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Access to Justice for Persons with Disabilities in Kenya From Principles to Practice

HRDA, The Master's Programme in Human Rights and
Democratisation in Africa

WILSON MACHARIA

ACCESS TO JUSTICE FOR PERSONS WITH DISABILITIES IN
KENYA
FROM PRINCIPLES TO PRACTICE

FOREWORD

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- Macharia, Wilson, *Access to Justice for Persons with Disabilities in Kenya: from Principles to Practice*, Supervisors: Benyam Dawit Mezmur, University of Western Cape and Susan Mutambasere, University of Pretoria. Master's Programme in Human Rights and Democratisation in Africa (HRDA), coordinated by Centre for Human Rights, University of Pretoria.

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- Yutthaworakool, Saittawut, *Understanding the Right to Change Legal Gender: A Case Study of Trans Women in Sri Lanka*, Supervisor: Kokila Lankathilake Konasinghe, University of Colombo (Sri Lanka) and Mike Hayes, Mahidol University. Master's Programme in Human Rights and Democratisation in Asia Pacific (APMA), coordinated by Mahidol University (Thailand).

This publication includes the thesis *Access to Justice for Persons with Disabilities in Kenya: from Principles to Practice* written by Wilson Macharia and supervised by Benyam Dawit Mezmur, University of Western Cape and Susan Mutambasere, University of Pretoria.

BIOGRAPHY

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DEDICATION

To those persons with disabilities who are not able to access justice due to legal, institutional and societal barriers, this is for you.

ABSTRACT

Approximately 15% of the world's population experience a form of disability, with a significant number of them experiencing a severe disability. According to the 2019 Kenya Population and Housing Census, about 2.2% of all Kenyans have a form of disability; with the most prevalent types of disabilities being mobility-related. These persons with disabilities face disproportionate marginalisation, which results in broad ranging restrictions on their full and effective participation in society. This marginalisation is further exacerbated by social, structural and legal barriers which impede their access to justice, a fundamental right, and a prerequisite for the realisation of other rights guaranteed across local and international human rights instruments. The international community has shifted towards a human rights approach which is aimed at enhancing effective participation of persons with disabilities on an equal basis with others. Kenya has expressed its commitment towards this approach through ratifying international human rights instruments such as the United Nations Convention on the Rights of Persons with Disabilities which forms part of Kenyan law pursuant to article 2(6) of the Constitution of Kenya 2010. Article 13 of the Convention requires access to justice for persons with disabilities to be enhanced at all phases of the administration of justice. This notwithstanding, access to justice for persons with disabilities in Kenya remains an unfulfilled desire. Against this background, this thesis seeks to identify the main challenges and practices that impede access to justice in the Kenyan justice system with a specific focus on persons with disabilities, with the aim of suggesting possible solutions that can aid in solving this paradox. It achieves this through examining- the nature and scope of the right of access to justice for persons with disabilities; the recognition of the right of access to justice for persons with disabilities in the Kenyan and international legal framework; the barriers that hinder the full and effective participation of persons with disabilities in the Kenyan justice system, with a specific focus on the courts; and the steps that Kenya should take to eliminate the identified barriers.

TABLE OF ABBREVIATIONS

CPR	Civil Procedure Rules
CRC	Convention on the Rights of the Child
CRPD	Convention on the Rights of Persons with Disabilities
CRPD Committee	United Nations Committee on the Rights of Persons with Disabilities
CWDs	Children with disabilities
ICCPR	International Covenant on Civil and Political Rights
KNCHR	Kenya National Commission on Human Rights
NLAS	National Legal Aid Service
NAP	National Action Plan on Legal Aid
NCPWD	National Council for Persons with Disabilities
PDA	Persons with Disabilities Act 2003
PMDs	Persons with mental disorders
PWDs	Persons with disabilities
UDHR	Universal Declaration of Human Rights
UDPK	United Disabled Persons of Kenya

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1.

INTRODUCTION

1.1 BACKGROUND AND CONTEXT

Approximately 15% of the world's population experience a form of disability, with a significant number of them experiencing a severe disability.¹ According to the 2019 Kenya Population and Housing Census, about 0.9 million Kenyans (2.2%) have a form of disability.² Of all the types of disabilities, the most prevalent are mobility related disabilities which are experienced by 0.4 million Kenyans which represents 42% of all persons with disabilities (PWDs). Other categories of disabilities such as visual, hearing, cognitive and communication are experienced by between 12% and 36% of all PWDs in Kenya. It should be noted that the 2019 data on disability prevalence has been contested due to the sharp drop in disability prevalence from the 3.5% that was recorded in 2009.³

As the case may be, these PWDs face disproportionate marginalisation, which results in broad ranging restrictions on their full and effective participation in society. This marginalisation is further exacerbated by social, structural and legal barriers which impede their access to justice, a fundamental right, and a prerequisite for the realisation of other rights guaranteed across local and international human rights instruments. As an essential ingredient of the rule of law, access to justice would present a unique method to counter the marginalisation of PWDs in Kenya.⁴

¹ World Bank Group, 'Disability Inclusion Overview' (*The World Bank*, 29 March 2017) <www.worldbank.org/en/topic/disability> accessed 3 June 2020.

² The Kenya National Bureau of Statistics (KNBS), '2019 Kenya Population and Housing Reports' (KNBS 2019) <www.knbs.or.ke/?p=5732> accessed 10 August 2020.

³ E Owino, 'Status of Disability in Kenya: 2019 census statistics' (Development Initiatives 2020) <<https://devinit.org/resources/status-disability-kenya-statistics-2019-census/>> accessed 10 August 2020.

⁴ J Begiraj, L McNamara and V Wicks, *Access to justice for persons with disabilities: From international principles to practice* (International Bar Association 2017).

The international community has shifted towards a human rights approach which is aimed at enhancing effective participation of PWDs on an equal basis with others.⁵ The approach is reinforced by the rich regional and international human rights norms and standards. Kenya has expressed its commitment towards this approach through ratifying human rights instruments which qualify as Kenyan law pursuant to article 2(6) of the Constitution of Kenya 2010 (the Kenyan Constitution). Kenya, for instance, is a state party to the United Nations (UN) Convention on the Rights of Persons with Disabilities (CRPD),⁶ which provides for access to justice on article 13. It reiterates that access to justice for PWDs should be enhanced 'at all phases of the administration of justice', whether they are direct participants or otherwise, and 'on an equal basis with others'. Moreover, African states have expressed a deeper commitment to realise the rights of PWDs through adopting the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa (the African Disability Protocol).⁷ Although not yet in force, it provides for access to justice under article 13.⁸

Further, the Kenyan Constitution enshrines widespread human rights protections to all citizens, including the right of access to justice,⁹ anchored on the 'national values and principles of governance'.¹⁰ It places a responsibility upon the state to ensure that no person is discriminated on any grounds.¹¹ In particular, article 54 elaborates the rights of PWDs to be treated with dignity, with equal access to all places, to use accessible means of communication and to access equipment to overcome constraints arising from disability.¹² These principles are further buttressed by the Persons with Disabilities Act 2003 (PDA).¹³

⁵ A Kanter, *The Development of Disability Rights Under International Law: From Charity to Human Rights* (Routledge 2015).

⁶ Convention on the Rights of Persons with Disabilities (adopted 13 December 2006, entered into force 3 May 2008) 2515 UNTS 3 (CRPD).

⁷ Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa (adopted 29 January 2018) (the African Disability Protocol).

⁸ *ibid* art 13.

⁹ The Constitution of Kenya 2010 (Kenyan Constitution) art 48.

¹⁰ *ibid* art 10(2).

¹¹ *ibid* art 27(4).

¹² *ibid* art 54(1).

¹³ Persons with Disabilities Act No 14 of 2003.

1.2 PROBLEM STATEMENT

Despite the ratification of the CRPD, the promulgation of the Kenyan Constitution and the existence of a disability specific legislation, access to justice for PWDs in Kenya remains an unfulfilled desire. First, the principle of universal design is not observed when designing and building justice sector facilities such as law courts, the very venues from which all persons should find recourse for violation of their rights.¹⁴ Secondly, key stakeholders in the justice system lack adequate capacity to identify disability needs and the appropriate accommodations that ought to be put in place to ensure effective participation of PWDs in the justice system.¹⁵ As a result, it is difficult for them to fulfil their duty in addressing the needs of PWDs as mandated by the law, which in turn results in stigmatisation and stereotyping against PWDs. Thirdly, the laws that operationalise the civil and criminal procedures that are employed in court proceedings use derogatory terminology to refer to persons with intellectual, mental and psychosocial disabilities, and further strip them off their legal capacity when they are parties to court proceedings.¹⁶ Finally, there are no free and effective legal aid programmes that assist PWDs in navigating the justice system in Kenya.¹⁷ As a result, PWDs lack knowledge on their rights and the operations of the justice system. It is paradoxical that due to the above barriers, PWDs, who are most in need of accessing the justice system, are the ones who are most likely to lack access to it.

¹⁴ Kenya National Commission of Human Rights (KNCHR), *Human Rights Baseline Survey Report* (KNCHR 2016) <www.knchr.org/Portals/0/GeneralReports/KNCHR_Human-Rights-Baseline-Survey-Report_2016_FX-Print.pdf?ver=2016-08-23-121839-380> accessed 5 October 2020.

¹⁵ Committee on the Rights of Persons with Disabilities (CRPD Committee), 'Concluding observations in relation to the initial report of Kenya' (2015) UN Doc CRPD/C/KEN/CO/1 para 25.

¹⁶ *ibid* para 23.

¹⁷ United Disabled Persons of Kenya (UDPK), 'A status of the human rights of persons with disabilities in Kenya: A shadow report to the initial report on the United Nations Convention on the Rights of Person with Disabilities to the UN Committee on the Rights of Persons with Disabilities' (UDPK 2013).

1.3 DEFINITION OF KEY TERMS

1.3.1 *Persons with disabilities*

Article 1 of the CRPD defines PWDs as including:

those who have long-term physical, mental, intellectual or sensory impairments, which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.¹⁸

This concept of disability has shifted away from the traditional medical model of disability to one that involves the social realities that are faced by PWDs in forms of barriers. In other words, disability is the ‘social effect of the interaction between individual impairment and the social and material environment’.¹⁹ Additionally, this definition considers disability as an evolving concept which manifests differently from time to time. To illustrate this, the African Disability Protocol adds persons with developmental disabilities as part of the broad category of PWDs.²⁰ Accordingly, this research shall adopt the term PWDs as used under the CRPD.

1.3.2 *Access to justice*

The concept of access to justice encompasses multiple stages of the process of obtaining solutions to identified justice problems.²¹ It begins with the recognition of rights that are entrenched in laws, then proceeds to the awareness and understanding of the said rights. It involves access to dispute resolution mechanisms which are part of both formal and informal justice institutions.²² It further entails the ability of these mechanisms to provide just, equitable, unbiased and enforceable solutions.²³

¹⁸ CRPD art 1.

¹⁹ CRPD Committee, ‘General Comment No 3 on Article 6: Women and girls with disabilities’ (2016) UN Doc CRPD/C/GC/3 para 5.

²⁰ Africa Disability Protocol art 1(g).

²¹ J Beqiraj and L McNamara, ‘Children and Access to Justice: National Practices, International Challenges’ (Bingham Centre for the Rule of Law Report 02/2016 International Bar Association 2016) 5.

²² United Nations, ‘Access to justice for persons with disabilities: Toolkit on disability for Africa’ (United Nations Department of Economic and Social Affairs 2016).

²³ The UN Refugee Agency (UNHCR), ‘Handbook for the Protection of Internally Displaced Persons: Part V: Protection Risks: Prevention, Mitigation and Response. Action Sheet 10 - Access to Justice’ <www.unhcr.org/protection/idps/4794b4e12/handbook-protection-internally-displaced-persons-part-v-protection-risks.html> accessed 5 June 2020.

This approach reflects the general UN expanded notion of access to justice, which encompasses ‘much more than improving an individual’s access to courts. It must be defined in terms of ensuring that legal and judicial outcomes are just and equitable’.²⁴ Accordingly, the right of access to justice for PWDs involves not only procedural access, but also substantive and promotional access.²⁵ Drawing from a comprehensive analysis of the development and scope of the right, this study shall consider the barriers that hinder access to justice for PWDs in Kenya.

1.4 RESEARCH OBJECTIVES

This research aims to examine:

- a) The nature and scope of the right of access to justice for PWDs.
- b) The recognition of the right of access to justice for PWDs in the Kenyan and international legal framework.
- c) The barriers that hinder the full and effective participation of PWDs in the Kenyan justice system, with a specific focus on the courts.
- d) The steps that Kenya should take to eliminate the identified barriers.

²⁴ United Nations Development Programme (UNDP), ‘Access to Justice: Practice Note’ (2004) 3.

²⁵ E Flynn, *Disabled Justice? Access to Justice and the UN Convention on the Rights of Persons with Disabilities* (Routledge 2016).

1.5 RESEARCH QUESTIONS

Against this background, this research seeks to identify the main challenges and practices that impede access to justice in the Kenyan justice system with a specific focus on PWDs, with the aim of suggesting possible solutions that can aid in solving this paradox. In addressing this broad question, the research will address the following questions:

- a) How does the international and national legal framework guarantee access to justice for PWDs in Kenya?
- b) What are the barriers that impede access to justice by PWDs in Kenya?
- c) What steps and measures should Kenya take to mitigate and eliminate these barriers?

1.6 METHODOLOGY

This dissertation shall rely primarily on desk-based research, mainly examining existing quantitative and qualitative data and literature concerning the main challenges that PWDs in Kenya face in accessing the justice system on an equal basis with others. The research shall draw from sources such as domestic legislation, court cases, book chapters, books, journal articles, government and other reports, normative framework by human rights institutions and general internet sources. Where need be, the research shall also draw from good practice from other countries.

1.7 LITERATURE REVIEW

In a commentary on the CRPD, Bantekas, Stein and Anastasiou provide a critical analysis of the articles of the CRPD and the obligations

that they create on the state parties.²⁶ Specifically on access to justice, they explore how the drafters of article 13 drew on concepts such as the right to an effective remedy and the right to a fair hearing as recognised in other UN human rights instruments to develop a stand-alone provision on access to justice for PWDs. Additionally, they consider how the right has been interpreted by the United Nations Committee on the Rights of Persons with Disabilities (CRPD Committee) in its normative framework and through its various interactions with state parties through concluding observations and communications. This commentary shall inspire the conceptualisation of article 13 of the CRPD which shall be explored in chapter two of this research. Further, this research shall adopt the frame of this commentary to explore the extent to which the article has been interpreted and applied in Kenya's context, and the concerns and recommendations that have been issued by the CRPD Committee through its concluding observations to Kenya.

Lord and others in a book chapter on access to justice for PWDs adopt the 'social model of disability' in their definition of the right.²⁷ In so doing, they deliberately depart from the traditionalist approach to access to justice which narrows the right to encompass due process and legal representation. They acknowledge that beyond these narrow interpretations of the right, there are multiple barriers that hamper the ability of PWDs to interact with the justice system, as well as their contribution to the administration of justice. As such, they define access to justice as a concept which encompasses 'effective access to the systems, procedures, information, and locations used in the administration of justice'. They also demonstrate that the denial of the right to access to justice exacerbates the possibility of violation of other rights, a clear indication that human rights are 'indivisible, interdependent and interrelated'.

