGPT is an AI-powered chatbot developed by OpenAI that understands and generates human-like text, acting as a versatile virtual assistant for answering questions, writing code, creating content, and brainstorming.

The quotation selected by Chigiti J from that decision stating that courts may not impose sanctions under inherent authority without clear and convincing evidence that a party knowingly submitted materially false or misleading pleadings actually supports the respondent's position rather than CAJ's. It confirms that sanctions require demonstrated misconduct, not mere use of an unfamiliar tool.

5.2 The Consistent Pattern in Comparative Jurisdictions

Courts in the United States, the United Kingdom, South Africa and other common-law jurisdictions have responded to AI-related concerns in litigation by concentrating on two questions. The accuracy of citations and legal authorities and the personal responsibility of the filing party (and their lawyers) for what is

put before the court. In the United States, sanctions have followed where lawyers submitted fabricated cases generated by AI, failed to verify AI-produced material before filing, or made false representations about their conduct. Thus in *Mata v Avianca Inc* (SDNY), Judge Castel sanctioned counsel who filed a brief containing non-existent precedents generated by ChatGPT, emphasizing that their misconduct lay in putting forward false citations without basic verification, not in the mere use of AI.³⁴ In *Park v Kim*, the Second Circuit referred counsel to its grievance panel after she cited a non-existent case produced by ChatGPT, again stressing the duty of reasonable inquiry into authorities cited.³⁵

Canadian courts have taken the same approach, in *Ko v Li 2025* the Ontario Superior Court confronted a factum containing inaccurate and apparently

³³*Usherson v Bandshell Artist Management* No 19-CV-6368 (JMF), 2020 WL 3483661 (SDNY 26 June 2020).

³⁴*Mata v Avianca, Inc* 678 F Supp 3d 443 (SDNY 2023) (Castel J).

³⁵*Park v Kim* 91 F.4th 610, 614–16 (2d Cir 2024).

non-existent citations and ordered counsel to show cause why she should not be cited for contempt, focusing on accuracy, candour and technological competence rather than proscribing AI tools as such.³⁶ In all of these decisions, it is the combination of fabricated law and human failure to verify or correct that attracts sanctions. None treats AI-assisted drafting and producing accurate documents as a per se abuse of process.

The international convergence on AI in litigation therefore points toward disclosure and verification rather than prohibition as the appropriate regulatory strategy. Several United States federal judges have issued standing orders that do not ban generative AI, but instead require parties to disclose any use of such tools and to certify that a human lawyer has reviewed and verified the content against reliable sources. A prominent example is the standing order of Judge Brantley Starr in the Northern District of Texas, which requires attorneys to file a Mandatory Certification Regarding Generative Artificial Intelligence either attesting that no portion of the filing was drafted by generative AI or certifying that any AI-drafted language has been checked for accuracy using print reporters or traditional legal databases.³⁷ Other district courts have adopted similar orders calibrated to ensure accuracy and accountability rather than to exclude AI-assisted drafting outright.

Across the Atlantic, the judiciary of England and Wales has taken a comparable stance

in its Artificial Intelligence (AI)- Judicial Guidance (October 2025).³⁸ The updated guidance recognises that AI tools are already part of the litigation environment, including in legal research and drafting and addresses the attendant risks through requirements of transparency, confidentiality and judicial caution. It warns judicial office-holders about the dangers of AI hallucinations and inappropriate disclosure of sensitive information but it proceeds on the basis that AI will be used and must be managed. As Lord Justice Birss observed in introducing the guidance, the use of AI by judges must be consistent with the integrity of the administration of justice and the rule of law, which calls for clear guardrails and human oversight, not a wholesale prohibition of AI tools.³⁹

South African courts have followed the same and is treating AI-related problems in litigation as issues of accuracy and professional responsibility rather than as grounds for a blanket prohibition of AI tools. In *Northbound Processing (Pty) Ltd v South African Diamond and Precious Metals Regulator* Acting Judge Smit discovered that counsel's heads of argument contained fictitious authorities that appeared to have been generated by an AI research platform, although the applicant ultimately obtained the mandamus sought, the court condemned the filing of AI-hallucinated cases as a serious ethical breach, referred counsel to the Legal Practice Council, and endorsed foreign authorities on the duty to verify AI-assisted research.⁴⁰ In *Mavundla v MEC: Department of Co-operative*

³⁶*Ko v Li* 2025 ONSC 2766 (Ont Sup Ct J) paras 5–14, 29–31 (Myers J).

³⁷*Mandatory Certification Regarding Generative Artificial Intelligence* Misc Order No 2 (ND Tex, 30 May 2023) (Judge-Specific Requirements of Judge Brantley Starr).

³⁸Courts and Tribunals Judiciary (England and Wales), 'Artificial Intelligence (AI) – Judicial Guidance (October 2025)' (31 October 2025) <<https://www.judiciary.uk/guidance-and-resources/artificial-intelligence-ai-judicial-guidance-october-2025/>> accessed 24 April 2026.

³⁹*ibid*, (quoting Lord Justice Birss: "The use of AI by the judiciary must be consistent with its overarching obligation to protect the integrity of the administration of justice and uphold the rule of law")

⁴⁰*Northbound Processing (Pty) Ltd v South African Diamond and Precious Metals Regulator & Others* (Case No 2025-072038, Gauteng Division, 30 June 2025, DJ Smit AJ).

Governance and Traditional Affairs, KwaZulu-Natal and related matters, South African courts confronted similar use of non-existent citations and again treated the submission of fabricated authorities as professional misconduct warranting sanction and regulatory referral.⁴¹ The Law Society of South Africa has since warned that submitting court documents that contain AI-generated, fictitious case citations constitutes serious professional misconduct and that such conduct will be referred to the Legal Practice Council with a real risk of suspension or being struck off. In other words, South African practice aligns with the US, UK and Canadian examples. Courts insist on human verification and are prepared to sanction lawyers who present fake authorities, but they have not declared AI-assisted drafting to be per se abusive or unlawful.

5.3 The Distinction Between Tool and Product

The distinction between the method of producing a document and the content of that document is fundamental to any legal analysis of AI in court filings. A document drafted using generative AI that contains accurate facts, verified citations and properly pleaded claims differs from a document drafted by hand that contains fabricated authorities or false statements. The law has always evaluated the content, not the production method. Holding

otherwise would require courts to inquire into whether counsel used voice dictation, a junior associate, a template, or a research assistant none of which has ever been treated as relevant to the validity of a filing. AI tools are, in this respect, a new category of an old phenomenon: drafting assistance. The question courts have always asked, and should continue to ask, is whether the resulting document is accurate, honest, and procedurally compliant.

6.1 Implications for access to justice and future reform

6.1 The chilling effect on self-represented litigants

If *HCJR Misc/E120/2025* is accepted as authority, its first and most immediate victim will be the self-represented litigant. Courts across the world are grappling with the fact that unrepresented parties are relying on AI tools to participate in legal proceedings they cannot otherwise afford to navigate. The National Center for State Courts in the United States reported in January 2026 that many self-represented litigants are relying on general-purpose AI tools and that courts are developing guidance for responsible use rather than prohibition.⁴²

In the Kenyan context, where access to qualified legal representation is unevenly distributed across income groups and geographical regions, the implication of

³⁶*Ko v Li* 2025 ONSC 2766 (Ont Sup Ct J) paras 5–14, 29–31 (Myers J).

³⁷*Mandatory Certification Regarding Generative Artificial Intelligence* Misc Order No 2 (ND Tex, 30 May 2023) (Judge-Specific Requirements of Judge Brantley Starr).

³⁸Courts and Tribunals Judiciary (England and Wales), 'Artificial Intelligence (AI) – Judicial Guidance (October 2025)' (31 October 2025) <<https://www.judiciary.uk/guidance-and-resources/artificial-intelligence-ai-judicial-guidance-october-2025/>> accessed 24 April 2026.

³⁹*ibid*, (quoting Lord Justice Birss: "The use of AI by the judiciary must be consistent with its overarching obligation to protect the integrity of the administration of justice and uphold the rule of law")

⁴⁰*Northbound Processing (Pty) Ltd v South African Diamond and Precious Metals Regulator & Others* (Case No 2025-072038, Gauteng Division, 30 June 2025, DJ Smit AJ).

⁴¹*Mavundla v MEC: Department of Co-Operative Government and Traditional Affairs KwaZulu-Natal and Others* (7940/2024P) ZAKZPHC 2 (8 January 2025) (KwaZulu-Natal Division, Pietermaritzburg) (Bezuidenhout J).

⁴²National Center for State Courts, 'AI Tools, Self-Represented Litigants & the Future of Access to Justice' (webinar, 21 January 2026) <<https://www.ncsc.org/event/ai-tools-self-represented-litigants-future-access-justice>> accessed 24 April 2026; Cyberjustice Laboratory, 'AI Tools, Self-Represented Litigants, and the Future of Access to Justice' (8 February 2026) <<https://www.cyberjustice.ca/2026/02/09/ai-tools-self-represented-litigants-and-the-future-of-access-to-justice/>> accessed 24 April 2026.

the Chigiti ruling would effectively impose an additional barrier on those already disadvantaged in the litigation system. This outcome is directly at odds with the constitutional imperative expressed in Article 48 and with the stated objectives of the Chief Justice's Social Transformation through Access to Justice (STAJ) blueprint, which is expressly referenced in the ruling itself.⁴³

6.2 The selective enforcement problem

The ruling also creates a problem of selective enforcement that the framework it establishes cannot resolve. Courts have no reliable mechanism for detecting whether a pleading was AI-assisted. In practice, the question will only arise when a party raises it as an allegation which means that AI use by represented parties, whose submissions are equally likely to have been produced with AI assistance will escape scrutiny. The result is a rule that disproportionately burdens those who candidly acknowledge their use of available tools while leaving sophisticated institutional litigants unaffected.

6.3 The regulatory vacuum and the path forward

Chigiti J was right to observe that Kenya currently lacks a legislative framework governing AI in judicial proceedings. The Artificial Intelligence Bill, 2026, introduced to the Senate by nominated Senator Karen Nyamu, is presently before the legislature.⁴⁴ It establishes an Office of the AI Commissioner, adopts a risk-based classification framework aligned with the EU AI Act, and introduces transparency and human oversight requirements. While the Bill does not specifically address court

filings, it signals a national policy direction toward regulated AI use which is not prohibition.

The appropriate response to the regulatory vacuum is the one Chigiti J himself recommended in closing that a committee should be invited to develop rules through public participation. Those rules should contain, in this paper's opinion, parties who use AI tools in preparing court documents should disclose that use, identifying the tools used and confirming that the content has been personally reviewed and adopted. Second, the filing party should remain fully accountable for all factual statements and citations, as is already the case under the general law. Third, sanctions should follow fabrication and dishonesty, not the mere use of technology. Lastly, courts should provide clear guidance to self-represented litigants on responsible AI use, rather than subjecting them to ad hoc adverse consequences.

The Law Society of Kenya and civil society organisations with access to justice mandates may also have standing to seek appellate clarification of the blanket bar on public interest grounds, given its potential effect on self-represented litigants across the jurisdiction. The appeal offers the Court of Appeal an opportunity to set authoritative parameters on a question that will only grow in significance as AI tools become more widely available.

7. Conclusion

HCJR Misc/E120/2025 is a ruling that the Kenyan legal community will need to reckon with seriously because the concerns that generated it are real. AI tools do create

⁴³Constitution of Kenya 2010, art 48 (obliging the State to ensure access to justice for all persons); Chief Justice of the Republic of Kenya, *Social Transformation through Access to Justice (STAJ) Blueprint* (Judiciary of Kenya, 2021) 1-4; *Savla v Commission on Administrative Justice* HCJR Misc/E120/2025 (Milimani High Court, Chigiti J, 16 April 2026) para 106 (expressly invoking the STAJ blueprint).

⁴⁴Artificial Intelligence Bill, 2026 (Senate Bill No 4, Kenya).



The Artificial Intelligence Bill, 2026 (Kenya) is a proposed law currently before Parliament aimed at creating a comprehensive legal framework to regulate AI in the country. It is Kenya's first serious attempt to directly govern artificial intelligence, moving beyond general laws like data protection and cybercrime.

new risks for court proceedings. Parties can use them to generate plausible-sounding but fictitious authorities. They can produce documents that appear professionally polished without the professional responsibility that polished documents ordinarily imply. Courts are right to be alert to these risks.

What the ruling fails to do is calibrate its response to the actual risk presented on the facts before it. The respondent produced pleadings with no identified falsehood, no fabricated case, and no misleading citation. He acknowledged his use of digital tools, took personal responsibility for the content and argued his case competently. The appropriate response to that conduct was, at most, a direction on future disclosure. Instead, the court set aside a judgment, struck out a pending application, imposed costs on the respondent, and issued a

personal bar of extraordinary breadth all on the basis of a finding that had no warrant in existing Kenyan law.

The Constitution of Kenya 2010 demands an expansive and purposive interpretation of rights. Article 48 exists to open the courts to those who might otherwise be excluded and article 27 exists to ensure that the law's protections are available equally to the powerful and the powerless while article 94 places the legislative function in Parliament. A ruling that inverts the first two provisions and transgresses the boundary established by the third stands on fragile constitutional ground. Appellate courts should take the opportunity to provide the clear doctrinal guidance that this judgment does not.

Ken Ogeto, SC, EBS, CBS, FCI Arb, is an Advocate of the High Court of Kenya and a Senior Counsel.



IMPALA CLUB



KARIBU IMPALA CLUB

We are registered as a social and sports oriented member's club along Ngong Road. Come and Join us and be part of our family centered environment, as you enjoy our modern facilities that we offer.



Joint
Ksh
220,000/=



Single
Ksh
170,000/=



Corporate Single
Membership 85,000/=
Corporate Joint
Membership 110,000/=



CONVERSION
18yrs -21yrs
Ksh; 30,000/=
24yrs - 30yrs
Ksh; 50,000/=



OLD CAMBRIAN
Single Ksh; 119,000/=
Joint ksh; 154,000/=



0710 231 659
0796 088 498



membership@impalaclub.co.ke



IMPALA CLUB Ngong Road.

Climate change litigation and business accountability for Human Rights: A comparative analysis of Tort and Constitutional Law Approaches



By Christabel Mideva Eboso

Introduction

Climate litigation is emerging as a site for contesting and promoting environmental justice and sustainable development. With regards to increasing business accountability in respect to climate change, applicants world-wide are largely turning to torts-based claims and human rights claims anchored on constitutions and international human rights instruments.

Tort law has provided avenues for addressing environmental harms through established legal doctrines such as negligence, nuisance, and trespass, allowing individuals and communities to seek redress for damages caused by pollution and other environmental infringements. Simultaneously, constitutional law, particularly provisions that guarantee the right to a healthy environment, is assuming an increasingly significant role in environmental and climate litigation,



Climate litigation refers to legal actions brought before courts or tribunals to address issues related to climate change—either by forcing governments and corporations to act, or by seeking compensation for climate-related harm.

providing a basis for challenging inadequate environmental policies and actions. Landmark cases such as *Urgenda v. The Netherlands*,¹ where tort law principles were interpreted in light of human rights obligations to hold the state accountable for insufficient climate action, and *Held v. Montana*, where a constitutional right to a clean and healthful environment was successfully invoked against state policies promoting fossil fuels, illustrate the potential

¹See *Urgenda Foundation v. State of the Netherlands* [2019] Dutch Supreme Court 19/00135.

of both legal frameworks to compel more ambitious climate action. The increasing utilisation of both tort and constitutional law in climate litigation reflects a broader trend of legal innovation in response to the urgency of the climate crisis and the imperative to protect fundamental rights. These legal strategies offer distinct but potentially complementary pathways for holding actors accountable, with tort law focusing on establishing duties of care and causation for specific harms, while constitutional law leverages fundamental rights to challenge inadequate climate policies and actions.

Discussion

In 2016, Kenya witnessed the filing of her two most recently first major environmental-related cases. First, was the lodging of the *Uhuru Owino* case in the Environmental and Lands Court (ELC). Second, was the *Save Lamu et al. V. National Environmental Management Authority and Amu Power Co. Ltd* at the National Environmental Tribunal. While both cases saw protracted litigation which ended in the Supreme Court and ELC respectively, what stands out is their use of different legal approaches to promote business accountability. Specifically, the *Uhuru Owino* case embraced a loose torts-based approach tempered with rights while the *Save Lamu* case was largely anchored on constitution-based rights. Accordingly, this article dwells on the two separate pathways of using torts-based climate litigation or constitution-based climate litigation to hold businesses accountable for human rights violations. This dual-pronged approach into the analysis of the function and use of climate change litigation in holding businesses accountable for rights

violations² through the two pathways of torts and constitutions generates insights into trends of business and human rights through climate change litigation.

Decided on 6 December 2024, the *Uhuru Owino* case saw the Supreme Court grant 1.3 billion in Kenya Shillings as damages to Uhuru Owino's residents for health risks and deaths arising from lead toxicity associated with the lead mining and processing activities of Metal Refinery (EPZ) Ltd. The 1.3 billion had been awarded by the ELC but was later revoked by the Court of Appeal on the grounds that the beneficiaries had not been identified. Further, the Court of Appeal had revised the apportionment of liability adopted by the ELC from 40% to 30% for NEMA, 25% to 40% for Metal Refinery (EPZ) Limited, from 5% to 10% Penguin Paper and Book Company Ltd, and from 10% to 5% for the Health and Environment ministries each. It further mandated 700 million in restorative damages to be paid to Uhuru Owino's residents for environmental clean-up if NEMA did not clean up the environment within four months after the judgement. These damages were based on the polluter pays principle as the corporate actors and government bodies were liable to varying extents for enabling environmental degradation through accumulation of lead toxicity in the Uhuru Owino settlement. In itself, this decision marked a turning point in Kenya's landscape of corporate accountability as a company was held responsible for the harms caused by its lead-based activities as it was fully aware of the dangers posed by lead poisoning to human health and the environment.³ The Supreme Court's 2024 decision innovative application of constitutional rights, environmental science, and torts-based

²See Jacqueline Peel and Hari M. Osofsky, 'A Rights Turn in Climate Change Litigation?' (2018) 7 *Transnational Environmental Law* 37-67.

³*Ibid.*, Article 42.

liability sets ground for a comprehensive approach to using environmental and climate change litigation to hold parties liable.

Given the irredeemable nature of harms from dirty energy investments like coal power plants, ELC in the *Amu case* halted coal power development in Kenya's coastal region because the coal power project was conceptualised without adequate public participation as required by the Kenyan Constitution and the project would have adversely impacted the country's mangrove forests which have a cultural value to local communities. While the coal project had climate change implications, the court focused on violation of public participation rights and potential impact of the project on the right to a clean and healthy environment. The Amu proceedings showed that there are multiple incidences of human rights violations in the implementation of development projects and initiatives geared to boost industrialisation.⁴

Outside the Amu case, there have been other legal challenges against corporations for participating in projects that violate human rights.⁵ These lawsuits have taken mainly taken constitution-based approaches. For instance, the EU and member countries have introduced human rights due diligence legislations to promote human rights compliance in businesses contexts.⁶ Human rights while normative

create duties on third parties to respect human rights. Accordingly, it is possible to conceptualise human rights as a subject matter of torts by building on constitutional human rights to treat individuals as right holders and corporations as duty bearers who have an obligation to protect human rights. Subsequently, constitutionalised human rights by identifying rights holders can be indirectly used to complement torts-based approaches for holding corporates accountable by treating corporations as duty bearers. Thus, the choice of torts in strategic climate litigation is designed to directly and indirectly promote human rights.

