



A BRIEFING PAPER ON IMPLEMENTING ARTICLE 12 OF THE CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES REGARDING LEGAL CAPACITY IN KENYA

A STUDY CARRIED OUT IN MANDERA AND TAITA TAVETA COUNTIES





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**THE KENYA NATIONAL COMMISSION
ON HUMAN RIGHTS**

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ISBN: 978-9966-040-26-8

This Report was published by:

Kenya National Commission on Human Rights,

Head Office,

1st Floor CVS Plaza, Kasuku Rd off Lenana Road,

P.O. Box 74359-00200, Nairobi, Kenya

Tel: 254-20-2717908/928/900

Fax: 254-20-2716160, Email: haki@knchr.org

Website: www.knchr.org

© KNCHR, 2016.

Printed in Kenya by:

Cover design and layout: Raphael Mokora (dockrapho@gmail.com)

KNCHR would appreciate receiving a copy of any materials in which information from this report is used.

This publication was made possible by the financial support of Open Society Initiative for Eastern Africa

Acknowledgement

Kenya National Commission on Human Rights (KNCHR) prepared this briefing paper with the support of the Open Society Initiative for Eastern Africa. Preparation of this would not have been possible without the excellent support and collaboration of the Technical Committee and Disabled Peoples' Organizations (DPOs). KNCHR acknowledges the input of the Technical Committee which comprised of Fatma Wangare (KAIH), Michael Njenga (USP-K), Collins Omondi (NCPWD), William Oluchina (KHRC), Shikuku Obosi (Inclusion International) and James Mwakazi (KNCHR). KNCHR also acknowledges the conceptual work for this study done by its staff Miriam Nthenge, Dr Bernard Mogesa for guiding the research methodology and James Mwakazi for guiding the research and publication. KNCHR would like to thank Justice Mumbi Ngugi (Human Rights Division), Hon. Hassan A. Ali (Nominated MCA Mandera County) and Hon. John Maghanga (Nominated MCA Taita Taveta County) for their contribution. In addition, KNCHR would like to thank the Kenya Bankers Association (KBA), Association of Kenya Insurers (AKI) and the Law Society of Kenya (LSK) as professional bodies for giving their input towards the development of this report. KNCHR acknowledges the contribution of officers from the Judiciary, County Government of Taita Taveta and Mandera, National Council for Persons with Disabilities (NCPWD) and Independent Electoral and Boundaries Commission (IEBC) representatives in Taita Taveta and Mandera Counties. KNCHR is above all grateful to all the caregivers and persons with disabilities who consented to be interviewed and proceeded to openly and generously share their experiences, thoughts and ideas on the right to legal capacity in Kenya. Finally, KNCHR wishes to acknowledge Felicia Mburu, Evelyn Kilemi and Kirimi Guantai, the team of consultants who authored this paper.



Patricia M. Nyaundi
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Glossary of terms

Guardian - One who is legally responsible for the care and management of a minor or of a person or property of a person who has been legally declared 'incompetent'

Caregiver – one who takes care of a person with disability and has regular contact with the person. Can be a primary or secondary caregiver.

Intellectual disability - It is characterized by significant limitations both in intellectual functioning and adaptive behavior as expressed in conceptual, social and practical skills. Conditions associated with intellectual disability include autism, cerebral palsy and Down syndrome. A person with intellectual disability has life-long support needs, they must be individualized which will lead to improved personal outcomes that may include more independence and enhanced opportunities.

Legal capacity – includes both the capacity for a right to recognition everywhere as persons before the law ('legal recognition') and the capacity to 'exercise' those rights.

Psychosocial disability - refers to the interaction between psychological and social/cultural components of disability. The psychological component refers to ways of thinking and processing experiences and perceptions of the world. The social/cultural component refers to societal and cultural limits for behavior that interact with those psychological differences as well as the stigma that society attaches to the label of disabled.

Pro bono – free legal services provided by legal practitioners.

Professional – qualified member of a professional body recognized under a construed law to provide specialized services in a particular field.

Self-advocacy - is about people with disabilities speaking up for themselves, making their own decisions⁵ and taking control of their lives. It does not preclude support but emphasizes that the fact that the person with a disability is the one in charge of their life.

Unsound mind – Language adopted by the Law and Courts of Kenya when referring to persons living with mental health conditions.

List of Abbreviations

AKI	Association of Kenyan Insurers
CEO	County Education Officers
CRPD	Convention on the Rights of Persons with Disabilities
CDF	Constituency Development Fund
DPOs	Disabled Peoples' Organizations
EKLR	Kenya Law Reports online
HIV	Human Immunodeficiency Virus
IEBC	Independent Electoral and Boundaries Commission
ICJ-Kenya	International Court Jurists in Kenya
HAWENKA	Horn of Africa Women Empowerment Network Agency
KBA	Kenya Bankers Association
KNCHR	Kenya National Commission on Human Rights
KMPDB	Kenya Medical Practitioners and Dentist Board
LSK	Law Society of Kenya
MCA	Member of County Assembly
NGOs	Non Governmental Organizations
NCPWD	National Council for Persons with Disabilities
NCAJ	National Council for Administration of Justice
CAJ	Commission on Administrative Justice (Ombudsman)

Executive Summary

Kenya has adopted the Convention on the Rights of Persons with Disabilities as law which recognizes the right to equal recognition before the law. Article 12 of the Convention addresses recognition before the law, legal capacity and decision making. Article 12 is particular in placing the duty of equal recognition before the law upon the State. In this regard, the government has the duty to ensure that persons with disabilities have;

- i) recognized legal capacity,
- ii) with the power to exercise their capacity on an equal basis with others,
- iii) provide access or support to ensure that persons with disabilities can exercise their capacity and
- iv) provide safeguards against abuse by such supports.

The concept of personhood in Kenya is skewed towards person with disabilities. This stems from socio-cultural beliefs which have been embodied in various legal provisions. Most cultures view persons with disability as recipients of help rather than persons. Further despite the existence of various human rights instruments, Kenya has various laws that limit the rights of persons with disabilities to equal recognition. Kenya's Constitution recognizes the right to equal protection and benefit before the Law for all persons under Article 27.

However various laws negate this right with regards to persons with disabilities. For example: the Marriage Act which limits the rights of persons with mental health conditions to get married; the Penal Code which creates the offence of "rape of an imbecile" presumes that any person with a mental health condition cannot consent to sex; the Criminal Procedure Code which allows courts to sentence persons with mental disabilities to serve sentences at the President's pleasure; The Law of Succession which limits the rights of persons with disabilities to inheritance; The Mental Health Act which allows guardianship laws to strip persons with disabilities of their rights to make

decisions amongst other laws in clear violation of the rights of persons with disabilities as envisioned under Article 12.

Article 12 calls for a distinction between mental capacity and legal capacity. The violations highlighted in the law are based on the medical model of disability which does not distinguish mental capacity from legal capacity. Whereas, legal capacity is the ability to hold rights and duties (legal standing) and to exercise these rights and duties (legal agency), mental capacity refers to the decision-making skills of a person which naturally vary from one person to another and may be different for a given person depending on many factors including environmental and social factors.

This means that irrespective of a person's mental status, the person has rights that should not be denied based on perceived disability.

The law has bestowed those rights thus one should be able to exercise the right to make decisions with required supports rather than be denied their rights through various guardianship laws. In Kenya, informal guardianship is more common than formal guardianship. Formal guardianship is where a court order is issued placing persons with disability under guardianship. Informal guardianship is where a family member (mostly parents) is perceived to have decision making powers over a person with disability.

Globally the disability rights movement is looking into supported decision making as an alternative to guardianship. Supported decision making is embodied in Paragraph 3 and 4 of Article 12. Supported decision making recognizes that every person has the right and capacity to make a decision. However due to varying capacities, a person may need various supports to enable them make a decision. Thus with a rights based approach, legal framework, support network and access to information, persons with disabilities can exercise their right to equal recognition before the law.

The right to equal recognition before the law is paramount in making disability rights a reality as it affects every aspect of a person's life. Socially, one needs to have the power to decide on matters such as healthcare, education, where to live, who to marry, whether or not to have a family and whom to associate with. Financially, one needs to have the power to enter into a contract, access financial services, access credit facilities, access insurance services, seek employment or even access various government social protection programs. In the justice sector, one needs to know that they will be protected from arbitrary arrest and institutionalization, and protected from discrimination. That they are guaranteed access to legal services and that their rights will be protected and enforced. Basically, Article 12 gives persons with disability the power to live on an equal basis with others.

Various Institutions have different interpretations of Article 12 and its implementation. This stems from the fact that there is no express recognition of legal capacity for persons with disabilities in Kenya. The use of ambiguous language in the law such as "unsound mind" makes it even more complicated.

As legal capacity is a legal question, Institutions in Kenya can only rely on the Court's interpretation. So far, there is no interpretation by the Court. This means that the justice sector, health sector, financial sector and county government structures have to rely on various formal and informal guardianship mechanisms to determine legal capacity for persons with disabilities.

In most cases, persons with disabilities are not consulted in matters concerning them and there is over reliance on the doctors' report.

Doctor's and Caregivers are therefore put at task to determine what the best interest of the persons is. Though most doctors and caregivers are well meaning, there have been cases of abuse or disregard for the person with disability. Also, the only person who can determine

what is in their best interest, is the person with disability. They must be consulted to determine what is in their best interest.

There are various models that have been adopted by various institutions to protect the rights of persons with disabilities to decide. For example, the National Council for Persons with Disabilities in partnership with the County Directorate have devised informal structures of ensuring that persons with disabilities benefit from social protection funds through registration and establishment of a complaints mechanism. Some County initiatives such as the DATU Sawazisha funds ensure that persons with disabilities can access funds through formation of groups which require exhaustive consultations amongst members. The Independent Electoral and Boundaries Commission has partnered with various DPOs to train and inform persons with disabilities on elections, voting and public participation. The Judiciary is addressing the issue of infrastructure and language barriers to enhance persons with disabilities' access to the courts and participation in proceedings.

However, more needs to be done to make sure that Article 12 becomes a reality. As this research will show, there is a huge misconception on what Article 12 aims to achieve. First, awareness creation across all government institutions is required to enable conceptualization on the implications of Article 12 and how it can be streamlined across all government agencies. Second, denial of the right to equal recognition before the law stems from various laws enforced in Kenya. This is further supported by lack of policies that can guide the application of the said laws especially to persons with disabilities. The Kenya National Commission on Human Rights had issued a briefing paper outlining key laws and policies that touch on legal capacity for persons with disabilities. These laws and policies need to be reviewed immediately to make Article 12 a reality. Third, there are various institutions that provide services for persons with disabilities, both government

and non-governmental organizations. There is the National Council for Persons with Disabilities, National Gender and Equality Commission and County Directorates that engage directly with persons with disabilities. Other government agencies that may have indirect contact include courts, police, ombudsman etc. Private entities rely on these institutions to guide them on how to engage with persons with disabilities. The problem is that there is a general lack of coordination amongst government and non-governmental agencies leading to lack of implementation. There needs to be

proper coordination and data collection which can inform policy.

Finally, the disability movement's slogan is "nothing for us, without us". Article 12 requires the participation of persons with disabilities in order to implement it. Supported decision making can only thrive in an environment where the person has control over their decisions with a strong support network and a legal framework. This requires consultation with persons with disabilities, caregivers, DPOs and institutions.



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THE KENYA NATIONAL COMMISSION ON HUMAN RIGHTS

CHAPTER 1

Background

Kenya ratified the Convention on the Rights of Persons with Disabilities ('CRPD' or 'the Convention') in 2008. By dint of Article 2 (6) of the Constitution of Kenya 2010, the Convention now forms part of the laws of Kenya¹. Despite the adoption of the Convention in 2006, legal capacity remains a difficult area of rights to implementation in Kenya.

Kenya's policy makers and implementers have not understood the full implications of Article 12 of the Convention.

Post-2010 and pre-2010 legislation fail to incorporate the principles of legal capacity established in Article 12 of the Convention. Court decisions on cases that touch directly on equal recognition before the law also fail to take cognizance of the requirements under the Convention. Professionals too and the society in general do not see the importance of legal capacity. In their defense, the Courts, professionals and caregivers argue that they have not come across a situation that warrants questions on legal capacity.

However in reality, these questions arise on a daily basis but various laws and policies allow different individuals and institutions to overlook these matters on legal capacity. As a result of this, persons with disabilities in Kenya still do not enjoy the benefit of being able to exercise their rights on an equal basis as their non-disabled peers. Many laws such as the Marriage Act, still assume that persons with disabilities merely because of their disability

hold lesser rights and cannot act to exercise their rights on an equal basis with others².

It is necessary to develop guidelines for policy makers, legislators and those who exercise administrative procedures on how to implement Article 12 of the Convention³. This paper builds up on a previous briefing paper on legal capacity. The paper aims to fill in the gaps left by including the voices of rural persons with disabilities, professionals, service providers and caregivers. By doing so, the paper will ensure that all stakeholders are included in implementing Article 12 in Kenya.

This paper studies the Kenyan policy and legislative environment relating to issues of legal capacity linking it up to implementation and interpretation by different key individuals and institutions. The paper then shows the situation of persons with disabilities in Kenya with regard to legal capacity; interpretation of legal capacity by key institutions, highlighting current practice, and local good practice models on implementing the right to legal capacity.

This paper also highlights the challenges in implementing the right to equal recognition before the law, from an institutional perspective and how various institutions have addressed them. The paper then makes recommendations on the implementation process as well as the content which should be included in policy, law and procedures to effect Article 12 of the Convention.

1.1 Methodology

The purpose of the research paper is: to detail the situation of the right to legal capacity in Kenya, how it is currently being implemented and interpreted at an institutional level. Sec-

ondly, the paper will identify challenges faced by individuals and institutions in implementation and concerns in achieving legal capacity from caregivers and persons with disabilities

¹ Kenya National Commission on Human Rights and the Open Society Initiative for Eastern Africa, 'How to Implement Article 12 of the Convention on the Rights of Persons with Disabilities Regarding Legal Capacity in Kenya; A Briefing Paper', 2014.

² *ibid*

³ *ibid*

at county level. This study was carried out in Mandera and Taita Taveta Counties in order to capture the rural voice of persons with disabilities and their caregivers. The Kenya National Commission on Human Rights identified the

two counties based on marginalization⁴ and prevailing circumstances for persons with disabilities.

The objectives of the briefing paper:

- a. To provide initial basic information on the meaning of legal capacity and implementation of the right to equal recognition to county governments, professional bodies, caregivers of persons with disabilities and persons with disabilities at the county level;
- b. To identify gaps, opportunities and challenges with regard to the right to legal capacity in Kenya; and
- c. To establish a framework which may be used to prepare policy, law and administrative procedures for implementing Article 12 of the Convention.