Gibson takes this argument a step further by contending that article 13 of the CRPD should be read to include a right to legal aid. In particular, she states thus:

²⁶ E Flynn, 'Article 13' in I Bantekas, MA Stein and D Anastasiou (eds), *The UN Convention on the Rights of Persons with Disabilities: A Commentary* (OUP 2018) 384-401.

²⁷ JE Lord and others, *Human Rights: Yes! Action and advocacy on the rights of persons with disabilities* (One Billion Strong and the University of Minnesota Human Rights Center 2009) 12.

If article 13 of the CRPD is to have any meaning, then it follows that – in the absence of forums which are simple enough in both procedure and substantive law to allow disabled citizens to have a fair hearing without the assistance of a lawyer – the convention requires states to provide legal aid to people with disabilities who cannot access private legal assistance and that, at a minimum, legal aid should be available for cases involving breaches of the human rights referred to in the treaty.²⁸

Even though such an expansive reading of article 13 might be challenged by states parties, Gibson makes an important point about the need for radical reform of procedural mechanisms to accommodate PWDs who wish to assert and enforce their legal rights. She locates her argument within the commentaries of various UN treaty bodies on the availability of legal aid in the civil and criminal justice systems to ensure the realisation of a wide variety of human rights.

In furthering this broad approach, Lawson and Flynn define access to justice for PWDs as comprising four components, namely substantive justice, procedural justice, symbolic justice and participatory justice.²⁹ The substantive element of access to justice ‘concerns itself with an assessment of the rights claims that are available to those who seek a remedy’.³⁰ It focuses on the content of the legal framework which informs the decisions that are made and which decisions may affect those who have justice claims. Procedural access to justice requires the elimination of barriers that impede the lodging of justice claims and the provision of supports to enable PWDs to participate effectively in the administration of justice. Symbolic access to justice reaffirms the necessity of considering what justice for PWDs entails by undertaking an expansive examination of justice outside the narrow confines of the legal system, including for instance, the political, social and cultural activities which further the participation of PWDs and their recognition as equal citizens. Finally, participatory justice reflects the imperative of article 13 on access to justice, as well as other articles touching on the participation of PWDs in all spheres of life.³¹

²⁸ F Gibson, ‘Article 13 of the Convention on the Rights of Persons with Disabilities: A right to legal aid?’ (2010) 15 *Australian Journal of Human Rights* 123, 123-131.

²⁹ A Lawson and E Flynn, ‘Disability and access to justice in the European Union: Implications of the UN Convention on the Rights of Persons with Disabilities’ (2013) 4 *European Yearbook of Disability Law* 7.

³⁰ *ibid.*

³¹ CRPD arts 4(3), 19, 29 and 33.

In her book on access to justice for PWDs, Flynn uses these four components to provide a nuanced picture of assessing the barriers that PWDs face in their interactions with the justice system.³² This broad approach towards access to justice is particularly important in Kenya's context, because despite the existence of a framework on due process, and a wide array of legal practitioners, there are other significant barriers that hamper access to the justice system. These barriers could be structural, institutional, legal or attitudinal. As a result, PWDs who fall victim of crimes or those whose rights are violated are unable to seek justice, which, in turn, subjects them to further violations of their rights.

Using country case studies, Begiraj, McNamara and Wicks identify some of the barriers that hinder the effective participation of PWDs in the justice system.³³ They classify them into the following categories: accessibility barriers due to inaccessible state infrastructure such as buildings and public transport; legal barriers such as laws that deny persons with intellectual, mental and psychosocial disabilities their legal standing in court; societal barriers where PWDs are repeatedly and erroneously portrayed as 'inherently wicked, abnormal or deviant'; communication barriers where PWDs are unable to communicate with justice sector personnel or understand court proceedings and financial barriers due to the expensive nature of accessing justice. In this regard, article 13 of the CRPD places an obligation upon state parties to safeguard effective access to justice for PWDs including by providing reasonable accommodation and enhancing the general accessibility of the justice infrastructure. Schulze identifies reasonable accommodations to include using sign language interpreters, providing assistive devices whenever required and engaging experts to enhance communication with PWDs with due regard to the individual's needs.³⁴

From a general accessibility point of view, Whittle elaborates on the obligation of states to raise awareness of the rights of PWDs, develop accessibility standards for all components of the justice system and improve the system's operational coherence and support facilities in full consultation with PWDs.³⁵ He further discusses the key obligations of

³² Flynn (n 25).

³³ Begiraj, McNamara and Wicks (n 4).

³⁴ M Schulze, *Understanding the UN Convention on The Rights of Persons with Disabilities: A Handbook on the Human Rights of Persons with Disabilities* (Handicap International 2010) 16.

³⁵ R Whittle, 'A right and an obligation under the UNCRPD' (Sheffield Hallam University 2012) <www.era-comm.eu/UNCRPD/kiosk/speakers_contributions/111DV68/Whittle_Accessibility.pdf> accessed 15 September 2020.

states to undertake physical accessibility audits, guarantee the availability of information on the operations of the justice sector, provide adequate training on disability inclusion, undertake an appraisal of legal, procedural and information barriers to access to justice, encourage advocacy support for PWDs and offer incentives to private litigants to represent PWDs. This research shall employ this approach to identify the specific barriers that hinder the ability of Kenyan PWDs to access justice and to provide recommendations on the steps that Kenya should take to enhance accessibility of the justice system.

Larson argues that access to justice for PWDs can be improved by training advocates and other stakeholders on disability inclusion in the justice system.³⁶ Such training will improve the level of awareness of laws and policies on disability rights amongst the stakeholders, as well as foster effective personal and professional interactions between them and PWDs. This, in turn, shall on the one hand empower PWDs who access such training to become better advocates for themselves and other PWDs, and on the other hand help those without disabilities to become better advocates for the rights of PWDs. In his view, training advocates is a more efficient and effective way to promote access to justice for PWDs, as opposed to simply developing a legal framework to address the challenges. With respect to legal training, the author acknowledges that several law schools around the world have begun to embrace better advocacy as a teaching goal, but he proposes a more holistic approach that takes in to consideration the needs of those who have significantly different needs such as PWDs. Notably, several law schools and other institutions in Kenya have included disability rights studies on their curriculum. However, such training should be incorporated in institutions where trainees are more likely to work in the justice sector. Unfortunately, some institutions, such as the Kenya School of Law which trains judges, advocates and paralegals, do not train on disability inclusion in the justice system. As such, the proposed strategy will be an important step towards enhancing access to justice for PWDs in Kenya.

³⁶ DA Larson, 'Access to justice for persons with disabilities: An emerging strategy' (2014) 3 *Laws* 220.

1.8 SCOPE AND LIMITATIONS

This research is on access to justice for PWDs in Kenya, with a focus on the accessibility of the judicial justice system. The research shall analyse the main issues and practices that operate as barriers to access to justice for PWDs and highlight possible solutions in Kenya. For the purposes of this research, accessibility involves access to information on the operations of the justice system; access to legal aid services before and during the adjudication of their cases and access to the justice infrastructure from which cases lodged by, or on behalf of, PWDs are adjudicated. The research is limited to the laws, policies and practices in Kenya. Even though the research identifies the denial of legal capacity in the civil and criminal justice systems as a barrier to accessing justice for persons with intellectual, mental and psychosocial disabilities, it limits itself to legal agency and standing specifically in court cases that involve such persons. In other terms, the research does not focus on the concept of legal capacity in all aspects of life.

A major limitation experienced while undertaking the research is that at the time of writing this dissertation, there is no specific study that has been undertaken on the realisation of the right to access to justice for PWDs in Kenya. The available material provides a mere description of the national legal framework. Additionally, some of the relevant material has been provided on inaccessible government websites, and in inaccessible formats, which made it a daunting task for the researcher to access the material using his screen reader for the blind. Be that as it may, this research shall draw upon the dearth of international literature that is available on the subject, and assess these in the context of Kenya with reference to available court cases, state reports, shadow reports and concluding observations from the CRPD Committee.

1.9 STRUCTURE

This research will be comprised of five chapters. The first chapter will give a background and introduction to the topic; provide insight into the research problem and the objective that it aims to achieve; highlight the questions that this research attempts to address and define the concept of access to justice as it relates to PWDs. The second chapter will provide a conceptual framework on access to justice for PWDs

drawing on human rights law in general, and the CRPD in particular. It will also briefly consider the work of Lawson and Flynn who define access to justice as comprising substantive, procedural, symbolic and participatory components, with reference to the lived experience of PWDs. Chapter three will analyse in detail the right to access to justice for PWDs in Kenya, with a focus on the legal framework governing access to justice in Kenya. While making reference to court cases, the initial state report and shadow reports to the CRPD Committee, and the Committee's concluding observations to Kenya, Chapter four shall present the practices and barriers that impede access to justice for PWDs. The fifth chapter will bear recommendations for enhancing access to justice for PWDs in Kenya.

2.

CONCEPTUAL FRAMEWORK AND LEGAL FOUNDATION OF ACCESS TO JUSTICE AND PERSONS WITH DISABILITIES

2.1 INTRODUCTION

This chapter aims to explore the meaning of ‘access to justice’ by considering how the right has been interpreted in relation to PWDs and how such interpretation addresses the barriers that they face in accessing justice. To fully understand the barriers experienced by PWDs in accessing justice in Kenya (in chapter four), this chapter will briefly consider the work of Lawson and Flynn who define access to justice as comprising substantive, procedural, symbolic and participatory components, with reference to the lived experience of PWDs. They base their conceptualisation on an argument developed by Bahdi who identifies the first three components, then suggest that ‘participatory’ justice must be added to Bahdi’s conceptualisation to achieve effective access to justice for PWDs.

2.2 CONCEPTUAL FRAMEWORK ON ACCESS TO JUSTICE FOR PWDs

While analysing the accessibility of the justice system by women in the Middle East and North Africa, Bahdi makes reference to three distinct but interrelated components of access to justice; ‘substantive, procedural and symbolic’.³⁷ In order to capture disability-related dimensions of access to justice and accommodate the principles of the CRPD, Lawson

³⁷ R Bahdi, ‘Background paper on women’s access to justice in the MENA region’ (International Development Research Centre, Women’s Rights and Citizenship Program and the Middle East Regional Office, Middle East and North African Regional Consultation, 9-11 December 2007, Cairo, Egypt).

and Flynn have expanded Bahdi's framework to accommodate notions of 'participatory justice'.³⁸ This framework provides a useful foundation for the analysis of access to justice which is particularly relevant in the context of PWDs in Kenya. As such, this section shall lay a conceptual foundation of the right to access justice by PWDs by considering the components as set out by Lawson and Flynn.

2.2.1 *Substantive access to justice*

The substantive element of access to justice 'concerns itself with an assessment of the rights claims that are available to those who seek a remedy'.³⁹ It focuses on the content of the legal framework which informs the decisions that are made, which may affect those who have justice claims. This concept extends into the realms of constitutional and statutory law reform processes, requiring the adoption of laws promoting substantive equality.⁴⁰ This, however, can hardly be achieved without the involvement of the disadvantaged group.

This concept clearly resonates with the experience of the disability movement which has for a long time sought active involvement in the development of laws, policy and practice affecting PWDs by employing the slogan 'nothing about us without us'.⁴¹ The imperative of active participation by disadvantaged groups was highlighted during the negotiation of the CRPD which has been acknowledged as the most inclusive human rights treaty drafting process.⁴² This involvement has been linked to the innovative articulation of equality of opportunity as enunciated in the CRPD.⁴³ As such, the starting point for determining the content of substantive justice for PWDs should be the CRPD since it was developed by, and for, PWDs.

³⁸ A Lawson and E Flynn, 'Disability and access to justice in the European Union: Implications of the UN Convention on the Rights of Persons with Disabilities' (2013) 4 *European Yearbook of Disability Law* 7, 7.

³⁹ Bahdi (n 37) 3.

⁴⁰ Lawson and Flynn (n 38) 7.

⁴¹ D Goodley, *Self-Advocacy in the Lives of People with Learning Difficulties* (Open UP 2000) 81.

⁴² E Flynn, *Disabled Justice? Access to Justice and the UN Convention on the Rights of Persons with Disabilities* (Routledge 2016) 14.

⁴³ F Mégret, 'The disabilities convention: Human rights of persons with disabilities or disability rights?' (2008) 30 *Human Rights Quarterly* 494; S Trömel, 'A personal perspective on the drafting history of the United Nations Convention on the Rights of Persons with Disabilities' in G Quinn and L Waddington (eds), [2009] *European Yearbook of Disability Law* 121; G De Burca, 'The European Union in the negotiation of the UN Disability Convention' (2010) 352 *European Law Review* 174.

2.2.2 Procedural access to justice

Bahdi's conceptualisation of procedural access to justice resonates with a narrow interpretation of justice which merely views justice as the process by which claims are adjudicated in legal or administrative systems. She stresses, however, that one should examine the 'opportunities and barriers to getting one's claim into court' in order to achieve procedural justice.⁴⁴ With respect to disability, procedural access to justice requires the elimination of barriers that impede the lodging of justice claims and the provision of supports to enable PWDs to participate effectively in the administration of justice. Therefore, procedural access to justice would require a focus on the elimination of barriers which prevent PWDs from participating in the justice system as lawyers, witnesses, judges, jurors or observers. The dismantling of the disabling barriers may also require that 'attention be given to structures which are outside the classic justice system such as schools, residential establishments, social services and the political sphere, which structures provide the context in which complaints or claims might first be voiced'.⁴⁵

It is noteworthy that the procedural and substantive components of access to justice as presented by Bahdi, and subsequently expanded by Lawson and Flynn, are inherently intertwined. To illustrate this relationship, Genn argues thus: 'If the law is the skeleton that supports liberal democracies, then the machinery of ... justice is some of the muscle and ligaments that make the skeleton work'.⁴⁶ Similarly, the European Union Agency for Fundamental Rights has stated:

the possibility of enforcing a right is central to making fundamental rights a reality. Access to justice is not just a right but also an enabling and empowering right in so far as it allows individuals to enforce their rights and obtain redress. In this sense, it transforms fundamental rights from theory into practice.⁴⁷

⁴⁴ Bahdi (n 37) 5.

⁴⁵ Lawson and Flynn (n 38) 4.

⁴⁶ H Genn, *Judging civil justice* (Cambridge UP 2010) 4.

⁴⁷ European Union Agency for Fundamental Rights (FRA), *Access to justice in Europe: An overview of challenges and opportunities* (FRA 2011) 3.

2.2.3 *Symbolic access to justice*

Bahdi defines symbolic access to justice as an approach which ‘steps outside of doctrinal law and asks to what extent a particular legal regime promotes citizens’ belonging and empowerment’.⁴⁸ Her concept relates to an inclusive society in which, due in part to its laws and justice system, persons from marginalised communities are empowered to participate as equal citizens. While building upon Bahdi’s conceptualisation, Lawson and Flynn argue that ‘recognition of the importance of the symbolic element of access to justice clearly requires monitoring of the levels of inclusion and participation of the relevant group, a process which cannot be effectively conducted without the involvement of the group concerned’.⁴⁹ However, the three authors acknowledge the difficulty of determining the impact of legal change on shifting social and cultural norms and the extent to which such norms influence subsequent legal reform. In the context of disability, this notion reaffirms the necessity of considering what justice for PWDs entails by undertaking an expansive examination of justice outside the narrow confines of the legal system, including for instance, the political, social and cultural activities which further the participation of PWDs and their recognition as equal citizens.