Underscoring the importance of how tort claims and the use of constitutional provisions in promoting rights-based approaches in climate change litigation function and differ is the fact that there is no unitary legal framework that can be uniformly used to hold businesses accountable or promote their accountability for human rights in climate change contexts.⁷ This absence of a single overarching framework⁸ calls for a review of torts-based and constitution-based legal pathways used to hold businesses accountable for human rights violations. Notably, the UN Guiding Principles on Business and Human Rights (UNGPs)⁹ have a semblance of an international legal framework that is globally used to promote business and human rights. However,

²See Jacqueline Peel and Hari M. Osofsky, 'A Rights Turn in Climate Change Litigation?' (2018) 7 *Transnational Environmental Law* 37-67.

³*Ibid.*, Article 42.

⁴OHCHR, 'Who Will be Accountable: Human Rights and the Post-2015 Development Agenda' (2014) HR/PUB/13/1.

⁵See Joana Setzer and Catherine Higham *Global Trends in Climate Change Litigation: 2022 Snapshot* (The Grantham Research Institute on Climate Change and the Environment 2022).

⁶Surya Deva, 'Mandatory Human Rights Due Diligence Laws in Europe: A Mirage for Rightsholders?' (2023) 36 *Leiden Journal of International Law* 389.

⁷UNHRC Resolution 26/9, 'Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights' (adopted 25 June 2014) Res 26/9, UN Doc A/HRC/26/L.22/Rev.1.

⁸See Jernej Letnar Cernic and Nicolás Carrillo-Santarelli (eds), *The Future of Business and Human Rights: Theoretical and Practical Considerations for a UN Treaty* (Intersentia 2018)

⁹UN Human Rights Council, 'Guiding Principles on Business and Human Rights: Implementing the United Nations' Protect, Respect and Remedy Framework' (21 March 2011) UN Doc A/HRC/17/31.

UNGPs are voluntary and non-binding thus reducing their effectiveness as a tool for promoting and protecting rights. Put differently, UNGPs allow businesses to assume legal responsibilities to promote rights but do not create enforceable rights obligations. Still, it is difficult to attribute liability as the climate change impact of businesses might be transnational and some corporations have complex value chains and sophisticated corporate structures whose global character make it difficult to hold them accountable.¹⁰

Despite this, the research interest in examining how rights dynamics are ingrained in climate change litigation is underpinned by the ever-changing landscape of the obligations of businesses to human rights in the context of climate change.¹¹ An example is how states exhibit differential levels of willingness to uphold and protect human rights as some commercial projects that violate human rights like the Lake Turkana Wind Project associated with mass displacements are integral in mitigating climate change. Equally important, there is uncertainty on whether the Paris Agreement as *lex specialis* which creates state's rights obligation is a ground for establishing rights obligations for corporations in respect of climate mitigation and adaptation. Here, it is worth noting that through the *Obligations of States in Respect of Climate Change, Advisory Opinion*,¹² the ICJ directed that states have obligations to protect rights and ensure the effective enjoyment of rights

by preventing environmental harms and protecting the climate system. As such, states might implement stronger rules and stronger mechanisms to ensure that businesses are compliant with climate change laws, which implies a corporate duty to protect against rights violations.

Further highlighting the importance of this discussion's examination of torts-based approach to climate litigation is the appellate decision in *Milieudefensie (Friends of the Earth Netherlands) and others v. Royal Dutch Shell* rendered by the Hague Court of Appeal in 2024. In this climate change litigation matter, the court first observed that corporate responsibility to protect human rights "exists independently of States' abilities and/or willingness to fulfil their own human rights obligations."¹³ The Dutch Court contended that corporations have a social duty of care. Subsequently, the Hague Court of Appeal pronounced that corporations have a duty to reduce their carbon emissions, and that they are responsible for indirect human rights violations emanating from their carbon emissions.¹⁴ While it may be argued that the social duty of care¹⁵ as a basis for tort claims against corporations for climate-related human rights violations is unique to Netherlands, it is important to not rule out the likelihood of this standard being implicitly transplanted in other jurisdictions. For instance, the *Urgenda Foundation* case positioned Netherlands as having rights obligations towards its citizens with respect to climate change,¹⁶ before attaining a transnational character as the

¹⁰Lizarazo-Rodriguez, Liliانا. "The UNGPs on business and human rights and the greening of human rights litigation: fishing in fragmented waters?." *Sustainability* 13, no. 19 (2021): 10516.

¹¹Renkens, Ilse Maria. "Mind the gap: Conflicts in the implementation of Kenya's Lake Turkana Wind Power project." In *Forum for Development Studies*, vol. 51, no. 3, pp. 517-542. Routledge, 2024.

¹²2025 I.C.J. (23 July 2025)

¹³*Milieudefensie (Friends of the Earth Netherlands) and others v. Royal Dutch Shell*, Para. 4.4.13. <https://uitspraken.rechtspraak.nl/details?id=ECLI:NL:GHDHA:2024:2100>

¹⁴Supra.

¹⁵Supra. para. 718

¹⁶*Urgenda Foundation v. State of the Netherlands* [2019] Dutch Supreme Court 19/00135.

basis for different jurisdictions finding that governments have duties to protect rights of their citizens affected by climate change.

Nonetheless, the specificity of the social duty of care to Netherlands does not mean that businesses in jurisdictions without an equivalent social duty of care can indirectly infringe on human rights as the national emissions reduction targets¹⁷ under the Paris Agreement may be extended to corporations operating in countries that are party to the Paris Agreement and have committed to reduce their national emissions.¹⁸ Indeed, this should become the case in Kenya upon the enactment of the pending draft Climate Change (Monitoring, Reporting and Verification) Regulations of 2021. Built on the Climate Change Act, the Regulations are designed to ensure organisations comply with their internal GHG emissions reduction and mitigation plans, and that these plans are in line with the Paris Agreement and other international climate legal regimes.

While Kenya has not had a pure tortious climate litigation case, the Supreme Court's ruling in the *Uhuru Owino* case opens an avenue for seeking relief through a combination of actions based on constitutional rights violations and torts. Notably, the Supreme Court made reference to the tort-based doctrine of strict liability.¹⁹ Under strict liability, redress is not based on intent or presence of negligence on the part of respondents for there to be an award of damages upon breach if duty of care. In this case, NEMA as the regulatory agency in charge of the environment had failed to discharge its statutory obligations and

allowed environmental harms through lead-smelting to continue even after receiving multiple complaints from the residents of Uhuru Owino settlement. Further, the Supreme Court cited EMCA Act and Article 70 of the Constitution to link NEMA's dereliction of its statutory regulatory duties to environmental harms and personal injuries suffered by Uhuru Owino's residents.²⁰ Consequently, the parties could invoke Article 70 to seek various reliefs for violations of their Article 42 rights without relinquishing their right to use Article 42 when seeking tortious damages for personal injuries suffered due to regulatory omissions of NEMA and other involved government bodies.

Although the Supreme Court took judicial notice of the differences between tortious standards and rights-based standards used in awarding relief,²¹ it is unlikely that there would be a difference in outcomes with respect to damages. However, rights-based approaches are more appropriate in public interest litigation while torts actions in climate litigation are highly suited for personal injuries. This convergence of outcomes when using either rights-based approaches or torts actions serves to show that Kenyan courts are flexible in protecting rights and awarding damages in climate litigation. Further, it shows a commitment to promoting corporate accountability in human rights.

Selection of torts-based and rights-based pathways in climate litigation

Regarding tortious actions as basis for holding corporations accountable

¹⁷Sharaban Zaman, 'Exploring the Legal Nature of Nationally Determined Contributions (NDCs) under International Law.' (2015) 26 Yearbook of International Environmental Law 98-126.

¹⁸Op cit. (n7) para. 717

¹⁹Uhuru Owino case (Supreme Court of Kenya), paras 103-106

²⁰Ibid.

²¹Ibid., paras 129-137.



Climate litigation is becoming one of the most powerful tools to force climate action, especially where governments or corporations fall short. In countries like Kenya, it's particularly important because strong constitutional environmental rights make courts an effective avenue for change.

for climate-related rights violations, *Milieudefensie v. Shell* is particularly noteworthy as it represents a significant instance where a court mandated a corporation to align its climate strategy with internationally recognised targets, underscoring the potential of tort law, informed by human rights principles, to impose tangible obligations on businesses regarding their climate impact. The court's decision was grounded in both the Netherlands' unwritten standard of care under tort law and international human rights norms, specifically Articles 2 (right to life) and 8 (right to private and family life) of the European Convention on Human Rights (ECHR), establishing a precedent for holding corporations legally accountable for their contribution to climate change.²² From a business and human rights perspective, it thus follows that torts-based approaches produce a snowballing effect by strengthening corporate human rights

compliance in that corporations are more likely to uphold human rights as a way of limiting tortious liability for contributing to rights violations.

In constitution-based climate litigation, a range of constitutional provisions are typically invoked. These often include the right to a clean and healthy environment, which is increasingly recognised in national constitutions and being applied to challenges related to climate change and environmental impacts of energy projects. Additionally, constitutional protections for the rights of Indigenous Peoples are frequently at the forefront of these challenges, encompassing rights to land, natural resources, cultural preservation, and the right to free, prior, and informed consent (FPIC) regarding projects affecting their territories as captured by participatory rights in decision-making and governance. Other relevant constitutional rights, such

²²See the *Milieudefensie* case.



Tort law is about responsibility and compensation—if someone's actions (or failure to act) cause harm, the law provides a way for the injured party to seek justice and financial redress.

as the right to life, health, and an adequate standard of living, are also sometimes invoked, depending on the specific impacts of the just transition projects on the affected communities. Constitutional challenges often invoke a range of interconnected human rights, reflecting the multifaceted impacts of just transition projects on the lives and livelihoods of affected communities. These cases demonstrate that the deployment of renewable energy infrastructure and the extraction of transition minerals can have cascading effects, potentially violating not only environmental rights but also fundamental social, economic, and cultural rights.

Tort arguments in climate change litigation against businesses typically function by attempting to establish a legal duty owed by the defendant business to the plaintiff or a class of plaintiffs.²³ Tort arguments often face significant hurdles in climate change litigation due to the difficulty of

establishing a direct causal link between the actions of a specific business and the widespread and long-term impacts of climate change on human rights. The diffuse nature of greenhouse gas emissions and the complexity of the climate system make it challenging to satisfy the traditional "but for" test of causation in tort law.

In contrast, constitutional provisions are invoked by focusing on fundamental rights guaranteed by national constitutions, such as the right to a healthy environments.²⁴ These arguments typically challenge government actions or omissions that are alleged to violate these constitutionally protected rights.²⁵ By directly invoking constitutional guarantees, litigants can bypass some of the causation and standing challenges inherent in tort law and focus on the state's overarching duty to uphold human rights in its climate-related policies and decisions.

²³Supra.

²⁴See Margaretha Wewerinke-Singh *State responsibility, climate change and human rights under international law* (Hart Publishing 2018).

²⁵See OHCHR, *Who Will be Accountable: Human Rights and the Post-2015 Development Agenda* (2014) HR/PUB/13/1 ix.

Each approach, tort and constitutional law, presents its own set of strengths as highlighted above and weaknesses in the context of climate change litigation against businesses. Tort law's strengths weaknesses include the significant challenges in proving causation and establishing legal standing in the context of climate change, as well as its potential limitations in addressing systemic issues. Conversely, constitutional law's weaknesses may lie in the varying scope of constitutional rights and the dependence of its success on the interpretation of these provisions by national courts. As such, both tort and constitutional law offer valuable but distinct avenues for promoting rights-based approaches in climate change litigation, with their effectiveness contingent on the specific legal context, the nature of the claim, and the remedies sought. A comprehensive strategy for holding businesses accountable for climate-related human rights impacts may involve utilising both tort and constitutional law, depending on the specific circumstances of the case and the legal tools available in a given jurisdiction.

Conclusion

In closing, climate litigation is informed by the urgency to address adverse climate change that harms the environment,²⁶ violates human rights,²⁷ and negatively affects intergenerational equity.²⁸ The discussion into the use tort-based litigation against corporations and rights-based constitutional challenges reveal the distinct yet potentially complementary roles of these legal pathways in climate litigation. Tort law offers a route for seeking remedies

for specific harms, while constitutional law provides a mechanism for challenging systemic failures that contribute to rights violations and compelling broader policy changes. Key legal principles emerging for businesses include the imperative to conduct thorough human rights due diligence, integrate human rights into impact assessments, and to be aware of the increasing potential for legal liabilities under both tort and constitutional law.

The interface between business and human rights is governed by complex regulatory frameworks that span international, cross-border, and domestic rules. Accordingly, legal challenges against businesses over human rights concerns draw on domestic legal instruments, regional laws, and international laws and standards.²⁹ Against this backdrop, it would be natural to look into how climate litigation is underpinned by international, regional, and domestic legal instruments. More importantly, it would be difficult to systematically map climate litigation trends based on the use of international, regional, and domestic legal instruments. However, systematically identifying similarities or differences in the use of torts and constitutions as legal pathways for holding businesses accountable for human rights violations is a necessary undertaking as it has practical implications for businesses and human rights. Notably, there is a need for a more focused analysis on how these legal strategies specifically function to hold businesses accountable for human rights obligations within the context of climate change and just transition.

²⁶Human Rights Council 'Report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, John H. Knox' (2013) UN Doc A/HRC/25/53.

²⁷General Assembly 'Request for an advisory opinion of the International Court of Justice on the obligations of States in respect of climate change' (2023) UN Doc A/RES/77/276.

²⁸General Assembly 'Protection of global climate for present and future generations of mankind' [2003] UN Doc A/RES/57/257.

²⁹Nicolas Bueno and Claire Bright, 'Implementing Human Rights Due Diligence through Corporate Civil Liability' (2020) 69 *International & Comparative Law Quarterly* 789.

Bibliography

Cases

Held v. State Montana Trial Court [2023] CDV-2020-307.

Milieudefensie et al. v. Royal Dutch Shell plc. [2021]
Hague District Court C/09/571932 / HA ZA 19-379.

Milieudefensie (Friends of the Earth Netherlands) and others v. Royal Dutch Shell, <<https://uitspraken.rechtspraak.nl/details?id=ECLI:NL:GHDHA:2024:2100>> accessed 18 May 2025.

Petition to the Inter-American Commission on Human Rights Seeking Relief from Violations of the Rights of Arctic Athabaskan Peoples Resulting from Rapid Arctic Warming and Melting Caused by Emissions of Black Carbon by Canada [2013].

Teitiota v. New Zealand [2020] UN Human Rights Committee No 2728/2016.

Urgenda Foundation v. State of the Netherlands [2019]
Dutch Supreme Court 19/00135.

Urgenda Foundation v. State of the Netherlands [2019]
Opinion of Advocate and Procurator General 19/00135.

United Nations bodies

General Assembly 'Protection of global climate for present and future generations of mankind' [2003] UN Doc A/RES/57/257.

General Assembly 'Request for an advisory opinion of the International Court of Justice on the obligations of States in respect of climate change' (2023) UN Doc A/RES/77/276.

Human Rights Council, 'Guiding Principles on Business and Human Rights: Implementing the United Nations' Protect, Respect and Remedy Framework' (21 March 2011) UN Doc A/HRC/17/31.

Human Rights Council, 'Report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, John H. Knox' (2013) UN Doc A/HRC/25/53.

OHCHR, 'Who Will be Accountable: Human Rights and the Post-2015 Development Agenda' (2014) HR/PUB/13/1.

Secondary sources

Bueno N and Bright C, 'Implementing Human Rights Due Diligence through Corporate Civil Liability' (2020) 69 *International & Comparative Law Quarterly* 789.

Cernic JL and Carrillo-Santarelli N (eds), *The Future of Business and Human Rights: Theoretical and Practical Considerations for a UN Treaty* (Intersentia 2018).

Deva S, 'Mandatory Human Rights Due Diligence Laws in Europe: A Mirage for Rightsholders?' (2023) 36 *Leiden Journal of International Law* 389.

Ginsburg T and Dixon R (eds) *Comparative Constitutional Law* (Edward Elgar Publishers 2011).

Gloppen S and St. Clair AL 'Climate Change Lawfare: In Climate Change: International Law and Global Governance, edited by Oliver C. Ruppel, Christian Roschmann, and Katharina Ruppel-Schlichting, 171–200. Volume II: Policy, Diplomacy and Governance in a Changing Environment. *Nomos*, 2013.

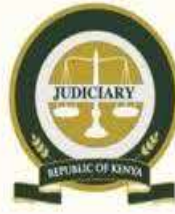
Peel J and Ososky HM, 'A Rights Turn in Climate Change Litigation?' (2018) 7 *Transnational Environmental Law* 37–67.

Rodríguez-Garavito C (ed.) *Litigating the Climate Emergency: How Human Rights, Courts, and Legal Mobilization Can Bolster Climate Action* (Cambridge: Cambridge University Press 2022).

Setzer J and Higham C *Global Trends in Climate Change Litigation: 2022 Snapshot* (The Grantham Research Institute on Climate Change and the Environment 2022).

Wewerinke-Singh M *State responsibility, climate change and human rights under international law* (Hart Publishing 2018)

Zaman ST, 'Exploring the Legal Nature of Nationally Determined Contributions (NDCs) under International Law' (2015) 26 *Yearbook of International Environmental Law* 98–126.



THE JUDICIARY CALL CENTER

NOW LIVE

Daily: 6:00 AM – 6:00 PM
(including Saturdays and Sundays)

Need help with:

- E-filing or case tracking (CTS)?
- Joining virtual court sessions?
- Understanding court procedures?
- Cause list inquiries?
- Registry-related support?



**Call or Write
for Support:**

0730 181 040

ictsupport@court.go.ke



A Judiciary Built on Integrity, Free from Corruption.

The Jurisprudence of the Poisoned Thange River: Toxic harm, state failure and the price of environmental justice in Kenya



By Sarafin Cheronu

Abstract

The Thange River Basin case marks a watershed moment in Kenya's environmental and constitutional jurisprudence. Residents of the Thange River Basin in Makueni County suffered prolonged exposure to contaminated soil, water and air, resulting in severe health and socio-economic consequences, including the death of seventeen people. Despite clear constitutional guarantees under Article 42 on the right to a clean and healthy environment, National Environmental Management Authority (NEMA) failed to intervene effectively, revealing significant gaps in environmental regulation, accountability and enforcement.

*This paper examines the evolving approach to environmental compensation in Kenya through the lens of **Muindi Kimeu & 3,074 Others v Kenya Pipeline Company Ltd & Another**. It interrogates whether the award of over KShs 3 billion reflects doctrinal consistency, signals a jurisprudential shift,*



The poisoning of the Thange River is not just an environmental incident—it is a legal, social, and economic issue.

or embodies overambitious compensation in light of enforcement realities.