1.2 Stages in developing the briefing paper

1. Analysis of Briefing Paper on Legal Capacity previously done, to identify the gaps left out.
 2. Analysis of the provisions of various laws and policies in Kenya on legal capacity identified by the Briefing Paper and how different professional bodies and state agencies have implemented them;
 3. Developing interview guides for the various categories of respondents (Professional Bodies within the Judicial System, Financial Sector and Health Sector. County government Structures involved in Disability, Caregivers of Persons with Disabilities and Person with Disabilities living in a rural setting)
 4. Interviews with the target group of respondents and Processing of data and information obtained as a result of the interviews;
 5. Preparation of the report.
- Time period: January – June 2015

1.3 Selecting the target groups of respondents

The briefing paper is based on qualitative research. This is because the paper seeks to gather the views and perceptions of various actors in implementing Article 12 of the CRPD. This involves understanding the subjective meanings held by the various professionals, caregivers and persons with disabilities. The groups

of caregivers and persons with disabilities were identified via non-probability sampling, while professionals were identified by purposive sampling (expert sampling). Thus, the following organizations and persons were interviewed:

- Judicial Service Commission⁵

⁴ Marginalization referring to areas with low levels of development, significant challenges in accessing basic needs, low access to healthcare services and education.

⁵ Established under Article 171 of the Constitution. Available at <http://www.judiciary.go.ke/portal/page/judicial-service-commission>

⁶ The Law Society of Kenya Act (Chapter 18 of the Laws of Kenya). Available at <http://www.lsk.or.ke/>

⁷ Established under the Insurance Act (Amendment) 2006, CAP 487 of the Laws of Kenya available at <http://www.AKI.go.ke/index.php/component/content/article/2-uncategorised/112-AKI-establishment>.

- Law Society of Kenya⁶
- Association Of Kenyan Insurers⁷
- Kenya Bankers Association⁸
- County Directors of Health Services (Mandera and Taita Taveta Counties)
- County Directorate for Social Services and Development (Mandera and Taita Taveta Counties)
- County Education Officers (Mandera and Taita Taveta County)
- County Assembly Committee on Social Services (Mandera and Taita Taveta County)
- Dawida-Taveta (DATU) Financial Services⁹, (Taita Taveta County)
- National Council for Persons with Disabilities¹⁰ Representatives at County Level
- Groups of Caregivers of Persons with Disabilities¹¹
- Groups of Persons with Disabilities¹²
- Wundanyi Disabled Persons Organization¹³
- Integrated Disabled Development Agency -Mandera¹⁴
- Mandera Disabled Persons Organization¹⁵
- Youth 2 Youth Initiative¹⁶

1.4 Limits of the study

The findings and recommendations of this study are unique to the counties sampled and may not necessarily be generalized to other counties not participating in the study. However the findings:

- are reflective of the situation of persons with disabilities in rural and/or marginalized areas and
- identify legislative and policy gaps in relation to the implementation of the rights as provided in Article 12 of the Convention on the Rights of Persons with Disabilities.

Further there were unique challenges that may have implications on the findings. Some are county specific while others had implications on the national laws and policies. These are as follows:

- There are no centralized statistics at the national or county level on the number of people under guardianship;
- Lack of proper documentation by the National

Council of persons with Disabilities' at County Level on the number of Persons with disabilities in their counties or the specific type of disability.

- Some County governments have adopted county specific policies on disability therefore lack of a standardized structure to make a comparison.
- Most professionals had limited interaction with disability matters generally and legal capacity matters specifically. This meant that the professionals interviewed had limited information on legal capacity for persons with disabilities.
- The focus group discussions were 80% attended by persons with physical disabilities. This created a biased view on legal capacity which mostly affects persons with psychosocial or intellectual disability¹⁷.

⁶ Registered as an Industry Association on 16th July 1962 by the Registrar of Trade Unions. Available at <http://www.kba.co.ke/overview/about-us>

⁷ Established by the Taita Taveta County Sawazisha Fund Act, 2014. Available at <http://taitataveta.go.ke/sites/default/files/REVISED%20DATU%20BILL%20%26%20REGULATIONS.pdf>

¹⁰ Established by the Persons with Disabilities Act No. 14 of 2003, available at <http://ncpwd.go.ke/>

¹¹ A total of 10 Caregivers were interviewed from each county. See annex one for composition.

¹² A total of 30 Persons with disabilities in each County were interviewed through a focus group discussion. See Annex one for composition.

¹³ Registered as a DPO with the Directorate of Social Services in Taita Taveta County.

¹⁴ Registered as an NGO in Kenya.

¹⁵ Registered as a DPO with the Directorate of Social Services in Mandera County.

¹⁶ Registered as a Community Based Organization in Mandera County.

¹⁷ See tables on Annex 2.

CHAPTER 2

Key Points on Article 12 on Equal Recognition before the Law

This section will give an overview of Article 12 of the CRPD. The Briefing paper¹⁸ comprehensively covered various definitions under Article 12 thus this is an overview to set the environment for this paper. Further, the Committee on the Convention on the Rights of Persons with Disabilities has issued a General comment on Article 12 that will guide this section. As such, this section will examine support, reasonable accommodation and safeguards.

Article 12¹⁹ (equal recognition before the law) of the UN Convention on the Rights of Persons with Disabilities lies at the heart of the Convention. It addresses recognition before the law, legal capacity and decision-making. Article 12, paragraphs 1 and 2, of the Convention requires States Parties to recognize persons with disabilities as individuals before the law, possessing legal capacity.²⁰

2.1 Findings on Article 12

Definition of Legal Capacity

The General Comment²¹ on Article 12 of the CRPD defines Legal Capacity as follows:

Legal capacity and mental capacity are distinct concepts. Legal capacity is the ability to hold rights and duties (legal standing) and to exercise these rights and duties (legal agency). It is the key to accessing meaningful participation in society. Mental capacity refers to the decision-making skills of a person, which naturally vary from one person to another and may be different for a given person depending on many factors, including environmental and social factors. Under article 12 of the Convention, perceived or actual deficits in mental capacity must not be used as justification for denying legal capacity.

Globally and regionally, Article 12 is being recognized as a key component to achieving disability rights. This is reflected in the African

Union's adoption of the Continental Plan of Action of the African Decade of Persons with Disabilities (2010 – 2019). The Plan outlines eight strategic thematic areas for implementation at national level, and includes priority action areas for each thematic area²². Under thematic area number 3, member States are encouraged to ensure that persons with disabilities gain full recognition before the law while ensuring effective access to justice on an equal basis with others²³. Key goals under thematic area number 3 include i) member states should have successfully repealed or amended any guardianship and inheritance laws to protect the rights of persons with disabilities, ii) require political parties to have disability inclusive party policies and manifestos with a view to enhance political participation of the disabled, iii) promote and ensure disability inclusive reform and policy of

¹⁸ Kenya National Commission on Human Rights, 'How to Implement Article 12 of Convention on The Rights of Persons with Disabilities regarding Legal Capacity in Kenya: A Briefing Paper', 2014.

¹⁹ Convention on the Rights of Persons with Disabilities, Article 12 (1): States Parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law.

²⁰ Supra 1

²¹ Committee on the Rights of Persons with Disabilities, Draft General Comment on Article 12- Equal recognition before the Law, Eleventh session, 30 March–11 April 2014.

²² African Union Commission, Continental Plan of Action for the African Decade of Persons with Disabilities, 2010-2019.

²³ ibid

the justice, law, and order sectors. Kenya being a member of the African Union is obligated to achieve these goals as well.

Article 12 restores the capacity of decision-making to people with disabilities. Respecting individual wishes and preferences – whether through supported decision-making or otherwise—is a legal imperative²⁴. Legal capacity goes beyond decision-making to the core of what it means to be human²⁵. Without legal capacity, the freedom to make choices is greatly diminished, yet life choices are part of who we are²⁶.

Legal capacity is also important because it has a huge impact on how other people (for example, service providers, public officials and members of the community) view persons with disabilities²⁷. If persons with disabilities are seen to be incapable of making any decisions about their own lives, negative stereotypes about disability are reinforced, yet these stereotypes are a significant barrier to the inclusion and participation of persons with disabilities in society²⁸.

Yet Legal Capacity and Mental Capacity are regularly misused in the Kenyan context. Currently in Kenya, there is no law or policy defining legal capacity. This creates a gap in the professional setting in that each organization/institution is left to its own measures to interpret legal capacity²⁹. Various Laws use the words “unsound mind” in their language in reference to legal capacity thus each institution

is left to its own interpretation³⁰. The Court’s general interpretation of legal capacity means the capacity to have rights and the power to exercise those rights. Both of these elements are integral to the concept of legal capacity because they establish the rights and responsibilities of persons to make their own decisions³¹.

Secondly **the meaning of legal capacity is distorted by the language used by the law. Various laws use the word “unsound mind” which creates ambiguity. There is no law, policy or case law in Kenya that defines “unsound mind”. The general assumption is that “unsound mind” is anyone with a mental health condition including intellectual or psychosocial disability.**

For instance, under the Mental Health Act the law states that a person of “unsound mind” can be institutionalized based on the recommendation of a doctor³². The closest the courts have come to defining what “unsound mind” is what is commonly known as “the reasonable man test” as set out in the English case of *Banks v Goodfellow*³³ which was interpreted in 1870. The reasonable man test refers to a hypothetical person in society who exercises average care, skill and judgment in conduct to serve as a comparison to what is expected of a person.

This paper therefore had to look at legal capacity definitions by various institutions and individuals in order to understand the Kenyan context on Article 12.

²⁴ World Health Organization, World Report on Disability, 2011 pg 138

²⁵ Kenya National Commission on Human Rights, ‘How to Implement Article 12 of Convention on The Rights of Persons with Disabilities regarding Legal Capacity in Kenya: A Briefing Paper’, 2014.

²⁶ *ibid*

²⁷ *ibid*

²⁸ USP Kenya, KAIH and MDAC, DPO/NGO information to the 3rd Pre-sessional Working Group of the United Nations Committee on the Rights of Persons with Disabilities for consideration when compiling the List of Issues on the First Report of the Republic of Kenya under the Convention on the Rights of Persons with Disabilities, 20 April 2015.

²⁹ Interview with Justice Mumbi Ngugi in Chambers, May 15 2015.

³⁰ *ibid*.

³¹ Gerard Quinn, ‘Personhood & Legal Capacity Perspectives on the Paradigm Shift of Article 12 CRPD’, HPOD Conference, Harvard Law School, 20th February, 2010

³² Section 16, Mental Health Act of 1989, Laws of Kenya.

³³ *Banks -v- Goodfellow*; QBD 1870. (Applicable in Kenya as precedent)

2.2 Interpretation of Legal Capacity in Kenya

1. Court

Legal capacity is what a human being can do within the framework of the legal system. It allows one to enjoy the right to access the civil and judicial system and the independence to speak on one's own behalf.³⁴

This statement gives a glimpse as to the approach taken by professional bodies on interpretation of legal capacity. Professional bodies rely on the court's interpretation in order to define legal capacity. However the court itself does not have a definition of legal capacity.

The Civil Procedure Act is the law which prescribes in detail the rules of civil litigation in Kenya. There are Civil Procedure Rules that apply to people who are found by a court to be incapable of protecting their interests when suing or being sued by reason of “unsound mind”³⁵. No guidance is given as to how a court is to establish if a person is of “unsound mind” or what constitutes “unsound mind” therefore it is upon the court's discretion. This means that a person deemed to be of “unsound mind” has no legal capacity in civil matters to represent himself or even appoint a lawyer to take up his/her case. If the court declares that someone in a proceeding is of “unsound mind”, it will appoint a “next friend” when the person is suing and a “guardian ad litem” when the person is the defendant in civil proceedings³⁶. In *Republic v Chairperson Kilibwoni Disputes Tribunal & two others*³⁷, the High Court of Eldoret stated clearly that “... it is only a Court

of Law which can adjudge a person to be of unsound mind for purposes of suing or being sued.”

In the criminal justice system, various matters on legal capacity arise due to different conflicting areas of law on various offences. According to Section 12 of the Penal Code, a person is not criminally responsible for an act or omission if at the time of doing the act or making the omission he is through any disease affecting his mind incapable of understanding what he is doing, or of knowing that he ought not to do the act or make the omission.³⁸ There is conflict when the foregoing section is read together with the Criminal Procedure Code, which provides that a person of unsound mind if found guilty of an offence can be sentenced to serve at the President's pleasure.³⁹ Section 146 prohibits ‘defilements of [idiots] or [imbeciles]’.⁴⁰ In addition to the Penal Code, the Sexual Offences Act recognizes various offences against persons with disabilities. However it recognizes the right to consent to sexual intercourse on condition the person has the freedom and capacity to give consent⁴¹. Under the Law persons of “unsound mind” cannot consent to sexual intercourse.⁴² In all criminal offences, whether as a victim or an accused person, courts have not expressly denied legal capacity. However, courts have relied on the doctor's assessment to interpret legal capacity. The same model has been adopted by the police, prosecutors, lawyers,

³⁴ Lawrence Mute, ‘Moving from the Norm to Practice; Towards Ensuring Legal Capacity for Persons with Disabilities in Kenya’, The Equal Rights Review, Vol. Nine (2012)

³⁵ Order 10 Rule 1 of the Civil Procedure Rules available at [http://www.kenyalaw.org:8181/exist/kenyalex/sublegview.xql?subleg=CAP.%2021#KE/LEG/EN/AR/C/CHAPTER 21/SUBLEG/HC_3/sec_1](http://www.kenyalaw.org:8181/exist/kenyalex/sublegview.xql?subleg=CAP.%2021#KE/LEG/EN/AR/C/CHAPTER%2021/SUBLEG/HC_3/sec_1)

³⁶ Lawrence Mute, ‘Moving from the Norm to Practice Towards Ensuring Legal Capacity for Persons with Disabilities in Kenya’, The Equal Rights Review, Vol. Nine (2012)

³⁷ Republic V. Chairperson Kilibwoni Disputes Tribunal & 2 Others [2009] Eklr

³⁸ Kenya National Commission on Human Rights, ‘From Norm to Practice, A Status Report on the Implementation of the Rights of Persons with Disabilities’, July 2014.

³⁹ Sections 162-164, 166-167 and 202 of the Criminal Procedure Code, Laws of Kenya.

⁴⁰ Elizabeth Kamundia, ‘Fact Sheet on Disability Rights in Kenya’, African Disability Rights Yearbook, 2014. Available at http://www.adry.up.ac.za/images/adry/volume2_2014/adry_2014_2_kenya.pdf

⁴¹ Section 42 Sexual Offences Act: For the purposes of this Act, a person consents if he or she agrees by choice, and has the freedom and capacity to make that choice.

⁴² International Court Jurists-Kenya, ‘Justice at City Hall: The Practice of City and Municipal Courts in Kenya and the Impact of by-law Implementation on Prison and Remand Facilities’, presented before the Open Society Foundations, Decriminalizing Petty Offences in Africa Report Meeting, Johannesburg, 19-20 June, 2014.

court users committees and probationary service providers. Thus the criminal justice system ends up implementing skewed laws on legal capacity in criminal matters leading to a miscarriage of justice. See case of *Wilson Morara Siringi v. Republic*⁴³

*In conclusion I would be remiss if I did not mention that the approach taken by the prosecution and the learned magistrate is that the complainant is an object of social protection rather than a subject capable of having rights including the right to make the decision whether to have sexual intercourse. This approach is inconsistent with the provisions of Article 12 of the Convention on the Rights of Persons with Disabilities which requires State parties to recognise persons with disabilities as individuals before the law, possessing legal capacity to act, on an equal basis with others. Kenya ratified this Convention in 2008 and by dint of Article 2(6) of the Constitution it forms part of the law of Kenya*⁴⁴.