2.2.4 *Participatory justice*

As stated above, Lawson and Flynn add a fourth component to Bahdi’s conceptualisation, arguing that ‘participatory justice’ should be regarded as one of the key components of access to justice for PWDs. The participatory element of access to justice is deeply rooted in the experience of negotiating the CRPD.⁵⁰ It reflects the imperative of article 13 on access to justice, as well as other articles touching on the participation of PWDs in all spheres of life.⁵¹ The right to participate on an equal basis with others in the justice system is equally an essential element of citizenship. Needless to say, in order to achieve participatory

⁴⁸ Bahdi (n 37) 3.

⁴⁹ Lawson and Flynn (n 38) 16.

⁵⁰ R Kayess and P French, ‘Out of Darkness into Light? Introducing the Convention on the Rights of Persons with Disabilities’ (2008) 8(1) Human Rights Law Review 1.

⁵¹ Convention on the Rights of Persons with Disabilities (adopted 13 December 2006, entered into force 3 May 2008) 2515 UNTS 3 (CRPD) arts 4(3), 19, 29 and 33.

justice, the diversity of the disability community should be recognised, particularly the ways in which disability interacts with other identities and how this can determine the person's interaction with the justice system as a whole.⁵²

The above four-dimensional conceptualisation of access to justice for PWDs shall be useful as a basic framework to analyse various aspects of the justice system in Kenya and the experiences of PWDs in accessing the same. Meanwhile, before engaging in this analysis on the next chapters, it is essential to consider the trajectory of international human rights law as it relates to access to justice, with a particular focus on the innovations of the CRPD.

2.3 ACCESS TO JUSTICE, INTERNATIONAL HUMAN RIGHTS LAW AND THE CRPD

It has been argued previously that the right of access to justice under article 13 of the CRPD is an extension of the existing universal rights to an effective remedy and to a fair hearing.⁵³ These rights were first recognised under the Universal Declaration of Human Rights (UDHR) of 1948,⁵⁴ and subsequently reiterated in other core human rights treaties such as the International Covenant on Civil and Political Rights (ICCPR),⁵⁵ and expounded through a normative framework by the Human Rights Committee and the Committee on Economic, Social and Cultural Rights. Traces of these and other rights closely connected to accessing justice (such as the right to complain to an independent authority and to receive adequate redress for violation of rights) are found in all core UN human rights instruments including: the Convention on the Elimination of All Forms of Racial Discrimination (CERD),⁵⁶ the Convention on the Elimination of All Forms of Discrimination Against

⁵² Lawson and Flynn (n 38) 45.

⁵³ *ibid* 7.

⁵⁴ Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR).

⁵⁵ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).

⁵⁶ Convention on the Elimination of All Forms of Racial Discrimination (adopted 7 March 1966, entered into force 4 January 1969) 660 UNTS 195 (CERD) arts 5(a) and 6.

Women (CEDAW),⁵⁷ the Convention Against Torture (CAT),⁵⁸ the Convention on the Rights of the Child (CRC),⁵⁹ the Convention on the Protection of the Rights of All Migrant Workers⁶⁰ and the Convention for the Protection of All Persons from Forced Disappearance.⁶¹

A similar cluster of rights is also found in the regional human rights system, including the African Charter on Human and Peoples' Rights (African Charter),⁶² the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol),⁶³ and the African Charter on the Rights and Welfare of the Child.⁶⁴ All together, these provisions reinforce the notion that without effective access to justice, 'the strength of universal human rights is weakened, and their content devalued'.⁶⁵ These developments form part of the context in which the stand-alone right to access justice, articulated in article 13, emerged.

2.3.1 The development of the right to access justice under the Convention on the Rights of Persons with Disabilities

As noted in chapter one of this research, PWDs represent one of the most marginalised communities who have long sought access to justice in order to remedy violations of their human rights.⁶⁶ While drafting the CRPD, the mandate of the drafters was to simply restate the application

⁵⁷ Convention on the Elimination of All Forms of Discrimination Against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 1 (CEDAW) arts 7, 8 and 15.

⁵⁸ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85 (CAT) arts 13 and 14.

⁵⁹ Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 (CRC) art 12.

⁶⁰ Convention on the Protection of the Rights of All Migrant Workers (adopted 18 December 1990, entered into force 1 July 2003) 2220 UNTS 3 arts 18 and 83.

⁶¹ Convention for the Protection of All Persons from Forced Disappearance (adopted 20 December 2006, entered into force 23 December 2010) 2716 UNTS 3 arts 2, 8, 11 and 17.

⁶² African Charter on Human and Peoples' Rights (adopted 28 June 1981, entered into force 21 October 1986) (African Charter) arts 3 and 7.

⁶³ Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (adopted 11 July 2003, entered into force 25 November 2005) (Maputo Protocol) art 8.

⁶⁴ African Charter on the Rights and Welfare of the Child (adopted 1 July 1990, entered into force 29 November 1999).

⁶⁵ Flynn (n 42) 380.

⁶⁶ *ibid* 383.

of existing universal human rights to the lived experience of PWDs.⁶⁷ The conversation on access to justice in the CRPD emerged in the third session of the ad hoc committee that was tasked with drafting the treaty. During this session, several proposals related to access to justice were suggested in the discussions on draft article 9 on equal recognition before the law.⁶⁸ These proposals included: ensuring the elimination of physical and communication barriers in judicial facilities; ensuring equal treatment of PWDs at all stages of judicial proceedings; ensuring effective remedies; recognising the legal capacity of PWDs in the justice system and providing legal aid to PWDs.⁶⁹ However, some proposed provisions such as the inclusion of legal aid as an essential component of access to justice and the need for the flexibility in existing laws of procedure and evidence to accommodate PWDs were contested since they contained elements which appeared to go beyond pre-existing human rights norms.⁷⁰

2.3.2 The adoption of a stand-alone article on access to justice

The inclusion of a stand-alone article to guarantee equal access to justice was discussed in detail during the fifth session of the ad hoc committee. The failure to reach a mutual agreement on the wording of such an article led to the formation of a working group comprising of Chile, Australia and Japan which was tasked with developing a single text to that effect.⁷¹ This process led to the adoption of draft article 13 in its current form. This article reiterates elements of earlier drafts, such as the obligation to enable PWDs to act as witnesses and participants in legal proceedings and the obligation to train justice officials. It further contains innovative additions, including the ‘provision of procedural and age-appropriate accommodations’. The following section shall

⁶⁷ United Nations, ‘Committee negotiating convention on rights of disabled persons concludes current session’ (Press release SOC/4680 12 August 2005) <www.un.org/press/en/2005/soc4680.doc.htm> accessed 10 August 2020.

⁶⁸ UN Convention on the Rights of People with Disabilities, Third session of the Ad Hoc Committee, ‘Daily summary of discussions related to Article 9’ (Volume 4 #3 26 May 2004) <www.un.org/esa/socdev/enable/rights/ahc3summary.htm> accessed 10 August 2020.

⁶⁹ *ibid.*

⁷⁰ Flynn (n 42) 385.

⁷¹ UN Convention on the Human Rights of People with Disabilities, Ad Hoc Committee, ‘Daily summary of discussion at the fifth session 26 January 2005’ (Volume 6 #3 26 January 2005) <www.un.org/esa/socdev/enable/rights/ahc5sum26jan.htm> accessed 10 August 2020.

consider how article 13 has been interpreted by the CRPD Committee and in academic commentary, including how it relates and connects to other articles of the CRPD.

2.4 UNPACKING ARTICLE 13 OF THE CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES

It has been established above that article 13 represents the first explicit statement of a right to access justice in international law. As such, it is worth analysing the scope of this new expression of the right and ascertain whether it does in fact go beyond the substance of existing international human rights norms. In this section, the research shall address how the scope of the right has been shaped by the interpretations provided by the CRPD Committee through the dialogues it has held with the state parties and by scholarly works on the article. Since the focus of this research is on accessibility, the author shall also undertake a brief analysis of the CRPD Committee's references to article 13 in its General Comment No 2 on article 9 on accessibility.⁷² This, in turn, shall give a foundation upon which access to justice for PWDs in Kenya can be assessed.

In verbatim, article 13 of the CRPD provides thus:

1. States Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages.
2. In order to help to ensure effective access to justice for persons with disabilities, States Parties shall promote appropriate training for those working in the field of administration of justice, including police and prison staff.

⁷² CRPD Committee, 'General Comment No 2 Article 9: Accessibility' (22 May 2014) CRPD/C/GC/2.

2.4.1 *Effective access to justice*

The overarching obligation of article 13 of the CRPD is to ensure ‘effective access to justice for PWDs’. Despite the lack of a general comment on article 13 by the CRPD Committee, this provision might well be interpreted *mutatis mutandis* with the right to an effective remedy as guaranteed under the UDHR and the ICCPR. According to Roht-Arriaza, a remedy is considered ‘effective’ if it is both individualised and adjudicatory.⁷³ Similarly, Flynn argues that this approach could be employed to determine the effectiveness of access to justice in the context of disability, with the individual’s requirements for ‘reasonable accommodation’ being met before justice can be considered to be effectively accessed.⁷⁴

The CRPD Committee addressed this issue in the communication of *X v United Republic of Tanzania*.⁷⁵ The communication was presented by a person with albinism, Mr X, who was attacked by two strangers while collecting firewood on 10 April 2010. The attackers rendered him unconscious and used clubs to hack off half of his left arm. Mr X’s attempts to pursue justice through the national mechanisms were hampered by several barriers including the slow pace of investigations by the relevant authorities, the geographical inaccessibility of the high court and the unreasonable delay in the application of local remedies.⁷⁶ Whilst addressing the admissibility of the communication, particularly on the exhaustion of local remedies, the CRPD Committee stated that the primary responsibility to prosecute, investigate and punish is a non-delegable duty vested upon the state.⁷⁷ Additionally, in consideration of the unpredictable duration of similar proceedings that had been instituted in Tanzania, the CRPD Committee stated that it would be unreasonable to require Mr X to initiate additional proceedings.⁷⁸ It also stated that a civil claim and an award of compensation alone could not be considered an effective remedy in such a case.⁷⁹ This decision sets a good precedence in determining the meaning of effective access to justice, whereby although

⁷³ N Roht-Arriaza, ‘State responsibility to investigate and prosecute grave human rights violations in international law’ (1990) 78 California Law Review 449.

⁷⁴ Flynn (n 42) 388.

⁷⁵ Communication 22/2014 (31 August 2017) UN Doc CRPD/C/18/D/22/2014.

⁷⁶ *ibid* paras 2.4-2.6.

⁷⁷ *ibid* para 7.3.

⁷⁸ *ibid* para 7.4.

⁷⁹ *ibid*.

available, insufficient local remedies are a hinderance to effective access to justice. The CRPD Committee, through its concluding observations, has also been emphatic on the need for legal representation and legal aid for PWDs.⁸⁰ Such legal aid schemes should not only be available, but also accessible and effective in tandem with the requirements of article 13 of the CRPD.⁸¹

2.4.2 *On an equal basis with others*

The phrase ‘on an equal basis with others’ as enshrined under article 13 forms part of the general principles and obligations of the CRPD as enunciated under articles 3 and 4 respectively and should be read together with article 5 on non-discrimination. Its use is a clear reflection of the mandate of the ad hoc committee to restate the application of existing universal human rights to the lived experience of PWDs.⁸² In this context, it should be understood to mean that PWDs should have the same opportunities as non-disabled people to access the justice system. Mégret acknowledges that while access to justice is not a new right, its recognition under the CRPD as a stand-alone article reflects the experience of PWDs who have been denied this right in the past.⁸³ To ascertain whether discrimination has occurred, one would need to answer the question: would a non-disabled person have been able to access justice in the same circumstances where a PWD has been prevented from accessing justice? It follows that discrimination includes a failure to provide reasonable accommodation,⁸⁴ which shall be discussed further in the section on accessibility.

⁸⁰ CRPD Committee, ‘Concluding observations on the initial report of China, adopted by the Committee at its eighth session (17-28 September 2012)’ (15 October 2012) UN Doc CRPD/C/CHN/CO/1; CRPD Committee, ‘Concluding observations on the initial report of El Salvador, adopted by the Committee at its tenth session (2-13 September 2013)’ (8 October 2013) UN Doc CRPD/C/SLV/CO/1 para 30(b); CRPD Committee, ‘Concluding observations on the initial report of Mexico’ (27 October 2014) UN Doc CRPD/C/MEX/CO/1 para 26(b).

⁸¹ BD Mezmur, ‘A step to zero attacks: Reflections on the rights of persons with albinism through the lens of X v United Republic of Tanzania’ [2018] Africa Disability Rights Yearbook 4.

⁸² Flynn (n 42) 394.

⁸³ Mégret (n 43) 494-512.

⁸⁴ CRPD art 2.

2.4.3 *Procedural and age-appropriate accommodations*

It is instructive to note that article 13(1) of the CRPD does not explicitly mention the concept of ‘reasonable accommodation’, which, as described above, is applicable to access to justice by virtue of articles 3, 4 and 5. Instead, article 13(1) requires states to ensure the provision of ‘procedural and age appropriate accommodations’. Existing scholarship has shown that while the relationship between ‘procedural and age accommodations’ and ‘reasonable accommodation’ is not explained in the treaty text, the former may be more generic and less individualised in approach than the latter.⁸⁵ Additionally, unlike the obligation to provide reasonable accommodation, the obligation to provide procedural and age-appropriate accommodations in the context of access to justice ‘cannot be mitigated by arguments about reasonableness’ since the burden vests upon the state or public officials involved in the administration of justice.⁸⁶

The CRPD Committee, through its concluding observations, has increasingly provided some perspective on the content and scope of procedural accommodations in the justice system; particularly those which can facilitate effective communication. For example, the CRPD Committee has recommended that state parties ensure the guarantee of sign language interpretation, the use of augmentative and alternative modes of communication and full accessibility to the physical environment, transport and communication.⁸⁷ It has also recommended that state parties introduce legislative reforms so that the national administrative, criminal and civil procedures include the requirement to make procedural accommodations for PWDs.⁸⁸ The CRPD Committee has further emphasised the need to ensure procedural accommodations for marginalised groups of PWDs such as women, girls and children with disabilities (CWDs). It has particularly expressed concerns about the access to justice barriers faced by women and girls with disabilities

⁸⁵ Flynn (n 42) 394; Lawson and Flynn (n 38) 7.

⁸⁶ Flynn *ibid* 393.

⁸⁷ CRPD Committee, ‘Concluding observations on the initial report of Costa Rica’ (12 May 2014) UN Doc CRPD/C/CRI/CO/1 para 26.