Additionally, the paper engages with toxic tort theory to highlight the evidentiary and methodological challenges in quantifying environmental harm, particularly the role of public health and epidemiological assessments in establishing causation and determining damages. Ultimately, the paper argues that while the decision represents a progressive step in environmental justice, important questions remain regarding the

practicality, methodological precision, and enforceability of large-scale environmental compensation awards in Kenya.

Key Words: *Environmental compensation; toxic tort; epidemiology*

1. Introduction

The Thange River Basin is located in Thange Ward, Kibwezi East Constituency in Makueni County. This basin is a catchment area surrounding the Thange River, a tributary within the Athi River drainage system. Moreover, as regards the topography, the Thange River Basin is generally a low-lying and gently sloping terrain, characterized by shallow valleys and seasonal riverbeds.¹ Due to its gently-sloping terrain, the Basin acts as a natural collection point for runoff. This Basin falls within Kenya's arid and semi-arid lands (ASALs). The features of ASALs are: low and unreliable rainfall, high temperatures and frequent drought conditions. Consequently, the Thange River is critical for the survival and livelihoods of communities living within and around the Basin. The river supports the livelihoods of about 10,000 people.² The residents grow crops such as butternut, vegetables, paw paws, mangoes, oranges and avocados while practising livestock farming.³

The Kenya Pipeline Company (KPC) owns a petroleum pipeline that runs from Mombasa to Nairobi, which is the inland distribution hub. On 12th May 2015, a leakage was detected in the Kenya Pipeline Company Limited (KPC) old pipeline, 50 metres

from the source of the Thange River.⁴ The groundwater at Thange River is located at the depths of between 1-4 metres deep and an aquifer is at 10 metres deep which greatly influenced the extent of pollution of the groundwater sources.⁵ Oil pollutants seeped through the soil into the porous rock, finding its way to the shallow ground water and surface water of the Thange River.⁶

Multiple villages in the Thange River Basin were affected. These are: Thange, Moki, Mbulutini, Kavunye and other surrounding settlements along the river. The residents of these villages were all directly dependent on the Thange River Basin for drinking water, domestic use, irrigation and livelihoods. These residents were directly affected by the oil contamination following the pipeline leak. The residents complained that they were exposed to the oil spill through air pollution and water pollution as the residents continued to use the water regardless of the pollution.

3,075 affected residents therefore filed a petition against KPC and National Environmental Management Authority (NEMA), in 2018 before the Environment and Land Court (ELC) in Makueni County. This was approximately three years after the 2015 oil spill. The petitioners filed a case against Kenya Pipeline Company which was then a state-owned corporation, mandated with providing means of transporting petroleum products in the Country, and NEMA, which is the principal instrument of Government charged with the responsibility of general

¹Hannah Wamuyu, Collins Odote & Stephen Obiero, 'The Utility of Epidemiology Evidence in Resolving Compensation Quandary in Kenya: Case Study of Thange Oil Spill, Makueni County, Kenya' (2023) 19/1 Law, Environment and Development Journal.

²Dan Odera, 'Application of Hydro geophysical Resources as an Onshore Oil Spill Response at Thange, Kenya' (2025) 4(1), 1-28.

³*ibid.* Panafcon Limited & Kenya Pipeline Limited, 'Environmental and Social Economic Impact Assessment Study of the Thange River Basin' (Vol A-2016) 11.

⁴*Kimeu & 3,074 Others v Kenya Pipeline Company Ltd & another* [2025] KEELC 52339 (KLR).

⁵*ibid* 33, 34.

⁶*ibid* 11.

supervision including co-ordination of overall matters relating to the environment and implementation of all environment related policies. This was due to the continued environmental and health impacts and the alleged inadequate remediation and compensation efforts by KPC.

The petitioners alleged that the spillage of the petroleum hydrocarbons was caused by acts of negligence and breach of duty of care as well as the duty to protect the environment.⁷ They further alleged that they suffered socio-economic losses as a result of the pollution on the soil, water and air. The exposure to polluted environment violated their right to life due to the injuries, incurable diseases and fatalities caused by the pollution.⁸ The oil spill polluted their soil and water, making it worthless, hence violating their right to own and occupy their parcels of land. Due to contaminated water and the loss of livestock and other primary sources of livelihood, residents were unable to access adequate food of acceptable quality as well as clean and safe water. They further alleged that they had been displaced from their land and water, which they relied on, for their livelihoods hence subjected to psychological torture including cruel and degrading treatment.

The KPC did not fully deny the spill. It acknowledged the leak from the KPC pipeline. However, it argued that it responded promptly once the leak was detected, took containment and clean-up measures. They further contended that the extent of the damage was exaggerated by the petitioners and that some of the alleged harm was not directly attributable to the spill.

The ELC adopted an expansive interpretation of the right to a clean and healthy environment. This right encompassed the right to protection of the environment, which therefore meant that the inherent and intrinsic value of living entities both human and non-human were recognized under the law. Thus, the law provided for a sustainable ecosystem. The Court further held that where there was environmental degradation or pollution as in the instant case and both the environment as well as human lives were detrimentally impacted, the court was empowered to grant remedies to protect the environment as an independent entity and also grant orders to protect human life.

The Court awarded apportioned liability against the KPC and NEMA in the ratio of 80:20% respectively. This is because NEMA was responsible for promoting the integration of environmental considerations into development policies, plans, programmes and projects with a view to ensuring the proper management and rational utilization of environmental resources on a sustainable basis.⁹ The total compensatory amount to be paid to victims was Kshs 2,118,831,676/= while damages of Kshs 900,000,000/= for environmental compensation was to be paid by KPC to NEMA in the event of default of compliance with environmental restoration orders. The 2.1 Billion was supposed to be paid within 120 days of the judgement. Declaratory orders against the respondents were also issued affirming violations of fundamental human rights and freedoms. Additionally, an environmental restoration order was issued requiring KPC to restore the petitioners' damaged land, soil, surface and underground

⁷*Thange River Basin case* (n 4).

⁸Robin Kundis Craig, 'The Public Health Aspects of Environmental Enforcement' (2010) 4 *Pittsburgh Journal of Environmental and Public Health Law* 1.

⁹*Kanyuira v Kenya Airports Authority* [2022] KESC 30 (KLR).

water, the environment (biota and fauna) and the entire Thange River Riparian habitat, to its original status and to the satisfaction of the court, within 120 days.¹⁰

Against this backdrop, this paper interrogates whether the Court's award, KShs. 3.1 Billion, reflects consistency with existing legal principles or signals an emerging jurisprudential shift toward more expansive environmental compensation in Kenya, while also questioning whether such awards are ultimately overambitious in light of enforcement realities. Beyond the quantum itself, the case also raises deeper methodological concerns characteristic of toxic tort disputes, particularly the challenges of establishing causation, quantifying exposure, and translating complex scientific and epidemiological evidence into legally cognizable damages.

This paper is structured as follows: **Section 2** examines the legal and constitutional framework governing environmental protection and compensation in Kenya, including relevant statutory principles and the role of regulatory agencies such as NEMA. **Section 3** interrogates the KShs 3.1 billion award in the *Thange River Basin* case, assessing whether it reflects doctrinal consistency, an emerging jurisprudential shift, or an overambitious approach to environmental compensation. **Section 4** situates the award within a toxic tort framework, highlighting methodological challenges in quantifying environmental harm and the role of epidemiological evidence in establishing causation.

Section 5 analyses the appellate issues and the framework within which the Court of Appeal will assess the merits, evidentiary sufficiency, and feasibility of the ELC's orders. Finally, **Section 6** offers recommendations for strengthening Kenya's environmental incident response, evidentiary standards in toxic tort litigation, and the management of large-scale compensation awards, before concluding with reflections on the broader implications of the case for environmental jurisprudence in Kenya.

2. Legal Framework on Environmental Compensation

Kenya's legal framework on environmental protection provides both a strong constitutional foundation and statutory mechanism for enforcement against industries whose activities pertain environmental matters.¹¹ These include sectors such as oil and petroleum transportation, mining and extractive industries, manufacturing and chemical production, energy generation, large-scale agriculture and waste management operations. Activities within these industries frequently involve risks such as oil spills, toxic emissions, water contamination, land degradation, and improper waste disposal.¹²

The Environmental Management and Coordination Act operationalise the right to a clean and healthy environment under Article 42 of the Constitution.¹³ *Articles 69 and 70 of the Constitution* imposes both state and individual obligations

¹⁰John Kimeu, Mukai, 'Petition for Appropriate and Urgent Remediation Restoration and Reinstatement of the Thange River Basin, Their Children, Livestock, Crops and Environment Following the Underground Oil Spill of May 12th by the Kenya Pipeline Company' (2018) Parliament of Kenya Digital Library.

¹¹Environmental Management and Coordination (Waste Management) Regulations, rule 14. See also The Basel Convention on the Transboundary Movement of Hazardous Wastes and Their Disposal (adopted March 1989).

¹²Timonah Chore, 'Reconceptualising the Right to a Clean and Healthy Environment in Kenya' (2019) 4(1) Strathmore Law Review 71; *Africa Centre for Rights and Governance (ACRAG) & 3 Others v Attorney General & 3 Others* [2011] eKLR; *Mohamed Ali Baadi & Others v Attorney General & 11 Others* [2018] eKLR.

¹³Environmental Management and Coordination Act, Cap. 387, s. 3(5).

in safeguarding ecological integrity. Of particular importance is *Article 21*, which outlines the state's obligations to observe, respect, protect, promote, and fulfil the rights in the Bill of Rights. In the context of environmental protection, this provision reinforces the State's duty to take both proactive and remedial measures to safeguard the right to a clean and healthy environment under *Article 42*.

Under the **Environmental Management and Coordination Act ("EMCA")** key principles such as the polluter pays principle, which requires those responsible for environmental harm to bear the costs of managing and remedying that harm.¹⁴ The precautionary principle requires that where there is a risk of serious or irreversible harm, the absence of full scientific certainty cannot be used to delay cost-effective measures to prevent environmental damage.¹⁵ This principle reflects the principle of absolute liability. The Supreme Court in the ***Owino-Uhuru Case*** laid out the criteria and applicability of this principle.¹⁶ The Court held that this principle inclines that the person who will be targeted to carry out clean-up of contaminated land is the polluter, regardless of whether the contamination was foreseeable when the pollution event occurred or whether the polluter was at fault.¹⁷

According to the **Organization for Economic Cooperation and**

Development (OECD), there are four aspects that must be considered in the enforcement of the polluter-pays principle, which were discussed below in the backdrop of the ***Owino-Uhuru Case***:

1. First, is the issue of identifying the polluter;
2. The extent of damage done to the environment and the extent of the polluter's liability so that precise monetary value can be attached to the degradation;
3. Pollution caused must be identifiable;
4. And, there must be a damage that must be compensated.¹⁸

Relatedly, the **Rio Declaration of 1992**, principle 16, establishes the Extended Polluter Responsibility (EPR), which transfers the burden of dealing with pollutants from governments to the organizations that produce them.¹⁹

The Environment and Land Court (ELC) Act establishes the ELC, pursuant to section 4 and 13 of the Act.²⁰ This Court has the authority to hear and determine disputes relating to the environment and the use and occupation of, and title to land.²¹ Nonetheless, there are other legislatively established tribunals; the National Environment Tribunal (NET) and the National Environmental Complaints Committee (NECC). These tribunals hear and determine disputes relating to the issuance of

¹⁴Ibid.

¹⁵*Michael Kibui & 2 Others (suing on their own behalf as well as on behalf of the inhabitants of Mwamba Village of Uasin Gishu County) v Impresa Construzioni Giuseppe Maltauro SPA & 2 Others* [2019] eKLR; *Social and Economic Rights in its decision in Action Centre (SERAC) & another v Nigeria Communication 155/96 [Ogoni Case / Serac case]*.

¹⁶*Export Processing Zone Authority & 10 Others (Suing on their own behalf and on behalf of all residents of Owino-Uhuru Village in Mikindani, Changamwe Area, Mombasa) v National Environment Management Authority & 3 Others* [2024] KESC 75 (KLR).

¹⁷Ibid. See also Freshfields, *Tolley Environmental Law* (Tolley Publishing Ltd 1998) Issue 3.

¹⁸*Owino Uhuru Case ; Rylands v Fletcher* (1868) LR 3 HL 330; *David M. Ndeti v Orbit Chemical Industries Limited* [2014] KEHC 4354 (KLR).

¹⁹Rio Declaration on Environment and Development, 1992 Principle 16; *Owino Uhuru Case*, para. 100; Kariuki Muigua, *Attaining Environmental Justice for Posterity* Vol 2 (Glen Wood Publishers Limited) 26-47.

²⁰Environment and Land Court Act Cap. 8D.

²¹Ibid. See also Macharia Kaguru, 'The Undelivered Promise: Constitutional Environmental Rights and Judicial Redress in Kenya and South Africa' (2024) 8(2) *Strathmore Law Journal* 23; Caiphas Soyapi, 'Environmental Protection in Kenya's Environment and Land Court' (2019) 31(1) *Journal of Environmental Law* 151.

Environmental Impact Assessment licenses (EIAs), such as was in the *Save Lamu case*.²² The Supreme Court, in ***Benson Ambuti Adega & 2 Others v Kibos Distillers Limited & 5 Others***, held that the ELC should not arrogate itself jurisdiction to hear and determine disputes that are within the purview of the NET and NECC.

In ***Romans Waema Gishinga v Shreeji Enterprises Ltd***, NEMA took out enforcement action against Shreeji Enterprises for carrying out quarrying operations without an Environment Impact Assessment license.²³ The NET held that Environment Impact Assessment compliance is mandatory before undertaking industrial activities, and validated NEMA's enforcement action. A major weakness in enforcement capacity of NEMA lies in the nature of remedies permitted under EMCA. Whereas EMCA provides for penalties for environmental violations, the penalties are minimal relative to the environmental damage by industries, polluters end up paying the penalties while continuing to violate the environment. Taken together, these constitutional provisions and statutory principles establish a legal architecture that recognizes environmental protection not merely as a regulatory concern but as a justiciable right capable of attracting remedies, including compensation.²⁴

3. Interrogating the 3.1 billion Quantum: Consistency, jurisprudential shift, or overambitious compensation?

At a foundational level, the quantum of the award can be defended as consistent with the remedial architecture established under Article 70(2) of the Constitution.²⁵ Article 70(2)(c) empowers courts to provide compensation for any victim of a violation of the right to a clean and healthy environment. In this sense, the ELC's willingness to award significant damages and compensation shows an understanding that constitutional remedies must be effective and commensurate with the nature and scale of harm suffered.²⁶ The recognition that 3,074 petitioners suffered interconnected and prolonged harm, since May 2015, further justifies a collective and aggregated approach to compensation.

Moreover, *section 2 of EMCA* mandates the ELC to be guided by, *inter alia*, the polluter-pays principle as well as the principles of intergenerational and intragenerational equity.²⁷ Thus, by apportioning liability between Kenya Pipeline Company, as the primary polluter, and NEMA, for regulatory lapses, the Court reinforces the position that both direct actors and oversight institutions may bear responsibility where their conduct contributes to environmental degradation. In the case concerning environmental pollution caused by Metal Refinery (EPZ) Ltd in Owino-Uhuru Village, Mombasa, residents suffered severe health effects, such as respiratory diseases, due to lead poisoning from toxic waste. Despite clear evidence of pollution, the National Environment Management Authority (NEMA) issued an Environmental

²²*Save Lamu & 5 Others v National Environmental Management Authority (Nema) & another* [2019] KEELC 4739 (KLR).

²³ELC No. 255 of 2016.

²⁴Brian Sang, 'Tending Towards Greater Eco-Protection in Kenya: Public Interest Environmental Litigation and Its Prospects within the New Constitutional Order' (2013) 57(1) *Journal of African Law* 29.

²⁵Constitution of Kenya, 2010, arts. 23 & 258.

²⁶Constitution of Kenya 2010, art 70(2); Macharia Kaguru, 'The Undelivered Promise: Constitutional Environmental Rights and Judicial Redress in Kenya and South Africa' (2024) 8(2) *Strathmore Law Journal* 23. Hannah Wamuyu, Collins Odote & Stephen Obiero, 'The Utility of Epidemiology Evidence in Resolving Compensation Quandary in Kenya: Case Study of Thange Oil Spill, Makeni County, Kenya' (2023) 19/1 *Law, Environment and Development Journal*.

²⁷EMCA, s 2. See also *The Basel Convention on the Transboundary Movement of Hazardous Wastes and Their Disposal* (adopted March 1989).

Impact Assessment (EIA) license and later permitted "test runs" instead of enforcing environmental safeguards.

The ELC found NEMA and other state agencies liable for regulatory failure and breach of constitutional obligations, awarding Kshs. 1.3 billion for personal injury and loss of life, alongside Kshs. 700 million for environmental restoration. The Court of Appeal revised the liability and set aside the compensation. However, the Supreme Court reinstated the ELC's ruling, holding that NEMA had acted *ultra vires* in allowing test runs and that state agencies failed in their duty to protect the environment.²⁹

In light of the foregoing, the *Thange River Basin* 3.1 Billion award does not emerge as an anomaly, but rather as part of an evolving jurisprudential trajectory. While *Owino Uhuru* laid the normative foundation by firmly situating environmental degradation within the framework of enforceable constitutional rights, the *Thange River Basin* decision represents a more assertive phase in this evolution, one that is marked by a higher quantum of damages, a more structured aggregation of claims, and a clearer articulation of shared liability between polluters and regulators.

However, the quantum of the award also raises legitimate concerns about whether it is overambitious in light of existing judicial practice, institutional capacity, and enforcement realities. The ELC imposed liability on KPC, a state corporation and NEMA, a state regulator.³⁰ In effect, the

burden of satisfying the 3.1 billion shillings award falls within the broader State framework, raising practical questions about fiscal feasibility and compliance. The Court, at paragraph 386, ordered that a sum of KShs 2.1 Billion be paid to the petitioners within one hundred and twenty days of the judgement, rendered on 11th Day of July, 2025. However, even where courts hold that compensation should be done within a structured period, compliance and enforcement is ultimately contingent upon treasury budgetary allocation, treasury processes, and institutional willingness to prioritize such huge liabilities. In cases involving substantial public financial exposure, there is a real risk that execution may be delayed, negotiated, or only partially fulfilled, particularly where no dedicated enforcement mechanism exists to guarantee timely satisfaction of the judgment debt.³¹

The fact that both liable entities; KPC and NEMA, operate within the State framework, introduces a structural paradox: the State is, at once, the regulator, the violator, through KPC and NEMA, and the ultimate obligor of compensation. In this context, the overambitious nature of the award is not necessarily a critique of its legal reasoning, but rather a reflection of the gap between normative judicial pronouncements and institutional capacity to realize them. The question, therefore, is not only whether the award is doctrinally justified, but whether, in practical terms, it can be effectively executed and translated into tangible relief for the residents of the Thange River Basin.

²⁹*Export Processing Zone Authority & 10 others (Suing on their own behalf and on behalf of all residents of Owino-Uhuru Village in Mikindani, Changamwe Area, Mombasa) v National Environment Management Authority & 3 others* [2024] KESC 75 (KLR).