This is also reflected in how the police respond to cases involving persons with disabilities.

*When I first got in trouble with the law, I was having a psychotic break and attacked my family including my mother. The police came and tied me up with a rope and made me sit on the ground. When I calmed down, I was in the police station and I was tied with ropes on my hands and feet like an animal. When I asked them what crime had I committed and how long I had been there, they did not respond but told me I had been held for 3 days. Next thing I knew, I was in court being charged with destruction of property. I was not allowed to plead. I ended up in Port Reitz Hospital from 1989 to when I was released.*⁴⁵

Persons with Disabilities can give evidence through an intermediary in sexual offence cases under the Sexual Offences Act⁴⁶. However, most police officers and prosecutors do not implement this provision hence they rely on the traditional requirement on what constitutes evidence under the Evidence Act⁴⁷. This compounded with stereotypes that women and girls with disabilities make bad witnesses in sexual offence cases leads to a miscarriage of justice⁴⁸ and denial of legal capacity.

⁴³ *Wilson Morara Siringi v the Republic*, Criminal Appeal No. 17 of 2014.

⁴⁴ *ibid*

⁴⁵ Interview with a male former psychiatric patient in Taita Taveta County on March 31, 2015.

⁴⁶ Section 31 of the Sexual Offences Act, Laws of Kenya

⁴⁷ Section 125 Evidence Act: Competency generally

- All persons shall be competent to testify unless the court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease (whether of body or mind) or any similar cause.
- A mentally disordered person or a lunatic is not incompetent to testify unless he is prevented by his condition from understanding the questions put to him and giving rational answers to them.

⁴⁸ Coalition on Violence Against Women, 'Baseline Survey, and the knowledge, awareness, and practice & prevalence rate of gender based violence (GBV) especially sexual violence among women and girls with intellectual disabilities', May-June 2013.

2. Law Society of Kenya

The Law Society of Kenya relies on the directive under the Civil Procedure Rules when addressing legal capacity in civil cases. Theoretically, this means that should a person with a psychosocial disability or intellectual disability need legal services in a civil matter

and does not have a legal guardian, the lawyer has to apply to court first to seek the appointment of a guardian before taking up the matter. In practice however, this theory is yet to be tested as most persons with disability cannot afford legal services.

3. Financial Sector

Under the Mental Health Act, Courts can appoint a guardian to monitor the affairs of a person of “unsound mind”. In practice, Courts rely on the doctor’s recommendation or opinion to make a finding on “unsound mind”/legal capacity. This was the case *In the matter of Leah Wachu Waiganjo*⁴⁹. Therefore **financial Institutions interpret legal capacity based on the guardianship order by a Court, where there is ambiguity on the existence**

of a disability⁵⁰. In the absence of a Court order, financial institutions will rely on the recommendations of a doctor if the disability is disclosed⁵¹. Where disability is an intellectual disability that can be seen, institutions will rely on the doctor’s report and caregiver’s information in addition to the information given by the person with disability to determine his/her legal capacity⁵².

4. Health Sector

With regards to health services, the Constitution of Kenya guarantees every person the right to privacy⁵³. Though *the Constitution does not define the term ‘privacy’ or what the right to privacy entails. However, Black’s Law Dictionary, Ninth Edition, defines the right to privacy as “the right of a person and the person’s property to be free from unwarranted public scrutiny or exposure.”* Violation of the right to privacy thus involves the unwelcome intrusion on someone’s personal privacy or disclosure of information about a person without their consent.⁵⁴ This interpretation has been taken a

notch higher by the Medical Practitioners and Dentists Board who interpreted this right as follows:

Abuse of professional confidence:-

“A practitioner or an institution shall not disclose to a third party information which has been obtained in confidence from a patient or the patient’s guardian, where applicable. The practitioner or institution shall safeguard the confidential information obtained in the cause of practice, teaching, research or other professional duties subject only to such exceptions as are applicable. The

⁴⁹ *In the Matter of Leah Wachu Waiganjo, Misc 330 of 2012, eKLR*: (a person suffering from a mental disorder) and in the matter of an application by William Kibera Waiganjo to be appointed manager to the estate of and guardian to the said Leah Wachu Waiganjo an application was made by William Kibera Waiganjo (the applicant) to be appointed guardian ad litem and manager of the estate of Leah Wachu Waiganjo (the subject). The basis of the application was that Leah suffers from a mental disorder that rendered her incapable of managing her affairs. Medical evidence was produced to show that she suffered from temporal lobe epilepsy and periodic depression. Based on the Court’s observations of Leah and the medical reports, the Court appointed the applicant to be Leah’s guardian ad litem, to manage her estate, including proper provision for her maintenance, and to take any appropriate legal action for her benefit and for the benefit of her estate

⁵⁰ Central Bank of Kenya Guidelines 2013.

⁵¹ Interview with Legal Manager and Industrial Relations, Kenya Bankers Association, April 20 2015.

⁵² Interview with Legal and Regulatory Affairs Manager, Association of Kenyan Insurers, April 20, 2015.

⁵³ Article 31, Constitution of Kenya 2010.

⁵⁴ *David Lawrence Kigera Gichuki v Aga Khan University Hospital* [2014] eKLR

following are possible exceptions:

- i. The patient or his/her lawyer may give a valid consent;
- ii. The information may be required by law or through a Court Order;
- iii. Public interest may persuade a Practitioner that his/her duty to the community overrides the one of the patient;
- iv. Information may be given to a relative or appropriate person if in his/her opinion it is undesirable on medical grounds to seek the patient's consent; and
- v. In the interest of research and medical education, information may be divulged, but at all times the patient's name shall not be revealed. A practitioner shall always be prepared to justify his/her action whenever he/she discloses confidential information. Whenever possible except in

*the public interest, the practitioner should keep secret the identity of the patient.*⁵⁵

In the Courts' and Kenya Medical Practitioners and Dentist Board's definitions, it is clear that consent is required of the persons before any medical treatment is given or disclosure of any information. However the Medical Board has two loopholes: i) in some cases a guardian is needed. There is no definition of when these cases arise but this can be interpreted as in the case of children or persons with mental disabilities. ii) if in the doctor's opinion, it is undesirable to seek the patient's consent. There is no rule or guidelines on when such circumstances arise leading to abuse of this discretion especially in cases of sexual or reproductive health rights of persons with disabilities.

5. Public Participation

On Election matters, the Constitution of Kenya states that no person shall be denied their voting rights or right to run for office on the basis of Disability⁵⁶. However in Article 100 one has to be of sound mind to run or stay in a public office. The Elections Court in Interpreting Article 260 of the Constitution, stated that

The key consideration whether or not a person has a disability is whether, due to the impairment which in interaction with various barriers may hinder the person from fully and effectively participating in society on an equal basis with others. The route adopted by the IEBC to satisfy various categories of disabilities in our view, is not only untenable but also lacks basis in law. The only reference to that consideration is found in Regulation

*54 (2) of the Elections (General) Regulations, 2012 which stipulates that the party list must contain, among other details, disability and the category of disability. But even if there is need, as indeed there may very well be, a case to have representation of other categories of disabilities, the power to make that decision lies with the political parties. The IEBC can only reject the party lists if it contains names of nominees who do not possess constitutional and statutory qualifications. In such a case, the party must, within the time the IEBC may specify, submit another name*⁵⁷.

In the above case, the court did not define legal capacity within the ambient of disability but gave a guideline⁵⁸. So long as the person with disability demonstrates that he/she can fully participate in a democratic process then

⁵⁵ Rule 8, Medical Practitioners and Dentists Board (Disciplinary Proceedings) (Procedure) Rules under the Medical Practitioners and Dentists Act Cap 253 Laws of Kenya.

⁵⁶ Article 33 Constitution of Kenya 2010.

⁵⁷ Linet Kemunto Nyakeriga & Another v Ben Njoroge & 2 others [2014] eKLR

⁵⁸ Ibid

they have a right to vote or run for office. This is the basis on which IEBC interprets legal capacity. However in practice, Persons living

in institutions or are known to have a mental disability, still cannot be registered as voters⁵⁹.

6. County Government

There is no definition of legal capacity within County Government structures or under the Social Assistance Act⁶⁰. Through the Act, the Government created the Cash Transfer Fund targeting persons with disabilities and is distributed through the Directorate of Social Services in addition to the National Development Funds⁶¹. In practice, persons

with severe disabilities are deemed not to have legal/mental capacity to manage funds on their own. Thus the directorate usually registers a caregiver alongside the person with disability to act as a de facto guardian for purposes of collecting the social assistance funds on behalf of the person with disability.

7. Community

From the Caregivers and persons with disabilities perspective, legal capacity meant the right to make decisions, the right to live and work as one wants, the right to education, the right to have a family and marriage of one's choice and the right to informed health care services especially in reproductive health.

I would love if my son could work, live on his own and raise a family. I cannot imagine taking care of him for the rest of my life. If there is a way the law can ensure that happens, then it would be good⁶².

However when asked to discuss legal capacity for a person with mental or psychosocial disabilities, respondents especially caregivers and those with physical disabilities reverted to mental capacity definitions rather than legal capacity.

Persons with mental health conditions should not vote as they do not understand

themselves. They would not know what they are doing. As for Intellectual Disabled, it will depend on the extent of their disability. If it is extensive, they should not vote⁶³.

Practically, legal capacity is the law's recognition of the validity of a person's choices. It is what allows a person to act within the framework of the legal system. It makes a human being a subject of law. Legal capacity is something that most people take for granted; that upon reaching the age of majority (in Kenya, 18 years of age) one will be able to make one's own decisions which will be respected. For most people, adulthood automatically means the right to become a self-determining individual. This has not been so for persons with disabilities, who have tended to be treated in the past as 'objects' to be managed as opposed to rights holders with their own interests and desires.⁶⁴

⁵⁹ United Disabled Persons of Kenya, "Towards the 2017 General Elections", September 2013.

⁶⁰ Section 23 of the Social Assistance Act 2013 recognizes the right of persons with severe mental disabilities to social assistance.

⁶¹ Attorney General of Kenya, Opening remarks during the 14th Session of the CRPD Committee, Geneva, August 17, 2015: A National Social Protection Policy was formulated in 2012 to guide initiatives on social protection. The policy identifies Persons with disabilities as a vulnerable group requiring social protection. The government has gone further and established a cash transfer programme for persons with severe disabilities.

⁶² Focus group discussion with primary Caregivers in Mandera on April 1, 2015.

⁶³ Focus group discussion, Taita Taveta County, April 30.

⁶⁴ Gerard Quinn and Theresia Degener, (eds), 'Human Rights and Disability: The Current Use and Future Potential of United Nations Human Rights Instruments in the Context of Disability' (Geneva: Office of the United Nations Commissioner for Human Rights, 2002)

2.3 Supported Decision Making, Guardianship and Substituted Decision Making.

Supported decision making is a new concept globally therefore from the onset of the study, it was clear that most institutions, organizations or persons interviewed would not be aware of what supported decision making is. Supported decision making is important because lack of necessary support services can make people with disabilities overly dependent on family members – and can pre-vent both the person with disability and the family members from becoming economically active and socially included⁶⁵.

Supported decision making includes a range of processes that enable the decisions to be driven by the persons own 'will and preferences'. In instances in which there is difficulty discerning the person's will and preferences, States should make available skilled supporters trained in establishing proper communication while respecting the obligation to respect autonomy.⁶⁶

Guardianship is when the law legally strips the custody, management and decision making powers from an individual and bestows them on another⁶⁷. Substituted decision making is a traditional response to decision making which allows other people to make decisions in place of the person with disabilities. Thus there is no difference between guardianship and substituted decision making⁶⁸. Both resulted from attribution of incapacity to an individual, which happened through status attribution, or the application of the outcome test or the functional test.⁶⁹ Under status attribution,

once it is established that any individual is a person with disabilities, the law presumes a lack of capacity. Once a person is deemed to lack capacity, another person is appointed to make decisions for the person with disabilities; in Kenya, the person so appointed is termed a 'guardian' or 'manager' where the person is appointed for the management of the estate of the person with disabilities. The guardian or manager then makes decisions for the person with disabilities based on the 'best interest' principle⁷⁰.

From the professional perspective, the institutions interviewed during the study, favored guardianship and/or substituted decision making as it was easier to implement and definitive. It must be noted that guardianship/substituted decision making relies wholly on the medical model of disability where the medical diagnosis is used to limit the rights of a person with disabilities (see case of Grace Wanjiru Munyinyi & Another v Gedion Waweru Githunguri & 5 others)⁷¹. This involved the use of court orders, recommendations from doctors and caregivers as recommended by various written laws, policies and case law. The reason why professionals favored this model is because of contract laws and the protections offered in ambiguous situations such as fraud, misrepresentation or mistake that are always included under disclaimer clauses in contracts. For example a bank would like to be protected from any claims or liabilities that may arise

⁶⁵ World Health Organisation, 'World Report on Disability', 2011 pg 137.

⁶⁶ Office of the High Commissioner for Human Rights, Committee on the Rights of Persons with Disabilities Day of General Discussion on Article 12 of the CRPD – The Right to Equal Recognition Before the Law (21 October 2009) IDA CRPD Forum, 'Principles for Implementation of CRPD Article.

⁶⁷ Kenya National Commission on Human Rights, 'How To Implement Article 12 Of Convention On The Rights Of Persons With Disabilities Regarding Legal Capacity In Kenya: A Briefing Paper', 2014

⁶⁸ Committee on the Rights of Persons with Disabilities, Eleventh session 31 March–11 April 2014 General comment No. 1 (2014) Article 12: Equal recognition before the law.

⁶⁹ Amita Dhanda, 'Legal Capacity in the Disability Rights Convention: Stranglehold of the Past or Lodestar for the future?', (2006-2007) 34 Syracuse J. Int'l L. & Com. 429

⁷⁰ Kenya National Commission on Human Rights, 'How To Implement Article 12 Of Convention On The Rights Of Persons With Disabilities Regarding Legal Capacity In Kenya: A Briefing Paper', 2014.

⁷¹ See case of Grace Wanjiru Munyinyi & Another v Gedion Waweru Githunguri & 5 others [2011] eKLR: parties were contesting the right of a shareholder who was declared mentally unfit in 1978 to: 1. Issue a power of attorney and 2. Make decisions over the running of his company. The Court in its dicta stated that a power of attorney presupposes that the person donating it has capacity. In the instant case it has been established that Moses Munyinyi Mbogo is of unsound mind and could not therefore have capacity to donate a power of attorney to anyone. What the plaintiffs should have done was to petition the court under Section 26 and 27 of the Mental Health Act (Cap 248 of the Laws of Kenya) to be appointed to be the administrator of the estate such a person of unsound mind. In the circumstances of this case, the plaintiff lacked capacity to file this suit on behalf of Moses Munyinyi Mbogo. The power of attorney that they have purported to rely on to file this suit has no legal effect since the person who purported to have donated the power of attorney did not have mental capacity in the first place to donate such powers."

from a fraudulent transaction involving persons with disabilities but this can only be done through disclosure. If upon disclosure (especially of a mental disability) most banks would prefer having a guardian to protect the interest of the bank from any future claims⁷².

The same applies with Insurance companies where it is expressed in the Insurance Act that full disclosure must be given before one enters into a policy agreement. This poses a challenge to persons with psychosocial disabilities in that by disclosing their conditions, they risk losing some rights in terms of making decisions without consulting their guardians. Where there is non-disclosure, then an insurance company is entitled to repudiate the contract.