⁸⁸ CRPD Committee, ‘Concluding observations on the initial report of Ecuador’ (27 October 2014) UN Doc CRPD/C/ECU/CO/1 para 27.

who are often victims of abuse or neglect.⁸⁹ In this regard, the CRPD Committee has implored state parties to put in place gender and age-specific procedural accommodation to ensure access to justice for PWDs.⁹⁰

The CRPD Committee has also implored states to ensure that all CWDs have access to justice through procedural accommodations appropriate to their age and specific disability-related needs.⁹¹ It is noteworthy that the CRPD Committee does not elaborate on specific age-appropriate accommodations that can ensure that CWDs are able to express their opinion on matters that concern them. Nonetheless, these accommodations can be inferred from General Comment No 9 by the Committee on the Rights of the Child (CRC Committee) which states:

A child with disability who comes in conflict with the law should be interviewed using appropriate languages and otherwise dealt with by professionals such as police officers, attorneys/advocates/social workers, prosecutors and/or judges, who have received proper training in this regard. Governments should develop and implement alternative measures with a variety and a flexibility that allow for an adjustment of the measure to the individual capacities and abilities of the child in order to avoid the use of judicial proceedings. Children with disabilities in conflict with the law should be dealt with as much as possible without resorting to formal/legal procedures. Such procedures should only be considered when necessary in the interest of public order. In those cases, special efforts have to be made to inform the child about the juvenile justice procedure and his or her rights therein.⁹²

2.4.4 The role of persons with disabilities as direct and indirect participants

Notwithstanding its adoption and inclusion on article 13, the term ‘direct and indirect participants’ is not elaborated in the text or in the subsequent normative framework by the CRPD Committee. The only category of ‘participants’ that is expressly recognised is PWDs as ‘witnesses’. On the one hand, the term ‘direct participants’ has been

⁸⁹ CRPD Committee, ‘Concluding observations on the initial report of San Salvador’ (n 80) para 30.

⁹⁰ *ibid.*

⁹¹ CRPD Committee, ‘Concluding observations on the initial report of Mexico’ (n 80) para 26(c).

⁹² UN Committee on the Rights of the Child (CRC Committee), ‘General Comment No 9 (2006) The rights of children with disabilities’ (27 February 2007) UN Doc CRC/C/GC/9 paras 74(a) and (b).

interpreted to refer to those PWDs directly involved in, or affected by, the outcome of a legal proceeding, including the parties to the case, legal representatives and adjudicators. On the other hand, ‘indirect participants could include court staff, court reporters, members of the public who attend the hearing, and other potential claimants who could be affected by the outcome of the hearing’.⁹³

The CRPD Committee had the opportunity to address the question of ‘direct and indirect’ participants in *X v Argentina*.⁹⁴ In this communication, the applicant alleged violations by Argentina of articles 9, 10, 13, 14, 15, 17, 25 and 26 of the CRPD, based on his treatment and the conditions he endured in prison. His argument concerning article 13 was based on his denial of entry to a hearing on a case concerning him and being forced to remain in the ambulance or on a stretcher outside the courtroom. Although the CRPD Committee found a violation of his rights under the other articles, it determined that based on the documentation submitted, the applicant had not exhausted all domestic remedies in respect of his allegation concerning article 13, thus declaring this portion of the communication inadmissible under article 2(d) of the Optional Protocol.

2.4.5 *All legal proceedings*

While the focus of this research is on access by PWDs to legal proceedings in court, it is important to understand the meaning of the term ‘all legal proceedings’ as enunciated in article 13 of the CRPD. In this regard, the first point of reference should be the general understanding of the right to equality before courts and tribunals, and to a fair trial as enunciated in article 14 of the ICCPR. According to the HRC, this right applies to all courts and tribunals whether ordinary or specialised and must also be available to all individuals regardless of their status.⁹⁵ Similarly, the CRPD Committee has taken an expansive view of the categories of hearings and processes that fall within the scope of the right for PWDs. For example, access to justice in non-judicial proceedings was addressed in its concluding observations on

⁹³ CRC Committee, ‘General Comment No 9’ (n 92).

⁹⁴ *X v Argentina* CRPD Committee Communication No 8/2012 UN Doc CRPD/C/11/D/8/2012.

⁹⁵ UN Human Rights Committee, ‘General Comment No 32 Article 14: Right to equality before courts and tribunals and to a fair trial’ (23 August 2007) UN Doc CCPR/C/GC/32.

New Zealand, in the context of the assessment of accident compensation claims and a possible establishment of an accident compensation tribunal. In this regard, the CRPD Committee implored the state to ‘examine the processes for the assessing of compensation by the Accident Compensation Corporation to ensure that adequate legal aid is available and that its processes are fully accessible to all claimants, and finally to ensure that this mechanism has a human rights focus’.⁹⁶ The CRPD Committee recommended that organisations of and for PWDs should be consulted as part of the establishment of any tribunal and that any such tribunal should adopt a flexible approach to the admission of evidence.⁹⁷

The CRPD Committee has further paid attention to specific kinds of legal proceedings where PWDs may be unfairly disadvantaged, especially in the criminal justice system. In its guidelines on the right to liberty and security of PWDs, the CRPD Committee stated that PWDs who are unlawfully deprived of their liberty are entitled to have access to justice to challenge the lawfulness of their detention and to obtain appropriate redress.⁹⁸ It also clarified that states parties should refrain from denying legal capacity of PWDs and detaining them in institutions against their will, ‘either without the free and informed consent of the persons concerned or with the consent of a substitute decision-maker, as this practice constitutes arbitrary deprivation of liberty’.⁹⁹ In its concluding observations on Paraguay, the CRPD Committee recommended that the state reviews its legislation with a view to ensuring that criminal sanctions applicable to persons with psychosocial or intellectual disabilities are subject to the same conditions as other persons subject to the justice system.¹⁰⁰

The CRPD Committee has also received an individual communication concerning the right to participate in all legal proceedings.¹⁰¹ In this case, an applicant with a hearing impairment alleged a violation

⁹⁶ CRPD Committee, ‘Concluding Observations on the initial report of New Zealand’ (31 October 2014) UN Doc CRPD/C/NZL/CO/1 para 24.

⁹⁷ *ibid* para 26.

⁹⁸ CRPD Committee, ‘Guidelines on article 14 of the Convention on the Rights of Persons with Disabilities’ (adopted during the Committee’s 14th session, September 2015) para 24.

⁹⁹ *ibid* para 8.

¹⁰⁰ CRPD Committee, ‘Concluding Observations on the initial report of Paraguay’ (15 May 2013) UN Doc CRPD/C/PRY/CO/1 para 32.

¹⁰¹ *A M v Australia* CRPD Committee Communication No 12/2013 UN Doc CRPD/C/13/D/12/2013.

of his rights under articles 12, 13, 21 and 29 of the CRPD. The communication was lodged based on domestic laws that denied jurors with a hearing impairment a right to sign language interpretation during court proceedings or in jury deliberations. Since the applicant had not been directly affected by the law in question, the CRPD Committee held that applicants must show either that an act or an omission of the respondent state has already adversely affected their enjoyment of a right, or that such an effect is imminent. Notwithstanding an argument by the applicant that an infringement of his CRPD rights was imminent, as he might be imminently selected to perform jury duties, which in turn would give rise to the assessment of his ability to perform such duties, the CRPD Committee maintained its ruling that the argument was merely hypothetical and hence the applicant could not therefore claim victim status within the meaning of article 1(1) of the Optional Protocol.

2.4.6 Appropriate training for those working in the field of administration of justice

Whereas the first paragraph of article 13 is primarily focused on participation in the ‘legal system’ as discussed in the preceding sections, the second paragraph of article 13 adopts a broader approach, requiring appropriate training of those ‘working in the field of administration of justice’. Although most of the CRPD Committee’s concluding observations have focused on the need for more training for a wide range of professionals, a specific emphasis on training for the judiciary, legal professionals and court staff has also emerged in more recent concluding observations, such as those issued to New Zealand and Ecuador.

2.5 RECOGNITION OF THE RIGHT OF ACCESS TO JUSTICE FOR PWDs BY OTHER HUMAN RIGHTS TREATY BODIES AND MECHANISMS

Evidently, the inclusion of a specific right to access justice in the CRPD has influenced other UN treaty bodies and mechanisms to place a renewed prominence on the subject in their work. Even before the adoption of the CRPD, the CRC Committee developed General Comment No 9 on the rights of CWDs, which recognised among other things; the need for enhancing accessibility to all places, transport and

communications for CWDs; the imperative of raising awareness among all professionals, including those in the justice sector, on the rights of CWDs; and the obligation to provide age-appropriate accommodations to CWDs who are in conflict with the law.¹⁰² This is further buttressed by the CRC Committee's General Comment No 24 on children's rights in the child justice system which emphasises that children with developmental delays or neurodevelopmental disorders or disabilities should not be subjected to the child justice system, even when they reach the minimum age of criminal responsibility.¹⁰³ Following the adoption of the CRPD, the UN High Commissioner for Human Rights identified specific challenges facing CWDs in its 2013 report on access to justice for children.¹⁰⁴ Similarly, the Expert Mechanism on the Rights of Indigenous Peoples and the Special Rapporteur on Poverty and Human Rights issued reports touching on access to justice for indigenous peoples with disabilities¹⁰⁵ and challenges in accessing justice for PWDs in extreme poverty.¹⁰⁶ The Committee on the Elimination of All Forms of Discrimination Against Women recently published a General Recommendation on women's access to justice, which included guidelines for ensuring a disability-friendly and accessible justice system.¹⁰⁷ Finally, the UN Basic Principles and Guidelines on remedies and procedures on the right of anyone deprived of their liberty to bring proceedings before a court¹⁰⁸ contains specific measures for PWDs. All together, these developments highlight the growing interest in this topic in the international human rights community, and the potential for article 13 of the CRPD to guide future developments in this field.

¹⁰² CRC Committee, 'General Comment No 9' (n 92) paras 26, 27, 37, 39, 40 and 74.

¹⁰³ CRC Committee, 'General Comment No 24 (2019) on children's rights in the child justice system' (18 September 2019) UN Doc CRC/C/GC/24 para 28.

¹⁰⁴ UN General Assembly Human Rights Council, 'Report of the United Nations High Commissioner for Human Rights: Access to justice for children' (16 December 2013) UN Doc A/HRC/25/35.

¹⁰⁵ UN General Assembly, 'Access to justice in the promotion and protection of the rights of indigenous peoples: Restorative justice, indigenous juridical systems and access to justice for indigenous women, children and youth, and persons with disabilities' (7 August 2014) UN Doc A/HRC/27/65.

¹⁰⁶ UN General Assembly, 'Report of the special rapporteur on extreme poverty and human rights, access to justice by people living in poverty' (9 August 2012) UN Doc A/67/278.

¹⁰⁷ Committee on the Elimination of Discrimination against Women, 'General recommendation on women's access to justice' (23 July 2015) UN Doc CEDAW/C/GC/33.

¹⁰⁸ Guideline 20.

2.6 ACCESSIBILITY, LEGAL CAPACITY AND ACCESS TO JUSTICE

The indivisibility and interdependence of all human rights has been affirmed by the preamble of the CRPD,¹⁰⁹ which means that regard must be given to other CRPD provisions when interpreting the requirements of article 13. Therefore, articles 9 and 21 are directly relevant when determining the accessibility of the justice system for PWDs. Article 9, on the one hand, contains a broad expression of the accessibility obligations requiring state parties to ensure the physical accessibility of buildings and spaces open to the public;¹¹⁰ the provision of live assistance and intermediaries such as sign-language interpreters;¹¹¹ accessible signage, including in braille and easy-to-read formats;¹¹² accessible information and communication technologies;¹¹³ and other forms of assistance and support needed to ensure access to information.¹¹⁴ On the other hand, article 21 focuses on the accessibility of information and communication.

The CRPD Committee's General Comment No 2 on accessibility also makes specific reference to access to justice thus:

There can be no effective access to justice if buildings of law-enforcement organs and judiciary are not physically accessible, and if the services they provide, information and communication are not accessible.¹¹⁵

Similarly, the Committee's General Comment No 1 on article 12 recognises the right to legal capacity as an essential component for access to justice. It states that PWDs must be recognised as persons with equal standing in courts and tribunals, so as to seek enforcement of their rights on an equal basis with others. PWDs who experience interferences with their right to legal capacity should have an opportunity to challenge such interferences and to defend their rights in court. In this regard, justice sector personnel should be trained to recognise PWDs as full persons before the law. Additionally, the judiciary must be made aware of their obligation to respect the legal personhood of PWDs, including their legal agency and standing.¹¹⁶

¹⁰⁹ CRPD preamble (c).

¹¹⁰ CRPD art 9(1)(a).

¹¹¹ CRPD art 9(2)(e).

¹¹² CRPD art 9(2)(d).

¹¹³ CRPD arts 9(2)(g) and (h).

¹¹⁴ CRPD art 9(2)(f).

¹¹⁵ CRPD Committee, 'General Comment No 2 Article 9: Accessibility' (n 72) para 33.

¹¹⁶ CRPD Committee, 'General Comment No 1 Article 12: Equal recognition before the law' (19 May 2014) UN Doc CRPD/C/GC/1 paras 34 and 35.

2.7 CONCLUSION

This chapter has provided the trajectory of international human rights law and the innovations of the CRPD as far as the right to access to justice for PWDs is concerned. It has also provided a conceptual framework of the right as has been analysed by Lawson and Flynn. This understanding of access to justice for PWDs shall be used as a basic framework to analyse various aspects of Kenya's justice system. The experiences of PWDs in accessing these shall also be considered in the coming chapters.

3.

LEGAL FRAMEWORK ON ACCESS TO JUSTICE FOR
PERSONS WITH DISABILITIES

3.1 INTRODUCTION

Having previously discussed the international basis upon which access to justice for PWDs is founded, this chapter shall examine the extent to which Kenyan law recognises the right to access justice for PWDs. It also discusses the general protection of all PWDs in the Kenyan Constitution and the PDA. As it is unfeasible to exhaust all legislation that has a bearing on access to justice in Kenya, this chapter highlights the main laws under which the civil and criminal justice systems operate, as well as the legal aid scheme in Kenya. Although the latter do not primarily regulate PWDs, they contain provisions that directly impact on their right to access justice. To begin with, the chapter shall rehash the international human rights instruments that have a bearing on the right of access to justice as identified on chapter two, specifically those that have been ratified by Kenya.

3.2 INTERNATIONAL LEGAL FRAMEWORK ON ACCESS TO JUSTICE FOR PERSONS
WITH DISABILITIES

From the onset, it is important to note that article 2(6) of the Kenyan Constitution provides that ‘any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution’. The effect of this provision is that Kenya is a monist state, and therefore it does not require legislation to domesticate international instruments. Accordingly, the text of article 13 of the CRPD, and its obligations as conceptualised in the previous chapter, are directly imported into Kenyan law by virtue

of its ratification in 2008.¹¹⁷ Additionally, Kenya has ratified other instruments that have a significant bearing on the right of access to justice, albeit in relation to other marginalised groups. Without a doubt, PWDs, who form a huge part of Kenya's population also form part of other categories of groups such as women, girls, children, older persons and displaced persons.¹¹⁸ Due to this intersectionality, instruments that do not directly touch on PWDs also affect them.