³⁰*ibid.*

³¹*Esther Wanjiru Mwangi & 3 Others v Hinghui International (K) Limited* [2016] eKLR; *Isaiah Luyara Odando & another v National Management Authority & 2 Others; County Government of Nairobi & 5 Others (Interested Parties)* [2021] eKLR.

³²Nyambura, Kitela, Kanini & Kyatha Advocates, 'Case Analysis: ELC Awards Kshs. 2.1 Billion against Kenya Pipeline for Oil Spillage' (2025) <https://thelawyer.africa/2025/07/16/elc-awards-ksh-2-1-billion-against-kenya-pipeline-for-oil-spillage/> accessed 21 February 2026.



From a toxic tort perspective, the Thange River contamination is a classic case of hazardous exposure leading to widespread harm. The real challenge is not the legal theory—it is proving causation, sustaining litigation, and securing meaningful remedies for affected communities.

4. Quantifying environmental harm and personal injury in the Thange River Basin Case: A toxic tort perspective

While the quantum of compensation awarded in the Thange River Basin case may be justified by the polluter pays principle, as established by the ELC, a more fundamental concern arises as to the methodology used to assess the extent of harm suffered by the residents of the Thange River Basin. Specifically, it remains unclear whether a comprehensive public health impact assessment was undertaken to accurately determine the nature, extent, and long-term consequences of the harm suffered by the affected individuals. Evidence presented before the court indicated that medical examinations

were conducted on only was produced to the effect that medical examination was conducted on only 1,305 persons, yet there are 3,075 petitioners in this case. This disparity raises questions as to whether the evidentiary basis used to quantify damages reflected the full scope of harm suffered the residents of the Thange River Basin.

Toxic tort law addresses liability arising from exposure to hazardous environmental substances. In environmental disputes involving toxic exposure, the release of pollution adversely affects both the environment and the health of the people who suffer environmental toxic injuries.³² Environmental pollutants whether at low or high concentration cause environmental toxic injuries which need attention. The injuries from large concentration of pollutants can lead to acute poisoning and even fatalities.³³ Disease injury may range from diseases such as cancers, arthritis, mental disorders, disabilities, congenital anomalies and respiratory illnesses which are damaging, irreversible and could lead to fatalities.³⁴

Toxic tort law plays an important role in providing legal remedies for environmental toxic injuries in form of compensation.³⁵ The purpose of compensation is to restore the plaintiff to the position he occupied prior to the tortious act of the defendant, therefore toxic tort law as a legal response is expected to achieve this purpose.³⁶ Accordingly, toxic tort litigation seeks to address the harms suffered by individuals exposed to hazardous substances and to ensure that polluters bear responsibility for the consequences of their actions.

³²Palma J. Strand, 'The Inapplicability of Traditional Tort Analysis to Environmental to Risks: The Example of Toxic Waste Pollution Victim Compensation' (1983) 35 Stanford Law Review 575.

³³Thomas Koenig and Michael Rustad, 'Toxic Torts, Politics, and Environmental Justice: The Case for Crimtors' (2004) 26/2 Law and Policy Journal.

³⁴Strand (n 28) 575.

³⁵Albert Lin, 'Beyond Tort: Compensating Victims of Environmental Toxic Injury' (2005) 78 Southern California Law Review 1439.

³⁶ibid.

A successful toxic tort claim requires the plaintiff to establish that the defendant had a legal duty of care, that the duty was breached, that the plaintiff suffered a legally cognizable injury, and that there exists a causal link between the defendant's conduct and the injury sustained. was the cause of the injury in question.³⁷ The success of toxic tort litigation depends on being able to identify, by expert scientific evidence, both the nature of the toxin and the causal link between the plaintiff's exposure to the toxin and the injuries they have suffered.³⁸ In this regard, factual causation is commonly assessed through the application of the 'but for test' as articulated in **Francis Muchai Karera v Jane Wahu & another [2009] eKLR**. Without such scientific and evidentiary grounding, courts are often left to approximate damages without a precise understanding of the underlying medical and environmental realities.³⁹

The importance of scientific evidence in toxic tort litigation has previously been recognised in Kenya, most notably in the lead poisoning case of **Kevin Musyoka and Others v Attorney General**,⁴⁰ which arose from the 2006 environmental contamination in Owino Uhuru, Mombasa.⁴¹ In this case, epidemiological studies played a critical role in establishing the extent of harm suffered by the affected community. The team that

undertook the studies used population-based and cross-sectional studies of children aged 12–59 months randomly selected from households in the Owino Uhuru settlement and the neighbouring Bangladesh settlement. Adults were also selected from both settlements for the purpose of testing blood lead levels. Thus, toxicological results were also undertaken as part of the larger epidemiology studies done which helped provided proof that to lead contamination had affected the people.⁴² In addition environmental sampling was done which provided environmental evidence to show levels of lead contamination in the soil and the environment at large.⁴³

The significance of such scientific approaches becomes evident when examining the Thange River Basin case. Pollution incidents that lead to toxic torts are inevitable in the world of industrialisation more so for a country like Kenya which is a developing country.⁴⁴ Therefore, the *Owino Uhuru* lead poisoning case is not the only pollution incident Kenya will experience. The residents of Thange in Makueni County were exposed to oil pollutants after an oil spill in the area which contaminated the environment.⁴⁵ Some of the residents sued the polluter Kenya Pipeline Company and other state actors in the case of **Muindi Kimeu & 3285 Others v Kenya Pipeline**

³⁷*Ryland v Fletcher* (1868) LR 3 HL 330 ; Clerk, J.F., (Ed) (1994, *Clerk and Lindsel on Torts* London: Sweet & Maxwell 16th Edn paras 3-01; Kip Viscusi, 'The Social Costs of Punitive Damages Against Corporations in Environmental and Safety Torts' (1998) 87 *Georgetown Law Journal* 285.

³⁸Dennis R. Honabach, 'Toxic Torts- Is Strict Liability Really the "Fair and Just" Way to Compensate the Victims?' (1982) 16/2 *University of Richmond Law Review*.

³⁹*ibid*.

⁴⁰[2016] eKLR.

⁴¹Nancy Etiang and others, 'Environmental Assessment and Blood Lead Levels of Children of Owino Uhuru and Bangladesh Settlements in Kenya' (2018) 8(18) *Journal of Health and Pollution* 1.

⁴²Hannah Wamuyu, Collins Odote and Stephen Anyango, 'Compensating Toxic Torts in Kenya: Overcoming the Causation Dilemma' (2021) 12(2) *Journal of Sustainable Development Law and Policy* 272.

⁴³Etiang and others (n 12) 4.

⁴⁴Hannah Wamuyu, Collins Odote and Stephen Anyango, 'Compensating Toxic Torts in Kenya: Overcoming the Causation Dilemma' (2021) 12(2) *Journal of Sustainable Development Law and Policy* 272.

⁴⁵Pius Maundu, 'Residents Suffer Liver, Stomach Diseases after Oil Spill in Thange River' *Nation* (30 August 2016) <<https://nation.africa/kenya/counties/makueni/residents-suffer-liverstomach-diseases-after-oil-spill-in-thange-river-1233320>>; Philip Muasya, 'Village Awaits Sh300m Payout for Oil Spill that Killed Life on its Farms' *The Standard* (25 May 2017) <<https://www.standardmedia.co.ke/article/2001231549/village-awaitssh300m-payout-for-oil-spill-that-killed-life-on-its-farms>>; Interviews with Muindi Kimeu, Farmer Key Informant (Thange, 6 February 2021).

Corporation and others for compensation for their injuries and losses of property namely livestock and crops.⁴⁶

The Thange River contamination involved prolonged exposure to petroleum hydrocarbons affecting soil, water, and air, media through which toxic substances can have both immediate and cumulative health effects.⁴⁷ Such exposure is often associated with chronic illnesses, reproductive health complications, and latent conditions that may not manifest until years after initial contact.⁴⁸ In this context, a rigorous public health impact assessment would have been critical in establishing epidemiological links between the contamination and the reported injuries, as well as in quantifying both present and future harm.

The litigation counsel relied on doctors and an occupational health expert to collect evidence of causation.⁴⁹ However, the injuries did not occur in an employer-employee relationship therefore, this approach of collecting evidence was challenged in the trial process. Consequently, the evidentiary framework adopted in the case became a point of contention.

Epidemiology evidence is ideal in toxic torts affecting a population as the experts are able to isolate other environmental factors that could have caused similar illnesses complained of by the residents.⁵⁰ The litigation counsel cited challenges of costs in getting the doctors to collect evidence.⁵¹ The litigation counsel bore the costs as

most claimants could not afford to pay for litigation expenses. The medical doctors collected toxicological evidence from a third of the claimants randomly selected from the general area of the oil spill.

The absence of comprehensive epidemiological studies represents a missed opportunity to establish clearer casual links between oil contamination and the illnesses reported by residents. Epidemiology experts were better placed to collect evidence of causation as they are better placed to isolate other possible factors that could cause similar symptoms of disease. Further the delay in engaging the experts can distort evidence of causation as other factors could have created a similar risk of causing disease injury. An opportunity was missed to conduct epidemiology studies which would have helped establish any cluster of disease that was associated with the oil pollutants. The processes would have paved way for early diagnosis and treatment for those already with injury or increased risk of disease which would have helped mitigate the damage. This is despite the fact that a government multi sectoral team, set up by the Cabinet Secretary for Energy Ministry to investigate the oil pollution incident, had recommended the Ministry of Health to conduct a comparative medical analysis over a number of years to determine unique medical cases that could be attributed to the oil incident.

This missed chance for the conduct of a comprehensive health assessment signifies

⁴⁶ELC Makuani Petition 9/2019 consolidated with petition No 8, 12 of 2019. See also Maureen Kinyanjui, 'Kenya Pipeline ordered to pay \$29.2 million to Thange residents for 2015 oil spill impacts' (2025) Business and Human Rights Centre <https://www.business-humanrights.org/en/latest-news/kenya-pipeline-ordered-to-pay-292million-to-thange-residents-for-2015-oil-spill-impacts/> accessed 21 March 2026.

⁴⁷*Kimeu & 3,074 Others v Kenya Pipeline Company Ltd & another* [2025] KEELC 52339 (KLR).

⁴⁸Palma J. Strand, 'The Inapplicability of Traditional Tort Analysis to Environmental to Risks: The Example of Toxic Waste Pollution Victim Compensation' (1983) 35 *Stanford Law Review* 575.

⁴⁹Hannah Wamuyu, Collins Odote & Stephen Obiero, 'The Utility of Epidemiology Evidence in Resolving Compensation Quandary in Kenya: Case Study of Thange Oil Spill, Makuani County, Kenya' (2023) 19/1 *Law, Environment and Development Journal*.

⁵⁰*ibid.*

⁵¹*ibid.*

absence of a legal framework stipulates processes that should follow to safeguard the health of the public that is exposed to pollution.⁵² A legal framework that lays down the structure of collaboration in the events of pollution disasters would ensure that all agencies are involved including the health agencies in laying down response and recovery efforts in case of pollution disasters.⁵³ Encouragingly, the NEMA is in the process of amending environmental assessment regulations in order to incorporate public health aspects in environmental assessment process. Regulations should provide for the conduct of health assessments whenever there are pollution incidents which could go a long way in providing claimants with evidence of causation.⁵⁴

5. Appellate issues and the framework for determination

Being aggrieved with the judgement by the Environment and Land Court (ELC), the defendant filed a Notice of Appeal on 23rd July 2025, challenging the entirety of the decision. In furtherance of the intended appeal, the defendant also lodged an application at the Court of Appeal under **Rule 5(2)(b) of the Court of Appeal Rules**, seeking stay of execution of the judgement and consequential orders pending the determination of the appeal.

The appeal raises a number of significant legal and evidentiary questions concerning the relationship between constitutional environmental rights, toxic tort liability, and methodology used in assessing large-scale environmental compensation.

5.1 Grounds of Appeal

The appellant (Kenya Pipeline Company) challenges the judgement on several principal grounds.

The appellant contends that the ELC erred in permitting the petitioners to conflate ordinary tort claims with constitutional violations. According to the appellant, the dispute essentially concerned personal injury, economic loss, and environmental damage arising from an oil spill, matters traditionally addressed under tort law. By allowing the claims to proceed as a constitutional petition, the court allegedly lowered the evidentiary threshold required to establish torts liability. Relatedly, the appellant argues that this approach enabled the petitioners to circumvent the statutory limitation period applicable to tort claims under **section 4(2) of the Limitation of Actions Act**, which restricts actions founded on tort to three years from the date the cause of action arose.⁵⁵ In the appellant's view, framing the dispute as a constitutional petition effectively allowed the respondents to evade these procedural constraints.

The appellant further argues that the trial court erred in concluding that all 3,075 petitioners were residents of the Thange River Basin and had suffered injury from the petroleum oil spill. It is contended that the respondents did not satisfy the evidentiary burden **under sections 107 and 109 of the Evidence Act** to prove residence, exposure, and individualized harm.⁵⁶ According to the appellant, the ELC relied on generalized

⁵²Hannah Wamuyu, Collins Odote & Stephen Obiero, 'The Utility of Epidemiology Evidence in Resolving Compensation Quandary in Kenya: Case Study of Thange Oil Spill, Makueni County, Kenya' (2023) 19/1 Law, Environment and Development Journal.

⁵³Hilda Mulwa and Abdullahi Hassan, 'The Thange River Oil Spill Judgement: A Landmark Precedent in Environmental Justice' <https://ahmednasir.law/the-thange-river-oil-spill-judgment-a-landmark-precedent-in-environmental-justice-2/> accessed 21 March 2026.

⁵⁴*ibid.*

⁵⁵Limitation of Actions Act Cap. 22 Laws of Kenya.

⁵⁶Evidence Act Cap. 80 Laws of Kenya.

assertions of harm without requiring proof linking each claimant to the alleged environmental contamination.

Another key ground of appeal concerns the treatment of expert and environmental evidence. The appellant asserts that the court disregarded critical reports, including the Environmental Impact Assessment Report prepared by SGS Kenya and the Total Petroleum Hydrocarbon (TPH) Trend Analysis Report. These reports, according to the Appellant, indicated that pollutant levels in soil and water were below internationally recognized thresholds established under World Health Organization guidelines, EMCA standards, and the Dutch Intervention Value Standards. The appellant also argues that the court misapprehended the scientific processes of bio-remediation and natural attenuation, which were being implemented to address the hydrocarbon contamination. In the appellant's view, the court's misunderstanding of these remediation processes led to the issuance of restoration orders that were scientifically impractical.

Closely related to the foregoing ground is the challenge to the environmental restoration orders issued by the court. The ELC directed the appellant to restore the Thange River Basin ecosystem, including soil, surface water, groundwater, *flora*, and *fauna* within a period of 120 days, failing which the appellant would be required to pay KShs 900 million to facilitate restoration by the NEMA. The appellant argues that such orders failed to take into account the scientific realities of environmental remediation, particularly in cases involving hydrocarbon contamination. Processes such as bioremediation typically occur gradually over many years, and the imposition of strict timelines may therefore be unrealistic and incapable of compliance.

The appellant also challenges the finding

that the oil spill violated the petitioners' right to life under *Article 26 of the Constitution*. It is argued that the court inferred a causal relationship between the contamination and alleged fatalities without sufficient toxicological or post-mortem evidence establishing a direct link between the spill and the deaths in question. The appellant further points to inconsistencies in the medical evidence presented by expert witnesses. Although medical experts testified that 1,305 individuals had been examined and diagnosed with liver and renal toxicity, the appellant argues that the tests did not directly measure the presence of benzene or toluene, the hydrocarbons allegedly responsible for the injuries. Additionally, the medical examinations were conducted several years after the spill, raising questions about the reliability of the causal inference.

The appellant also disputes the court's finding that the petitioners' rights to property under *Article 40* were violated. According to the appellant, the court awarded compensation for crop losses, livestock deaths, and economic disruption without requiring adequate documentary or valuation evidence. For instance, the appellant argues that the award for crop loss was based on general allegations of crop destruction without supporting records of yields, valuation reports, or farm accounts. Similarly, the livestock compensation award relied on sampling evidence rather than verifiable proof of livestock ownership and losses.

5.2 The role of the Court of Appeal in determining this Appeal

In determining the appeal, the Court of Appeal will primarily be guided by established principles governing appellate review, as laid out in the Court of Appeal Rules. An appellate court will generally interfere with the findings of a trial court

where it is demonstrated that the court misdirected itself in law, misapprehended the evidence, or arrived at conclusions that are plainly inconsistent with the evidence on record.⁵⁷

With respect to the characterization of the claim, the Court of Appeal will need to determine whether the ELC correctly treated the dispute as a constitutional environmental claim rather than as a purely private tort claim. Kenyan environmental jurisprudence increasingly recognizes that environmental degradation may simultaneously give rise to both constitutional violations and private law claims. *Article 70 of the Constitution* expressly empowers courts to grant relief, including compensation, for violations of the right to a clean and healthy environment without requiring proof of personal loss or injury. In this respect, the appellate court may consider whether the ELC's approach reflects the constitutional design intended to facilitate broader environmental protection.

On the issue of limitation, the Court may also consider whether environmental pollution constitutes a continuing violation. Where environmental harm persists over time, courts have sometimes treated the cause of action as continuing, thereby preventing strict application of statutory limitation periods. In relation to evidentiary questions, the Court of Appeal will likely scrutinize the expert medical and environmental evidence presented during trial, particularly the extent to which the evidence established a causal link between the oil spill and the alleged health and environmental impacts. Environmental

litigation frequently involves complex scientific evidence, and the appellate court may assess whether the trial court adequately evaluated the reliability, scope, and limitations of the expert testimony.

The appellate court will also assess the propriety of the quantum of damages awarded.⁵⁸ As a general rule, appellate courts are slow to interfere with the trial court's assessment of damages unless the award is shown to be inordinately high or low or based on incorrect legal principles.⁵⁹ This was held by the CoA in **Butt v Khan [1978]**, where the Court held that the damages awarded were so inordinately high that it thought it could interfere with the award.⁶⁰ In **Bhogal v Burbridge [1975]**, it was stated that some uniformity must be sought in the award of damages and recent awards in comparable cases in local courts may be looked at.⁶¹ In **Orbit Chemicals Industries v Professor David M Ndeti**, the case related to the discharge of waste water or chemicals used to manufacture detergents on the respondent's land. The Court of Appeal reduced the amount of compensation awarded to the respondent noting that in regard to restoration of the soil, the same was awarded as special damages which ought to have been specifically pleaded and proven. To the sum of cost of restoration awarded by the High Court at Kshs 267, 439,464.15, the Court of Appeal reduced the same to Kshs. 12,000,000.00.

In this case, the Court of Appeal may consider whether the aggregated compensation awarded to the 3,075

⁵⁷*Martin Wanderi & 106 Others v Engineers Registration Board & 10 Others*, SC Petition No. 19 of 2015 [2018] eKLR. See also *Kemro Africa Limited t/a "Meru Express Service (1976)" & Another v Lubia & another (No 2)* [1985] eKLR.

⁵⁸*Musembi & 13 Others v Moi Educational Centre Co Ltd & 3 Others* SC Petition No. 2 of 2018 [2021] KESC 50 (KLR). See also *The Matter of African Commission on Human and People's Rights v Republic of Kenya* Application No. 006/2012 Judgement (Reparations) 23 June 2022 [The Ogiek Case].