When asked whether there is a situation where supported decision making can be adopted as an alternative to guardianship,

1. The LSK pointed out that it is possible depending on who would be the monitoring body to ensure that the supporter is indeed assisting the persons with disability make a decision⁷³.
2. Financial Institutions on the other hand agreed that supported decision making would be an alternative provided that there is a law or policy protecting the institutions interests from future suits based on decisions made under the model⁷⁴.
3. Micro finance institutions on the other hand did not see the importance of supported decision making as they interact with groups and not individuals, thus the assumption was that all members had been consulted before the decision

was made⁷⁵.

Kenya is currently reviewing the Persons with Disabilities Act and the Mental Health Act which will both likely have clauses on supported decision making. Respondents from the Judiciary, Financial Institutions and County Government had stated that they are in compliance with the Persons with Disabilities Act and were therefore updated on the legal capacity clauses under the Persons with Disabilities Bill, 2013 and Mental Health Care Bill. Two issues arose out of this discussion; **i) who was best placed to be the monitoring body on supported decision making or legal capacity matters? ii) who was best placed to address complaints on legal capacity or supported decision making.**

The LSK and Judiciary was in favor of supported decision making as there needs to be a shift from the medical model of disability to the social model. However the Institutions differed on monitoring. The Judiciary preferred if complaints especially those on the judiciary were addressed by the NCAJ⁷⁹ or the Judiciary Ombudsman. The LSK was in favor of complaints being addressed by the Commission on Administrative Justice who already have the mandate to address complaints against the government and seek redress on behalf of the complainant. In terms of Monitoring, the Judiciary and LSK agreed that the National Council for Persons with Disabilities as well as the National Gender and Equality Commission⁸⁰ were both better placed to implement and monitor supported decision making if a law on supported decision making is passed.

⁷² Interview with Legal Manager and Industrial Relations at Kenya Bankers Association, April 20, 2015.

⁷³ Interview with Programs Manager - Public Interest and Advocacy, Law Society of Kenya, April 17 2015.

⁷⁴ Interview with Legal Manager, Association of Kenya Insurers, April 20 2015.

⁷⁵ Interview with Director of Operations - DATU Sawazisha Fund, Voi, Taita Taveta County, April 1, 2015.

⁷⁶ Interview with Head of Human Resource and Communications, Judiciary on April 27, 2015. The NCAJ was established under Section 34 of the Judicial Service Act (No. 1 of 2011) as a policy making, implementation and oversight body within the judiciary. Membership consists of State and Non-State Actors within the Judicial Sector.

⁷⁷ The Judiciary Ombudsperson is mandated to enforce administrative justice in the Judiciary. Available at <http://www.judiciary.go.ke/portal/page/office-of-the-ombudsperson>

⁷⁸ Commission on Administrative Justice Act, 2011 pursuant to Article 59 (4) of the Constitution of Kenya..

⁷⁹ Supra note 73

⁸⁰ NGEAC derives its mandate from Articles 27, 43, and Chapter Fifteen of the Constitution; and section 8 of NGEAC Act (Cap. 15) of 2011, with the objectives of promoting gender, equality and freedom from discrimination.

The KBA, AKI, IEBC, County Directorate of Social Services, County Director of Education and NCPWD all agreed that if supported decision making is adopted in Kenya, the NCPWD should have the mandate to monitor its implementation and address any complaints related to supported decision making. This is because the Council was designed to address all disability matters and it would be prudent to have one centralized body to address all disability matters⁸¹.

In the healthcare sector, doctors were strongly opposed to guardianship and/or substituted decision making in regular medical procedures and general information awareness⁸². The argument was that these models are not practical in treatment which may lead to misdiagnosis⁸³. The models were only acceptable in a situation where the person with disability is completely incapable of expressing themselves or in an incomprehensible state⁸⁴. Doctors stated that it is easier to treat the individual as they can express exactly how they are feeling rather than relying on a third party. Supported Decision making was a preferred model though practically, the doctors admitted that stereotypes and prejudices would influence how medical practitioners treat the patient⁸⁵. In addition was the fact that Kenyans generally do not question doctors on health matters. Therefore even with supported decision making, persons with disability would still do as they have been advised by the doctor without asking questions⁸⁶.

While most caregivers were against supported decision making from the onset, there was no

differentiation between substituted decision making and guardianship⁸⁷. Guardianship was defined as having control and decision making powers over a person with disability. Substituted decision making was defined as making decisions on behalf of a person with disability⁸⁸. The understanding of guardianship is also construed to mean a parent or relative who is taking care of a person with disability⁸⁹. None of the participants were aware of formal guardianship through the courts. Only one participant had been institutionalized though guardianship laws in the Mental Health Act but even then, he did not understand what it meant⁹⁰.

From my understanding of supported decision making as you have explained, I do not think as a county government we need to wait for the national government to make laws on supported decision making. It is in the best interest of our people to come up with laws that support the rights of person with disabilities to make decisions and these laws should fit into our circumstances. If caregivers would look at the benefits rather than negatives, we could find a way forward⁹¹.

In general, Caregivers were in support of guardianship and substituted decision making especially as it fitted their circumstances. *I myself I'm a person with disability. I take care of a child with disability but his is mental. He can't even leave the house as he will get lost or forget his way home. Therefore if the law could allow me to make decisions for him, why not?⁹²*

⁸¹ DPO/NGO information to the 3rd Pre-sessional Working Group of the United Nations Committee on the Rights of Persons with Disabilities for consideration when compiling the List of Issues on the First Report of the Republic of Kenya under the Convention on the Rights of Persons with Disabilities on 20 April 2015.

⁸² Interview with Hospital Manager, Mandera County Referral Hospital Level 4 on April 1, 2014

⁸³ Interview with the County Director of Health Services, Taita Taveta County on March 29 2015.

⁸⁴ *ibid*

⁸⁵ *ibid*

⁸⁶ *Supra* 81

⁸⁷ Focus Group Discussions with Caregivers in Mandera on March 31, 2015.

⁸⁸ *ibid*

⁸⁹ *ibid*

⁹⁰ Focus group discussion with Caregivers in Taita Taveta on April 30 2015.

⁹¹ Nominated MCA, Taita Taveta County. Focus Group Discussion on March 31 2015.

⁹² Focus Group Discussion, Taita Taveta County on March 31, 2015

For a person with psychosocial and intellectual disability, guardianship or substituted decision making is not an option. They preferred supported decision making.

I make my own decisions. I decide when I want to work and if I do not want I tell my mother today I will not farm. My mother tries to force me to farm but I tell her to stop it or I may have a psychotic break. I would like to vote but since I was institutionalized in 1989, it has been hard to participate. Mental people should be allowed to vote for the leader they want, it is their right⁹³.

In some cases, legal capacity was hindered by physical, cultural and language barriers. This brings out the concept of reasonable accommodation in decision making. For instance the case of John⁹⁴ in Mandera who is a 16 year old deaf child, attending a public primary school without a sign language teacher. When John and his parent tried to raise this issue with the school there was no response nor offer for an alternative mode of delivery thus limiting John's right to education.

In Mandera the security situation has further weakened the right to equal recognition through public participation. Recent terrorist attacks have caused the government to put in curfews. The right to associate has been restricted due to fear of attacks and most NGOs in the area and the Catholic Church that would create awareness in the area have either left or reduced their interactions with persons with disabilities. Persons with disabilities used to rely on the NGOs and the Church to give them information on public participation and forums.

I am of Gabra origin but was adopted by the Catholic church in Mandera. That is why I seem to be more educated than most

persons in the area. The church would help us with basic needs and teach us matters on the law. They would help us attend government meetings and explain our rights to us. However, due to insecurity, the church has become close knit. They no longer let anyone into the church grounds. NGOs have left too, we only have our community organizations to turn to⁹⁵.

There is also a challenge related to clans/customs. Amongst the communities living in Mandera, the clan system is deeply rooted in the culture⁹⁶. Hence superior clans are deemed to have more decision making power than the smaller clans. Thus persons with disabilities from weaker clans have less legal capacity within the community than persons with disabilities from stronger clans.

Around here, the chief's baraza has more power than the courts. The Chief is more respected especially if the chief comes from the right clan. Therefore as a person with disability, if I feel my rights are being abused and I come from the right clan, I would approach the chief or clan elders⁹⁷.

Legal capacity encompasses the right to make decisions or participate in decision making. Legal capacity is not limited to personal decisions but also decisions that affect the community, the county or the nation. The Constitution of Kenya gave all citizens the power of public participation to ensure that all views on matters affecting citizens are taken into consideration. However, though persons with disabilities may have the intention and opportunity to participate in public decision making, certain aspects of accessibility might limit their ability to participate in such forums thus limiting their legal capacity. In Taita Taveta, public participation of persons with

⁹³ Interview with former Psychiatric Patient, Taita Taveta County.

⁹⁴ Name changed to protect his identity. John's Case was confirmed by the County Director of Education who admitted he was having a challenge placing him in a School as Madera County did not have a qualified sign language teacher. Focus Group Discussion Interview on April 1, 2015.

⁹⁵ Focus group Discussion in Mandera on April 1 2015.

⁹⁶ Aden Abdi, 'Clans, conflicts and devolution in Mandera Kenya', October 14 2014. Available at <http://www.insightsonconflict.org/2014/10/clans-conflicts-devolution-mandera-finding-durable-solution-conflict-degodia-garre/>

⁹⁷ Focus group Discussion in Mandera on April 1 2015.

disabilities has been hindered by two factors: Culture and the nature of the terrain. Taita Taveta is surrounded by the Taita Hills. Most government offices are located in the hilly areas of the County making them inaccessible to person with physical disabilities. Thus when a person with a physical disability would like to raise a complaint, give an opinion or seek services, they either have to send someone to speak on their behalf or overcome various challenges to access the offices.

I am blind and very passionate about politics. I have a copy of the Constitution in my pocket that I carry it with me everywhere. It is not in Braille but I know every provision on my rights, including the ones on reasonable accommodation. I remember how we fought to have the County government include ramps and sign language interpreters in all public forums. That way, more persons with disabilities can participate in County government forums on development and be heard. Most people never used to attend meetings because of lack of interpretation or accessibility issues. Attendance is still low but it is a start⁹⁸.

On cultural matters, Taita Taveta County has a significant community of persons with albinism. Due to its proximity to Tanzania, persons with albinism are afraid to be seen in public forums for fear of being kidnapped and sold in Tanzania.

As you can see, I am a person with albinism and I am also a community mobilizer for persons with albinism through the Wundanyi Disabled People Organizations. Luckily for me, I live and work in Mwatate thanks to the County Government initiative to hire persons with disabilities. However, I am having problems mobilizing people like me. When I invite them to meetings, they will not come for fear of being attacked and sold in

Tanzania for witchcraft purposes.⁹⁹

Therefore for supported decision making to be successfully implemented, not only should there be a law or policy guiding the process but also reasonable accommodations to address the particular needs of persons with disabilities. There should also be a single body that will be mandated to implement supported decision making.

Every decision a person makes may have a social and/or legal implication. Supported Decision making helps the persons to navigate through the decision making process, understand the legal or social implications and finally make an informed decision.

Based on this concept, various institutions that have been mentioned stand out in terms of monitoring and implementation of supported decision making models. For instance;

1. The National Council for Persons with Disabilities has the mandate to formulate policies and measures to ensure equal opportunities for persons with disabilities¹⁰⁰. This mandate can be expanded to include a policy on supported decision making. Secondly, the Council has a national reach, and is in the process of creating data base of all persons with disabilities. The challenge however is that the Persons with Disabilities Act where the Council draws it's mandate from does not expressly recognize the right to legal capacity thus limiting the activities that the Council can engage in.
2. The National Gender and Equality Commission is a Constitutional Body that has the mandate to promote equality and freedom from discrimination in accordance with Article 27 of the Constitution. The Institution also has the mandate to coordinate mainstreaming of matters to do with disability in

⁹⁸ Focus Group Discussion in Wundanyi, Taita Taveta County on March 30, 2015.

⁹⁹ Focus Group Discussion in Wundanyi, Taita Taveta County on March 30, 2015.

¹⁰⁰ Focus Group Discussion in Wundanyi, Taita Taveta County on March 30, 2015.

national development and advise the government¹⁰¹. Because the Commission draws its mandate from the Constitution, it has discretion as to policy making on supported decision making. The challenge would be how the institution responds to complaints that the Commission is biased against issues on disability and the youth¹⁰².

3. Commission on Administrative Justice has been given a wide mandate both by the Constitution and the Commission on Administrative Justice Act to address

complaints on administration, promote good governance and efficient public service delivery by enforcing the right to fair administrative action¹⁰³. As seen in this report, persons with disabilities lack a proper complaints mechanism and the Commission has the mandate to address complaints. However on supported decision making, the challenge would be the fact that the Commission's mandate is already so wide, they may not be in a position to adequately address disability matters.

2.4 Common Abuses of Legal Capacity

In Kenya, there is a general lack of awareness on legal capacity matters. Article 12, equal recognition before the law has been assumed by professionals, persons with disabilities and even caregivers. Thus what may be a violation under Article 12 is assumed to be normal by the general public. For instance, the target communities visited during this research, assumed that it was better for a caregiver to make decisions over or on behalf of persons with disabilities irrespective of whether or not they could express themselves. This was reflected in the number of deaf persons interviewed in both Mandera and Taita Taveta County who were assumed to have a mental disability rather than deaf.

This child was born silent. He has never spoken and his mother is unable to take care of him. You can tell that he understands what you are saying but he can't speak. His mind is intact but we do not understand why he does not speak. Therefore we the community

*ensure that he has enough food to eat and clothes to wear. We send him on errands and keep him busy. When we need his opinion, we ask his mother.*¹⁰⁴

The judicial system is especially known for miscarriages of justice on the right to equal recognition before the law. However the judiciary's argument is that the law is already skewed on legal capacity. Until a case is brought challenging the right to equal recognition, then the judiciary cannot do much about it¹⁰⁵. The judiciary does not keep a specific record of the types of cases touching on disability that pass through the courts thus exact data is unavailable¹⁰⁶. However the National Council for Law Reporting¹⁰⁷ is mandated to record and publish all case law that passes through the judicial system which then creates the record of precedent that the judiciary can use to interpret law.

According to ICJ-Kenya most persons with

¹⁰¹ Mandate and Functions of National Gender and Equality Commission. Available at <http://www.ngeckkenya.org/about/15/Mandate>

¹⁰² [NGEC accused on bias against the disabled; The Star, May 26, 2015. Available at <http://www.the-star.co.ke/news/ngec-accused-bias-against-disabled>

¹⁰³ Council on Administration of Justice mandate. Available at http://www.ombudsman.go.ke/index.php?option=com_fsf&view=faq&catid=2&Itemid=448

¹⁰⁴ Interview with the Chair of the Council of Elders in Kishamba Village, Mwachawaza Location, Mwatate Sub County, Taita Taveta County, April 4 2015.

¹⁰⁵ Interview with Justice Mumbi Ngugi on May 8 2015.

¹⁰⁶ Interview with Head of Human Resource and Communications, Judiciary on April 27 2015.