A common thread that runs throughout the international human rights framework are the principles of equality and non-discrimination, which gives each individual the right to equality before the law regardless of their status. Traces of the right of access to justice are found in core human rights instruments that have been ratified by Kenya including CERD,¹¹⁹ CEDAW,¹²⁰ CAT,¹²¹ CRC¹²² and the Convention for the Protection of All Persons from Enforced Disappearance.¹²³ A similar cluster of rights is also found in the regional human rights system, including the African Charter,¹²⁴ Maputo Protocol¹²⁵ and the African Children's Protocol.¹²⁶ As noted in chapter one, the AU has adopted the Africa Disability Protocol which guarantees the right to access to justice on article 13. However, the protocol has not yet been ratified by Kenya, nor come into force.

¹¹⁷ Kenya ratified the CRPD on 19 May 2008. UN Treaty Body Database, 'Ratification Status for Kenya' <https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=90&Lang=EN> accessed 15 October 2020.

¹¹⁸ The Kenya National Bureau of Statistics (KNBS), '2019 Kenya Population and Housing Reports' (KNBS 2019) <www.knbs.or.ke/?p=5732> accessed 10 August 2020.

¹¹⁹ Arts 5(a) and 6.

¹²⁰ Arts 7, 8 and 15.

¹²¹ Arts 13 and 14.

¹²² Art 12.

¹²³ Arts 2, 8, 11 and 17.

¹²⁴ Arts 3 and 7.

¹²⁵ Art 8.

¹²⁶ Interpreted under the Guidelines on Action for Children in the Justice System in Africa (2011) <www.africanchildforum.org/cfr/Supplementary%20Documents/other-documents-15_en.pdf> accessed 15 October 2020.

3.3 CONSTITUTIONAL PROTECTION OF PERSONS WITH DISABILITIES AND THE RIGHT OF ACCESS TO JUSTICE

3.3.1 *The recognition of the rights of persons with disabilities*

The promulgation of the Kenyan Constitution brought with it a progressive bill of rights that enshrines a wide array of guarantees, including the right of access to justice. It permits every individual to enjoy the rights and freedoms recognised therein without discrimination, including on the basis of disability.¹²⁷ The Kenyan Constitution is anchored upon the ‘national values and principles of governance’ which include human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised.¹²⁸ Since a mere recognition of equality and non-discrimination in laws and policies does not automatically eliminate inequalities,¹²⁹ the Kenyan Constitution enunciates provisions on both ‘procedural or formal equality’ and ‘substantive equality’.¹³⁰

The substantive equality approach is particularly important in relation to the rights of PWDs, as it ‘requires the law to ensure equality of outcome and is prepared to tolerate disparity of treatment to achieve this goal’.¹³¹ The approach reckons, for instance, that while equal access to the justice system might be constitutionally enshrined, there may be a need to address the institutional, physical, attitudinal and legal barriers that may hinder the accessibility of the justice system to PWDs. This is explicitly captured under article 27(6) of the Kenyan Constitution which imposes an obligation upon the state to ‘take legislative and other measures, including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination’. In affirmation of the approach, the High Court, in the case of *John Kabui Mwai and 3 others v Kenya National Examination Council and 2 others*,¹³² stated that:

¹²⁷ Kenyan Constitution art 27(4).

¹²⁸ Kenyan Constitution art 10(2).

¹²⁹ K Mbondenyi and O Ambani, *Principles, governance and human rights* (Law Africa Publishers 2012) 221.

¹³⁰ *ibid* 232.

¹³¹ *ibid*.

¹³² Petition 15 of 2011 [2011] eKLR.

When the Constitution was adopted, the framers knew, and clearly had in mind, the different status of persons in the society and the need to protect the weak from being overrun by those with ability. They had in mind the history of this country, both the differences in endowment either by dint of the region where one came from or as a function of other factors, which might necessitate special protection.¹³³

As a concrete foundation of this approach, the Kenyan Constitution enshrines provisions tailored to protect special groups of people who require affirmative action owing to their vulnerability, among them children, PWDs, youth, minorities and marginalised groups, and older members of the society.¹³⁴ With respect to PWDs, article 54 provides:

54. (1) A person with any disability is entitled—

a) to be treated with dignity and respect and to be addressed and referred to in a manner that is not demeaning;

b) to access educational institutions and facilities for persons with disabilities that are integrated into society to the extent compatible with the interests of the person;

c) to reasonable access to all places, public transport and information;

d) to use Sign language, Braille, or other appropriate means of communication; and

e) to access materials and devices to overcome constraints arising from the person's disability.

(2) The State shall ensure the progressive implementation of the principle that at least five percent of the members of the public in elective and appointive bodies are persons with disabilities.

¹³³ Petition 15 of 2011 [2011] eKLR.

¹³⁴ Kenyan Constitution arts 53-57.

3.3.2 *Access to justice under the Kenyan Constitution*

Prior to the promulgation of the Kenyan Constitution in 2010, access to justice had been harrowed by a myriad of challenges such as unaffordable court fees, geographical inaccessibility, complexity of rules and procedures, excessive use of legalese and a lack of awareness of the operations of the justice system.¹³⁵ These challenges were more pronounced in relation to PWDs. The bill of rights under the current constitution guarantees access to justice as a fundamental right,¹³⁶ and further enshrines several rights which guarantee access to the justice system. These include the right to fair administrative action,¹³⁷ rights of arrested persons,¹³⁸ right to fair hearing¹³⁹ and rights of persons detained, whether held in custody or imprisoned.¹⁴⁰ Additionally, court fees should not be an impediment to access to justice.¹⁴¹

Articles 49(1)(c) and 50(7) allow for the provision of legal aid on behalf of accused persons. As has been noted in the preceding chapter, the right to legal aid is an essential component of access to justice as it ensures that marginalised persons such as PWDs are not denied a fair hearing due to their insufficient means to hire competent counsel. However, for countries such as Kenya, the provision of legal aid and assistance is a capital-intensive undertaking which has proven difficult to accomplish effectively due to limited resources.¹⁴² The Kenyan Constitution also enshrines other provisions that are geared towards promoting equal access to judicial and quasi-judicial mechanisms for the protection of human rights. Article 22, for instance, obligates the Chief Justice to develop rules that provide for the right of every person to access courts for remedies when their rights have been infringed or are threatened.¹⁴³ Clause 2 of this article is geared towards ensuring that there are no factors that hamper access to justice when enforcing the Kenyan Constitution by

¹³⁵ The Kenya Law Reform Commission, 'Report on Audit and Prioritization of Legislation for Conformity with the Constitution of Kenya, 2010' (The Kenya Law Reform Commission February 2014) 30.

¹³⁶ Kenyan Constitution art 48.

¹³⁷ Kenyan Constitution art 47.

¹³⁸ Kenyan Constitution art 49.

¹³⁹ Kenyan Constitution art 50.

¹⁴⁰ Kenyan Constitution art 51.

¹⁴¹ Kenyan Constitution art 47.

¹⁴² Mbondenyei and Ambani (n 129).

¹⁴³ Kenyan Constitution art 22.

ensuring that no fees are charged for instituting proceedings; removing the complex legal requirement of proving *locus standi*; minimising procedural formalities and allowing experts to appear as friends of the court where necessary. Additionally, article 35 guarantees every citizen the right of access to information, where such information is required for the exercise or protection of any right, in this case access to justice.¹⁴⁴

The analysis above illustrates that the Kenyan Constitution does not explicitly refer to the reasonable accommodations that should be provided to address the peculiar needs of PWDs. Nonetheless, a purposive reading of the text, coupled with the substantive protection of PWDs and accessibility as outlined in article 54 illustrates that the common thread that cuts across these cluster of rights is an emphasis that the justice system must be accessible for all persons, in an expeditious, efficient and procedurally fair manner.¹⁴⁵ While addressing the right of access to justice for PWDs, the High Court has in fact interpreted the right to include access to the ‘infrastructure necessary to ensure justice is available to all persons’.¹⁴⁶ The right also involves access to laws, the courts, court staff, information on the operations of the justice system and court procedures by all people regardless of their status.¹⁴⁷ Additionally, as illustrated in chapter two, access to information on the operations of the justice system is directly relevant in enhancing effective access to justice by PWDs.¹⁴⁸ Article 35 therefore imposes a duty upon the state to provide such information in formats that are accessible by PWDs in their various capacities. This may include information on the relevant laws, accessing the national legal aid scheme, instituting proceedings in court and available remedies.

In addition to this interpretation, articles 49, 50 and 51 of the Kenyan Constitution enunciate legal provisions that are directly applicable in addressing barriers faced by PWDs in the criminal justice system. These include the right of arrested persons to be informed of their rights in a ‘language that the person understands’,¹⁴⁹ the right of accused persons to have reasonable access to the evidence that the prosecution relies

¹⁴⁴ Kenyan Constitution art 35.

¹⁴⁵ Mbondenyi and Ambani (n 129) 213.

¹⁴⁶ *Paul Pkiach Anupa and another v Attorney General and another (Anupa case)* Nairobi Petition No 93 of 2011[2012] e KLR.

¹⁴⁷ *ibid.*

¹⁴⁸ See para 2.6 above.

¹⁴⁹ Kenyan Constitution art 49(1).

upon,¹⁵⁰ to be assisted by an interpreter without payment if they cannot understand the language used during trial¹⁵¹ and to access information in a language that they understand.¹⁵² Arguably, accessible methods of communication and language in this case include material in alternative formats such as braille and sign language which are expressly recognised in the Kenyan Constitution.¹⁵³ These provisions also mirror the provisions of the CRPD, specifically on accessibility and access to justice.

3.4 LEGISLATIVE FRAMEWORK

3.4.1 *The Persons with Disabilities Act 2003*

The PDA has been acknowledged as ‘the first serious attempt to enact the human rights imperatives of PWDs in Kenya’.¹⁵⁴ It provides for the rights and rehabilitation of PWDs and further establishes the National Council for Persons with Disabilities (NCPWD), the main focal point for all disability matters in Kenya.¹⁵⁵ The PDA provides for equalisation of opportunities¹⁵⁶ and the elimination of all forms of discrimination against PWDs.¹⁵⁷ On access to justice, the PDA requires the development of rules and regulations to provide for free legal services for PWDs,¹⁵⁸ to exempt PWDs from paying legal fees and to recognise the provision of free sign language interpretation, braille services and physical assistance in court.¹⁵⁹

Despite its enactment prior to the promulgation of the Kenyan Constitution, it recognises substantive and procedural adjustments that should be considered to enhance access to justice for PWDs. For instance, it requires all suits involving PWDs to be disposed of expeditiously with due regard to the peculiar needs of PWDs.¹⁶⁰ On the criminal justice

¹⁵⁰ Kenyan Constitution art 50(2)(j).

¹⁵¹ Kenyan Constitution art 50(2)(m).

¹⁵² Kenyan Constitution art 50(3).

¹⁵³ Kenyan Constitution arts 7 and 54.

¹⁵⁴ Mbondenyei and Ambani (n 129) 216.

¹⁵⁵ Persons with Disabilities Act No 14 of 2003 (PDA) preamble.

¹⁵⁶ PDA s 7(1)(b)(i).

¹⁵⁷ PDA s 7(1)(b)(iv).

¹⁵⁸ PDA s 38(1).

¹⁵⁹ PDA s 38(2).

¹⁶⁰ PDA s 38(4).

system, accused PWDs who are not eligible for bail are entitled to be held in custody in facilities which are modified to suit their needs.¹⁶¹ With respect to ‘symbolic access to justice’, the PDA guarantees the right to a barrier-free and disability-friendly environment to enhance access to public places, buildings, public transport and other infrastructure.¹⁶² This is essential since courts, like most government institutions, operate from public spaces. Where such public infrastructure is inaccessible, the NCPWD has powers to issue adjustment orders on the modification of such facilities.¹⁶³ Unfortunately, as shall be illustrated in the next chapter, these powers have not had any impact on the accessibility of the state infrastructure in general and the courts in particular.

3.4.2 *The civil justice system*

In Kenya, the civil justice system operates under the Civil Procedure Act (chapter 21), with the procedural aspects of the courts being provided for under the Civil Procedure Rules (2010) (CPR). The CPR refers to persons with intellectual, mental and psychosocial disabilities as ‘persons with mental disorders’ (PMDs), a terminology that is considered to be disrespectful.¹⁶⁴ Like minors, PMDs are considered to lack capacity to sue or be sued in their own name, enter into contracts or make valid undertakings.¹⁶⁵ Instead, suits that involve PMDs are instituted in the name of a representative¹⁶⁶ and failure to do so means that the suit is dismissed with costs.¹⁶⁷ Any damages or costs which are awarded in favour of the PMD are paid to the Public Trustee, who is allowed to hold and utilise the funds in the manner that they deem fit for the benefit of the PMD.¹⁶⁸

¹⁶¹ PDA s 38(3).

¹⁶² PDA ss 21-23.

¹⁶³ PDA ss 24 and 27.

¹⁶⁴ A Kanter, *The Development of Disability Rights Under International Law: From Charity to Human Rights* (Routledge 2015) 13.

¹⁶⁵ Civil Procedure Rules (CPR) 2010 Order 32 r 15.

¹⁶⁶ CPR Order 32 rr 1(1) and 15.

¹⁶⁷ CPR Order 32 r 2(1).

¹⁶⁸ CPR Order 27 r 10(2).

3.4.3 *The criminal justice system*

The criminal justice system in Kenya is governed by the Penal Code, the Criminal Procedure Code, the Sexual Offences Act and the Evidence Act. The general rule on criminal responsibility is that every person above eight years is presumed to be of sound mind and criminally culpable until the contrary is proved.¹⁶⁹ The criminal responsibility of a person is ascertained by considering the person's mental state at the time of committing the offence. Like the CPR, the Sexual Offences Act makes reference to PMDs, defining them as persons who are affected by any mental disability, whether temporary or permanent, including those who, at the time of committing the offence, are not able to appreciate the nature and consequences of the act.¹⁷⁰ The Penal Code uses a more derogatory term, 'insane persons'. When the court finds that a person was not in the right state of mind at the time of committing an offence, it presumes that the offence was committed independently of their will.¹⁷¹ Where such a person is found guilty of a charge, the court reports the case to the President of the Judiciary,¹⁷² who may then direct that the person is detained in a mental hospital, prison or other suitable place of safe custody.¹⁷³

3.4.4 *Denial of legal capacity in court procedures*

From the analysis of the laws that inform the operations of the civil and criminal justice system, it is clear that they outrightly deny PWDs, particularly those with mental and intellectual disabilities, their agency, their right to be treated equally before the law and the right to represent themselves or choose their own representatives which affects their 'procedural access to justice' as demonstrated in chapter two. These laws further use derogatory language to refer to PWDs therefore applying the medical approach which considers the person who has an impairment as the problem.¹⁷⁴ Consequently, the fate of PWDs is left at the behest of the representatives who are empowered to make decisions,

¹⁶⁹ Penal Code 1 August 1930 (Cap 63) (Penal Code) s 11.

¹⁷⁰ Sexual Offences Act No 3 of 2006 s 2.

¹⁷¹ Penal Code s 9(1).

¹⁷² Criminal Procedure Code 1 August 1930 (CPC) Cap 75 s 166(2).

¹⁷³ CPC s 166(2).