⁵⁹*Butt v Khan* [1978] KECA 24 (KLR).

⁶⁰[1978] KECA 24 (KLR). See *Oluoch v Robinson* [1973] EA 108; *Kimothia v Bhamra Tyre Retreaders* [1971] E.A. 81.

⁶¹[1975] EA 285.

petitioners was supported by sufficient evidentiary grounding and whether the award properly reflected the scale of environmental harm. This is because there was no valuation report that supported the amount of damages issued in this case, as opposed to, for example, the **Mohammed Ali Baadi case**.⁶² The Court should place reliance on the Supreme Court and ELC judgement in **Owino-Uhuru Case** as was held in **Bhogal v Burbridge**. The number of persons who were stated to have died as a result of lead exposure in the **Owino Uhuru case** was captured at twenty (20).⁶³ Medical reports and evidence to that effect were adduced. The Court held that there was a direct effect as shown from the medical reports. Upon this consideration, the Court found that the ELC arrived at the correct amount in terms of compensation for personal injury and loss of life; the amount was neither excessive nor did the court consider an irrelevant factor.

Finally, the Court may examine the feasibility of the environmental restoration orders issued by the ELC. Environmental restoration orders are a key remedial tool in environmental litigation, but their effectiveness depends on the practicality of implementation. The appellate court may therefore consider whether the restoration timelines imposed by the trial court were realistic in light of the technical processes required for environmental remediation. Ultimately, the appeal presents the Court of Appeal with an opportunity to clarify the evolving contours of environmental constitutional litigation in Kenya, particularly the relationship between constitutional environmental rights, evidentiary standards in toxic tort claims, and the appropriate methodology for quantifying large-scale

environmental compensation.

6. Recommendations

While the Thange River Basin case represents a very important development in Kenya's environmental jurisprudence, it also reveals structural weaknesses in both the legal and institutional framework governing environmental compensation. There is therefore a need to address these weaknesses, as have been laid out in the preceding sections.

Kenya lacks an effective environmental incident response mechanism that addresses the health impact of population which exposes vulnerable populations to unmitigated harm. Such is the case in *Thange Oil Spill* case. Victims are left to sue and therefore struggle with the challenges of collecting evidence of causation for their injuries. There is need for environmental incidence response mechanisms to incorporate public health processes such as epidemiology studies which help in the assessment of health impact which process consequentially provides evidence of causation for pollution victims. The public health response processes should be codified into law in order to guarantee protection that is critical for a healthy population. There should be mandatory collaboration between NEMA and Ministry of Health rather than discretionary with respect to delivering appropriate public health response for pollution incidents.

The courts and legal practitioners need to recognise toxic tort challenges of proving causation in order to appreciate the importance of epidemiology evidence which can help in the collection of such

⁶²*Baadi, Mohamed Ali & others v Attorney General & 11 Others* Petition 22 of 2012 [2018] KEHC 5397 (KLR).

⁶³*Owino Uhuru Case* para. 161.



Environmental jurisprudence is where law meets ecology. In Kenya, courts are increasingly proactive, using constitutional rights and global principles to expand environmental protection and accountability.

evidence critical for compensation. The legal practitioners can be trained in the discipline of public health law in order to better appreciate interventions that should be placed by state in occasions of disasters that endanger population health. With a legal framework in place that allows the conduct of public health assessment, environmental incidents can be dealt with effectively to allow collection of evidence of causation and mitigation of damage where early diagnosis and treatment is done.

Moreover, another concern relates to the appropriate structure for the management and distribution of large-scale environmental compensation awards. Where environmental harm affects entire communities and ecosystems, as is in this case, individualized monetary compensation may not always fully capture the collective nature of the injury. In ***African Commission on Human and Peoples' Rights v Kenya (Ogiek Case)***, the African Court directed that part of the reparations be channelled through a community development fund

established for the benefit of the affected indigenous community.⁶⁴ In the present case, a similar model could be considered. Rather than relying solely on individualized payouts, part of the compensation could be administered through a locally managed environmental restoration or community resilience fund dedicated to ecosystem rehabilitation, public health monitoring and livelihood restoration.

6. Conclusion

The Thange River case represents a significant development in Kenya's environmental jurisprudence, affirming the judiciary's willingness to award substantial compensation and enforce constitutional environmental rights. The decision reflects an expanded understanding of liability, integrating both polluter responsibility and regulatory accountability. However, it also exposes practical challenges surrounding enforcement, especially where large-scale monetary awards are directed at state entities. Additionally, the case highlights gaps in the use of scientific and epidemiological evidence in quantifying harm, a core concern in toxic tort litigation. In this respect, the Thange River Basin decision should be understood not simply as a determination of liability, but as part of a broader jurisprudential shift in which Kenyan courts increasingly recognize that meaningful environmental justice requires remedies capable of addressing both the intragenerational and intergenerational consequences of environmental harm.

Sarafin Cheron is an LLB candidate at the University of Nairobi whose interests span AI governance, property law, commercial law, space law, and public international law.

⁶⁴The Matter of African Commission on Human and Peoples' Rights v Republic of Kenya Application No. 006/2012 Judgement (Reparations) 23 June 2022 [*The Ogiek Case*].

Beyond retirement: The Kibuka Transition Model and the rise of the crowning job



Dr. Gethaiga Kibuka

1. Introduction

There is a quiet crisis unfolding in the professional lives of millions of people which arrives at the moment a person clears their desk for the last time and steps out of the office into what is usually celebrated as the reward of a lifetime of labour. However, for many people retirement is not liberation but a loss. The usual idea of retirement is based on the assumption that older people want to and should slowly stop working and then stop being productive forever. This assumption was first given a theoretical form by Elaine Cumming and William Henry who introduced disengagement theory which is the proposition that aging is characterised by a natural and mutually beneficial withdrawal between the individual and society.¹ While disengagement theory was influential as the first sociological theory of aging, it has since been largely discredited as a universal account of retirement experience. The lived reality of modern retirement is far more



"Beyond retirement" is no longer just about life after a formal career—it's about how people transition into a new phase of productivity, purpose, and financial sustainability in longer lifespans and changing economies.

complicated and more urgent than the disengagement model anticipates.²

People work for reasons that extend well beyond the financial aspect. Work provides social connection, a sense of competence and a source of identity. When formal employment ends the removal of these psychosocial anchors can prompt what researchers like Sadaf Ahsan and others have described as a post-retirement identity crisis which is a period of self-questioning and in many cases, depression

¹Elaine Cumming and William Henry, *Growing Old: The Process of Disengagement* (Basic Books 1961).

²Mo Wang and Junqi Shi, 'Psychological Research on Retirement' (2014) 65 Annual Review of Psychology 209.

and anxiety.³ Sadaf Ahsan and others have also shown that the loss of professional identity is among the most psychologically destabilising aspects of retirement particularly for individuals whose careers constituted the primary source of their self-concept.⁴ For these individuals, retirement is rupture and not rest.

In the modern world, people are living longer and remaining healthy and cognitively active well into their seventh and eighth decades of life. The OECD has reported that population ageing presents a major challenge for economies and that promoting the employment and employability of older workers is essential to sustaining growth and managing fiscal pressures.⁵ Average employment rates for workers aged 60 to 64 across OECD countries stood at 55.9% in 2024, with wide variation between countries most notably from 77.2% in Iceland to just 25.4% in Luxembourg which reflects the uneven and inconsistent nature of current retirement policy frameworks.⁶ The scale of this demographic shift demands rethinking of what retirement means and what it should accomplish.

Two partial responses to this challenge have emerged in the literature. They include bridge employment and encore careers. Bridge employment refers to work arrangements that are part-time, lower-paying or in a different field which individuals take up in the period between full-time career employment and complete withdrawal from the workforce.⁷ Encore careers is a term popularised by Marc

Freedman and describes a more purposeful form of post-career work characterised by continued income and social impact.⁸ Bridge jobs and encore careers are different paths. Healthier workers with more skills and experience who do not strongly see themselves as retired are much more likely to choose encore careers. But these models mainly describe what people do after leaving full-time work and they still do not explain why some people reject retirement entirely or show how to move through this stage in a deliberate and dignified way.

This article addresses that gap. It introduces the Kibuka Retirement Transition Model (KRTM). This framework reconceptualises retirement as a transition into purposeful engagement rather than a terminal stage of withdrawal. The KRTM is anchored on two concepts, namely the **Reluctant Retiree** which describes individuals who exit the payroll but resist disengaging from meaningful work and the **Crowning Job** which describes the post-career role that represents the highest and most impactful expression of an individual's accumulated human capital, identity, and legacy-building capacity.

2. Theoretical background: What existing models get right and wrong

Before introducing the KRTM, it is necessary to engage honestly with the theoretical landscape in which it sits. The first major theoretical tradition is disengagement theory introduced by Cumming and Henry in 1961. Disengagement theory posits that aging involves a natural and socially

³Sadaf Ahsan and others, 'Mental Health in the Context of Post-Retirement Identity Crisis' (2021) 11(2) *Journal of Psychiatry and Mental Disorders* 45.

⁴*ibid.*

⁵OECD, *OECD Employment Outlook 2025: Navigating the Golden Years – Making the Labour Market Work for Older Workers* (OECD Publishing 2025).

⁶*ibid.*

⁷Yujie Zhan and others, 'Bridge Employment and Retirees' Health: A Longitudinal Investigation' (2009) 14(4) *Journal of Occupational Health Psychology* 374.

⁸Marc Freedman, *Encore: Finding Work That Matters in the Second Half of Life* (PublicAffairs 2007).

sanctioned process of mutual withdrawal and that the individual withdraws from active social roles and society reciprocally reduces its demands upon the individual.⁹ The theory was groundbreaking as the first sociological theory of aging but its main claims have been challenged and largely rejected by subsequent empirical research. Disengagement theory fails to account for the evidence that social engagement, not withdrawal, is associated with greater life satisfaction, better cognitive functioning, and improved physical health in later life.¹⁰ It mistakes the absence of formal employment with the absence of productive contribution which is an assumption that the KRTM directly challenges.

In opposition to disengagement theory, activity theory argues that successful aging occurs when individuals maintain the social roles and activities they performed during earlier stages of life.¹¹ Where disengagement theory prescribes withdrawal, activity theory prescribes continuity of engagement. Research has broadly supported the activity theory prediction that more socially active older adults report higher levels of life satisfaction.¹² However, activity theory is insufficiently nuanced about the quality of activity. Not all post-retirement activity is equally meaningful and activity theory does not explain why some individuals find it important to remain engaged in purposeful identity-affirming work rather than simply staying busy.

Continuity theory, formally proposed by Robert Atchley in 1971 and elaborated in



A reluctant retiree is someone who exits the workforce not by preference, but due to pressure or constraint—financial, institutional, or personal. It's increasingly common in Kenya and globally as longevity rises and economic security remains uneven.

his 1989 article 'A Continuity Theory of Normal Aging' in *The Gerontologist*, offers a more sophisticated account.¹³ Atchley suggested that when people reach midlife and older age, they usually try to keep their way of life and sense of self as steady as possible mainly by relying on the same habits and solutions that have worked for them in the past.¹⁴ Internal structures such as personality, values and beliefs remain relatively stable while external structures such as social roles and relationships are adapted to sustain a consistent self-concept and lifestyle. Continuity theory is compelling because it correctly identifies the psychological importance of self-continuity in the aging process which is central to understanding the **Reluctant Retiree**.¹⁵ However, its limitation is that it is primarily

⁹Elaine Cumming and William E Henry, *Growing Old: The Process of Disengagement* (Basic Books 1961) 227.

¹⁰Laura L Barnes and others, 'Social Resources and Cognitive Decline in a Population of Older African Americans and Whites' (2004) 63(12) *Neurology* 2322.

¹¹Robert J Havighurst, 'Successful Aging' (1961) 1(1) *The Gerontologist* 8.

¹²Bruce W Lemon, Vern L Bengtson and James A Peterson, 'An Exploration of the Activity Theory of Aging: Activity Types and Life Satisfaction Among In-Movers to a Retirement Community' (1972) 27(4) *Journal of Gerontology* 511.

¹³Robert C Atchley, 'Retirement and Leisure Participation: Continuity or Crisis?' (1971) 11(1) *The Gerontologist* 13.

¹⁴*ibid.*

¹⁵Robert C Atchley, 'A Continuity Theory of Normal Aging' (1989) 29(2) *The Gerontologist* 183.

descriptive rather than normative which means it explains what people tend to do but does not articulate the most meaningful or impactful pathway through the retirement transition.

In Erik Erikson's psychosocial theory, the key task of middle adulthood is generativity. This is using one's abilities to support and guide the next generation which research links to better mental health and cognitive functioning in later life.¹⁶ Dan McAdams showed that highly generative adults tend to tell redemptive life stories where earlier struggles are reframed as preparation for meaningful contribution.¹⁷ Gary Becker's human capital theory adds that education, training and experience function like long-term investments that increase a person's productive value over time.¹⁸ The KRTM argues that these investments combined with a generative drive and redemptive life story find their fullest expression in post-retirement Crowning Jobs where older adults, freed from organisational constraints, can deploy their accumulated wisdom with maximum autonomy and purpose.

3. The Kibuka Retirement Transition Model (KRTM)

The Kibuka Retirement Transition Model explains retirement as a journey with three linked stages. *The Career Phase, the Transition Phase, and the Crowning Phase*. Each stage has its own psychological, social and practical features and together show how a working life moves from first entry into work through a period of tension and re-thinking to its highest and most meaningful stage.

3.1 Phase one: The career phase (foundation)

The Career Phase encompasses the full arc of an individual's formal working life from initial entry into employment through decades of professional development to the point at which formal career employment ends. In the KRTM, this phase is the period in which a person gradually builds their professional identity and capacity to contribute to others and not just about earning a salary and doing a job.

Gary Becker's human capital theory established that investment in education and on-the-job training generates returns that increase productivity and earnings over time.¹⁹ Within the KRTM, this idea is broadened to cover all the key abilities professionals build over a career which includes working well with people, handling organisations, spotting opportunities and risks, communicating with very different kinds of people and developing a deep understanding of their field. These abilities amount to a kind of wisdom that can only be gained later in life. They come from years of trial and error and experience but not from initial training alone.

The KRTM frames the Career Phase as the *foundation* because the skills and wisdom accumulated during this period are not ends in themselves. They are the raw materials from which the **Crowning Job** will be constructed. The challenge is to recognise this dynamic and to support the transition from foundation to culmination.

¹⁶Erik H Erikson, *Childhood and Society* (WW Norton 1950); Barry D Lebowitz and others, 'Midlife Eriksonian Psychosocial Development: Setting the Stage for Late-Life Cognitive and Emotional Health' (2016) 30 *Developmental Psychology* 1.

¹⁷Dan P McAdams, *The Redemptive Self: Stories Americans Live By* (Oxford University Press 2006).

¹⁸Gary S Becker, 'Investment in Human Capital: A Theoretical Analysis' (1962) 70(5) *Journal of Political Economy* 9.

¹⁹Becker (n 18).

3.2 Phase two: The transition phase (Reluctant Retiree)

The Transition Phase is the most psychologically complicated and arguably the most consequential stage of the KRTM. It begins as the individual approaches or enters formal retirement and ends when they have found their **Crowning Job** or in the absence of adequate support and self-understanding, when they settle into a resigned disengagement that represents a waste of human capital.

There is a pattern of psychological disruption that follows formal career exit, there is an initial period that may include both relief and exhilaration, followed by a more sustained period of disorientation, loss of structure and identity questioning.²⁰ Loss of work-based identity is associated with increased risk of depression, anxiety, and social isolation particularly for individuals with strong professional identities. A 2025 overview of reviews on retirement's impact on health and well-being confirmed that the retirement transition can have negative consequences for mental health particularly for lower-income individuals and those with limited social networks beyond the workplace.²¹

In the KRTM, this disruptive period after leaving full-time work is seen as transitional stages where a person has left their old role but has not yet found a new one. The **Reluctant Retiree** feels this especially strongly. Their refusal to fully retire is not irrational but comes from a clear sense that their most important work is still ahead. They are trying to protect their identity and way of life by holding on to

both inner values and outer roles even as formal careers end. Whether this becomes damaging or transformative depends on how others respond. If family and society pressure them to act retired and withdraw then they are likely to feel defeated and never find their **Crowning Job** but if this resistance is understood and supported, the Transition Phase can open the door to the **Crowning Phase** where their highest contribution becomes possible.

3.3 Phase three: The crowning phase (crowning job)

The **Crowning Phase** is the stage at which the **Reluctant Retiree** successfully transitions into a role that allows them to deploy their full accumulated human capital in the service of a chosen purpose. This is the **Crowning Job**. It is important to be precise about what distinguishes the **Crowning Job** from other forms of post-retirement work. Bridge employment is transitional and financially motivated, it is a holding position between full-time career work and full retirement.²² An encore career involves paid work that combines personal meaning and social impact typically in a different field from one's career.²³

The **Crowning Job** shares characteristics with the encore career, but it is more specifically anchored in the individual's accumulated professional identity. Where the encore career may involve reinvention for example the finance professional who becomes a teacher or the lawyer who starts a social enterprise, the **Crowning Job** involves culmination which means the deployment of everything one has learned

²⁰Anastasia Fadeeva and others, 'Retirement Adjustment Framework: Understanding the Interplay Between Individual and Contextual Factors' (2025) *Journal of Prevention and Health Promotion*.

²¹*Ibid.*

²²Yujie Zhan and others, 'Bridge Employment and Retirees' Health: A Longitudinal Investigation' (2009) 14(4) *Journal of Occupational Health Psychology* 374.

²³Marc Freedman, *Encore: Finding Work That Matters in the Second Half of Life* (PublicAffairs 2007).

and being in a role that could not have existed without the career that preceded it.

For many Reluctant Retirees, entrepreneurship is a natural form of Crowning Job because it turns decades of experience and skill into a self-directed venture that protects identity and keeps them usefully engaged. Unlike bridge employment which is mainly a temporary financial arrangement or encore careers that require starting again in a new field, post-retirement entrepreneurship builds directly on the person's core competencies, networks and sector knowledge from the Career Phase. By starting a consultancy, niche practice, social enterprise or small firm, the Reluctant Retiree keeps acting as an expert and problem-solver while gaining new freedom to apply their wisdom, mentor others and strengthen institutions. This kind of entrepreneurial Crowning Job helps to stabilise the difficult Transition Phase, supports mental health through purpose and structure and at a societal level prevents the waste of valuable human capital in ageing populations.

4. Illustrative case studies

The following case studies are made-up examples that show how the KRTM works in different types of jobs. They are not about specific people but they are based on patterns that researchers have clearly found in studies of what people do after retirement.

Case study 1: The corporate executive turned mentor

Consider a senior executive who retires after thirty-five years in corporate leadership. At the height of her career, she led a large organisation through multiple periods of restructuring and transformation thus building deep competencies in strategy, human capital development and institutional

design. Upon retirement, she initially welcomes the freedom only to find that the absence of meaningful challenge generates a sense of purposelessness. Her identity had been constructed around leadership and responsibility and without these, the social and psychological scaffolding of her sense of self began to erode.

