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THE JUDICIAL SERVICE ACT

(*No.* 1 *of* 2011)

THE STATE OF THE JUDICIARY AND THE ADMINISTRATION OF JUSTICE ANNUAL REPORT 2014–2015

IN ACCORDANCE with the requirement under section 5 (2) (b) of the Judicial Service Act, 2011, the Chief Justice of the Republic of Kenya publishes the State of the Judiciary and the Administration of Justice Annual Report 2014–2015.

FOREWORD

The transformation of the Judiciary and reforms in the justice sector continue to register major successes. All the institutions in the justice chain are responding to the new imperatives demanded by the Constitution, 2010, and whereas challenges still abound, steady progress is being made. This report on the State of the Judiciary and the Administration of Justice, 2013/2014 discusses the progress made this far and issues that require further intervention.

For the Judiciary in particular, the FY2013/14 was a successful but challenging one. In the first part of the year, the Judicial Service Commission (JSC) investigation unearthed far-reaching governance, management and integrity problems that led to the dismissal of the Chief Registrar of the Judiciary. This action by JSC provoked resistance from the National Assembly and the Executive resulting into an attempt, though ultimately unsuccessful, by the two Organs of State to disband JSC. The elaborate disciplinary processes JSC instituted, and the resultant friction in inter-agency relationship, took valuable Judiciary time in the first part of the year.

The second half of the year was characterized by a review of systems, policies, and processes to institutionalize accountability and restore integrity and competence in the running of the institution, particularly at the management level. A new Chief Registrar of the Judiciary, Ms. Anne Amadi, was appointed to oversee this process. Since then, tremendous progress has been made in this regard. That is why large segments of this Report are operational in nature, detailing processes and actions that have been taken to correct course.

Despite these challenges, the Judiciary continued to implement the Judiciary Transformation Framework. Several policies and manuals have been developed; human resource and financial systems, procedures and processes have been institutionalized; court construction and rehabilitation works continue in over 100 sites throughout the country; the training programs are running well; the reduction in case backlog has been accelerated; partnership with other government agencies, including County Governments, is evolving well; access to justice intervention initiatives are on course, including recruitment of more judges, increase in number of mobile courts, and establishment of more high court stations. Most importantly, as is discussed at length in this Report, very large and sound jurisprudence is emerging from our courts, especially on Elections, Devolution, Bill of Rights, Family and Labour Law.

The Judiciary shall continue to build on these gains and improve on service delivery standards to the public. For the independence of the Judiciary to be secured as contemplated by the Constitution, it is vital that Parliament urgently enacts the Judiciary Fund Bill, which we have already forwarded to the National Assembly. I also wish to draw the attention of Parliament to the recommendations of the National Council on the Administration of Justice (NCAJ) Special Working Committee on Land, which is contained in this Report.

Let me thank the State of the Judiciary and Administration of Justice Report Preparatory Committee comprising Duncan Okello, Kwamchetsi Makokha, Abdul Omar, Dr. Masha Baraza, Moses Maranga, Katra Sambili, Lyna Sarapai, Lorraine Ogombe, Martha Mueni, Anthony Mwicigi, John Muriuki and the individual Directorates for the effort and dedication in the preparation of the background work for this publication.

I wish to thank the Kenyan taxpayers for their continued generous support to the Judiciary, as well other development partners including the World Bank, Ford Foundation, UNDP and GIZ. I also wish to thank all the staff of the Judiciary as well as heads of all the NCAJ agencies for the achievements we have made during the year.

HON. DR. WILLY MUTUNGA, D. Jur, SC, E.G.H.,
Chief Justice and President of the Supreme Court of Kenya
Chairman, National Council on the Administration of Justice.

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LIST OF ABBREVIATIONS

Auctioneers Licensing Board	ALB
Case Clearance Rate	CCR
Chief Registrar of the Judiciary	CRJ
Community Service Order	CSO
Continuous Judicial Education for judicial officers	CJE
Council of Governors	COG
Court Users Committees	CUCs
Deputy Chief Justice	DCJ
Judicial Service Commission	JSC
Judiciary Ombudsperson Office	OJO
Judiciary Training Institute	JTI
Judiciary Transformation Framework	JTF
Judiciary Transformation Support Project	JTSP
Kenya Association of Manufacturers	KAM
Kenya Law Reform Commission	KLRC
Kenya Revenue Authority	KRA
Learning and Training Committee	LTC
Medium Term Expenditure Framework	MTEF
National Council for Law Reporting	NLRC
National Council on the Administration of Justice	NCAJ
National Security Advisory Council	NSAC
National Transport Safety Authority	NTSA
Office of the Director of Public Prosecutions	ODPP
Performance Appraisal System	PAS
Performance Management System	PMS
Refugee Consortium of Kenya	RCK
Salaries and Remuneration Commission	SRC
State of the Judiciary and Administration of Justice Reports	SOJARs
The Judiciary Performance Improvement Project	JPIP