¹⁷⁴ Kanter (n 164) general introduction.

enter agreements and use funds in the manner that they deem fit. This results in an automatic application of substituted decision making, which is contrary to the provisions of article 12 of the CRPD.¹⁷⁵

Legal capacity comprises the ability to hold individual rights (legal standing) and to exercise those rights (legal agency).¹⁷⁶ The denial of legal capacity on these laws manifests in two ways. First, the laws that inform the civil procedures equate such disabilities with a lack of legal capacity.¹⁷⁷ This is referred to as the ‘status approach’, whereby an individual is denied legal capacity based on their disability status. It is based on a presumption of incapacity which is predicated on a medical diagnosis of impairment.¹⁷⁸ In other terms, their disability status automatically strips them of their legal capacity.

Secondly, the laws accord legal capacity based on the person’s ability to appreciate the nature and consequences of their actions. This has been described as the ‘outcome approach’. It provides a mechanism for removing or restricting legal capacity with the presumption that an individual cannot make rational decisions due to their disability. An example of this is the provision that requires criminal cases that involve PMDs to be reported to the President of the Judiciary before conviction and sentencing.¹⁷⁹ Notably, this approach rests on a problematic conflation of a person’s legal capacity with their mental capacity. Whereas legal capacity comprises of a person’s ability to hold and exercise individual rights,¹⁸⁰ mental capacity reflects an individual’s decision-making skills, which should be determined scientifically on a case by case basis.¹⁸¹ This crucial separation of mental capacity and legal capacity is lacking in Kenya.

Consequently, the individuals’ graduated levels of ability and capacity which should be bolstered with structural supports are not considered. So far, the legality of these laws has not been addressed in court.

¹⁷⁵ Convention on the Rights of Persons with Disabilities (adopted 13 December 2006, entered into force 3 May 2008) 2515 UNTS 3 (CRPD) art 12; CRPD Committee, ‘General Comment No 1 Article 12: Equal recognition before the law’ (19 May 2014) UN Doc CRPD/C/GC/1.

¹⁷⁶ CRPD Committee, ‘General Comment No 1’ *ibid* para 13; J Beqiraj, L McNamara and V Wicks, *Access to justice for persons with disabilities: From international principles to practice* (International Bar Association 2017).

¹⁷⁷ CRPD Committee, ‘General Comment No 1’ *ibid* para 9.

¹⁷⁸ Beqiraj, McNamara and Wicks (n 176).

¹⁷⁹ CPC s 166(2).

¹⁸⁰ CRPD Committee, ‘General Comment No 1’ (n 175) paras 8, 13 and 19.

¹⁸¹ Beqiraj, McNamara and Wicks (n 176).

However, the state, through its interactions with the CRPD Committee, has received recommendations on the same, key among them being the need to repeal all the laws that encourage substituted decision making and replace them with mechanisms for supported decision making.¹⁸² This shall be explored further in the next chapter.

3.5 LEGAL AND POLICY FRAMEWORK ON LEGAL AID

Apart from the constitutional provisions that were highlighted in the beginning of this chapter, Kenya has a robust legislative and policy framework that is aimed at promoting legal aid. Kenya enacted the Legal Aid Act in 2016, which is further reinforced by the National Legal Aid and Awareness Policy and the National Action Plan on Legal Aid (NAP). The Legal Aid Act was enacted to give effect to articles 19(2), 48, 50(2)(g) and (h) of the Kenyan Constitution on access to justice. Section 2 defines legal aid as:

Legal advice; legal representation; assistance in resolving disputes by alternative dispute resolution; drafting of relevant documents and effecting service incidental to any legal proceedings; and reaching or giving effect to any out-of-court settlement. It also entails creating awareness through the provision of legal information and law-related education; and recommending law reform and undertaking advocacy work on behalf of the community.

The Legal Aid Act established the National Legal Aid Service (NLAS) which is aimed at promoting access to justice by inter alia providing affordable, accessible, sustainable, credible and accountable legal aid services to indigent persons, creating a legal aid scheme to assist indigent persons in accessing legal aid, promoting legal awareness and supporting community legal services by funding justice advisory centres, education and research.¹⁸³ The act further establishes the Legal Aid Fund which is used for running the functions of the NLAS.¹⁸⁴ These functions include to undertake and promote research in the field of legal aid and access to justice with specific reference to the needs of indigent

¹⁸² CRPD Committee, 'Concluding observations in relation to the initial report of Kenya' (2015) UN Doc CRPD/C/KEN/CO/1 para 25.

¹⁸³ Legal Aid Act No 6 of 2016 (Legal Aid Act) s 3.

¹⁸⁴ Legal Aid Act ss 29 and 30.

persons and marginalised groups, promote public interest litigation with regard to matters of concern to the marginalised groups, develop programmes for legal aid education and the training and certification of paralegals, and promote legal literacy and awareness with particular attention to vulnerable sections of the society.¹⁸⁵

As stated in chapter two, legal aid is one of the key ingredients for ensuring effective access to justice for PWDs.¹⁸⁶ The CRPD Committee has emphasised the need for legal representation and legal aid for PWDs.¹⁸⁷ In its concluding observations to Kenya, the CRPD Committee implored the state to provide free legal aid services to PWDs.¹⁸⁸ The NLAS as established presents a good opportunity for the state to fulfil these requirements. However, in order to achieve this, several measures would have to be taken. First, a portion of the legal aid fund should be set aside for a disability-specific legal aid programme within the NLAS. The functions of this programme would be raising awareness amongst PWDs on their rights and available remedies, representing PWDs who are parties to court proceedings and even training paralegals within the disability movement. Flynn argues that even though disability-specific legal aid programmes may appear as a form of segregation, they often have the effect of responding better to the specific needs of PWDs.¹⁸⁹ Such a programme would also resonate with the constitutional provisions on affirmative action.¹⁹⁰

Secondly, the NLAS shall need to undertake meaningful consultations with PWDs and their representative organisations. As established in the previous chapter, the participation of PWDs is necessary for the creation of an inclusive justice system. Commendably, the NLAS has an oversight and supervisory board which is constituted of among others, a member

¹⁸⁵ Legal Aid Act s 7.

¹⁸⁶ See chapter 2.4.1 above.

¹⁸⁷ CRPD Committee, 'Concluding observations on the initial report of China, adopted by the Committee at its eighth session (17-28 September 2012)' (15 October 2012) UN Doc CRPD/C/CHN/CO/1; CRPD Committee, 'Concluding observations on the initial report of El Salvador, adopted by the Committee at its tenth session (2-13 September 2013)' (8 October 2013) UN Doc CRPD/C/SLV/CO/1 para 30(b); CRPD Committee, 'Concluding observations on the initial report of Mexico' (27 October 2014) UN Doc CRPD/C/MEX/CO/1 para 26(b).

¹⁸⁸ CRPD Committee (n 182) para 25.

¹⁸⁹ E Flynn, *Disabled Justice? Access to Justice and the UN Convention on the Rights of Persons with Disabilities* (Routledge 2016) 122.

¹⁹⁰ Kenyan Constitution arts 27 and 54.

nominated by the NCPWD.¹⁹¹ The participation of PWDs should also be considered within the NLAS, whether as employees, consultants or even lawyers. Thirdly, in terms of accessibility, the NLAS should have its headquarters in the capital and in all other counties in Kenya as required by the establishing act.¹⁹² Additionally, the NLAS should publish legal aid material in accessible formats.¹⁹³ Benyam argues that legal aid schemes should not only be available, but also accessible and effective in tandem with the requirements of article 13 of the CRPD.¹⁹⁴

3.6 CONCLUSION

The foregoing analysis has clearly revealed the high threshold that the Kenyan Constitution has set in relation to access to justice for PWDs. This marks a radical shift in programme development and implementation on the subject, and gives the state a greater responsibility in ensuring that the right is enjoyed by all citizens, especially indigent persons. Similarly, the enactment in 2016 of the Legal Aid Act marked a significant milestone in the development of the justice system in Kenya. It signifies the equality of all citizens through the provision of free legal services to the vulnerable and indigent of the society. Overtly, the PDA also seeks to reverse the trend of discrimination that has over the ages been perpetrated against PWDs. All together, these provisions echo the principles of equality before the law, the right to equal protection and equal benefit of the law, and non-discrimination as enunciated on the CRPD and other human rights instruments. They demonstrate the extent to which ‘substantive justice’ has been provided for PWDs in Kenya.¹⁹⁵ They further reinforce the duty of the state to take actions to ensure that access to justice is guaranteed for all. The High Court was emphatic on this duty in *Centre for Human Rights and Democracy and others v The Judges and Magistrates Vetting Board and others*,¹⁹⁶ by holding that:

¹⁹¹ Kenyan Constitution art 9(1)(k).

¹⁹² Legal Aid Act 2016 s 6.

¹⁹³ Legal Aid Act 2016 s 84.

¹⁹⁴ BD Mezmur, ‘A step to zero attacks: Reflections on the rights of persons with albinism through the lens of X v United Republic of Tanzania’ [2018] Africa Disability Rights Yearbook 4.

¹⁹⁵ See para 2.2.1 above.

¹⁹⁶ Nairobi Constitutional Petition 11 of 2012 (Unreported).

As part and core of our constitutional and statutory obligations, we have to innovate new methods and devise new strategies for purposes of providing access to justice to all persons who are, or were about to be denied their basic fundamental and human rights.¹⁹⁷

Conversely, it is clear that the laws which govern both the civil and the criminal justice systems outrightly deny PWDs, particularly those with mental and intellectual disabilities, their legal capacity. This, and other barriers that impede access to justice by PWDs, shall be explored in the next chapter.

¹⁹⁷ Nairobi Constitutional Petition 11 (n 196) para 62.

4.

BARRIERS TO ACCESS AND PARTICIPATION IN COURT

4.1 INTRODUCTION

Without a doubt, the courtroom remains a key location from which justice claims are made and adjudicated. However, several inaccessible features disproportionately affect access and participation by PWDs. These include physical barriers caused by inaccessible justice infrastructure, information and communication barriers due to a lack of material in accessible formats such as braille, sign language, easy-to-read or electronic formats, and procedural barriers particularly where persons with intellectual, mental or psychosocial disabilities are refused access to legal representation or advice on the basis that they lack the requisite litigation capacity. These barriers are further compounded by other factors such as low literacy levels among PWDs, lack of specialised knowledge among legal practitioners of the needs of PWDs, prohibitive costs of litigation and limitations on the availability of legal aid. This chapter shall examine the accessibility of the Kenyan courts and the court procedures to PWDs.

4.2 ACCESSIBILITY

4.2.1 Physical accessibility of courts

Despite the emergence of legal obligations on courts, being public buildings, to increase their accessibility for PWDs, physical access remains an issue due to the physical barriers that impede access to the

courts and other justice infrastructure.¹⁹⁸ Physical barriers to justice have been described as a symbolic challenge to the way in which the justice system responds to PWDs,¹⁹⁹ because it can discourage them from pursuing justice or even offering services within the court system.²⁰⁰ In Kenya, these barriers were raised in the case of *Paul Pkiach Anupa and another v Attorney General and another*,²⁰¹ which was the first attempt to pursue access to justice for PWDs, particularly the physical accessibility of courts since Kenya ratified the CRPD and the promulgation of the Kenyan Constitution.

In this case, the second petitioner deponed that he had been unable to accompany his advocate to the court on numerous occasions owing to the inaccessibility of the Milimani High Court's building. He further claimed that access to the Constitutional and Human Rights Division of the Court was a daunting task, and that on numerous occasions, he had relied on assistance by his advocate to jump up the hurdles which caused him great embarrassment.²⁰² According to the petitioners, PWDs, particularly those with physical disabilities, experience similar challenges in courts all over the country.²⁰³ Accordingly, the petitioners moved the court to:

- (i) Declare that the New Milimani Law Court ... [is] not accessible to persons with disabilities...;
- (ii) Order that all the courts in Kenya be fitted with ramps to facilitate access to all courtrooms for all persons with all forms of disabilities; and
- (iii) In the alternative, compel the Minister for Special Programmes to issue a notice in the Gazette to ensure that all Ministries, Departments of Government, and the Local Authorities provide suitable ramps in public buildings including the courts.²⁰⁴

¹⁹⁸ J Beqiraj, L McNamara and V Wicks, *Access to justice for persons with disabilities: From international principles to practice* (International Bar Association 2017) 16.

¹⁹⁹ E Flynn, *Disabled Justice? Access to Justice and the UN Convention on the Rights of Persons with Disabilities* (Routledge 2016) 84.

²⁰⁰ Beqiraj, McNamara and Wicks (n 198) 26.

²⁰¹ *Paul Pkiach Anupa and another v Attorney General and another (Anupa case)* Nairobi Petition No 93 of 2011[2012] e KLR.

²⁰² *ibid* para 5.

²⁰³ *ibid* para 6.

²⁰⁴ *ibid* para 4.

The court, together with the parties in the petition, conducted a site visit of the court building which was aimed at determining the accessibility of the building for PWDs.²⁰⁵ Unfortunately, the court dismissed the petition reasoning that the obligations contemplated by section 22 of the PDA which requires all public buildings to be made accessible within five years of its coming into operation was sufficient an obligation to redress the disadvantage suffered by PWDs.²⁰⁶ As noted in the previous chapter, this section came into operation on 1 January 2010,²⁰⁷ which meant that the Judicial Service Commission had three more years from the time of the judgment to adapt the court buildings to suit PWDs. This notwithstanding, the court emphasised that the right of access to justice ‘entails physical access to courts and the personnel, information, process and procedures that relate to them including access to information about the justice system’.²⁰⁸

The site visit report produced by the Kenya National Commission on Human Rights (KNCHR) revealed that the court building was not suitably accessible for PWDs.²⁰⁹ To illustrate this, several barriers were identified. For example, the parking spaces at the courts did not give sufficient room for persons using wheelchairs to comfortably disembark from a vehicle. There was also no ramp at the parking lot to allow ease of movement onto the lobby at the main entrance of the court. Moreover, the main entrance to the court building had a metal bar that hindered access by wheelchairs.

For persons with visual impairment, no signage was available in alternative formats such as large prints, tactile markings, braille or clear colour contrast for persons with low vision. The available lifts did not have braille or engraved controls nor audio feedback to notify them of the various levels. To access the constitutional court, persons who use wheelchairs had to be lifted through the fire exit since the main staircases were not wide enough for their wheelchairs. Moreover, the level of accessibility of other important areas of the court such as the witness boxes and the public gallery was alarming.²¹⁰ Indeed, the

²⁰⁵ *Anupa* case (n 201) para 31.

²⁰⁶ *ibid* para 69.

²⁰⁷ Legal Notice No 182 of 2009.

²⁰⁸ *Anupa* case (n 201) para 64.

²⁰⁹ KNCHR, ‘Paul Pkiach Anupa and another v Attorney General and another Petition No 93 of 2011: Site visit report’ (2012).