Rather than settling into full disengagement, she recognises her own reluctance as a signal. She establishes a mentorship platform, initially informal and later institutionalised, through which she advises startups and social enterprises navigating exactly the kinds of challenges she spent her career mastering. The platform grows. She becomes known not just as a former executive but as a builder of leadership capacity across a generation of emerging organisations. Her **Crowning Job** is not her career replicated but her career fulfilled. The skills she spent thirty-five years acquiring find their most impactful application.

This case illustrates several of the KRTM's claims. The Career Phase creates the conditions for the **Crowning Job**, that the Transition Phase is characterised by identity disruption and the need for purposeful re-engagement and that the Crowning Phase represents an enhanced expression of human capital, freed from the constraints of organisational hierarchy and directed entirely by the individual's own sense of purpose.

Case study 2: The educator who becomes a knowledge creator

A teacher retires from formal teaching after decades in the classroom. His formal exit from the education system does not resolve his orientation toward knowledge transmission. He struggles with the loss of daily engagement with students. He carries a sense that his accumulated knowledge and teaching skill represent a resource that

her retirement has not extinguished.

He then begins writing, first articles, then books then structured online learning resources accessible to a broader audience than any classroom could accommodate. His reach expands and finds that retirement has removed the institutional constraints that limited her pedagogical vision in formal employment and that the **Crowning Job** of knowledge creation allows her to teach in a manner that is both more ambitious and more personally authentic than anything her formal career permitted.

This case illustrates the KRTM's insight that the Crowning Phase can represent a transcendence of the formal career. The educator's **Crowning Job** builds directly on the foundation of her Career Phase but it expands its scope and impact beyond what formal employment could have achieved. This supports the KRTM's claim that human capital may in some instances reach its highest expression not during formal employment but in the autonomy of the Crowning Phase.

Case study 3: The professional who builds community impact

A mid-level professional exits formal employment after a long career in public administration. He does not fit the profile of the high-achieving executive whose identity is obviously career-defined but finds retirement equally disorienting. It is a loss of purpose and the sense of contributing to something larger than himself. He spends a period in the Transition Phase uncertain how to redirect his energy and skills.

His **Crowning Job** emerges organically from his engagement with his community.

Drawing on his administrative expertise, his knowledge of institutional processes and his extensive local networks makes him establish a community-based organisation focused on youth empowerment and skills development. The organisation addresses challenges that his formal career brought into his field of vision but that bureaucratic constraints prevented him from fully addressing. His **Crowning Job** is, in this sense, the fulfilment of a professional aspiration that formal employment could not accommodate.

This case is significant because it demonstrates that the KRTM is not solely applicable to high-status or high-achieving individuals. The **Crowning Job** does not require fame or extraordinary resources. It requires only that the individual's accumulated competencies and motivations find a purposeful vehicle for expression and that the individual has the self-awareness, support, and enabling conditions to construct that vehicle.

5. Discussion

5.1 Retirement as transformation, not termination

The cases above, considered alongside the theoretical frameworks discussed in this article, support a practically urgent conclusion. The assumption that formal career exit marks the beginning of a terminal withdrawal from productive society represents a theoretical error and a policy failure.

Retirement as a social institution was designed in a world of shorter life expectancies, physically demanding labour and limited educational attainment among older workers.²⁴ It made sense

²⁴OECD, Ageing and Employment Policies (OECD Publishing 2025) ; OECD, OECD Employment Outlook 2025: Navigating the Golden Years – Making the Labour Market Work for Older Workers (OECD Publishing 2025).



The notion that human capital peaks later in life suggests we should rethink retirement, employment, and education systems. Instead of sidelining older workers, economies—especially Kenya’s—could gain by leveraging their peak value rather than discarding it.

in that world to imagine that formal career exit coincided more or less with the natural limits of productive capacity. That world no longer exists for a growing proportion of the workforce in developed and developing economies alike. As the OECD has documented, people are not only living longer but remaining healthier and healthcare advances have allowed more individuals to continue working and contributing well beyond traditional retirement ages.²⁵ In this context, the insistence on retirement as termination represents a failure to adapt policy and institutional frameworks to demographic and social reality. The KRTM challenges this failure directly. By looking at retirement as a transition rather than a termination.

5.2 Human capital peaks later in life

One of the most counterintuitive implications of the KRTM is the proposition that human capital may peak not in mid-career but in the Crowning Phase. This claim requires unpacking because it appears to contradict assumptions in economics and management theory. Standard human capital theory says that people’s productivity usually follows a hill-shaped pattern over their lives. They become more productive as they gain education and experience then later become less productive as their physical abilities and some mental functions start to decline.²⁶ The OECD has noted concerns that aging workforces could lead to slower

²⁴OECD, Ageing and Employment Policies (OECD Publishing 2025) ; OECD, OECD Employment Outlook 2025: Navigating the Golden Years - Making the Labour Market Work for Older Workers (OECD Publishing 2025).

²⁵ibid.

²⁶Vegard Skirbekk, 'Age and Individual Productivity: A Literature Survey' (2004) 2 *Vienna Yearbook of Population Research* 133; Elke Loichinger and Bernhard Hammer, 'Influence of Workforce Ageing on Human Capital Formation' (International Institute for Applied Systems Analysis 2019) WP-19-002.

productivity growth based on this view.²⁷ However, the human capital that is most relevant to the **Crowning Job** is not captured by these productivity metrics. The skills that define the **Crowning Job** which include strategic wisdom, relational competence, institutional knowledge, the capacity to identify patterns across decades of experience, the ability to mentor and develop others are precisely the skills that increase rather than decrease with age. The KRTM draws on these insights to argue that the most valuable contributions of many experienced professionals may occur after and not during formal career employment provided the institutional and cultural conditions for the **Crowning Job** are in place.

5.3 Identity continuity

The concept of the **Reluctant Retiree** states that identity which is the coherent narrative self that individuals construct across the course of a lifetime is not a luxury but a psychological necessity²⁸ When retirement disrupts this narrative, the consequences can be severe. Robert Atchley's continuity theory provides the theoretical foundation for understanding this dynamic.²⁹ But the KRTM goes further by arguing that identity continuity in retirement is not merely preserved by maintaining hobby activities or social connections. It is best preserved by finding a **Crowning Job** that allows the individual to continue to be the person they have spent their career becoming, in a context that provides contribution and the recognition of competence. This is why bridge employment is psychologically insufficient because it may maintain income and structure but fails to sustain the

identity-affirming quality of purposeful skill-intensive contribution.

5.4 Legacy as a central motivator

The KRTM says that legacy, which is making a real, lasting contribution to people and communities who will live on after you, is one of the strongest motivations for older workers in the Crowning Phase. This has practical consequences. **Crowning Jobs** should be found and designed in ways that let older adults pass on their knowledge and strengthen institutions. Roles that give real chances for knowledge transfer and building organisations are much better at keeping **Reluctant Retirees** engaged and mentally healthy than roles that only pay them or just keep them superficially busy.

6. Implications

6.1 For individuals

The most immediate and actionable implication of the KRTM is for individuals approaching the retirement transition. The model argues that the most dangerous error an individual can make is to treat formal career exit as the end of their most meaningful contribution rather than as the beginning of it. Individuals who identify their **Crowning Job** early are far better positioned to navigate the Transition Phase without prolonged identity disruption. This means that retirement planning must extend beyond financial preparation to encompass what might be called *purpose planning*. This is a systematic process of identifying the motivations that have defined a career and asking how they might find their way to the Crowning Phase.

²⁷OECD (n 24).

²⁸Dan P McAdams, *The Redemptive Self: Stories Americans Live By* (Oxford University Press 2006); Robert C Atchley, *Continuity and Adaptation in Aging: Creating Positive Experiences* (Johns Hopkins University Press 1999).

²⁹Robert C Atchley, 'A Continuity Theory of Normal Aging' (1989) 29(2) *The Gerontologist* 183; Robert C Atchley, *Continuity and Adaptation in Aging: Creating Positive Experiences* (Johns Hopkins University Press 1999).

6.2 For organisations

Organisations that fail to leverage the accumulated human capital of their retiring workforce are wasting one of the most valuable resources at their disposal. The knowledge and institutional wisdom that experienced professionals carry with them when they exit formal employment cannot be replicated by documentation or the recruitment of younger workers. When that knowledge walks out the door without adequate transfer, it is lost not just to the organisation, but to the wider social and economic ecosystem in which the organisation operates. The KRTM provides organisations with a practical framework for addressing this failure. By recognising **Reluctant Retirees** and supporting the emergence of their **Crowning Jobs** organisations can transform what is currently treated as a management challenge (workforce aging) into a strategic asset.

6.3 For policymakers

The current retirement policy frameworks across most jurisdictions are built on a binary model of employment and retirement that fails to reflect the diversity of modern working lives. Age-based mandatory retirement thresholds, pension systems that penalise continued work and labour market regulations that create disincentives for phased or flexible retirement arrangements all constitute structural barriers to the emergence of **Crowning Jobs** at scale.

The government must move urgently to develop more flexible retirement systems that allow individuals to exit formal career employment while continuing to contribute in **Crowning Jobs** roles without financial

penalty. This includes the reform of pension frameworks to permit continued earning alongside pension receipt, the development of legal and tax structures that support informal mentorship and community contribution roles and the creation of public platforms and incentive structures that facilitate knowledge transfer between retiring professionals and younger generations. The OECD has called for labour market policies and employer practices that support the hiring, retention and employability of older workers, noting that as life expectancy continues to rise, the potential to extend working lives also grows.³⁰ The KRTM provides the conceptual framework. The goal is to enable retirees to realise the **Crowning Jobs** for which their careers have prepared them.

7. Conclusion

The retirement crisis is real and growing. It is a crisis of identity, purpose and wasted human capital. Across the world, capable and motivated professionals are exiting formal employment and disappearing into a conventional retirement narrative that was designed for a world that no longer exists. One of shorter lives, physically demanding work and the assumption that wisdom and experience had no further institutional home once formal employment ended. The Kibuka Retirement Transition Model offers a timely and actionable alternative to this narrative. By defining the **Crowning Job**, it provides a conceptual destination that is anchored in the individual's own accumulated identity and competence. The question is no longer when we stop working. It is whether we have the insight and the institutional imagination to ask what we were, all along, preparing to begin.

³⁰OECD (n 24).

Incentivized Justice: Reforming Continuous Professional Development (CPD) requirements to mandate Pro Bono for license renewal in Kenya



By Abigael Jemutai

Introduction

The Constitution promises justice as one of the fundamental rights. It belongs to each citizen, though for many ordinary citizens, the path to justice can feel out of reach. Cost and distance often impede access to justice. With already strained budgets, Legal representation is a far-fetched dream and a distant reality. The middle-income families are barely able to afford the services of a private lawyer.¹ It is in such a gap that pro bono services can not only be viewed as a charitable act, but as an act that goes beyond goodwill. They open doors to justice that many indigent people feel are locked. These services make the constitutional promise a reality. Access to justice means the ability of an individual who seeks justice to access legal information, legal advice, legal assistance, and legal representation.

Regardless of background, pro bono services ensure that justice is not based only on those who can afford it.²

Transactional quality of present CPD accumulation

Each year, thousands of lawyers in Kenya scramble to gain CPD points as a prerequisite for license renewal. The existing system, as per the Advocates Act (Continuous Professional Development) Regulations, 2014, states that an advocate shall participate in or attend approved events at which that advocate shall accrue a minimum of five units, except where that advocate has been exempted in part or in whole³ All applicants for an annual practicing certificate shall be accompanied by evidence that the applicants have acquired five units of continuing legal education in every season of practice.⁴ The prime purpose of the Continuing Professional Development (CPD) is to ensure advocates continuously improve and modernize their professional knowledge, skills, and competence. It fosters individual development and the development

¹Kathryn Graham - Geo. J."Increasing Access to Legal Services for the Middle Class",- <https://heinonline.Org/hol/loginhol?Redirect_url=https%3a%2f%2fheinonline.Org%2fhol%2fmojo%3f%252fmojo%3d%26auth_token%3dqcbilsk8skpox%252fv0ltn> -on 21 February 2026

²LH Keith - Mitchell Hamline L. Rev," The Structural Underpinnings of Access to Justice: Building a Solid Pro Bono Infrastructure",- <https://heinonline.org/HOL/loginhol?redirect_url=https%3A%2F%2Fheinonline.org%2FHOL%2Fmojo%3F%252Fmojo%3D%26auth_token%3DD97%252F%252FmJHEQrBqm> -on 21 February 2026

³Advocates Act, The advocates (continuing professional development) rules, section 4(a).

⁴Advocates Act, The advocates (continuing professional development) rules, section 7.



CPD is not just a requirement—it's a career strategy. In fast-changing fields (like law, finance, and technology), continuous learning is essential to remain effective and credible.

of desirable qualities to practice effectively in their workplace. CPD promotes the lifelong learning process, reflection, and high ethical and professional standards. It also affirms to the clients and the general public the competence and dedication of the advocate and guarantees that advocates are up to date and applicable in various legal changes.⁵

CPD activities can include in-house training, open learning, short courses, conferences, seminars, workshops, structured reading, self-study, preparing and delivering a presentation, and serving as a coach or mentor. CPD is vital for survival and prosperity in an increasingly litigious society, where professional ethics and codes of conduct are firmly and rightly enforced. While there is a need to maintain high standards in the dispensation of justice, there has been unrest about the nature and quality of training provided under the Continuous

Legal Education (CLE) program. Proponents have raised these concerns in almost every CLE meeting. Studies have grumbled in person about the cost of instruction, the nature of the training provided, and the fact that renewal of the annual practicing certificate has been pegged to attendance and completion of the five units. This has created a culture in which some advocates attend seminars just to enroll and get the five mandated units without attending the entire session. As a result, the emphasis has shifted from the intended learning to acquiring the required qualifications for the annual practicing certificate.⁶

Despite criticism, the court has upheld the mandatory nature of CPD requirements. *In Ng'ang'a vs Law Society of Kenya, Civil Appeal No. 371 of 2019*, the Court of Appeal held that the purported legitimate objective of CPD requirements is to maintain competence

⁵Advocates Act, The advocates (continuing professional development) rules, section 3.

⁶Magdalene Nzisa Munyo, "Reaction of Advocates based in Nairobi on the relevance of the compulsory continuing legal education programme", 11 November 2008, <<https://erepository.uonbi.ac.ke/bitstream/handle/11295/7983/Magdalene%20n.%20munyao%20M.B.A%202008.pdf?sequence=3&eduction>>, on 21 February 2026

and keep advocates up to date on statutory developments. This is due to the dynamic nature of the law, and the LSK must keep itself abreast of any new developments in the legal field.⁷ This can be achieved through training and participation in the initiated programs. The Court also affirmed that mandatory LSK membership and compliance with CPD statutes are legitimate and reasonable limitations under Article 24 of the Constitution.⁸

As part of improving access to justice by vulnerable and marginalised groups, the Judiciary deployed the pro bono scheme by allocating funds to indigent clients to seek legal services. Courts were given KSh79 million to pay the claims of advocates who provided pro bono services. To further their services to the people, the Judiciary supplemented these efforts with programs that aimed at dismantling other barriers to access to justice, such as complicated court processes. In this respect, an Automation Process Guide for the Court of Appeal was published to help litigants in navigating technology solutions deployed at the court and ensure seamless processes and procedures that conform to the policy documents of the Court. This has reduced the case backlogs by 2.16% from 649,342 to 635,262.⁹

Missed opportunity for impact

The main drawback of the existing system is the lack of connection to quantifiable impact. The advocate is allowed to gain continuing

professional development points in consecutive years without using the acquired competencies to provide service to the indigent and underserved citizens. Moreover, Rule 6 (11) of the Advocates (Continuing Professional Development) Rules, 2014 states that regular or pro bono legal work is not an approved Continuing Professional Development (CPD) activity, except for legal work that is for the Legal Aid Programme.¹⁰ The exclusion of pro bono work from CPD activity results in a narrow construction of the aims that may be achieved through CPD. While broadening knowledge and sharpening personal skills are critical for the ever-evolving legal profession, emphasis ought also to be placed on the notion that CPD may be used to supplement the development and progress goals of the country.¹¹

Constitutional and statutory framework

Pro bono work in Kenya traces its roots in our national laws and professional standards. Access to Justice is a Constitutional right in Kenya¹² Article 48 of the Constitution of Kenya provides that the state shall ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice. This ensures that justice is practically accessible. A specific force is given to it in matters criminal. Article 50(2) outlines the accused person's right.¹³ Furthermore, **Article 50(2)(g)** provides the right of an accused person to choose and be represented by an advocate.¹⁴ Furthermore, **Article 50(2)(h)**

⁷Nganga v Law Society of Kenya & 2 others [2025] KECA 1384 (KLR).

⁸Constitution of Kenya, 2010, Article 24

⁹The Judiciary of Kenya, "State of the Judiciary and the Administration of Justice Annual Report Financial Year 2023/24" - <<https://judiciary.go.ke/wp-content/uploads/2024/11/SOJAR-2023-2024.pdf>> -on 23 February 2026

¹⁰Advocates (Continuing Professional Development) Rules 2014, rule 6 (11).

¹¹Muiru, A., Mburu, B., Wanjau, B., and Otieno, J. et al., "Developing Alternative Pathways to Enhance Access to Justice through Incentivised Pro Bono and Legal Aid Services in Kenya"; <[3Strathmore+Law+Clinic-42-64 \(1\).pdf](#)>-on 22 February 2026.

¹²Constitution of Kenya, 2010, Article 48.

¹³Constitution of Kenya, 2010, Article 50(2).

¹⁴Constitution of Kenya, 2010, Article 50(2)(g).

obligates the State to provide an advocate at its expense if a substantial injustice would otherwise result.¹⁵ These constitutional articles establish that legal representation is a cornerstone of a fair trial and a right that the State must actively facilitate.

Moreover, Article 50 of the Constitution affords the right to a fair hearing. It provides that every accused person has the right to a fair trial, which includes the right 'to have an advocate assigned to the accused by the State and at the State's expense, if substantial injustice would otherwise result, and to be informed of this right promptly. It does not state that one should be able to afford legal services.¹⁶ Legal aid thereby ensures access to justice by securing the right to a fair trial.¹⁷ It is important to note that the Kenyan government is only obligated to provide lawyers to capital offenders before the High Court and juvenile offenders, who do not have access to legal representation.¹⁸ This situation, among other factors, has allowed access to justice to develop at a painfully slow rate. As opined by Majanja J, *'Without access to justice, the objects of the Constitution, which are to build a society founded upon the rule of law, dignity, social justice and democracy, cannot be realized for it is within the legal processes that the rights and fundamental freedoms are realized.'*¹⁹

Professional force is given to the constitutional mandate through the Advocates Act, Cap. 16, Laws of Kenya. This duty is supplemented by section 13 of

the Act, which outlines the academic and professional qualifications for admission as an advocate. The Law Society of Kenya (LSK) Code of Standards of Professional Practice and Ethical Conduct supplements this obligation by requiring an advocate to uphold the same standards of diligence, confidentiality, and fairness regardless of whether a client is paying or not. This stipulation makes it unequivocally clear that the financial ability of a client should not be the determining factor in the quality of justice to be dispensed.²⁰ The professional rules do not change because a case is unpaid. This encourages service to individuals of limited means, but it doesn't relax the duties of competence, communication, or confidentiality. All clients should be subjected to the same diligence. The ethical baseline does not shift with the rate of billing.²¹

The framework is also reinforced by the Legal Aid Act, 2016, to give effect to Article 48. The Act establishes the National Legal Aid Service (NLAS), a structured, government-backed initiative that mainstreams the provision of legal aid.²² The Act recognizes that legal aid can be provided by pro bono advocates drawn from legal firms, educational institutions, and civil society organizations. It provides services, such as legal education, advice, representation, and alternative dispute resolution. It also addresses cases such as Land disputes, Employment rights, Family law matters, and criminal defense for the indigent²³ Current government initiatives, such as

¹⁵Constitution of Kenya, 2010, Article 50(2)(h).