CHAPTER ONE

LEADERSHIP AND MANAGEMENT

1.1 Introduction and Context

Leadership and management arrangements for the Judiciary are provided for in the Constitution and the Judicial Service Act, 2011. The Chief Justice is the head of the Judiciary, President of the Supreme Court, Chairperson of the Judicial Service Commission (JSC) and Chair of the National Council on the Administration of Justice (NCAJ). The Deputy Chief Justice is the deputy head of the Judiciary and Vice-President of the Supreme Court, while the Chief Registrar of the Judiciary (CRJ) serves as the chief administrator and accounting officer of the Judiciary, and is also secretary of the Judicial Service Commission and the National Council on the Administration of Justice.

As Head of the Judiciary[1], the CJ exercises general direction and control over the Judiciary, and also acts as the link between the institution and other organs of State. The Chief Justice represents the Judiciary nationally and internationally, which entails various coordinating and administrative responsibilities, and is also required to perform numerous constitutional and statutory duties and functions. Operational and management leadership of the Judiciary is bestowed upon the Chief Registrar of the Judiciary, who is responsible for day-to-day operations.

[1] *The Office of the Chief Justice, which includes the Deputy Chief Justice, provides policy leadership, including creating platforms for the implementation of initiatives designed to achieve various objectives, and exercises oversight over administrative functions. Leadership and management arrangements are organized around leadership and management teams at every station, then rise up to the National Leadership and Management Committee. Additionally, the Judiciary Leadership Advisory Council was constituted and launched to advise the Chief Justice.*

The JSC continued to promote and facilitate the independence and accountability of the Judiciary and made important steps in entrenching the efficient, effective and transparent administration of justice.

1.2 Leadership and Management Outlook, 2013/2014

The period under review was characterised by the performance of constitutional, statutory, administrative and other functions bestowed on the various leadership and governance offices in the judiciary. From a leadership perspective, several rules were gazetted, policy initiatives launched, several admissions of advocates and swearing in ceremonies conducted. From a management perspective, the period was dominated by audit reviews and a purge on corruption, and a codification of several policies and manuals.

1.2.1 Policy Initiatives

During the reporting period, a number of policy and administrative initiatives were undertaken. The Chief Justice appointed three taskforces to research, investigate and generate recommendations on seminal areas of the law, policy and the administration of justice. He also issued practice directions and gazetted a number of rules on the advice of the Rules Committee.

1.2.1.1 Taskforce to Develop Bail and Bond Policy Guidelines

In May 2014, the Chief Justice appointed the 'Taskforce to Develop Bail and Bond Policy Guidelines' (Bail and Bond Taskforce) with Lady Justice Lydia Achode as chair. It was tasked with developing a National Bail Policy to guide police, prosecution, probation, judicial and prison officers on the application and administration of bail and bond; and make appropriate recommendations on legislative and regulatory

amendments necessary for addressing inconsistencies and enabling fair administration of bail and bond measures. The Office of the Deputy Chief Justice, in conjunction with the National Council for the Administration of Justice, supported the Task Force in the development and implementation of its work plan. The task was completed and the Bail and Bond Policy document is now in place.

1.2.1.2 Taskforce to Develop Sentencing Policy

In June 2014, the Chief Justice appointed and gazetted a taskforce to review past sentencing patterns, policies and outcomes; report on how to reduce unwarranted disparity, increase certainty and uniformity; and promote proportionality in sentencing; and create a roll out plan for suggested interventions. Justice Mbogholi Msagha is chair of the task force whose secretariat is based at the Judiciary Training Institute. The taskforce has completed its activities and its report is about to be launched.

1.2.1.3 Sexual Harassment Policy

A task force was set up to develop a sexual harassment policy for the Judiciary. The Judiciary Training Institute is leading this process and The Draft Sexual Harassment Policy 2014 is already developed and is now pending formal adoption by the JSC.

1.2.1.4 Ceremonial/Statutory/Administrative Duties

During the reporting period, the Chief Justice issued at least 30 Gazette Notices, which included the gazettement of the Sexual Offences Rules. The Rules Committee also considered the draft Witness Protection Rules of Court, Court of Appeal Rules; HIV/AIDS Tribunal Rules; Children Rules; Marriage Rules; and Kadhis Court Rules

The Mediation Accreditation Committee was gazetted pursuant to Article 159 of the Constitution and s. 59(A) of the Statute Law (Miscellaneous Amendments) Act, 2012, that empower the Chief Justice to establish the Mediation Accreditation Committee. The committee will institutionalize the role of alternative dispute resolution in order reduce case backlog and enhance speedy and affordable access to justice. The functions of the committee are: to determine the criteria and propose rules for the certification of mediators, maintain a register of qualified mediators, enforce a code of ethics for mediators and set up appropriate training programmes for mediators.