²¹⁰ *ibid* para 3.

physical structure of the courts was such that it was a hindrance to justice seekers owing to the herculean task that PWDs were subjected to in trying to access them.²¹¹

Even though the site visit was conducted in 2012, these barriers have constantly been raised by other stakeholders. These include the shadow report to the initial state report submitted to the CRPD Committee by the United Disabled Persons of Kenya (UDPK),²¹² the response to issues submitted to the CRPD Committee by the KNCHR²¹³ and annual reports prepared by the KNCHR on the human rights situation in Kenya.²¹⁴ On a positive note, a human rights baseline survey conducted by the KNCHR established that 12% of the courts in Kenya have been made to be compliant to the needs of PWDs.²¹⁵ Although insufficient, this indicates that there is some recognisable effort that has gone into making the courts accessible to PWDs. These efforts, however, should be duplicated in all courts in Kenya, including those that are situated in rural areas.

4.2.2 Access to information and communication

The court can be an intimidating and challenging environment for many participants, including PWDs. Challenges may be faced by PWDs when communicating with the court and its officers, and in understanding the court procedures. For example, people who have hearing impairments can be convicted wrongfully due to communication barriers between them and the court. Also, persons with visual impairment may have to rely on other people, including strangers, to read the contents of court documents which may impinge on their right to privacy. In this regard, the full inclusion of PWDs in the justice system requires more than physical

²¹¹ *Anupa* case (n 201) para 66.

²¹² United Disabled Persons of Kenya (UDPK), 'A status of the human rights of persons with disabilities in Kenya: A shadow report to the initial report on the United Nations Convention on the Rights of Person with Disabilities to the UN Committee on the Rights of Persons with Disabilities' (UDPK 2013).

²¹³ KNCHR, 'A report to the Committee on the Rights of Persons with Disabilities' (KNCHR 2015).

²¹⁴ KNCHR, 'Thematic Reports: Rights of Persons with Disability (PWD)' (KNCHR, 2014) <www.knchr.org/Publications/Thematic-Reports/Group-Rights/Rights-of-Persons-with-Disability-PWD> accessed on 24 September 2020.

²¹⁵ KNCHR, *Human Rights Baseline Survey Report* (KNCHR 2016) 30 <www.knchr.org/Portals/0/GeneralReports/KNCHR_Human-Rights-Baseline-Survey-Report_2016_FX-Print.pdf?ver=2016-08-23-121839-380> accessed 5 October 2020.

adaptation of the court infrastructure. For instance, courts should ensure that announcements, relevant documentation, explanations of court proceedings and all other processes involving the participation of court users are effectively communicated to PWDs. This has been emphasised under the CRPD,²¹⁶ which imposes an obligation upon Kenya to adopt measures *inter alia* ‘to ensure that different material is provided in alternative formats such as braille and sign language’.²¹⁷ Effective and accessible communication can be facilitated through the use of material in alternative formats, assistive devices, third parties such as sign language interpreters and guardians, or a combination of these.

Barriers in communication, particularly for persons with hearing impairments, were raised in the case of *NAO v Republic*.²¹⁸ NAO, the appellant in this case, had a hearing impairment. She lodged an appeal against a conviction in which she was found guilty for manslaughter contrary to section 202 as read with section 205 of the Penal Code and sentenced to serve life imprisonment.²¹⁹ The appeal was lodged on the grounds that due to her being deaf, she did not understand the nature and gravity of the charge in the main trial, she was not warned of the harsh sentence that would befall her and she did not understand some of the issues interpreted by the sign language interpreter due to the complexity of the sign language that was used.²²⁰ In the final decision, the court substituted the original prison term with a three year probationary order. It is noteworthy that the court did not address the accessibility issues that were raised as grounds of the appeal. It however recognised the appeal as a special case due to the barriers that NAO faced when trying to obtain legal aid or access paralegals while in prison.²²¹ Nonetheless, this case brought to light the challenges that are faced by persons with a hearing impairment when they are parties to court proceedings.

The issue of communication barriers, particularly for persons with intellectual, mental, psychosocial and hearing disabilities, was also raised by the KNCHR in its response to the CRPD Committee’s list of

²¹⁶ Convention on the Rights of Persons with Disabilities (adopted 13 December 2006, entered into force 3 May 2008) 2515 UNTS 3 (CRPD) art 21.

²¹⁷ CRPD art 9.

²¹⁸ Criminal Appeal No 31 of 2017 eKLR.

²¹⁹ *Republic v NAO* case No 577 of 2016 unreported.

²²⁰ *NAO v Republic* (n 218) para 27(4-7).

²²¹ *ibid* para 41.

issues on Kenya's initial report on the implementation of the CRPD.²²² KNCHR noted that there are no appropriate services to support the judiciary in communicating with this category of PWDs when the need arises.²²³ Where such services are provided, they are fraught with delays and other inadequacies which prejudice the interests of PWDs. In its report, KNCHR cited a case where it received a complaint concerning a deaf defendant who had been in remand for a long time due to the absence of a sign language interpreter. The sign language interpreter was only availed upon the intervention by KNCHR.²²⁴ These submissions were reiterated by the UDPK in its shadow report.²²⁵

In its concluding observations to Kenya, the CRPD Committee expressed concerns about the barriers that hinder the access to justice of PWDs particularly due to the lack of information available in accessible formats and the additional costs associated with accessing the services of sign language interpretation.²²⁶ It was also concerned about the lack of information and communication technologies at low cost for PWDs, especially those living in rural areas. It is important to note that access to, and participation in, the justice system is also dependent on access to the relevant information on rights and the operations of the justice system. Access to such information has been recognised as an area that requires immediate action and intervention in order to realise the rights of PWDs.²²⁷ Concerns have been raised on access to information by persons with hearing impairments in Kenya, specifically regarding information and material disseminated through the mainstream media such as radio and television.²²⁸ Moreover, relevant material, particularly on the justice system, is only provided on government websites which are not designed with accessibility in mind.²²⁹ There is also a limited provision of sign language interpreters in public institutions which include courts and legal aid programmes.

²²² KNCHR, 'A report to the Committee on the Rights of Persons with Disabilities' (n 213).

²²³ KNCHR, 'From norm to practice: A status report on the implementation of the rights of persons with disabilities in Kenya' (KNCHR 2014).

²²⁴ *ibid.*

²²⁵ UDPK (n 212).

²²⁶ CRPD Committee, 'Concluding observations in relation to the initial report of Kenya' (2015) UN Doc CRPD/C/KEN.

²²⁷ UDPK (n 212) para 26.

²²⁸ *ibid.*

²²⁹ CIPESA, 'Removing Barriers to ICT Accessibility for Persons with Disabilities in Kenya, Tanzania and Uganda' (CIPESA, November 2019) <https://cipesa.org/wpfb_dl=312> accessed 10 October 2020.

4.2.3 *Geographical barriers to access to justice*

In chapter two, it was noted that dismantling barriers to access to justice requires that equal attention be given to other structures which are not necessarily situated within the classic justice system.²³⁰ This includes the general state infrastructure, which has implications on the experience that PWDs have when moving to the courts and other justice sector facilities. For example, a wheelchair user shall hardly approach such facilities if the journey would involve being lifted aboard the available public transport, paying for an extra seat for their wheelchair, or even having to be accompanied by someone else to assist them with mobility. This is more demoralising when the person is a woman with a physical disability who may rely on drivers and touts, (often men), to lift her aboard the vehicle or the building at her destination. Sadly, this is the situation of PWDs in Kenya, including those who have justice needs.²³¹

In this regard, Kenya has an obligation to take necessary steps to promote the independence of PWDs,²³² including by making community services and facilities for the general population responsive to the needs of PWDs.²³³ The CRPD Committee in its concluding observations expressed deep concerns on the lack of measures to sanction non-compliance with existing accessibility standards.²³⁴ Despite the coming into force of sections 22 and 23 of the PDA on accessibility of public buildings and public service vehicles respectively, this essential infrastructure is still inaccessible to PWDs countrywide. Notably, the timeline for compliance with section 22 was December 2015, while that for section 23 was December 2012.²³⁵

An assessment of both private and public buildings conducted four years after the two sections came into force revealed that several

²³⁰ A Lawson and E Flynn, 'Disability and access to justice in the European Union: Implications of the UN Convention on the Rights of Persons with Disabilities' (2013) 4 *European Yearbook of Disability Law* 7, 4.

²³¹ EFE: Agencia EFE, 'Kenya: Hostile territory for disabled people' (EFE, 24 July 2019) <www.efc.com/efe/english/life/kenya-hostile-territory-for-disabled-people/50000263-4029547> accessed 20 October 2020.

²³² CRPD art 20.

²³³ CRPD art 19(c).

²³⁴ CRPD Committee, 'Concluding Observations in relation to the initial report of Kenya' (n 226) para 17.

²³⁵ KNCHR, 'A report to the Committee on the Rights of Persons with Disabilities' (n 213) 16.

buildings that house national and county government offices, courts, public toilets and police stations among others did not comply with current accessibility standards.²³⁶ Similarly, accessibility to transport services both in rural and urban areas remains a big challenge for PWDs in Kenya. This is further compounded by the fact that public transport vehicles are privately owned, and Kenya has not taken concerted efforts to either provide alternative transport or oblige private owners to abide with the accessibility requirements. All together, these barriers reflect the huddles that Kenyan PWDs have to go through to get to courts.

4.2.4 Resourcing accessibility measures to enhance access to justice

The above barriers illustrate that Kenya has not taken action to ensure that Kenyan PWDs have equal access to the built environment, to public transport, to information and communications, and to other facilities and services that are open or provided to the public as imposed by the CRPD,²³⁷ the Kenyan Constitution²³⁸ and the PDA.²³⁹ This, in turn, disproportionately affects the ability of PWDs to access justice. As highlighted in chapter two, the CRPD Committee implores state parties to set accessibility standards which have to be negotiated with organisations of PWDs, then prescribed to service providers, builders and other relevant stakeholders.²⁴⁰ Notably, these can only be achieved through ‘gradual implementation’.²⁴¹

A possible argument that Kenya may use to justify this failure is a lack of financial resources to modify existing infrastructure and design and build accessible facilities. Such an argument would lead to the question whether accessibility is a socio-economic right. In this regard, it should be noted that the inclusion of accessibility as a stand-alone right on the CRPD has been subject to some criticism.²⁴² This research however considers accessibility as an enabler of other rights, including access to justice which is a civil right. Therefore, to counter the argument

²³⁶ KNCHR, ‘A report to the Committee on the Rights of Persons with Disabilities’ (n 213) 16.

²³⁷ CRPD arts 4 and 9.

²³⁸ Art 54.

²³⁹ Ss 21-23.

²⁴⁰ CRPD Committee, ‘General Comment No 2 Article 9: Accessibility’ (22 May 2014) CRPD/C/GC/2 para 22.

²⁴¹ *ibid* para 24.

²⁴² Flynn (n 199).

of limited resources, this research reiterates the views of the CRPD Committee that designing accessible infrastructure costs less than making future modifications to enhance accessibility for PWDs.²⁴³ As such, the economy would not feel the pinch by enhancing accessibility.

Moreover, the benefits of enhancing accessibility shall not only be enjoyed by PWDs, but also the general public, as its purpose is to make goods and services available and usable by the greatest number of persons possible. In the context of access to justice, increasing accessibility for PWDs shall also lead to greater access for others who interact with the justice system in a variety of ways. For instance, the availability of legal information in a variety of formats such as easy to read formats shall benefit those whose first language is not English and people with low literacy skills. Similarly, enhancing the physical accessibility of the state infrastructure in general, and the justice sector facilities in particular, shall benefit other people such as older persons and those who obtain short term physical injuries that do not qualify as disabilities. Noteworthy, some accessibility measures such as sign language interpretation do not necessarily incur benefits for non-disabled people, but still fall within the obligations to provide accessibility. It then follows that the more Kenya invests in designing an accessible society, the less barriers will exist that shall necessitate individual accommodation.²⁴⁴

4.3 SUBSTITUTED DECISION MAKING IN COURT PROCEDURES

As illustrated in chapter three, persons with mental, intellectual or psychosocial impairments are denied of their legal capacity in both the civil and criminal justice systems. This results in an automatic application of substituted decision making, where other representatives, in this case friends, *guardian ad litem* or court officers appointed by the court, make important decisions on their behalf. These issues were raised on the shadow reports of KNCHR and UDPK to the CRPD Committee.²⁴⁵ In this regard, Kenya reported that the government was pushing for a

²⁴³ CRPD Committee, 'Concluding observations in relation to the initial report of Kenya' (n 226).

²⁴⁴ A Lawson, 'Reasonable accommodation and accessibility obligations: Towards a more unified European approach?' (2011) 11 European Anti-Discriminatory Law Review 21.

²⁴⁵ KNCHR, 'A report to the Committee on the Rights of Persons with Disabilities' (n 213); UDPK (n 212).

shift from substituted decision making to supported decision making for PWDs, and for the recognition of the distinction between legal capacity on the one hand and mental capacity on the other hand.²⁴⁶

Article 12(3) of the CRPD enjoins Kenya to put in place measures to ensure that support is given to PWDs to exercise their capacity. In this regard, the CRPD Committee has implored Kenya to eliminate all forms of substituted decision-making regimes and replace them with a system of supported decision making, in tandem with its general comment on equal recognition before the law.²⁴⁷ The nature of support that would be required in the context of access to justice is not stipulated by the CRPD. Nonetheless, the CRPD Committee recognises that such support may be formal or informal.²⁴⁸ For instance, in Kenya, support in the identification of the preferred representative of a person with a mental disability in court may be offered through ‘peer support, advocacy, help with communication, and even the deferral of decisions to a trusted person’.²⁴⁹ Ultimately, the mechanism that is adopted should ensure that the person with a mental disability remains the primary decision-maker whilst they appoint another person or people to represent them in court proceedings.

4.4 BARRIERS TO ACCESSING LEGAL AID AND ASSISTANCE

The legal system in Kenya is adversarial in nature, which means that the courts arrive at a decision by allowing both parties in a suit to present their submissions. Therefore, the parties should have either legal knowledge or legal representation. One of the disadvantages of such a system is that the laws and procedures that are employed are often too technical for indigent persons. Additionally, the services of lawyers are often too expensive. In this regard, PWDs can only be saved from the rigors and costs of the system through accessing free legal aid. However, this is hampered by several impediments.

²⁴⁶ CRPD Committee, ‘Consideration of reports submitted by States parties under article 35 of the Convention, initial reports of State parties due in 2010: Kenya’ (28 July 2014) UN Doc CRPD/C/KEN/1 para 126.

²⁴⁷ CRPD Committee, ‘Concluding observations in relation to the initial report of Kenya’ (n 226) para 24.

²⁴⁸ CRPD Committee, ‘General Comment No 1 Article 12: Equal recognition before the law’ (19 May 2014) UN Doc CRPD/C/GC/1 para 15.

²⁴⁹ J Craigie, ‘A fine balance: Reconsidering patient autonomy in light of the UN Convention on the Rights of Persons with Disabilities’ (2015) 29 *Bioethics* 398, 399.

The first, and perhaps the major, impediment to accessing legal aid services in Kenya is the issue of poverty. A majority of Kenyans, including PWDs, are unable to access legal services due to socio-economic factors.²⁵⁰ This is further compounded by the expensive nature of legal services provided by private practitioners and the payment of court fees which is a requirement when instituting proceedings in court. Secondly, the exclusion of PWDs from mainstream justice processes, coupled with exorbitant legal fees, undermines their ability to participate effectively in the justice system. As a result, PWDs remain unaware of their rights, lack knowledge of the court system, or experience unending frustrations while seeking to access justice.²⁵¹ Thirdly, despite the enactment of the Legal Aid Act, and the subsequent adoption of the NAP, the government, through the NLAS, has not put in place disability-specific interventions or prioritised investments relating to free legal aid for PWDs.