¹⁶Herbert Mwaura, 'Pro bono Practices and Opportunities in Kenya' (Latham and Watkins LLP, May 2019) accessed on 22 February 2026

¹⁷International Covenant on Civil and Political Rights, 16 December 1966, 999 UNTS 171, art 14.

¹⁸Practice Directions Relating to Pauper Brief's Schemes and Pro Bono Services (Gazette Notice No. 370).

¹⁹Kenya Bus Services Ltd and Another vs Minister for Transport & 2 Others (2012) eKLR

²⁰Law Society of Kenya, Code of Standards of Professional Practice and Ethical Conduct (2016) Part II.

²¹McGavock Reed" Professional Responsibility in Pro Bono & Public Service Work: Maintaining Ethical Standards with Limited Resources", December 2, 2025 - <<https://macreedlaw.com/professional-responsibility-in-pro-bono-public-service-work-maintaining-ethical-standards-with-limited-resources>> - on 21 February 2025.

²²Office of the Attorney General and Department of justice " - <[Home - Office of the Attorney General and Department of Justice](#)> - on 27 February 2026

²³Muthiassociates" How Lawyers in Kenya Can Leverage Free Legal Resources for Success. "March 4, 2025 - <<https://muthiassociates.com/leveraging-free-legal-resources-kenya>> - on 27 February 2026

the launch of Legal Aid Centers, such as Kibera, indicate a renewed commitment to ensure access to justice is universal, just like health. This ensures that essential legal services are brought closer to people who need them most in a visible, trusted way, strengthening the rule of law and deepening constitutionalism.²⁴

Benefits

The relevance of pro bono service to professional practice has a meaningful impact on the justice system of Kenya. First, it has a direct impact of promoting access to justice in people who cannot afford their own representation, therefore providing practical application to Article 48 of the Constitution, which guarantees all persons access to justice.²⁵ Second, pro bono service has a positive impact on judicial efficiency; as noted in the 2024/25 State of the Judiciary Report (SOJAR), the Judiciary had a record case clearance rate of 104 per²⁶ cent with 647684 matters being closed against 621425 matters filed, which is a historic high and thus means these figures are actual developments that Kenyans want to have disputes resolved in time.²⁷ It also provides professional development through experience working on precedent-setting cases, and it has a Community Impact by protecting the disadvantaged and human rights.²⁸ The Kenyan lawyers have access to a treasure trove of free legal materials that can not only help them to improve

their practice but also enable them to promote justice and human rights. With the help of tools that are involved in the public interest litigation and the cooperation with organizations like LSK, FIDA Kenya, and NLAS, legal professionals will be able to enhance their research skills, increase the pool of their professional contacts, and be of more service to the community.²⁹ Lastly, a strong pro bono culture leads to the legitimacy of the profession, which shows that advocates are not business participants but officers of the court who must administer justice.

Existing Pro Bono infrastructure in Kenya

There is no need to construct a mandatory pro bono system. Kenya already has an established framework of pro bono legal services, which offers ready-to-go avenues through which the required number of hours could flow. Organisations such as FIDA Kenya specialize in providing free legal aid to women facing gender -based discrimination and domestic violence. Kituo Cha Sheria services the poor in legal aid with branches in Nairobi and Mombasa. Amnesty International Kenya provides legal support for human rights-related cases. The National Legal Aid Service (NLAS), a government-backed initiative that provides legal services and representation primarily to the poor, marginalized, and vulnerable in society. NLAS provides civil matters, criminal cases, children's issues, constitutional

²⁴Henry Makori, "AG to commission legal aid service in Nairobi" - <https://www.the-star.co.ke/news/2025-11-17-ag-to-commission-legal-aid-service-in-nairobi> - on 27 February 2026.

²⁵Elsy C. Sainna, "ACCESS TO JUSTICE: Reflections on salient features of the Legal Aid Act-2016" on February 17 2017 - <https://icj-kenya.org/news/access-to-justice-reflections-on-salient-features-of-the-legal-aid-act-2016> - on 3 March 2026.

²⁶Capital FM, "Kenya: Judiciary Posts 104% Case Clearance Rate As Koome Unveils Sojar Report" on 21 November 2025 - <https://allafrica.com/stories/202511210271.html> - on 3 March 2026.

²⁷Kiprono Keileb, "CJ Koome praises Judiciary's efforts as courts surpass case clearance record", on 21st November, 2025 - https://peopledaily.digital/news/cj-koome-praises-judiciarys-efforts-as-courts-surpass-case-clearance-record?utm_source=KenyaMOJA.com - on 3 March 2026

²⁸Muthiassociates, "How Lawyers in Kenya Can Leverage Free Legal Resources for Success", March 4 2025 - [How Lawyers in Kenya Can Leverage Free Legal Resources for Success - MUTHII W.M & ASSOCIATES](https://www.muthiassociates.com/resources-for-success-muthii-w-m-&-associates) - on March 3, 2026.

²⁹Farlex, "How FIDA-Kenya is championing criminal justice for women and girls", - [How FIDA-Kenya is championing criminal justice for women and girls](https://www.farlex.com/online-library/kenya) - [Free Online Library](https://www.farlex.com/online-library/kenya)



The creation of the Pro Bono Institute of Kenya marks a shift toward a more coordinated, scalable system, but access gaps still remain—especially for rural and marginalized communities.

matters, and public interest cases. Through these organizations, lawyers can widen their expertise while contributing to social justice.³⁰

Proposed Implementation

Translating the incentivised pro bono concept into practice requires an elaborate implementation model. The main component of the model is a conversion rate between the pro bono service and CPD credit. In keeping with the stipulated need of five CPD units in a year under the Advocates Act (Continuous Professional Development) Regulations, 2004, this article suggests that an advocate who performs two pro bono services would earn the entire five CPD points necessary to renew his or her license. The handlers of one pro bono case would get two points and may complement them with conventional CPD activities. Individuals who perform beyond the requirement would

not only get bonus points but also get publicly recognised, which would also be a way of motivating excellence. The 1 pro bono threshold is a workable commitment.

To ensure that pro bono services are actually served and not merely claimed, Pro bono services would only count if served through approved providers such as National Legal Aid Services, FIDA Kenya, Kituo cha Sheria, the Law Society of Kenya, or other organisations accredited by LSK for the same purpose. As with traditional CPD claims, the number of pro bono case claims would be audited annually, with penalties for false claims including disciplinary action under the Advocates Act

Challenges

However, despite the strong legal and institutional structure, the demand for legal services surpasses the supply. The Kenyan

³⁰"Top 5 Platforms Offering Free Legal Services in Kenya", August 15, 2024 - [Top 5 Platforms Offering Free Legal Services in Kenya](#) - on 16 March 2026.



Kenya has a strong legal and institutional framework for access to justice, but practical barriers—cost, delays, and inequality—still limit real access. Ongoing reforms are improving the system, but gaps remain, especially for marginalized communities.

population faces a legal issue, most of which would be solved with simple consultative legal counsel. The limitations are not only financial. The spatial analysis published in the *Journal of African Law* shows that the average distance to the nearest court of a Kenyan is 22 kilometres, and nearly 10 percent of the population, representing 5.3 million individuals, live more than 50 kilometres away, and 1.7 million Kenyan citizens live more than 100 kilometres away.³¹ The price and time invested in traveling are practically overwhelming obstacles to justice among such inhabitants.³² However, to fill the huge demand, Kenya has not done enough yet; the combined efforts of pro bono lawyers and paralegals, organised through organisations such as the LSK and other NGOs, do not suffice. Hence, the need for mandatory pro bono service from every practicing lawyer.

Conclusion

In conclusion, a key and feasible way to enhance access to justice in Kenya is by reforming the Continuing Professional Development (CPD) system to include compulsory pro bono work. Although the existing CPD system is effective in maintaining the professional competence of advocates, it has a limited scope of influence on society due to its rather transactional nature.

Incorporating the pro bono work into CPD would also provide alignment between the professional development and the constitutional obligation to the Constitution of Kenya, especially the provisions of Article 48 of the Constitution of Kenya and Article 50 of the Constitution of Kenya. This would allow the legal profession not only to remain highly competent through acknowledging pro bono legal service as a qualifying CPD activity but also to play a direct role in filling the justice gap encountered by indigent and marginalized communities. Existing institutions like the National Legal Aid Service and the Law Society of Kenya would be leveraged to maintain accountability and proper implementation. Finally, integrating pro bono practice into CPD standards would reestablish the identity of the advocate, not as a practitioner in private, but as an officer of the court and protector of justice who believes in the rule of law and in the promotion of constitutional principles in society.

Abigael Jemutai is a second-year law student at Kabarak University. A passionate writer and advocate for legal transparency.

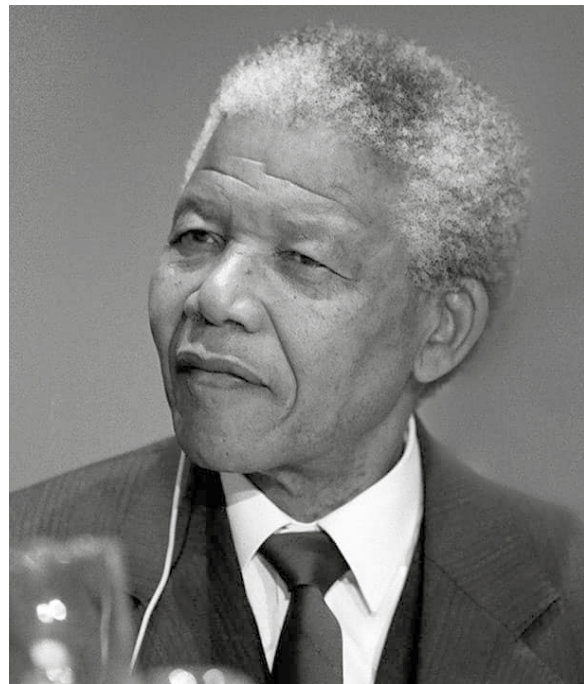
³¹Lance Hadley and Edith, "How Far Are Kenya's Courts? Distance as a Barrier to Justice in Kenya", on 16 September 2025 - <[How Far Are Kenya's Courts? Distance as a Barrier to Justice in Kenya | Journal of African Law | Cambridge Core](#)> - on 16 March 2025.

There is Something in a “Mother Tongue”: An Inclusive or Divisive Factor in Nation-Building?



By Ouma Kizito Ajuong'

President Nelson Mandela, in his autobiography, “Long Walk to Freedom”, writes that if you talk to a man in a foreign language he understands, it goes to his head, but if you talk to a man in his own native language, it goes to his heart. While this has often been misunderstood by many people as approval of tribalism, for Mandela, the use of native or indigenous languages is not about encouraging tribalism. Rather, it is about embracing one’s African nature and culture. It is also about appealing to certain emotions as we connect to our roots as Africans. For Mandela, speaking one’s mother tongue is not divisive; it is an appreciation of diversity. Instead of causing division, President Mandela suggests that the use of the mother tongue is a way of building bridges among different communities. By contrast, President Julius Nyerere felt very strongly that thinking in vernacular languages was dangerously tribalistic and retrogressive. For Nyerere, the use of indigenous languages was limited to local and cultural events and was not a factor in nationhood. This paper therefore seeks to discuss the place of the “mother tongue” in Kenya today. Is it something that divides Kenyans or unites them? Is



Nelson Mandela

there a need to strengthen indigenous languages, or should we do away with them completely?

Mother tongue as a gateway to culture

Many proponents of the use of mother tongue associate it with the propagation of culture. If you are unable to speak your mother tongue, or unable to relate to it, then you may be seen as someone who does not understand culture. Language is often believed to be the gateway to culture. In Africa, where a person does not appreciate or understand culture, they are often treated



Julius Nyerere

as a foreigner. *"Mwacha mila ni mtumwa."* The Constitution of Kenya recognises the protection and promotion of both culture and linguistic diversity. This means that, unlike Nyerere's position, vernacular languages in Kenya are not only protected but also promoted. As much as speaking mother tongue in Kenya today may be frowned upon by some people, it is legally encouraged and may form part of Kenyan nationhood. It is important, however, to note that although indigenous languages are promoted, Kiswahili is recognised as the national language. In essence, therefore, Kenya uses a double-edged sword. This means that while we protect and promote indigenous languages, we also develop a unifying language, namely Kiswahili. So, what does this mean in the broader scheme of things? It means that there is some truth in the assertion that the mother tongue is the gateway to culture. From this perspective, the mother tongue in Kenya is

not an element of division but an assertion of diversity.

Mother tongue and intellectual and cultural Identity

One thing that distinguishes African countries today is not only their different indigenous languages but also their adopted colonial languages. The argument is that the colonial master intended to erase indigenous languages so that Africans would never unite, and so that they would buy into colonial languages in a way that changed their cultural identity. While this may not be wholly true, there is some truth in it. In Africa, we have pushed our indigenous languages to the periphery in favour of colonial languages, which are used in business, school and formal transactions. As a result, colonialism has managed to change Africa's cultural identity. Kenya, as a common law jurisdiction,

did not merely adopt the British legal system; it also adopted a way of thinking culturally and socially. Consequently, Kenyan customary languages and ways of life are still often seen as inferior to the language and way of life of the West. A case in point is the claim that polygamy is primitive and a system of “wife purchase”, while homosexuality is treated as “woke”. How do we name our children today? Some people have abandoned the African way of naming children for two reasons. First, there are those who feel that names such as Liam and Jayden make their children look modern. Secondly, there is the fear of being judged on the basis of one’s last name, which remains a reality in Kenya. In this realm, therefore, the question to ask is whether our mother tongues have helped us build a national cultural identity or whether they break that cultural identity. Again, when it comes to national cultural identity, although the riddle has not fully moved away from the colonial masters, Kenya has taken the approach of fusing different cultures and mother tongues as a way of promoting national unity.

Feelings of inferiority or superiority around Mother Tongue

How do you feel about people who speak their mother tongue? There are many people in today’s society who feel that those who speak their mother tongue are uncivilised. “*Washamba*.” In fact, in today’s Kenya, speaking one’s mother tongue is something that some people are ashamed of, and many shun it because they associate it with tribalism. There are also others who feel superior because they speak their mother tongue. I do not think that speaking one’s mother tongue makes a person inferior. It does not make one superior either. One does not become tribal merely because one speaks one’s mother tongue. In the broader picture, there is a need to

admit that while speaking mother tongue in and of itself is not dangerous, using mother tongue to exclude those who do not speak your language is wrong and does not help nationhood. The solution is to use official languages, especially in public, but this does not mean that we should erase the mother tongue.

The mother tongue and politics

As already highlighted, the colonial masters needed to divide and rule. This tactic was adopted and perfected by post-colonial governments, a situation that has persisted to date. As the saying goes, politics is local, and the mother tongue is always a major tool. This is because, as President Mandela says, there is a need to speak to the heart. More importantly, speaking mother tongue often gives politicians a safe place to hide and disparage people from other tribes or clans. Think of Rwanda, the politics and civil war between the Tutsi and the Hutu, and, in Kenya, the 2007 post-election violence and the “*madoadoa*” language. I therefore submit that the politics of tribe is divisive rather than inclusive. It is in politics, more than in anything else, that the “mother tongue” serves to divide the people.

Conclusion

The matter of indigenous languages, or the mother tongue, is a long and intricate discussion, and I have only scratched the surface. The use of the mother tongue in and of itself is not a divisive factor in nationhood. However, the way the mother tongue is used or deployed may determine whether it becomes an inclusive agent or a divisive agent.

Ouma Kizito Ajuong’ is an Advocate of the High Court of Kenya and a Senior Parliamentary Counsel at the Office of the Attorney General and Department of Justice.

Prof. Laban P. Ayiro ushers in the launch of David Musau Mumama Learning Complex to promote Kenya's legal education prospects for the future



By Tioko Emmanuel Ekiru

1. Brief Introduction

Legal education in the 21st century demands an epistemological overhaul, abandoning the "model that clings to dogmatic pasts."¹ This outdated approach, in which teacher-authorities dispense all knowledge and apply historical solutions to contemporary and future challenges, fails to equip law students and graduates to navigate today's complexities.² Instead, we must embrace a "prospective/projective" model, prioritizing the cultivation of skills to tackle multifaceted problems and to innovate alternatives that do not yet exist.³ This redesign goes beyond the mode of teaching to encompass robust physical infrastructure attuned to globalized dynamics, fostering an environment where the current and future generations of lawyers can experiment, collaborate, and envision emancipatory justice for all.

2. Reimagining legal education beyond the lecturer-student classroom approach

In the modern era of rapid geopolitical shifts, the prospective model equips future lawyers with a new mindset of dismantling systemic barriers, championing social justice, the rule of law, human rights, and building equitable societies. Ultimately, this holistic approach redefines legal training as a catalyst for societal transformation and emancipation, blending physical innovation with intellectual rigour geared towards preparing law students and graduates for a just global future that is beyond the traditional lecturer-student classroom approach.

3. The launch of David Musau Mumama Learning Complex as a milestone for legal training

At Daystar University, the launch of the David Mumama Learning Complex (DMMLC) on April 15, 2026, stands as a bold response to these imperatives. This state-of-

¹Mateus de Oliveira Fornasier, 'Legal Education in the 21st Century and Artificial Intelligence' (2021) 19(31) *Revista Opinião Jurídica* 1-32, available at <https://periodicos.unichristus.edu.br/opiniaojuridica/article/download/3341> > accessed (20 April 2026).

²See Walter Khobe, 'Transformation and Crisis in Legal Education in Kenya' (2017) *The Platform Magazine for Law, Justice and Society*, pp 66-70.

³Mateus de Oliveira Fornasier, 'Legal Education in the 21st Century and Artificial Intelligence' (2021) 19(31) *Revista da OAB* 1 <<https://doi.org/10.12662/2447-6641oj.v19i31.p1-32.2021>> accessed 18 April 2026.



Prof. Laban Ayiro, Vice Chancellor Daystar University

the-art facility now houses Daystar School of Law, and it was officially launched and dedicated by the Most Rev. Dr. Jackson Ole Sepit, Archbishop of the Anglican Church of Kenya.

The building is named in honour of a Kenyan visionary and philanthropist, David Musau Mumama, who, alongside his devoted family, donated a staggering 30 hectares of prime land to Daystar University, worth KSh 300 million, cementing their status as one of the institution's largest donors.