¹⁰⁷ Established and mandated by the National Council for Law Reporting Act and Legal Notice No. 29 of 2009.

disabilities interact with criminal laws either as accused persons (60% being petty offences) or as victims¹⁰⁸. The common offences including possession of stolen merchandise, drug dealing, rape/defilement, lack of licenses or compliance with by-laws. With regards to victims, the common cases are as victims of sexual abuse, domestic violence, and disinheritance and guardianship laws¹⁰⁹.

I was once arrested by the police who assumed I was drunk. My condition makes me unstable when I walk and I sound like I am drunk when I speak. They took me in and were about to charge me with being drunk and disorderly even after I tried to explain myself. The OCS though knows me as we have worked a lot with him on disability cases. He is the one who had me released but they did not even bother apologizing for their mistake.¹¹⁰

It is very common to find sexual offences against persons with disabilities being withdrawn yet the Sexual Offences Act states that no sexual offence matter can be withdrawn. The Sexual Offences Act states that no sexual offence can be withdrawn or settled out of court, yet at county level this is happening¹¹¹. On being asked if there is a complaints mechanism to address withdrawal of sexual cases, the response was that there is none. Most victims are usually referred to the Ombudsman who sits in Nairobi and has no representatives at County level.

I am a person with disability and an NGO representative. On rape and defilement cases, our people prefer to settle matters out of court as it is more efficient. We know it is unjust for the victim but can you blame the parents

when a case takes years to be concluded and still the perpetrator is set free? For example we have an ongoing case of a girl with mental disability who was defiled. She got pregnant from the defilement and gave birth. The Child is now about a year old and the case is still ongoing. Her grandmother takes care of her and it is too expensive to keep pursuing the case. She lives far from the court, has to raise her disabled granddaughter and now a child as well. The case keeps being mentioned and mentioned but nothing is coming out of it. The police told her grandmother to just settle the matter with the perpetrator as the case will never end. I will not be surprised if the case is withdrawn¹¹².

In Mandera, matters of rape or defilement, the cases are never referred to the magistrates' courts but to the Kangaroo court, the most the elders will do is to impose a fine of a few goats or sheep on the perpetrator as restitution to the girl's family and he will then walk free. In the past, the girl would have been accused of adultery under Islamic law and subjected to punishment. I recall only one matter where a defilement case was taken before the magistrate's court, the case was however almost thrown out because the girl was deaf and no interpreter was willing to come forward and assist in interpreting for the victim as the matter had been decided by the feared elders. Only through the intervention of HAWENKA and a few community activists did the case go forward and the perpetrator convicted¹¹³

There is no legal aid mechanism that ensures persons with disabilities have access to legal information or legal aid should

¹⁰⁸ International Court Jurists-Kenya, 'Justice at City Hall: The Practice of City and Municipal Courts in Kenya and the Impact of by-law Implementation on Prison and Remand Facilities', presented before the Open Society Foundations, Decriminalizing Petty Offences in Africa Report Meeting, Johannesburg, 19-20 June, 2014.

¹⁰⁹ Ibid.

¹¹⁰ Interview with National Council for Persons with Disabilities representative in Taita Taveta County on April 27 2015.

¹¹¹ International Rescue Committee, 'My Action Counts: An Assessment of Gender Based Violence in Nine Counties of Kenya', 2014.

¹¹² Focus Group Discussion in Wundanyi, Taita Taveta County. The participant is an activist with the Wundanyi Disabled People Organisation.

¹¹³ FGD in Mandera Town, Mandera County. The participant is a deaf teacher and an activist with IDDA.

services be required. This affects the right to equal recognition as persons with disabilities in most cases are not aware of their rights. Legal aid/information should be provided in both civil and criminal cases. However in Kenya, legal aid is only provided to persons facing capital offences. The National Council for Administration of Justice (NCAJ)¹¹⁴ is mandated to give guidelines and policies on access to justice. At county level, this body is represented through the Court Users Committee (CUC) who should have 2 representatives of persons with disabilities¹¹⁵. In Mandera and Taita Taveta, no person with disabilities sits in the CUC. Further, neither the NCAJ nor the CUCs have passed a policy or guideline on access to justice for persons with disabilities especially on access to information. Most Courts are focusing on physical accessibility and language barriers.

*As the judiciary we have ensured that all courts are accessible to persons with disabilities. We have installed ramps and are focusing on getting sign language interpreters. The Judiciary also has a draft Disability Policy to guide operations and address disability matters though this policy mostly focuses on staff. The only difficulty we are facing is in offering Braille services especially in civil cases. If there was a way we could know beforehand the disabilities that would be before court in a given case, then it would be easier for the court to provide sign language interpreters and Braille services.*¹¹⁶

Guardianship laws have also created a system that ensures persons with disabilities access to financial services is limited. This is based on contracts laws where one has to be of “sound

mind” to enter into a contract. Granted there are exceptions to the rule but most financial institutions grapple with determinations of “sound mind” as there is no definition. In most cases, financial institutions rely on the medical diagnosis or the caregiver to guide them on the legal or mental capacity of the person. As a result one may be required to get a court order or the caregiver is given quasi decision making powers over the person with disability. For instance, the Kenya Bankers Association relies on the Employment Act, Banking Act and Central bank of Kenya Prudential Guidelines 2014 Circular to determine legal capacity. Under the guidelines, Banks have to act in the best interest of the person and a proxy can be appointed to act as a co-signatory to protect the interest of the bank¹¹⁷. However the Person with disability has the duty to exercise due diligence to avoid fraud. Where the person has no capacity, then a court order is required showing that a guardian has been appointed or that there is a power of attorney over the financial estate of a person of “unsound mind”.

Another common abuse of guardianship laws is by families or caregivers of persons with disabilities. The Courts stated that about 80% of guardianship cases filed with the Family Court Division involve applications for guardianship over elderly parents who may or may not be suffering from an age related disability¹¹⁸. About half of the cases are not genuine as the main objective of the case is children trying to defraud their elderly parents¹¹⁹.

Most caregivers in Kenya are caregivers by default because they are related to the person with disability and are generally unaware of guardianship laws. The caregiver is deemed to have decision making powers over the person

¹¹⁴ National Council for Administration of Justice functions. Available at <http://www.judiciary.go.ke/portal/page/national-council-on-the-administration-of-justice>

¹¹⁵ Clause 3, Court User Committee Establishment Guidelines of 2013.

¹¹⁶ Interview with Head of Human Resource and Communications, Judiciary on April 27 2015.

¹¹⁷ Central Bank of Kenya Prudential Guidelines 2014 Circular.

¹¹⁸ Interview with Clerk - Registry Family Division, High Court Mililani, May 8 2015.

¹¹⁹ “Daily Nation, Kirima in Sound Mind while signing Will Court told”, Daily Nation, November 13, 2012. Available at <http://www.nation.co.ke/news/Kirima-in-sound-mind-when-signing-will-court-told/-/1056/1619112/-/tjprpl/-/index.html>

with disability. In Taita Taveta and Mandera Counties, professional caregivers such as teachers or community health workers did not see themselves as caregivers but rather service providers. Thus the professional caregivers did not agree that they had any duty towards persons with disabilities as provided for under Article 12 of the CRPD. As for primary caregivers, who were mostly family members, it was clear that the right to make a decision especially on marriage, family life, financial decision and sexual reproductive health rights is highly limited for persons with disabilities. In rural settings, the family collectively made decisions for persons with disabilities without consulting them. The reason being that the family was deemed to be acting in the best interest of the person.

I am a man with disability and I loved a woman without disability. However the community kept telling her negative stories until she left me. I then opted to marry a lady with disability. The community still spoke ill of us saying that we will spread the disabilities to our children. They added that how does a person with disability help another person with disability? So according to the community, persons with disabilities should never get married¹²⁰.

This societal view on marriage is reflected in how the Marriage Act was passed. Section 5 (2) bars persons with mental disabilities from witnessing a marriage. Section 11 states that persons with mental disability whether temporary or permanent cannot give consent to marry. Finally Section 50 makes a marriage voidable if one of the parties has a mental disability. In January 2015, nominated MP Isaac Mwaura proposed amendments

to the Marriage Act to allow persons with psychosocial and intellectual disabilities to marry but was met with comments such as “we cannot allow mad people to get married”¹²¹. The amendments were not passed.

Equal recognition before the law also means the right to give consent. The Constitution of Kenya guarantees the right to privacy for all person thus guaranteeing the right of persons with disabilities to consent. Various laws in Kenya limit the right to consent for person with disabilities such as the Penal Code. As a result, the health sector has various violations on the right to privacy. Common complaints include doctors administering treatment without the consent of the person with disability or making assumptions on the person’s health¹²². Also hospital staff have been accused of giving little or no information to persons with disabilities on their illness, treatment or reproductive health rights.

As a woman with a physical disability I remember when I was pregnant and went into labour. The doctor saw me and told me I just have to go for a caesarian section. I asked him why but he did not tell me anything. So I insisted I must give birth naturally. He left me in labour for 3 days and finally went for a C-section when my child’s heart started failing. Later I came to find out that my type of disability does not allow me to give birth naturally. The doctor was right but he should have given me the information to allow me make a choice rather than take it away¹²³.

Kenya’s Constitution created room for public participation¹²⁴. Before any law or policy takes effect, whether at national or county level, the government has to involve stakeholders in the enactment process. Persons with disabilities

¹²⁰ Focus Group Discussion in Wundanyi, Taita Taveta County, March 30 2015.

¹²¹ ‘How Persons with Mental Health Conditions Lost the Right to Marry’, The Star March 17 2015 available at <http://www.the-star.co.ke/article/how-kenyans-living-mental-health-conditions-lost-right-marry#sthash.2zER6qkl.TTCDrc9K.dpbs>

¹²² Independent Medico-Legal Unit, ‘Complimentary State Party Report to the Committee against Torture and Cruel, Inhumane and Degrading Treatment’, June, 2014.

¹²³ Focus Group Discussion, Taita Taveta, April 1 2015.

stated that due to various factors such as accessibility to the venue, location of the event and stereotypes on disability, they found it hard to be involved in public events.¹²⁵

Mandera County is very expansive, if for instance there is an event at the county headquarters at Mandera Town, it is very difficult for any persons from let's say Rhamu, to attend the function even if they wish to. The situation is even worse for Persons with Disabilities. This makes us feel much sidelined. Even attending this Focus Group Discussion was a struggle for most of us because there are limited modes of public transport and the road network is almost non existent¹²⁶

At county level, most representatives with disability are in office through nomination as representatives of persons with disabilities¹²⁷. Therefore their elected counterparts do not value their input. In other cases the opinions of persons with disabilities who try to give their input in a public event are usually disregarded unless the person is either respected in the community or authoritative in claiming their rights¹²⁸. Persons with disability also noted that persons with physical disabilities are usually more respected in public gatherings than those with psychosocial or intellectual disabilities. Therefore there is still a stereotype on leadership and disability which limits the rights of persons with disabilities to equal recognition before the law.

¹²⁴ Articles 118 (Public Access and Participation) and Article 196 (Public Participation and County Assembly, powers, privileges and immunities) of the Constitution of Kenya 2010.

¹²⁵ United Disabled Persons of Kenya, 'Towards the 2017 General Elections', September 2013.

¹²⁶ Focus group discussion, Mandera County on April 2 2015.

¹²⁷ Interview with Hon. Hassan A. Ali, Nominated MCA on Disability, Mandera County on March 31 2015.

¹²⁸ Focus group discussion Mandera County on April 2 2015

CHAPTER 3

Challenges in Addressing Legal Capacity from an Institutional Perspective

The State party report to the committee clearly indicated that Kenya is grappling with implementing Article 12 of the Convention. This is especially because few people have understood the requirement under Article 12. Supported decision making is after all a new concept globally¹²⁹. In Kenya persons with disabilities have been carrying out various informal models of supported decision

making. In the list of Issues, the Committee requests that the government gives details of how it has been implementing supported decision making in Kenya though it is clear that implementation is a challenge in itself¹³⁰. This section seeks to address challenges in implementing Article 12 from the perspective of the professionals, caregivers and persons with disabilities in rural areas.

3.1 Judiciary

The closest Authority on definition of legal capacity used by the court was set in the case of *Banks v. Goodfellow* in 1870. Mr. Banks was known for having epileptic fits and had written a will which was contested for lack of mental capacity. The case set out four elements that must be met for one to be declared mentally fit to execute a will:

- The testator must understand the nature of the act and its effect;
- The testator must understand the extent of his property;
- The testator must be able to understand and appreciate the claims of those around him, to which he should be giving effect; and
- There is no "disorder of the mind that shall poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties – which no insane delusion shall influence his will in disposing of his property and bring about a disposal of it which, if the mind had been sound, would not have been made."¹³¹

The misconception between legal capacity and mental capacity has on several occasions led to a miscarriage of justice in criminal and civil cases. In *Nkilisho Moonga v Republic [2015] eKLR*, the court having believed that the appellant's soundness of mind was questionable inquired into that fact. The court found that indeed he was not of sound mind and proceeded to make an order committing him to a mental hospital. The court record was however not transmitted to the Minister for consideration as required by the law. Consequently the court did not receive any report stating that the appellant was capable of making his defense. The court vacated its order and continued with the case contrary to the law. Having not followed the procedure as provided by Section 162 – 163 of the Criminal Procedure Code, the subsequent trial was not fair. The appellant's rights to a fair trial were indeed violated¹³³.

A question on equal recognition before the law has never been presented before the Court in Kenya for interpretation. Therefore the

¹²⁹ Committee on the Rights of Persons with Disabilities, Eleventh session 31 March–11 April 2014 General comment No. 1 (2014) Article 12: Equal recognition before the law.

¹³⁰ Committee on the Rights of Persons with disabilities, List of Issues in Response to Kenya's Initial State Party Report, April 24, 2015.

¹³¹ Amy A. Mortimore and Mark Weintraub, 'What is Incapacity? A Study of Banks v. Goodfellow (1870) LR 5 QB 549, 2003'. Available at <http://www.cwilson.com/services/18-resource-centre/371-testamentary-capacity-issues.html>

¹³² *Nkilisho Moonga v Republic [2015] eKLR*..

¹³³ *ibid*

Courts have to rely on different interpretations in civil and criminal law to establish what legal capacity is on a case by case basis. Only when lawyers come up with a case that addresses legal capacity as the legal question and not as incidental to another issue, will the Court finally address its mind to Article 12 of the CRPD¹³⁴.

One question that comes up is on data collection regarding cases on legal capacity. Unfortunately, the Judiciary does not maintain a data base of persons with disabilities who come

into contact with the judicial system. There is no requirement thus it is difficult to estimate the number of cases they may handle thus difficult to inform a disability policy. However, the Judiciary does maintain a sexual offender's register¹³⁵. The register indicates some detail about the offender such as age, location and offence. It also maintains the details of victims such as age and sex. However the register does not indicate disability irrespective of whether it is the victim or the offender.

3.2 Law Society of Kenya

The Law Society of Kenya is the body that regulates the legal profession in Kenya. In addition to that, LSK has a mandate to take up strategic cases and offer legal aid. However, the LSK does not have a direct mandate to address disability save for the clients that they may attend to through their legal aid initiatives¹³⁶. Institutionally, LSK has set up a Welfare Committee to cater for lawyers who may suffer from a disability or mental illness while in practice¹³⁷. The Committee provides financial support to the lawyer or his next of kin. In addition the Committee will provide transition of services should the lawyer who acquires a disability be unable to carry on in practice¹³⁸.