This failure could be attributed to two factors. Firstly, although the NAP recognises the various national and international frameworks that place an obligation upon Kenya to enhance access to justice, it does not include the CRPD and the PDA despite their express provisions on the same.²⁵² Secondly, the development of the NAP did not involve consultations and participation of PWDs and the organisations that advocate for the inclusion of PWDs. This is evident from its recognition of the partners that were directly involved in the development of the action plan.²⁵³ As illustrated in chapter two, the participation of PWDs is an essential component of enhancing access to justice, including in the development of legal aid schemes. As a result of this failure, the CRPD Committee has expressed its concerns about the lack of provision of free legal aid for PWDs.²⁵⁴ It has also expressed concerns that mediation, conciliation and other traditional dispute resolution mechanisms prevail in claims by PWDs.²⁵⁵

Gibson contends that article 13 of the CRPD should be read to include a right to legal aid, at least for cases involving breaches of the

²⁵⁰ National Action Plan on Legal Aid (NAP) (2017-2022) 12.

²⁵¹ *ibid.*

²⁵² *ibid* 8 and 11.

²⁵³ *ibid* 36.

²⁵⁴ *ibid* 25.

²⁵⁵ CRPD Committee, 'Concluding observations in relation to the initial report of Kenya' (n 226) para 9.

human rights referred to in the CRPD.²⁵⁶ She presents an important point about the need for radical reform of procedural mechanisms to accommodate PWDs who wish to assert and enforce their legal rights. The CRPD Committee failed to provide clarity on the place of legal aid in fulfilling article 13 when it had the opportunity to do so.²⁵⁷ Despite this omission, other mechanisms such as the African Court on Human and Peoples' Rights have affirmed the obligation of states to provide legal aid.²⁵⁸ As the case may be, the obligation of Kenya to provide legal aid for PWDs cannot be contested. This is because further to ratifying the CRPD and other instruments, it has established a national legal aid scheme which should be inclusive for all, including PWDs. As argued in the previous chapter, all that may be required is taking measures such as establishing a disability-specific programme within the NLAS.

4.5 LACK OF KNOWLEDGE ON THE JUSTICE NEEDS OF PWDs

The second paragraph of article 13 of the CRPD requires appropriate training of those 'working in the field of administration of justice'. As illustrated in chapter two, the CRPD Committee has placed a specific emphasis on the need for training of the judiciary, legal professionals and court staff in its recent concluding observations,²⁵⁹ including to Kenya.²⁶⁰ This has also been recognised on its General Comment No 2 on article 12 of the CRPD.²⁶¹ It is noteworthy that such training is necessary for the elimination of the attitudinal barriers that PWDs face when dealing with justice sector personnel. For instance, persons with hearing impairments can only communicate effectively with people who have knowledge of sign language. For persons with psychosocial, intellectual and visual disabilities, the frontline workers in the courts should be able to understand the reasonable accommodations that may be required to be able to assist them.

²⁵⁶ F Gibson, 'Article 13 of the Convention on the Rights of Persons with Disabilities: A right to legal aid?' (2010) 15 Australian Journal of Human Rights 123, 123-131.

²⁵⁷ BD Mezmur, 'A step to zero attacks: Reflections on the rights of persons with albinism through the lens of X v United Republic of Tanzania' [2018] Africa Disability Rights Yearbook 4.

²⁵⁸ *Onyango & Others v Tanzania* Application 006/2013 (Judgment) (2016) paras 181 and 182.

²⁵⁹ See para 2.4.6.

²⁶⁰ CRPD Committee, 'Concluding observations in relation to the initial report of Kenya' (n 226) 25.

²⁶¹ CRPD Committee, 'General Comment No 2' (n 240) para 7.

A key barrier that has been identified in Kenya is the lack of justice sector personnel with sufficient knowledge, training and awareness to fully address the legal issues facing PWDs, particularly those with hearing, mental and psycho social disabilities.²⁶² These personnel lack the capacity to identify the appropriate support that needs to be put in place to ensure effective participation of PWDs in the justice system. This makes it difficult to fulfil their duty to address the needs of vulnerable groups in society as mandated by the Kenyan Constitution.²⁶³ This often leads to ignorance which results to stigmatisation and stereotyping against PWDs.

Generally, lack of capacity to accommodate PWDs flouts the state obligation to provide support for PWDs to access the justice system.²⁶⁴ Larson argues that access to justice for PWDs can be improved by training advocates and other stakeholders on disability inclusion in the justice system.²⁶⁵ Such training will improve the level of awareness on laws and policies on disability rights amongst the stakeholders, as well as foster effective personal and professional interactions between them and PWDs. This, in turn, shall on the one hand empower PWDs who access such training to become better advocates for themselves and other PWDs, and on the other hand help those without disabilities to become better advocates for the rights of PWDs. In his view, training advocates is a more efficient and effective way to promote access to justice for PWDs, as opposed to simply developing legal framework to address the challenges. With respect to legal training, the author acknowledges that several law schools around the world have begun to embraced better advocacy as a teaching goal, but he proposes a more wholistic approach that takes into consideration the needs of those who have significantly different needs such as PWDs.

Notably, several law schools and other institutions in Kenya have included disability rights studies on their curriculum. However, such training should be incorporated in institutions where trainees are more likely to work in the justice sector. Unfortunately, such institutions,

²⁶² KNCHR, 'A report to the Committee on the Rights of Persons with Disabilities' (n 213) 16.

²⁶³ PDA s 23(1).

²⁶⁴ CRPD art 13.

²⁶⁵ DA Larson, 'Access to justice for persons with disabilities: An emerging strategy' (2014) 3 Laws 220, 238.

such as the Kenya School of Law which trains judges, advocates and paralegals, do not train on disability inclusion in the justice system. As such, the proposed strategy will be an important step towards enhancing access to justice for PWDs in Kenya. On the initial state report to the CRPD Committee, the government committed to ensure effective training of personnel in the national justice system and to sensitise the public and other relevant actors on the rights of PWDs and ways of handling cases affecting PWDs.²⁶⁶ Commendably, this process has commenced, following the development of the judiciary's disability mainstreaming policy.²⁶⁷

4.6 CONCLUSION

This chapter has painted the picture of the barriers that PWDs face in accessing the justice system in Kenya. It has demonstrated that despite the existence of a strong framework on the right, the situation on the ground and in practice is different. As a consequence, multiple barriers impede the ability of PWDs to address their justice needs. Having achieved this, the next chapter shall explore the steps that Kenya can take to enhance access to justice for PWDs moving forward.

²⁶⁶ CRPD Committee, 'Concluding observations in relation to the initial report of Kenya' (n 226).

²⁶⁷ Kenya Judiciary, 'Disability Mainstreaming Policy' (2016).

5.

CONCLUSION AND RECOMMENDATIONS

5.1 INTRODUCTION

This research has interrogated the extent to which the right to access to justice is guaranteed for PWDs in Kenya. It proceeded with the assumption that despite the existence of strong legal frameworks and principles on access to justice for PWDs, the full exercise of the right is hampered by barriers in the justice system. Chapter two of the research conceptualised what access to justice entails for PWDs, drawing inspiration from the CRPD, while chapter three highlighted the national legal framework on access to justice. In chapter four of this study, the hypothesis has been established that in practice, PWDs face difficulties in accessing justice in Kenya due to various barriers. This chapter revisits the main findings of the research and offers recommendations on the same.

5.2 ACCESSIBILITY AND REASONABLE ACCOMMODATION IN THE JUSTICE SYSTEM

It has been found that Kenya has not fulfilled its legal obligations of making all places, programmes and services accessible for PWDs. Some basic challenges, such as access to the physical infrastructure in which justice is administered, access to the proceedings in court and the need to secure a right of audience before courts, remain to be addressed in Kenya. In this regard, the judiciary should take effective steps to reduce the obstacles that hinder public access to information, ensure proximity and physical access to courts, and take effective steps to ensure that it remains open and available to all who seek its assistance. This creates a need to provide reasonable accommodations, specifically for PWDs

who interact with the justice system.²⁶⁸ A crucial difference between reasonable accommodation and accessibility is that while reasonable accommodation is an individualised response, accessibility measures are designed to accommodate groups of PWDs, such as making information available electronically for persons with visual impairments, providing sign language interpretation for persons with hearing impairments, building suitable ramps for persons with physical disabilities, or a combination of all these.²⁶⁹

5.3 THE SHIFT FROM SUBSTITUTED DECISION MAKING TO SUPPORTED DECISION MAKING

It has been found that the legal framework that operationalises Kenya's civil and criminal procedures equates mental capacity to legal capacity, such that the absence of mental capacity justifies the limitation of legal capacity in court, contrary to the requirements of the CRPD.²⁷⁰ The CPR, in particular, disregard support and maintains substituted decision making.²⁷¹ Whilst the CRPD provides that the primary consideration should be the will and preference of a person with mental disability,²⁷² Kenya adopts the medical approach to mental disability, informed by the 'best interest' principle.²⁷³ Article 12(3) enjoins Kenya to put in place measures to ensure that support is given to PWDs to exercise their capacity, mainly by replacing substituted decision making requirements with supported decision making.

²⁶⁸ CRPD Committee, 'General Comment No 2 Article 9: Accessibility' (22 May 2014) UN Doc CRPD/C/GC/2 para 26.

²⁶⁹ *ibid.*

²⁷⁰ Convention on the Rights of Persons with Disabilities (adopted 13 December 2006, entered into force 3 May 2008) 2515 UNTS 3 (CRPD) art 12.

²⁷¹ CPR order 32.

²⁷² CRPD art 12(4).

²⁷³ *ibid.*

5.4 ACCESS TO LEGAL AID

The research has found that PWDs in Kenya do not have effective access to legal aid and legal representation. A majority of Kenyans, including PWDs, are unable to access legal services due to socio-economic factors.²⁷⁴ This is further compounded by the expensive nature of legal services provided by private practitioners and the payment of court fees which is a requirement when instituting proceedings in court. Further, the exclusion of PWDs from mainstream justice processes, coupled with exorbitant legal fees, undermines their ability to participate effectively in the justice system. As a result, PWDs remain unaware of their rights, lack knowledge of the court system or experience unending frustrations while seeking to access justice.²⁷⁵ Also, despite the enactment of the Legal Aid Act, and the subsequent adoption of the NAP, the government, through the NLAS, has not put in place disability-specific interventions or prioritised investments relating to free legal aid for PWDs. To address these issues, the NLAS and other providers of legal services should come to grips with the concerns of PWDs and undertake meaningful consultations with them to understand how legal information and advice can be provided in an accessible manner.

5.5 RECOMMENDATIONS

Given the diversity in the requirements of PWDs, and since corresponding accommodation needs often vary, it is necessary for Kenya to ensure that the justice system is accessible to PWDs as a whole, or, at a minimum, to specific categories of PWDs. Despite the identified shortcomings, Kenya still has an opportunity to build a sustainable, coherent and effective framework that would enhance access to justice for PWDs. Generally, in enhancing access to justice for PWDs, Kenya needs to take a wholistic approach which involves several legislative, institutional and other measures.

²⁷⁴ NAP 12.

²⁷⁵ *ibid.*

Legislative measures

The government of Kenya, through parliament, should:

1. Fasttrack the review of the PDA and bring it into line with the provisions of the CRPD and the human rights-based approach to disability.²⁷⁶ Among other things, the reviewed legislation should define the principle of reasonable accommodation in all areas, including access to justice, in line with article 2 of the CRPD. Further, the legislation should ensure legal recognition of the denial of reasonable accommodation as a form of discrimination.
2. Ensure adequate processes in the parliament to enact various bills regarding the rights of PWDs which are pending approval. This includes the review of the PDA which commenced in 2015.
3. Adopt measures to amend and/or repeal legislation which use derogatory terminology to refer to PWDs. Additionally, the resulting legislation should replace all forms of substituted decision-making regimes with a system of supported decision making in civil and criminal court procedures in line with the CRPD Committee's General Comment No 1 on equal recognition before the law.

The county assemblies in the 47 counties should:

1. Develop specific legal and policy frameworks for implementing the CRPD, with due regard to access to justice for PWDs at the county and municipal levels.
2. Generally, both the national and county assemblies should establish mechanisms to ensure meaningful consultations with PWDs and their representative organisations in the aforementioned processes, and in the discussion and adoption of relevant public policies in both levels. Without the active participation of Kenyan PWDs, attempts to design laws and policies which will achieve disability equality and inclusion in Kenya are unlikely to succeed since particular dimensions of the disadvantage and exclusion experienced by PWDs would go unaddressed.

²⁷⁶ CRPD Committee, 'Concluding observations in relation to the initial report of Kenya' (2015) UN Doc CRPD/C/KEN/CO/1 para 6.

Administrative measures

The government of Kenya, through its focal points on disability rights (the Ministry of East African Community, Labour and Social Protection and the NCPWD), should:

1. Raise awareness among the members of the national and county assemblies on the CRPD and ensure their involvement in implementing the concluding observations issued by the CRPD Committee with due regard to the requisite legislative measures.
2. Fasttrack the effective implementation of the National Plan of Action on implementation of the recommendations made by the CRPD Committee in its concluding observations with particular reference to its recommendations on the accessibility of the justice system.
3. Adequately address the current situation of access to justice and PWDs in the next state report to the CRPD Committee. The report should also indicate any progress that has been made since the initial state report was submitted to the CRPD Committee in 2014.
4. The NCPWD should implement the regulations of non-compliance as provided by the PDA by ensuring that adjustment orders are issued to non-compliant public buildings and public transport providers.

The KNCHR should:

- Monitor and report on the current situation of the accessibility of the justice system for PWDs, and support on-going initiatives to implement the CRPD including by conducting research on access to justice for PWDs in Kenya.

The NLAS should:

- Establish a free legal aid programme for PWDs who claim their rights, which should be designed with due regard to the needs of PWDs and be ran by personnel who are trained in accommodating PWDs.

Judicial measures

This research calls upon the judiciary to:

1. Through the Judicial Service Commission, develop mechanisms to provide effective procedural and age-appropriate accommodations in tandem with the requirements of article 13 of the CRPD.
2. Develop a capacity building strategy within the judiciary on the rights of PWDs, and train its personnel including lawyers, magistrates, judges, clerks and other frontline workers.
3. Adequately address the accessibility of the justice system by PWDs in court cases, including by issuing necessary orders to the Judicial Service Commission, the government and other justice stakeholders to ensure accessibility of their facilities and programmes in accordance with the legal obligations on the same.

Other measures

1. The Council for Legal Education, being the regulator of legal education in Kenya, should ensure that legal education institutions, including universities and the Kenya School of Law, incorporate disability rights law as part of their curriculum, in order to ensure that all legal professionals have an understanding on the rights and accommodation needs of PWDs.
2. The civil society should undertake strategic litigation on the accessibility of the justice system in Kenya.

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