Far beyond bricks and mortar, this donation forms a foundational pillar for reimagining legal training in Kenya. It is also perfectly

aligned with Kenya's aspirations for an access to justice system anchored in the philosophical underpinnings of Kenya's 2010 constitution, which enshrines not just rights but a dynamic vision of constitutionalism.⁴

In the age of corrupt bargains and ethical shortcuts, the facility aims to nurture integrity as a bulwark against moral decay, producing servant leaders who champion the public interest, accountability, and constitutional promises such as ethical orientation and access to justice.⁵ The complex also embodies the Daystar School of Law, commitments for moral ideals aimed at moulding and producing competent, well-trained, and ethically

⁴See Article 48 of the Constitution of Kenya, 2010, which discusses access to justice; in *Kenya Bus Service Ltd & another v Minister for Transport & 2 Others*, Civil Suit 504 of 2008, Justice Majanja made the point that by incorporating the right of access to justice, the Constitution requires us to look beyond the dry letter of the law. In addition, he affirmed that the right to access is a reaction to and a protection against legal formalism and dogmatism. Article 48 must be located within the Constitutional imperative that recognises the Bill of Rights as the framework for social, economic, and cultural policies.

⁵See Article 10 of the Constitution of Kenya 2010, which establishes binding national values and principles of governance, including democracy, human dignity, and integrity, for all state organs and public officials. These principles must be applied during the interpretation of the Constitution, the enactment of laws, and the implementation of public policies; see also Article 73 of the Constitution of Kenya (2010), under Chapter Six on "Leadership and Integrity," which outlines the responsibilities of leadership. It dictates that authority is a public trust, requiring integrity and accountability from state officers.

grounded architects of social change for the nation-building in the legal profession sphere. By embedding these ideals, the DMMLC ensures legal education serves Kenya's aspirations for a just, responsive, participatory, and inclusive society, where law is a tool for empowerment rather than an elite preservation instrument for injustice.

Prof. Laban P. Ayiro, one of Kenya's foremost institution builders and the current Vice-Chancellor of Daystar University, expressed profound gratitude to Mumama's family during the launch of the complex. He underscored the profound meaning of the building, stating that it speaks beyond words and stands as a visible expression of faith, answered prayers, and collective belief. He emphasized the importance of honouring both God and the individuals through whom such visions are fulfilled.

He shared the testimony that he came to Daystar in a spirit of service, describing his role as one rooted in stewardship, purpose, and growth. He encouraged appreciation of even the small contributions made by other individuals and called on alumni and the Daystarian community to give back to the institution.

Prof. Ayiro also reminded attendees to walk in humility and never take milestones for granted, invoking Micah 6:8's biblical principles of doing justice, loving kindness, and walking humbly with God. This philosophy positions the DMMLC not as an endpoint but as a launchpad for manufacturing ethically grounded lawyers who prioritize public interest over personal gain, but it resonates with Daystar's vision of developing Christ-centred servant leaders who integrate faith, learning, and service to transform the world through world-class, value-based education.

Beyond this, the DMMLC embodies cutting-

edge infrastructure attuned to globalized dynamics in legal practice. For example, Smart boards and high-resolution projectors enable interactive, tech-infused lectures, preparing students for technology-based legal practice, with fully equipped moot courts that simulate real-world advocacy design. These features ensure that Daystar's law graduates thrive in a ready-made environment aimed at responding to the rapid global changes in our time.

4. Conclusion: Pioneering future lawyers as the next research agenda

The launch of the DMMLC positions Daystar School of Law as a premier hub for equipping current and future lawyers with the skills to address emerging global legal trends. This state-of-the-art facility will foster innovative training programmes that blend cutting-edge technology, interdisciplinary approaches, and practical simulations—centred on amplifying emerging African voices across critical areas such as moot courts, research, and global publications. At the launch, for instance, Dean of the School of Law, Dr. Maurice Ajwang Owuor, emphasized that the complex provides the infrastructure for modern, dynamic, forward-looking, solution-oriented legal education grounded in a Problem-Based Learning (PBL) approach, designed to enable law students to tackle ill-structured, real-world problems through critical thinking and innovations. Therefore, DMMLC is not just a mere physical infrastructure; it is a bold paradigm shift in legal pedagogy aimed at reimagining how the current and future lawyers are shaped to confront challenges in an ever-evolving world.

Tioko Emmanuel Ekiru is a Lecturer at Daystar University School of Law. He also serves as the Founding Editor-in-Chief of Daystar University Law Journal.

The hidden tax: A feminist critique of Kenya's legal and fiscal framework



By Kirwa Michelle

The opening phrase to the article feels aggressive. Mostly because of the word feminist, "is this another rant? What could they possibly want more?" go to the myriad of questions calculated by the angry. Someone will see it and get totally bored, "why are we always talking about women". To speak of a feminist critique of frameworks is to invite dismissal, a rant. Who benefits? One that seeks to see things from a constitutional perspective and asks, is the law really gender neutral as it stipulates? And if it is, why does this neutral law produce unequal outcomes? How equal is article 27? Practically or theoretically? Am I aggressive or is the system just failing.

I would like to shift the gaze to our land's supreme law, the constitution. Known across Africa as one of the most progressive constitutions regarding the fact that the framework encompasses matters of equality subjugating discrimination. Article 27 focuses on equality, Article 43 on economic rights and Article 10, our robust enlistment of our core national values highlighting equity. Our legal supreme document principally has a sensational skeleton. Affirmative action to curb gender inequality in governance with the unimplemented two thirds gender rule. National Gender and Equality Commissions! We are totally ahead on our principally cemented framework.



The "hidden tax" is not a single policy failure—it is a systemic feature of how law and economics interact in Kenya. While the legal framework promises equality, the fiscal and institutional realities shift disproportionate burdens onto women.

However, equality in the Kenyan legal system practically is akin to an illusion. A beautiful mirage on a hot sunny day to a thirsty driver needing water after longer and the longest miles travelled. This symbol promises equality yet feigns an ignorance to economic and societal differences between the sexes. One that calls for non-discrimination but keeps care giving unrecognized. This illusion of our legal framework begs the unanswered question, is equality fair? Is it fair to be equal?

The hidden burden on the fiscal side of Kenya will and always fell on the women. Where patriarchal norms have called the men providers, critical economic study and



Value Added Tax (VAT) is designed as a neutral consumption tax, but in practice it has gendered effects—especially in contexts like Kenya where income, work, and spending patterns differ sharply between men and women.

survival mechanisms have proven who is the real giver and nurturer. Following the Value Added Tax Act, V.A.T is the tax imposed on suppliers legally but mostly consumers bear the brunt of it. Upon an economist's view, this burden lies in the price elasticity of demand where for an inelastic curve, customers have no choice but to buy thus bearing the cost of VAT. Whereby in elastic demand, luxuries are not necessary, thus bought less.

Drawing this economic explanation on price elasticity of demand, our affected group, women, are seen to be the buyers of day in day out commodities. Name it, bread for breakfast, milk for the children, a pack of diapers, some lollipops for the sweet tooth, you can name it from a wide range of everyday commodities. Commodities that are not substitutable. When these consumables are bought on the daily with the increase in VAT, women are directly

affected as they are the constant buyers. End products for a legally imposed duty on a supplier but an economically imposed duty on the consumer. This then by a far increases the concept of lower income to women at the end as VAT makes a situation where both a man and a woman can earn the same but the woman always loses more. The innate inelasticity of household care is where the tax burden hits women more.

Kenya's fiscal framework under the Income Tax act, taxation is dwelled upon neutrality and the principal ability to pay. Although, this is not realistic in Kenya's labor market as the act assumes a predominantly formal economy, whereas in Kenya, a significant amount of economic activity dwells on the informal sector. Consider your local mama mboga, the lady who repairs your clothes by the road side, the mama who you get your rush hour lunch from or even the lady who cooks and cleans and the

kids give her the title 'aunty'. Women are disproportionately represented in informal trade, small scale businesses and unpaid household economic activities. These fall out of the protective frameworks of formal taxation. The aftermath however, is a structural irony. While the law is presumed to be neutral, it operates on the economic assumptions that are quick to exclude these groups. Women thus bear indirect taxation through consumption tax that does not correspond to formal tax reliefs. Therefore, fiscal neutrality actually digs a deeper hole to fairness, where for you to be visible you have to be formally employed, a place where women remain systematically unrepresented. Taxing survival while exempting systems.

When we think of VAT applying to goods broadly, then it is seen as a neutral concept. But, when factors such as biology come to play, the scale is extremely tipped off. The issue of pink tax has remained a constant issue where normal body function is subjected to heavy criminalization in the sense of being hectically expensive. The cheapest quality sanitary products go for Ksh.75 in the local shops. These are non-optional goods tied to, I repeat, NORMAL BODY FUNCTION. In areas where women cannot afford, we fall prevalent to period poverty. Neutrality under the law fails women here as men do not have an equal mandatory consumption thus neutral tax plus unequal necessity equals to unequal burden. This tax then remains hidden in the law where women have to pay a price for normalcy.

The prevalent argument by Catherine MacKinnon on how neutral the law is forming the basis of my feminist lens. Though the appearance might seem neutral, we are living in a space of dominant groups. Where tax systems assume formal income-based economies as the head while our

economy lies on the shoulders of informal incomes. We exclude integral parts. Carol Gilligan cleared it by the notion of systems ignoring care-based roles. Cooking, child care, home management are not recognized nor paid yet they sustain the economy. Although formal equality aims to treat everyone the same, we need substantive equality. One that accounts for real differences, biological functions! Our legal framework does not acknowledge accounts of this. This perspective seeks accounting for the structural and economic disparities.

Ultimately, the hidden tax is not just an economic oversight but a manifestation of the legal framework that mixes up formal neutrality with substantive equity. The fiscal system treats its citizens as genderless and standardized units refusing to live the life supposed to be lived. The definition of productivity by the law is viewed from a flawed lens of formal employment whereas it is only exclusionary by design. Article 27 is not achieved by applying the same rules to everyone standing on different foundations. True constitutional follow up requires a necessary shift toward FISCAL FEMINISM: a policy framework that mandates gender disaggregated economic analysis before any new tax is legislated. To show that the state cares for the fragility of the informal economy and will balance its budget on the backs of its vulnerable.

The question is no longer the neutrality of tax but rather who pays the cost of neutrality. And until we honestly and legally answer this question, then equality remains a mirage leaving the women of the nation to travel the longest miles, perpetually thirsty in a system that will never give them a drink.

Kirwa Michelle is a law student at the University of Nairobi with a growing interest in financial and commercial law, currently balancing my LLB and CPA journey.

Martha Koome's Courting Courage: A Life of Law, Faith, Family and Reform

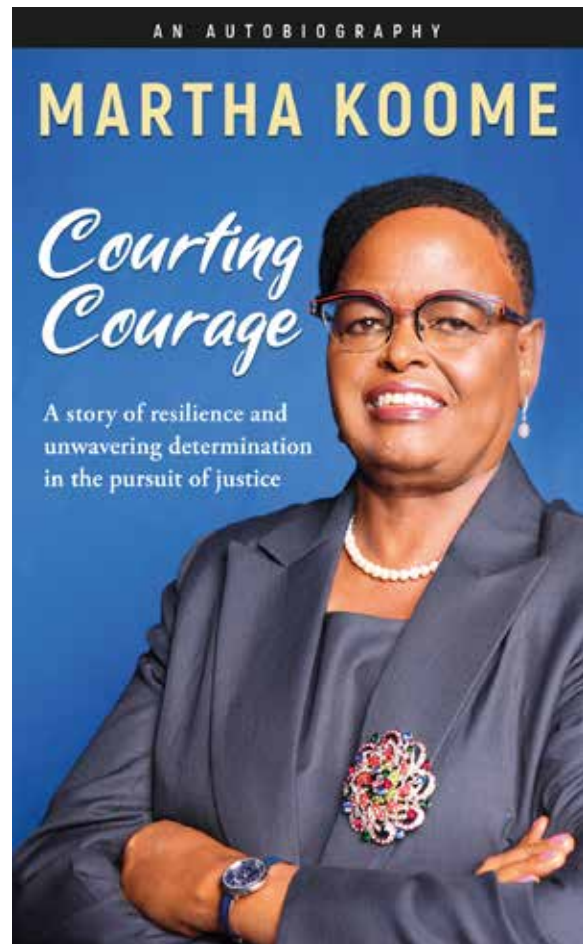


By Iteyo Khaisia

'These matters require a trailblazer.' When Chief Justice Martha Koome was contemplating whether to accept the role for public office, these words spoken by the Registrar of the High Court guided her decision. And yet, the five words are an apt reflection of her entire life.

Courting Courage explores the Chief Justice's life and experiences with a deeply personal tone. Throughout the book, the reader does not meet the CJ. One simply meets Martha Koome, a little girl born to a mother with a fiery vision beyond her years and a purpose to meet the needs of her community. Hers is the story of how prayer and community shaped her identity. The injustice suffered at the hands of her father and eldest brother in her academic pursuit contrasted with the kindness she enjoyed at her grandfather's side is a tension most women raised in a patriarchal society know all too well. Raising a family while attending lectures has to have been the hallmark of her resilience. Despite all these hurdles, in a country that loves honorifics and titles, she became Wakili Martha Koome; the first in her community.

As of all academic overachievers, a pass disheartened her greatly. Dr Njagi's words, "Make your practice first class" did not just comfort her, they became the very



embodiment of her journey as a lawyer. Her lecturer introduced her to her first law firm where she worked brilliantly. Perhaps all we need is a mentor who gives us a chance. What we do with that chance, is, however, entirely up to us. And for Martha, that chance only led her upwards and onwards.

Her diligence and thoroughness were apparent in how she applied herself from her days as an intern at Mathenge and Muchemi Law Firm through to her serving at the highest court in the land. Even while bogged with corporate work, she still

pursued family law cases on a *pro bono* basis. The book depicts a time where family law was not mainly undertaken by the big fish because vulnerable groups would be on the needy end of the rope. However, for Martha, marriage and family were seen for what they are, the biggest make or break for those caught up in it.

The experiences in her legal journey describe her work ethic as nothing less than devoted. She always went above and beyond for what she believed in. Whether it was the *pro bono* cases on family law or in her private practice when representing political detainees like Raila Odinga, her commitment to justice always prevailed.

The book paints a vivid picture of the times that her activism lived in. At FIDA-Kenya, she and her distinguished colleagues, including my favourite lecturer Dr. Baraza, did the kind of work that only fairy tales are made of. In a highly dictatorial era, they lobbied for women's rights, lobbied for policy reforms, brought the patriarchy to its knees and made headlines. FIDA-Court was feared by all and sundry that even the media could not pass on a good story featuring it.

At a time when constitutional reform was highly contested, she was right at the vortex. She was part of the team that reviewed the constitution and wrote the draft that laid the groundwork for the eventual promulgation of the 2010 Constitution, complete with the Bill of Rights we enjoy today.

The memoir describes an honest perspective of transitioning from private practice to public service. Her dilemma regarding activism, remuneration and imposter syndrome paint a sincere picture familiar to anyone who has to make a big shift in their career. 'It is the individual grit, initiative and innate desire to continue learning and improve that maketh a judge.'

Despite feeling out of depth at first, these words spoken out of experience much later defined her journey as a judge from the High Court through to the Supreme Court.

Her Lady Justice's perhaps most invaluable weapon in her arsenal is her problem-solving capacity. A similar pattern is apparent to the reader of her works. At the High Court in Nairobi, her first order of business was renovating her office to match her cosy. She is, just a girl, after all. Next was the system ensuring no cases were delayed because of technical court orders. In Nakuru, it was the food kiosk owned by the OCS and developing CUCs. In Kitale, it was the mobile courts and in the Court of Appeal it was technology in the midst of a global crisis.

The publication does not cover the CJ's life in isolation, however. Her life is seen to have been shaped by the hands of many. For the lovers of a good romance, her marriage makes for a good swoon. The couple's experiences are marked by humour, trust and a deep consideration for one another right from her initial meeting with Koome and how she stands him up on their would-be first date to the growth of their children and careers. Theirs is a love story for the books. Oh wait, it already is!

Her love for her family goes undoubted by way of how she shows up fully for them and they her. The days spent at her sister Rosemary's house during her O-levels and the celebrations of her father back in Meru when she is appointed judge all point to the same thing, her strong bond with her family. Good news arrives at her doorstep while surrounded by her family, she is appointed judge of the Court of Appeal at her niece's wedding and President of the Supreme Court at her in-law's funeral. Her interconnectedness with her community gives a real feel of her personal life.

The book captures her love for children that went beyond her family, it poured into her involvement with Imani Children's Home and even into legal regulations and policy reforms. Her work with children earns her a seat at ACERWC. She chaired a special taskforce on children and despite hostile stakeholders' efforts, successfully drafted and defended the bill on children's rights that later became the Children's Act. In her personal life, she and her family continue to support Imani Children's Home. Passion really does drive purpose.

'In this field you will have enemies.' The work depicts the real but unfortunate horrors of the legal profession stained by propaganda meant to smear one's name, defamatory statements meant to threaten one's promotion and remarks borne out of insecurity. The CJ's professional life was not without political interference and personal vendettas aimed at ruining her reputation. During vetting of judges post-2010 and her interview for the highest position in the judiciary, she comes face to face with ghosts from her past, including claims of incompetence by an unsatisfied SK Macharia and the pass at undergraduate level. Despite all this, she was always victorious in the end.

Courting Courage has many literary strengths including the personal tone employed throughout. Its biggest strength, however, is its historically rich context that the author beautifully interweaves with her story to ground her narration. The historical backdrop provides the lens through which the writer's journey from Kithiu Village to the corridors of the Supreme Court lands.

Despite this, the reader is left wanting because one of the most crucial parts of the author's experiences is left out. What happens while she is Chief Justice and what she plans to do after office is yet to

be seen. Perhaps a new edition in the near future will quench the reader's thirst for more. One thing is for sure, however. The author has always been in the business of structural reform and change. Whether it be constitutional matters, adapting to her driver working from home or getting a new chef for the Court of Appeal because mandazi and bananas were lacklustre, it is certain that what lies in the author's future will be nothing short of a story worth telling.

This book is a must-read for every legal professional, both future and present, who envisions a world in which social justice is the norm rather than the exception. It is a must-have for any individual who seeks out systemic overhaul, democratic ideals and constitutionalism. Any founder in pursuit of enriching community by serving the vulnerable in society has a lot to learn throughout the book. Bibliophiles interested in African autobiographies and Historians whose business is the history of law, politics and gender issues cannot afford to by-pass this read.

'The law exists. What we use it for, however, is up to us.' While turning the pages, the reader is pulled into deep introspection of what use the law will serve in their lives. Lady Justice Martha Koome paved her own way and used the law as a tool of social transformation. The lessons and values picked up from her story invite the reader to ponder until only one question is left. What path will you charter yourself? After all, these things require a trailblazer.

Cheers!

Iteyo Khaisia is a first-year law student at the University of Nairobi whose passions lie squarely in social justice, governance and mental health. She is an African bibliophile who writes introspectively about matters history, politics and social structures.

READ THE PLATFORM

FOR LAW, JUSTICE & SOCIETY