There is no policy or guideline on disability matters within the LSK. There is no guideline on legal capacity either as the Society relies on the Laws and/or Court's interpretations on what is legal capacity. As identified earlier, the current interpretation of legal capacity is based on authorities on Contract Laws or the Law of Succession. Most civil cases that have come

before the LSK have been on employment law and specifically matters on reasonable accommodation¹³⁹. Thus the test in *Banks v. Goodfellow* remains the authority on legal capacity matters especially in succession cases.

LSK is also a member of the Council of Legal Education Board which governs training of lawyers¹⁴⁰. In this regard, LSK gives advice on the syllabus and recommendations on the trainers. This includes workshops on pro bono (free) legal services and thematic matters such as disability. The LSK also has a Medico-Legal Committee that is taking the lead in giving legal opinions on the review of the Mental Health Act¹⁴¹. However a quick reading of the proposed Mental Health Care Bill shows that the Bill is still relying on the Medical model. Further the Bill has been pending for the last 7 years begging the question, what was the objective of reviewing the law?

The LSK is mandated to carry out continuous legal education to its members. Each year a lawyer has to receive a minimum of 5 points

¹³⁴ Interview with Justice Mumbi Ngugi on May 8 2015.

¹³⁵ Chief Justice Willy Mutunga, 'Launch Of The National Sexual Offenders Register And Presentation Of The Draft Rules Under The Sexual Offences Act 2006', April 24 2012.

¹³⁶ Interview with Programs Manager - Public Interest and Advocacy, Law Society of Kenya, April 17 2015.

¹³⁷ *ibid*

¹³⁸ *ibid*

¹³⁹ *ibid*

¹⁴⁰ Section 4 of the Law Society of Kenya Act, Cap 18 Laws of Kenya as read with Section 28 of the Advocates Act.

¹⁴¹ Interview with Programs Manager - Public Interest and Advocacy, Law Society of Kenya, April 17 2015.

in order to qualify to practice the next year¹⁴². The challenge here is that classes focusing on pro bono legal practice, children or vulnerable groups such as disability have been poorly attended by members¹⁴³. Most lawyers are not

interested in human rights work as compared to corporate law. Thus LSK has never provided any form of training on legal capacity in disability rights.

3.3 Financial Institutions

Financial institutions such as banks, microfinance institutions and insurance companies also face various dilemmas on legal capacity matters of persons with disabilities. Of particular interest is the Law of Contracts which states that a person has to be of sound mind to sign a contract. This however does not exclude banks, microfinance companies or insurance companies from providing services to persons with disabilities.

In particular, banks are required to comply with the Persons with Disabilities Act in all their dealings with persons with disabilities. Banks are also required to offer non-discriminatory services to persons with disabilities and offer literacy education on banking procedures and requirements. However, this is not effective due to lack of knowledge on the rights of persons with disabilities especially in a financially uninformed group¹⁴⁴. Banks in particular rely on guardianship laws which are necessary to protect the interest of the bank from law suits related to fraud where a person acts on behalf of another but without their legal authority or consent. However, in most cases, the appointed guardian or caregiver rarely acts in the best interest of the persons with disability resulting in fraud¹⁴⁵.

Within the insurance industry, the issue of legal capacity is a challenge especially in signing contracts and receiving pensions¹⁴⁶.

The most common cases on legal capacity are related to disability caused by old age. The Pensioner may not have the capacity to sign any contract or make a decision on who the next of kin should be or who should collect his/her accrued benefits. Also in some cases, the beneficiaries or next of kin may not necessarily be the caregiver of the pensioner with a disability thus may not use the benefits to the wellbeing of the pensioner with a disability nor consult them on such decisions.

The issue of legal capacity in financial matters was further highlighted by the County Directorate of Social Services in distribution of Cash transfers under the National Development Fund for persons with disabilities. The director of HAWENKA pointed out even when the funds are available, caregivers use the funds mostly for their benefit and not for that of the person with disability¹⁴⁷. Taita Taveta County had in addition to the National Development Fund Created the Dawida-Taveta Sawazisha Fund (DATU Fund) which provides loans and grants to groups of persons with disabilities to start entrepreneurship projects. Of the ten groups of persons with disabilities that applied, only three groups qualified for the loan¹⁴⁸. However, the three groups that qualified were mostly controlled by caregivers of persons with disabilities and not the members with disabilities. Though the financial institutions

¹⁴² Law Society of Kenya, Practice Rules for Advocates.

¹⁴³ Interview with Programs Manager - Public Interest and Advocacy, Law Society of Kenya, April 17 2015.

¹⁴⁴ Interview with Legal Manager and Industrial Relations, Kenya Bankers Association, April 20 2015.

¹⁴⁵ See case of Wachu Wacharia (note 49 above).

¹⁴⁶ Interview with Manager Statutory and Legal Affairs, Association of Kenyan Insurers, April 20 2015.

¹⁴⁷ Interview with Director of Education and Social Services, Mandera County on April 2 2015

¹⁴⁸ Interview with Director of Operations, DATU Sawazisha Fund on April 1 2015

agree that it limits the rights of persons with disabilities to make decisions in the group,

the Institution had no power to change the situation.¹⁴⁹

3.4 County Education Office

The Basic Education Act 2013 calls for inclusive education for children with disabilities and non-discrimination in provision of education services¹⁵⁰. The right to education under this law should be in the best interest of the child and this includes child participation in making a decision on the right to education. Though this Act provides more rights for persons with disabilities over their education, the guidelines on implementation of the Basic Education Act are yet to be passed¹⁵¹. Thus District Education officers are relying on the Special Needs Education Policy to implement inclusive education in schools. In practice, this means that the caregiver is given more decision making power over education than the person with disability.

The Education Assessment and Resource Center in Mandera is charged with making assessment needs of children with disability then refers them to the appropriate school and hospital for their needs¹⁵². In Taita Taveta, the County District Education Office is charged with assessment and referral of children with disabilities as well. However, both institutions

face the challenge of lack of sufficient qualified staff to address the needs of children resulting in limited choices for children with disabilities to attend school. The children end up attending the available school rather than a school of their choice that offers education that fits their needs.

In both Taita Taveta County and Mandera County there was a clear link between the right to education and culture which denied children the right to make a choice. The District Education Officer, Taita Taveta County pointed out that most families do not see the importance of educating a child with disability especially those with perceived severe disabilities¹⁵³. Thus the families would decide not to educate their children with disabilities. In the cases where children with disabilities are enrolled, it is mostly children with physical disability rather than intellectual disability¹⁵⁴. The interesting fact to note was that public primary schools in Taita Taveta County have an integrated section which cater mostly to Autistic Children and children with Cerebral Palsy though enrolment is still low¹⁵⁵.

¹⁴⁹ The Taita Taveta DATU Sawazisha Fund Act does not give mandate to the County to investigate the operations of a group unless they suspect fraud on lack of compliance with other government regulations. Thus in fighting within the group is left to the group to sort it out

¹⁵⁰ Section 4 (s) Basic Education Act: The provision of basic education shall be guided by the following values and principles— non-discrimination, encouragement and protection of the marginalized, persons with disabilities and those with special needs;

¹⁵¹ Interview with County Education Officer and the Director of the Mandera Education Assessment and Resource Center on April 2 2015.

¹⁵² *ibid*

¹⁵³ Interview with County Education Officer, Mwatate, Taita Taveta County on March 27, 2015

¹⁵⁴ *ibid*

¹⁵⁵ Taita Taveta County Register of Primary Schools. There are 6 public schools in the County with Integrated units.

3.5 County Government Structures

The Constitution of Kenya created the County Government system which provides various services for persons with disabilities. Some duties such as the National Development Fund and Implementation of the Disability Policy though a national function are disbursed at the county level.

In this regard, there are two main institutions that cater for persons with disabilities at the National and County Level. The National Council for Persons with Disabilities (NCPWD) is mandated to register persons with disabilities. The County Directorate of Social Services is mandated to distribute the cash transfer funds for persons with disability which is allocated through the National Development Fund. To receive the funds, one must be registered with the NCPWD.

On registration there is a challenge in how the registration is done. First persons with disabilities are not aware of the council, the Services it provides and its mandate. As a result very few persons with disabilities are registered with the council at county level compared to the demographic numbers in the county. In Taita Taveta, the Council's representative had been in the county for 3 years but had only registered 121 persons. In Mandera County

the data was not available as the Council Representative had never reported to the County office since her appointment.

The Second challenge is that, currently only persons with severe disabilities receive the National Development funds. This poses a challenge in that caregivers must be registered alongside the person. The care giver collects the funds on behalf of the person and in most cases they do not involve the persons in making decisions on how the funds should be spent. Some caregivers have been reported to the council and directorate as abusers. However, neither the Council nor the Directorate has the mandate to appoint a caregiver without a court order or consent from the person with disability.

Finally, there is a general lack of awareness amongst persons with disabilities on the role of the directorate and the role of the council. As a result few persons with disabilities are registering for services. Further for the few who are registered with the Council, the Master registry has no specification of the disability that the person has. Disability is registered as Physical or Mental which makes it difficult to provide tailor made services for persons with disabilities.

3.6 Health Service Providers

The health care sector has a connection to legal capacity. The Constitution of Kenya¹⁵⁶ guarantees each individual the right to privacy. This means the right of a person to consent to treatment or be informed of the treatment being offered to them. Persons with disability especially psychosocial or intellectual disability have been assumed not to have the mental capacity to consent to treatment. As a

result, their caregivers are relied upon to give the medical situation of the person.

However, at County level, the biggest challenge to treatment is the caregiver. Doctors said they prefer dealing with the persons with disability as they alone can explain what is ailing them¹⁵⁷. However, caregivers tend to interfere with treatment as they believe they know the ailment better than the person

¹⁵⁶ Article 31 of the Constitution of Kenya 2010.

¹⁵⁷ Interview with Mandera East Sub-County Public Health Officer on April 1 2015.

experiencing the pain¹⁵⁸. In some cases Doctors may rely on caregivers to translate where the person has communication problems but a lot of information gets lost in communication¹⁵⁹ leading to misdiagnosis. If hospitals had sign language and Braille services then they would be in a better position to provide services for persons with visual or hearing disabilities.

The second challenge is attitudinal barriers and stereotypes on disability especially on sexual and reproductive health. This is especially so from nurses and doctors who are in direct contact with persons with disabilities. Though the Counties of Mandera and Taita Taveta have

a non-discrimination policy in their service charters at the Ministry of Health offices¹⁶⁰, persons with disabilities complained of lack of information on sexual and reproductive health rights and access to information on the same. While awareness creation programs on family planning, vaccination and HIV testing is available to the general public, persons with disabilities were not accorded the same benefit including reasonable accommodation to access facilities where events were held, translation services and when asking a question, they received a negative attitude or response from nurses and doctors.

3.7 Independent Electoral and Boundaries Commission (IEBC)

The Constitution of Kenya¹⁶¹ states that every person has the right to participate in elections. This could either be as a voter or as a person running for elections. The same article states that a person has to be of sound mind to run for office or continue holding office. The IEBC has carried out various activities to ensure that persons with disabilities can participate in elections including providing reasonable accommodations¹⁶². It is important to note that parliament has not provided any legislation in line with the provisions of Article 100 of the Constitution of Kenya. Thus legal capacity of persons with disability is limited by the law especially intellectual and psychosocial disabilities where persons of “unsound mind” cannot hold office or be registered as voters¹⁶³.

There is no directive or policy guideline on what constitutes unsound mind therefore IEBC relies on medical diagnosis and court directives to interpret this clause.

Secondly is the issue of awareness creation on public participation activities and on voter rights. The IEBC is mandated to create awareness on voting rights. However the IEBC relies on NGOs to carry out trainings to persons with disabilities on their voter rights¹⁶⁴. On the other hand awareness creation for the general public will be carried out by IEBC but for persons with disabilities it is their respective NGOs that create awareness. IEBC states that this is due to lack of expertise and technical support required to train persons with various disabilities on their rights.

¹⁵⁸ Ibid

¹⁵⁹ Interview with County Director of Health Services Taita Taveta District, March 29 2015

¹⁶⁰ Service Charters were on display at the Notice Board outside the Office of the Directorate of Health in Mandera and Taita Taveta County. This is the same service charter form the Ministry of health before the devolved system of government took effect. This indicates that County governments need to review their service policies to fit their county needs.

¹⁶¹ Article 100 of the Constitution of Kenya 2010.

¹⁶² United Disabled Persons of Kenya, 'Towards the 2017 General Elections', September 2013.

¹⁶³ Ibid

¹⁶⁴ Interview with IEBC Programs Officer, Mwatate sub-County Taita Taveta County, March 27, 2015

3.8 Caregivers

The role of caregivers in providing support for persons with disabilities cannot be underestimated. As a world bank report puts it,

Many persons with disabilities need assistance and support to achieve a good quality of life and to be able to participate in social and economic life on an equal basis with others. A sign language interpreter, for instance, enables a Deaf person to work in a mainstream professional environment. A personal assistant helps a wheelchair user travel to meetings or work. An advocate supports a person with intellectual impairment to handle money or make choices. People with multiple impairments or older persons may require support to remain in their homes. These individuals are thus empowered to live in the community and participate in work and other activities, rather than be marginalized or left fully dependent on family support or social protection. Most assistance or support comes from family members or social networks. State supply of formal services is generally underdeveloped, not-for-profit organizations have limited coverage, and private markets rarely offer enough affordable support to meet the needs of people with disabilities¹⁶⁵

There is no universal definition of a caregiver but this has been loosely understood as community individuals who take care of a person with disability. These can be divided into primary caregiver and secondary caregiver¹⁶⁶. Primary caregivers are mostly family members, whether an adult or child, who take care of a person with disability in the home. Secondary caregiver refers to community members and social service staff, whether paid or volunteer, who provide additional support services to persons with disabilities. This could include

through home visits, schools, health centers or through faith based organizations.

This distinction is important because in Kenya, there is no definition of a caregiver which poses the first challenge. During the study both primary and secondary caregivers were interviewed but secondary caregivers did not see themselves as caregivers but rather service providers. Primary caregivers were mostly parents of the persons with disability majority being women but secondary caregivers included community health workers and religious leaders. Secondary caregivers thus did not see what role they had to play in supporting the right to equal recognition before the law as they did not deem themselves as caregivers.

I am not a caregiver, I am just the Imam. At the Mosque we run sensitizations on cultural matters especially those that are against the Quran like throwing away children with disabilities. We also give hotubas (sermons) on clanism. In Mandera the clans have a lot of power and if you are a person with disability and from a weaker clan, it means that you have no decision making powers at all. So we talk about equality irrespective of your clan. The parent is their caregiver¹⁶⁷.

As a community health worker, I visit the families in the area, give them information on health services and sometimes distribute basic drugs to women and children. With regards to disability I visit with the families, advise them on what they need to do and sometimes offer physiotherapy services. I can't be a caregiver because I am not part of the family. I do not make any decisions for the family or for the child with disability. I merely advice¹⁶⁸.

¹⁶⁵ World health Organisation, 'World report on Disability', 2011 pg 137

¹⁶⁶ Consortium on AIDS and International Development, 'Policy Briefing Paper', March 2012.

¹⁶⁷ Focus Group Discussion on April 1, 2015. Muslim Cleric at the Madina Mosque, Mandera.

¹⁶⁸ Interview with Community Health Worker in Kishamba Village, Kishamba Village, Mwachawaza Location, Mwatate Sub County, Taita Taveta County, April 4, 2015

The second challenge comes from the perception of the primary caregivers. The community has dealt with legal capacity matters at family level and in extreme cases, the Council of Elders steps in. For persons with severe disabilities, the caregiver and community at large expect that it is the mother or immediate family that should make all decisions pertaining to the person. If asked

how they know what the person wants, the response is usually based on what the family/caregiver thinks is best for the person with disability. In some cases the person may not have a severe disability but due to their language or communication barrier, the caregiver assumes the needs and decisions of the persons with disability.

3.9 Persons with Disabilities

The right to equal recognition before the law for persons with disabilities has always been ignored. The society generally assumes that the person has no capacity to make a decision for themselves irrespective of their disability. The caregiver or assistant is usually given more recognition than the persons. This is compounded by the fact that most persons with disabilities are not aware of their rights or are conditioned to believe that they do not have that right.

In Mandera and Taita Taveta Counties, equal recognition before the law is a foreign concept. Persons with disabilities living in a rural set up are used to more informal systems of law thus Article 12 seems unattainable for persons with disabilities in Mandera and Taita Taveta County.

Around here, we do not go to court. We deal with the Elders or the chief when my

family gives me a hard time. I can call the elders to intervene or in severe cases I can call the chief. Sometimes they listen, maybe because I have a physical disability. However when it's a Chief's Baraza or a meeting discussing government affairs, I have noticed my opinions are not taken seriously. I know the Constitution and I know my rights to public participation. That makes it easier for me to participate in public hearings.¹⁶⁹

Majority of the persons interviewed that have disability did not know of the Constitution nor their rights as provided for under Article 54. Thus trying to identify areas where their rights could either be claimed or violated, was difficult. The biggest challenge facing persons with disabilities on their right to equal recognition is lack of awareness on their rights.

¹⁶⁹ Focus group discussion, Mandera on March 31 2015.

CHAPTER 4

Good Practices on Implementing Article 12

From the findings of the study, it can be concluded that Article 12 of the CRPD is highly misunderstood by most practitioners, caregivers and persons with disabilities as well. However this does not mean that there are no good practices being implemented. There are various formal and informal methods of implementing Article 12 though the duty bearers are not consciously aware of their efforts. Article 12 of the Convention has

midwived a significant paradigm shift for the way in which persons with disabilities exercise their human rights. Whereas before the assumption was that persons with disabilities did not have legal capacity, the assumption now is that all persons with disabilities have legal capacity and that wherever they may not be able to exercise that capacity effectively they shall be provided with appropriate supports to make their own decisions.¹⁷⁰

4.1 Good Practices from the law:

The Sexual Offences Act has a broad definition for a person with mental disability to ensure that it does not prejudice persons with psychosocial or intellectual disability¹⁷¹. Thus the Act, gives a wide discretion to the Court or anybody interpreting the Act without prejudice. Secondly, the Act allows vulnerable witness (which includes persons with mental disabilities) to give evidence through an intermediary. Though most abuse of legal capacity in sexual offences starts with the police¹⁷², the law allows a supported decision making mechanism where a witness can give evidence through an intermediary. Under the Children's Act, the Department of Children services has the power to appoint a suitable guardian in cases of abuse¹⁷³. The Domestic Violence Act, 2015 recognizes domestic violence as physical, mental or emotional abuse from a spouse or family member¹⁷⁴. Families and caregivers have been known to

be either physically or emotionally abusive towards persons with disabilities¹⁷⁵. Reports have shown that there is a significant increase in violence in homes that have children with disabilities¹⁷⁶. This poses a challenge in that persons with disabilities may not necessarily be able to communicate the abuse and in cases of mental or emotional abuse, it may not be taken very seriously. By recognizing mental and emotional abuse, the Act empowers persons with disabilities to report abuse.

The law too often places a person with disability under the legal guardianship of another instead of providing measures and safeguards to support such persons to make decisions.¹⁷⁷ Most pending cases in the Family Division of the High Court are guardianship cases involving substantial wealth and between children and their aging parents. There is no guideline to determine sound mind under such circumstances thus the court usually

¹⁷⁰ Lawrence Mute, 'Moving from the Norm to Practice Towards Ensuring Legal Capacity for Persons with Disabilities in Kenya', 2012.

¹⁷¹ Section 2, Sexual Offences Act: "person with mental disabilities" means a person affected by any mental disability irrespective of its cause, whether temporary or permanent, and for purposes of this Act includes a person affected by such mental disability to the extent that he or she, at the time of the alleged commission of the offence in question, was—

(a) unable to appreciate the nature and reasonably foreseeable consequences of any act described under this Act;

(b) able to appreciate the nature and reasonably foreseeable consequences of such an act but unable to act in accordance with that appreciation;

(c) unable to resist the commission of any such act; or

(d) unable to communicate his or her unwillingness to participate in any such act;

¹⁷² Fiona Sampson and Sasha Hart, '160 Girls Making Legal History: Overview of the Development and Implementation of a Strategic Equality Initiative to Achieve Legal Protection from Defilement for All Girls in Kenya', 2013.

¹⁷³ Childrens Act, Section 79: A court before which a child is brought, and especially where that child is not represented by an advocate, may appoint a guardian ad litem for the purposes of the proceedings in question and to safeguard the interests of the child.

¹⁷⁴ Section 3 as read with Section 6 of the Protection from Domestic Violence Act, 2015.

¹⁷⁵ African Child Policy Forum, 'The African Report on Children with Disabilities: Promising starts and persisting challenges', 2014.

¹⁷⁶ Ibid

¹⁷⁷ Ibid

relies on the doctor's professional opinion and assessment leading to fraud and corruption. However the court has discretion to take extra measures such as ordering the persons be brought to court for an independent assessment and observation¹⁷⁸. This is the only way that courts can ensure the rights of the persons with disability to equal recognition are not taken away through fraudulent interpretation of guardianship laws.

In criminal cases, the Judiciary is currently reviewing the Sentencing Policy to look into the procedure on sentencing¹⁷⁹. The Draft Rules highlighted the challenges facing persons with disabilities and persons with mental illness¹⁸⁰. The Judiciary is keen on making provisions specifically on Sections 166 and 167 of the Criminal Procedure Code to ensure persons with disabilities get the right to a fair trial and sentence as accused persons¹⁸¹. However, there is still no procedure for reviewing cases of persons serving sentences at the President's

pleasure. As a result the Mercy and Pardons Board cannot release persons with disabilities serving at the President's pleasure meaning that they get forgotten in the system¹⁸². The judiciary has also validated its Disability Policy to ensure persons with disabilities can access court services on a non-discriminatory basis¹⁸³. Though the policy focuses on employees with disabilities, the preamble states that users of Court services shall not be discriminated and shall have access to language services on an equal basis with others. This ensures that persons with disabilities in the court process can participate in hearings whether as an accused, complainant or litigant.

The National Disability Policy guarantees Persons with disabilities equal access to services. Though supported decision making is still not recognized under the policy, a person with disability shall be accorded all reasonable accommodation to guarantee access to rights¹⁸⁴.

4.2 Good Practices from Professionals Bodies on Legal Capacity

Most professional bodies have not addressed the matter of equal recognition before the law though most say that they adhere to Human Rights and Business Principles¹⁸⁵. Though the principles are not binding, corporates are expected to adhere and implement the principles such as clauses on non-discrimination, providing complaints mechanisms and equal rights to all workers

by accommodating their situations. Each sector has different practices on disability rights starting with non-discrimination as a protection mechanism. For example, the banking Industry has introduced disability compliant services such as voice enabled ATMs and WIBA Compliant internet banking to ensure persons with visual and hearing disabilities have control over their finances¹⁸⁶.

¹⁷⁸ Judiciary of Kenya, Judges and Magistrates Handbook on Court Procedures.

¹⁷⁹ Kenya Gazette, Gazette Notice No. 4087, June 16, 2014: Appointment of a Task Force to:

(a) review past sentencing patterns, policies and outcomes.

(b) report on how to reduce unwarranted disparity, increase certainty and uniformity; and promote proportionality in sentencing.

(c) create a roll out plan for suggested interventions; including educating and engaging members of the public and other stakeholders on the sentencing system and its effectiveness.

¹⁸⁰ Kenya Draft Sentencing Rules, para. 18-20.

¹⁸¹ *ibid*.

¹⁸² Kenya National Commission on Human Rights, 'How To Implement Article 12 Of Convention On The Rights Of Persons With Disabilities Regarding Legal Capacity In Kenya: A Briefing Paper', 2014.

¹⁸³ Judiciary Disability Policy 2015.

¹⁸⁴ Preamble, National Disability Policy, 2006.

¹⁸⁵ Principle 11 of the Guiding principles on Business and Human Rights: Business enterprises should respect human rights. This means that they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved. Available at http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf

¹⁸⁶ Kenya Bankers Association, 'Consumer Guide to Banking in Kenya'. available at <http://www.kba.co.ke/images/stories/KBA%20Consumer%20Guide%202014.pdf>

In banking, a person is not required to disclose their disability while opening a bank account but should they disclose, the bank is required to provide accommodation to enable the person to have full control over the account.

Micro finance institutions are a step ahead on legal capacity. Most micro finance institutions prefer to finance groups due to security concerns. Group members act as guarantors to each other when applying for a loan without security¹⁸⁷. Therefore Microfinance institution have adopted the same model to finance groups of persons with disabilities. In addition, the groups are required to provide minutes of meetings to show that all members were consulted over any decision that the group makes. The requirement to show minutes of meetings ensures that persons with disabilities can participate in group activities, access loans and finances. A good example of this was the DATU fund in Taita Taveta where groups have to annually comply with legal requirements including filing their annual returns, minutes

of group meetings and show that they attended various trainings on financial management as a group in order to access more funds¹⁸⁸. In addition groups seeking the disability funds under DATU had to show that the composition of the group was 75% persons with disabilities and the Chairman, Treasurer and Secretary had to be persons with disabilities in order to meet the threshold of a disabled persons group¹⁸⁹. This ensured that caregivers of persons with disabilities did not take over control of the group and involved persons with disabilities in the group's activities¹⁹⁰.

Insurance companies have ensured that policies are accessible to persons with disabilities and have removed any increased levies that apply to persons with disabilities so long as they disclose the disability.

The Law Society of Kenya has provided a transition policy to take over the affairs of members who may suffer from a disability while in practice to protect the person's interest while protecting the clients.

4.3 Good Practices by County Government Structures

At County level, a person with disability will first come into contact with the National Council for Persons with Disabilities and The Directorate of Social Services. These two Institutions work hand in hand in providing services to Persons with Disabilities. The Council registers Persons with Disabilities¹⁹¹. Once registered they can access services such

as free health care, access to the National Disability Fund and registration for tax exemptions¹⁹². The Directorate manages distribution of Cash Transfer Funds allocated through the National Development Fund to persons registered with the Council¹⁹³. As indicated earlier, only persons with severe disabilities are currently receiving the fund

¹⁸⁷ Interview with Director of Operations - DATU Sawazisha Fund, Voi, Taita Taveta County, April 1, 2015

¹⁸⁸ Section 17, Taita Taveta DATU Sawazisha Fund Act, 2013.

¹⁸⁹ Interview with Director of Operations - DATU Sawazisha Fund, Voi, Taita Taveta County, April 1, 2015

¹⁹⁰ Interview with Manager Statutory and Legal Affairs, Association of Kenyan Insurers, April 20 2015.

¹⁹¹ Interview with National Council for Persons with Disabilities representative, Voi, Taita Taveta County on April 1, 2015

¹⁹² Mandate of the National Council for Persons with Disabilities:

1. Formulating and developing measures and policies designed to achieve equal opportunities for PWDs;
2. Cooperating with the government during the National Census to ensure that accurate figures of PWDs are obtained;
3. Issuing orders requiring the adjustment of buildings that are unfriendly for use by PWDs;
4. Recommending measures to prevent discrimination against PWDs;
5. Encouraging and securing the rehabilitation of PWDs within their own communities and social environment;
6. Registering persons with disabilities and institutions and organizations giving services to PWDs; and
7. Raising public awareness on Disability

Available at <http://ncpwd.go.ke/index.php/about-ncpwd/the-council-mandate>

¹⁹³ Social Assistance Act, Section 2 defines both financial assistance and social services.

thus there needs to be a caregiver to receive the fund on behalf of the person with a severe disability. Both the Council and Directorate offer counseling services to caregivers to enable them understand that the funds are to be used for the benefit of the person with disabilities first before the family can benefit. In addition, any person including the person with disability can lodge a complaint with the Directorate or Council on account of abuse of funds by a registered caregiver¹⁹⁴. Though the Council can take action by investigating the complaint, reporting the abuser and work with the person with disability to find an alternative collector/ receiver of the funds¹⁹⁵. However the Council can only act upon a reported complaint. The Directorate as well gives regular trainings to caregivers and persons with disabilities on social assistance and monitors the use of funds by families receiving the cash transfer¹⁹⁶. Where there is a complaint, they work with the council to have the errant caregiver struck off the list. There had been complaints about corruption in the post office that is the main distributor of the Disability Funds¹⁹⁷. The Directorate's duty is to investigate such complaints and have the post office staff arrested if the allegations are true. By creating complaints mechanism, both the directorate and Council ensure that the right of persons with disabilities to equal recognition before the law are upheld.

The Ministry of Health is also key on ensuring that persons with disabilities have more control over their health rights. Health has now been devolved to Counties' and each County Director of Health has ensured

that persons with disabilities have access to HIV testing and information¹⁹⁸. Secondly, in Mandera and Taita Taveta Counties, both Ministries rely on the non-discriminatory principles in the Health Policy of 2006¹⁹⁹. Under the policy, doctors are required to give all relevant health information to the patient before any medical procedures are undertaken. Taita Taveta County has gone a step ahead in drafting a Disability and Reproductive Health Policy to ensure more women with disabilities can access reproductive health services in a more private setting and with proper equipment to suit her disability needs²⁰⁰. The new government hospital being constructed in Mwatate will have language translators to cater for patients with hearing disabilities which gives them more control over their health²⁰¹.

The Independent Electoral and Boundaries Commission has ensured that through trainings and awareness creation, persons with disabilities can participate in elections and public participation events²⁰². Apart from updating their website on dates and locations where public awareness forums will be held, IEBC has ensured that there is reasonable access to venues and translation services during their events. At County level, IEBC representatives have capitalized on partnerships with civil society organizations and churches to create awareness on voter rights to persons with disabilities²⁰³. This is due to the realization that during regular public awareness forums, persons with disabilities still did not attend hearings²⁰⁴. Therefore they partnered with Disabled Persons organizations

¹⁹⁴ Interview with Director of Social Services, Taita Taveta County on April 1, 2015

¹⁹⁵ *ibid*

¹⁹⁶ Directorate of Social Services Service Charter on Disability Services displayed on the Notice Board

¹⁹⁷ Interview with the Director of Social Services Taita Taveta highlighted that they had received complaints from persons with disabilities that when they collected their funds, they were given less money. On questioning why, the postal officer informed them that it was less "transactional fees. The focus group discussion also highlighted similar complaints.

¹⁹⁸ Kenya National AIDS Strategic Plan, 2009/2010 -2012/2013 available at http://www.aidstar-one.com/sites/default/files/prevention/resources/national_strategic_plans/Kenya_09-13.pdf

¹⁹⁹ Health Policy 2006

²⁰⁰ Interview with the County Director of Health Services, Taita Taveta County on March 29 2015.

²⁰¹ *ibid*

²⁰² 'IEBC Developing Gender, Disability Inclusion Policy', October 24, 2014. Available at <http://www.iebc.or.ke/index.php/component/content/article/80-news-archives/october-2014/387-iebc-developing-gender-disability-inclusion-policy>

²⁰³ Interview with IEBC Programs Officer, Mwatate sub-County Taita Taveta County, March 27, 2015

²⁰⁴ Interview with Hon. Hassan A. Ali, Nominated MCA on Disability, Mandera County on March 31 2015.

to train their members on voter rights and also use the organizations as mobilizers for persons with disabilities²⁰⁵. The IEBC also partnered with the County Assembly representative on Disability matters to mobilize their supporters with disabilities to create awareness on the need for public participation as required by the Constitution²⁰⁶. The County Assemblies have created county committees that address matters on disabilities. Though disabilities have been classified under social services alongside women and children, the County Assembly Nominated Representatives for Disability in Mandera and Taita Taveta County have ensured persons with disabilities get more recognition in the County matters²⁰⁷. For instance, in Taita Taveta County, the creation of the DATU fund was through the efforts of Hon. Maghanga who sits on the County Board of Directors of the Fund²⁰⁸. Each sub county has a board which is required to have a representative of persons with disabilities in it²⁰⁹. The Boards are tasked with the duty of approving loans and grants to groups or individuals with disabilities hence

the need for representation.

In Mandera County, the Chair of the County Assembly Committee on Social welfare has included chief barazas as part of public participation²¹⁰. This ensures that persons with disabilities have more avenues to participate in decision making within the County. As a result of this cooperation, Mandera County was able to allocate funds towards free wheelchair provision for persons with physical disabilities in the 2013/2014 County budget²¹¹. Through Partnerships and initiatives, County governments are ensuring that the rights of persons with disabilities are being upheld. An example of this is the partnership between the MCAS Nomadic Communities' and the National Gender and Equality Commission (NGEC) which resulted in the Northern Nomadic Disabled Persons Organizations²¹². Through this caucus, the MCAS hope to develop a tool to track legislative laws and International Conventions and Declarations that affect persons with disabilities.

²⁰⁵ *ibid*

²⁰⁶ Interview with Hon. John Maghanga, Nominated MCA, Taita Taveta County on April 1 2015.

²⁰⁷ Interview with Hon. Maghanga and Hon. Hassan

²⁰⁸ Interview with Hon. John Maghanga, Nominated MCA, Taita Taveta County on April 1 2015.

²⁰⁹ Section 5 of the Taita Taveta DATU Sawazisha Fund Act.

²¹⁰ Interview with Hon. Hassan A. Ali, Nominated MCA on Disability, Mandera County on March 31 2015.

²¹¹ *ibid*

²¹² National Gender and Equality Commission, Nomadic Disabled Caucus on persons with disabilities, February 17, 2015. Available at <http://www.ngeckenya.org/news/6077/nomadic-mca-caucus-holds-forum-on-disability-mainstreaming>

CHAPTER 5

Recommendations

The recommendations proposed herewith aim to respond to the findings in Chapters 2- 6 of this paper. The key finding is that unless legal capacity and equality before the law is defined in law and policy, implementation of Article 12 will not become a reality. The definition of legal capacity will in turn cause a ripple effect necessitating the review of laws and policies to make them compliant with the CRPD and the Constitution. The following are specific recommendations focusing on thematic issues that arose from the study:

1. Law and Policy Reform

The Law Reform Commission needs to be more involved in reviewing all laws that may have an impact on disability and not just the laws that directly address disability such as the Persons with Disabilities Act or the Mental Health Act. There needs to be an urgent review of all laws that touch on legal capacity or equal recognition before the law to check for language and compliance with Article 27 of the Constitution and Article 12 of the CRPD. This paper has already shown that use of ambiguous language leads to misinterpretation of the rights of persons with disabilities. In particular is the use of the word ‘unsound mind’ which not only creates ambiguity but merges legal capacity and mental capacity into one concept. Use of clear terms such as mental health conditions, psychosocial or intellectual disability, would be more precise as to whom the law applies to. In addition, clear and precise language would ensure uniformity in interpreting disability across all sectors leading to standard application of rights.

Kenya is already implementing supported decision making mechanism albeit through informal systems. As indicated in the findings, formal guardianship is rarely used in Kenya. Further guardianship laws have been used to defraud persons with disabilities. This proves that the Country is ready for the application

of supported decision making models. In this regard, Kenya has to urgently develop a law or policy framework to regulate supported decision making, being careful to include safeguards to protect the rights of persons with disabilities. The drafting of the framework should include consultation with caregivers and persons with disabilities in order to meet the needs of the end users. Also in consultation should be the professional bodies such as KBA, AKI, LSK and the Judiciary as these bodies too have genuine concerns on matters involving legal capacity while protecting their interests. In summary, before any law or policy on supported decision making is passed, all stakeholders must be consulted.

2. Awareness creation

The Second finding is that due to societal attitudes and prejudices, any organization aiming to implement Article 12 of the CRPD will have to invest in awareness creation as well. This research established that there is very little knowledge or appreciation for Article 12 or what equal recognition would mean to a person with disability. Not only are persons with disabilities unaware of their rights under Article 12 but even Government institutions and private bodies that have to interact with matters of legal capacity on a daily basis are unaware of this right.

Disability rights education needs to be taught to key stakeholders in order to create well targeted rights based projects. For instance, Kenya is currently reviewing the Persons with Disabilities Act and the Mental Health Act. Yet a quick run through of the Mental Health Care Bill reflects the medical approach to disability which is what the Country needs to move away from. Guardianship is still recognized in place of supported decision making. The government, being the duty bearer needs to take the lead in awareness creation. Partnerships between

various government agencies and DPOs have also proved to be successful in awareness creation.

3. Advocacy Strategies by Organizations.

In coming up with advocacy strategies, organizations may need to look into impact litigation cases. One of the challenges on the definitions was that no statutory body or institution had attempted to define ambiguous definitions such as “sound mind” or “legal capacity” vis a vis “mental capacity”. All government agencies and professional bodies chose to rely on the court’s interpretation. The Court on the other hand had not had a chance to explore the legal implications of Article 12 of the CRPD as a case is yet to be presented for interpretation. Impact litigation is important because any interpretation by the Constitutional or superior Courts are binding on lower courts as precedent. Given that Kenya is relying on a precedent from the year 1870 in succession matters, it may be time to move the court to make new precedents that reflect the change in circumstances. Drafting laws and policies may take a longer time than seeking constitutional interpretations of ambiguous clauses. Therefore as an advocacy strategy, organizations may need to look into strategic impact litigation cases on the right to equal recognition before the law.

Any advocacy strategies that will be implemented on the right to equal recognition before the law must look at the two levels of government. It is easy to address the national advocacy strategy but it is clear that implementation at county level is lacking. It is difficult for the national

government, as a duty bearer, to fulfill its obligations under the CRPD when County governments are unaware of these rights. Right holders as well have shown that they need more empowerment in terms of understanding and claiming their rights from duty bearers. This is the only way to ensure that the right to equal recognition is upheld when both duty bearers and right holders are aware of their rights and duties and hold each other accountable.

In making advocacy strategies, organizations should consider the gender aspects of legal capacity. Women and Girls with disabilities are slightly more disadvantaged than other persons with disabilities in terms of legal capacity. Generally, in cultural settings, women and girls are perceived to have lesser rights. This view is reinforced when a woman has a disability. In this study, this was mostly reflected in terms of sexual and reproductive health rights of women with disabilities. Therefore advocacy strategies should take cognizance of gender disparities in legal capacity.

4. Coordination between Government structures.

The Committee on the CRPD has recommended that there needs to be a single coordinating body on the rights of person with disabilities generally²¹³. In addition this report has shown that there also needs to be a specific body that will address the right to equal recognition before the law as envisioned by Article 12 of the Convention. For example, the County Directorate of Social Services, Ministry of Health, NCPWD, NGEC and Ministry of Education all provide different services for persons with disabilities. Yet each institution prefers to work in isolation and only coordinate

²¹³ Concluding Observation on Kenya's Initial State Party Report on the Convention on the Rights of Persons with Disabilities, para. 60: The Committee recommends that the State party ensure explicit appointment of the governmental body which is the focal point for the implementation of the Convention, and consider the appointment of a coordination mechanism under Article 33 (1) and elaborate concretely on its prerogatives. It also recommends that the State party establish a national mechanism to monitor the implementation of the Convention, with the participation of the Kenya National Commission on Human Rights as institution in compliance with the Paris Principles, in line with article 33.2 of the Convention, and ensure the full participation of persons with disabilities and their representative organizations in the monitoring process, including by providing the necessary funding.

when necessary. **Disability and legal capacity is a cross cutting issue that affects the work of each government agency. Thus, there needs to be one institution to guide streamlining of disability and application of equality before the law in all government agencies.**

At National Level there are two statutory bodies coordinating disability matters with almost overlapping mandates, this is the NCPWD and NGECE. In addition, both institutions partner and with a 3rd body in implementing disability rights at County level, this is the Directorate of Social Services which though under the Ministry of Devolution at National Level, operates as a separate entity at County Level. All three bodies have a mandate to monitor discrimination on disability matters, implementation of disability projects and to some extent may receive complaints. There is also the Ministry of Labour which coordinates the government's implementation of disability matters. On complaints, there is an additional body, the Commission on Administrative Justice that also receives complaints with regards to government actions. This creates confusion and repetitive work. For Article

12 to be successfully implemented, one body needs to be appointed as the sole body to monitor, implement and receive complaints. If need be the other organizations can refer all persons with disabilities with questions on legal capacity to that institution for ease of service.

5. Data Collection

Another finding in this report is that there is lack of data on disability. The NCPWD is tasked with registration of persons with disabilities but lacks sufficient data on persons with disabilities. For any law or policy reform to be carried out successfully, it must be informed by factual data. This was also a finding by the Committee on the CRPD which recommended a centralized database on persons with disabilities with disaggregated data²¹⁴. This data base should identify the specific disability, gender, age and not just general reference to disability. The central database will act as a reference point for all institutions that work on or come into contact with disability related matters.

²¹⁴ Concluding Observation on Kenya's Initial State Party Report on the Convention on the Rights of Persons with Disabilities, para. 56: The Committee recommends that the State systematically facilitate the collection, analysis and dissemination of disaggregated data according to sex, age, disability, indigenous communities, refugee or migrant status, geographical location, across all sectors including health, education, employment, political participation, access to justice, social protection, violence, etc by disability and according to other categories listed above, and amend the census questions, in close cooperation with organisations of persons with disabilities, to accurately reflect the population.

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Annex 2. Interviews and FGDs

- Interview with IEBC Programs Officer, Mwatate Sub-County Taita Taveta County, March 27, 2015
- Interview with County Education Officer, Mwatate, Taita Taveta County on March 27, 2015
- Interview with the County Director of Health Services, Taita Taveta County, on March 29, 2015
- Interview with Hon. Hassan A. Ali, Nominated MCA, Mandera County, March 31, 2015
- Interview with Hon. Maghanga, Nominated MCA, Taita Taveta County, March 30, 2015.
- Interview with Director of Operations, DATU Sawazisha Fund, Voi Sub-County, Taita Taveta County, April 1, 2015
- Interview with the Hospital Manager, Mandera County Referral Hospital, Level 4 on April 1, 2015
- Interview with Director of the Horn of Africa Women Empowerment Network Kenya Agency (HAWENKA), April 1 2015.
- Interview with Mandera East Sub-County Public Health Officer on April 1, 2015.
- Interview with Director of Social Services, Taita Taveta County on April 1, 2015
- Interview with Director of Education and Social Services, Mandera County on April 2, 2015.
- Interview with County Education Officer and the Director of the Mandera Education Assessment and Resource Center on April 2, 2015
- Interview with the Chair of the Council of Elders in Kishamba Village, Mwachawaza Location, Mwatate Sub-County, Taita Taveta County, April 4, 2015
- Interview with Community Health Worker in Kishamba Village, Kishamba Village, Mwachawaza Location, Mwatate Sub-County, Taita Taveta County, April 4, 2015
- Interview with Programs Manager, Public Interest and Advocacy, Law Society of Kenya, April 17, 2015
- Interview with Legal Manager and Industrial Relations at Kenya Bankers Association, April 20, 2015.
- Interview with Legal and Regulatory Affairs Manager, Association of Kenyan Insurers, April 20, 2015.
- Interview with Legal Manager Association of Kenya Insurers, April 20, 2015.
- Interview with Head of Human Resource and Communications, Judiciary on April 27, 2015.
- Interview with NCPWD Representative in Taita Taveta County on April 27. 2015.
- Interview with Clerk, Registry Family Division, High Court Mililani, May 8, 2015.
- Interview with Justice Mumbi Ngugi in Chambers, May 15, 2015.

Tables showing Persons who participated in Focus Group Discussions

MANDERA COUNTY		
Sub-County	Number of participants in FGD	Disability
Mandera East	2	Deaf
	1	Blind
	12	Physical disability
	1	Muslim Cleric with physical disability due to an accident
Lafey	1	Physical disability due to elephantiasis
	1	Physical disability due to lower limb amputation
	1	Blind
	8	Physical disability
	3	Primary Caregivers with Physical disability
	1	Muslim cleric with physical disability
Banisa	2	Teachers with physical disability
	1	Teacher (Blind)
	1	Teacher (hard of hearing)
	1	Medical Officer with physical disability as a result of the 1998 bomb blast
	2	Primary Caregivers with physical disability
	1	Down Syndrome

TAITA TAVETA COUNTY		
Sub-County	Number of participants in FGD	Disability
Wundanyi	1	Albinism
	13	Physical disability
	1	Blind
Voi	1	Near-sighted
	2	intellectual disability (non-disclosed)
	1	psychosocial disability (schizophrenia)
	2	Albinism
	7	Physical
	2	Primary Caregivers with physical disabilities
Mwatate	1	down syndrome
	1	Intellectual disability as a result of an accident
	4	Primary caregivers
	1	Community Health Worker
	1	Deaf

Annex 3. Pictures from the Study



Hon. Maghangha during an FGD with participants from Wundanyi Sub County, Taita Taveta County



FGD Participants from Voi Sub-County, Taita Taveta County



The Gentleman was spotted in Tsavo East National Park on the Mwatate-Taveta Road attempting to get to the Chief's Baraza in Taveta Town. This particular day, there was a meeting to discuss the DATU Sawazisha Funds targeting persons with disabilities and that is why he was going for the meeting He said he had been on the road for 2 hours and was 30 minutes away from the Chief's office



FGD participants from Mwachawaza Village, Mwatate, Taita Taveta County

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ISBN No: 978-9966-040-26-8