During the reporting period, a total of 927 advocates were sworn in. Other major ceremonial events that occurred in the reporting period are listed in Table 1.1 below.

Table 1.1 Key Events Presided Over by the Chief Justice, 2013 / 2014

Date	Event
July 1, 2013	Launch of the Court of Appeal in Kisumu
July 2, 2013	Launch of the High Court at Busia
July 4/5, 2013	Launch of the High Court Building and inauguration of Court of Appeal at Malindi
July 31, 2013	Swearing in of additional members of the Judges and Magistrates Vetting Board
August 5, 2013	Swearing in of the chair of the Ethics and Anti-Corruption Commission
August 6, 2013	Swearing in members of the Standards Tribunal
September 6, 2013	Swearing in of a member of the HIV/Aids Tribunal
October 4, 2013	Launch of the Advocates Disciplinary Tribunal
January 7, 2014	Swearing in of members of the Kenya Law Reform Commission
January 13, 2014	Swearing in of the Chief Registrar of the Judiciary
January 29, 2014	Launch of the Political Parties Tribunal
March 29, 2014	Swearing in of KRA and Transition Authority members
April 14, 2014	Swearing in of two Commissioners of the Judicial Service Commission
April 30, 2014	Swearing in of a Commissioner of the Salaries and Remuneration Commission

Appointment of Judiciary Working Committee on Tribunals

The Constitution places all independent tribunals under the Judiciary. During the reporting period, the Chief Justice appointed a Judiciary Working Committee on the Transition and Restructuring of Tribunals headed by Justice Kathurima M'noti of the Court of Appeal and its report is expected before the end of December 2015.

1.3 Inter-Governmental Relationships

1.3.1 The Executive: Security Agencies

The Judiciary has taken leadership in fostering intergovernmental relations through the promotion of dialogues. In this regard, a number of meetings were held with various government agencies. In May 2014, the Chief Justice held consultations with the National Security Advisory Council (NSAC) on bail and terrorism and in July 2014, the Judiciary Training Institute held a one- day symposium on the challenge of security and Bill of Rights that brought together judicial and other law enforcement agencies. In February 2014, the Chief Justice addressed the Members of County Assembly Forum in Mombasa on the administration of justice within the context of devolution.

1.3.2 Parliament

The engagement with both Houses of Parliament witnessed the holding of several meetings with the various parliamentary committees including the Justice and Legal Affairs Committee, as well as the Budget Appropriations Committee of the National Assembly. The budgets for the Judiciary, Judiciary Training Institute and Judicial Service Commission for 2014/2015 were presented, outlining expenditure trends, proposed Judiciary Budget Allocation for FY 2014/2015, Composition of Recurrent Budget for FY 2014/2015, Judiciary

Development Budget FY 2014/2015, Key Outputs, JSC Vote Estimates for FY 2014/2015 and key areas of focus for JSC and JTI. The Committee raised several concerns over the relatively high costs of court constructions, uncertainty over the position of leases and importance of having in place a Judiciary Fund.

It was proposed that there is need for regular informal meetings between the Committee and Judiciary. The Committee proposed to have a retreat with the Judiciary to discuss areas of collaboration in as far as budget implementation and audit is concerned. The Committee reaffirmed its commitment to support the Judiciary budget and pledged to work closely with the Judiciary in enabling fulfillment of its core mandate of administering justice to all.

The Judiciary held a one day meeting with the Senate to discuss and understand the constitutional mandates of the two institutions and strengthen their working relationship.

1.3.3 County Governments

During the reporting period, the leadership of the Judiciary visited several Counties and paid courtesy calls on 10 Governors. The Chief Justice paid courtesy calls on the Governors of Kiambu, Nakuru, Bomet, Migori, Homa Bay, Kisumu, while the Deputy Chief Justice (DCJ) visited the Governor of Machakos who made a commitment to donate land to facilitate the expansion of Machakos Law Courts, the building of a fully serviced inn for judges, and construction of residential houses for judicial officers working in the county. The Chief Registrar visited the Governors of Trans Nzoia, West Pokot, Bungoma and TaitaTaveta. In November 2014, the Chief Justice also held meetings with the Council of Governors (CoG) on the establishment of Courts to deal with County matters.

The court visits opened up opportunities for partnership with county governments. In all the stations visited, the Judiciary leadership met Governors of the respective counties, who undertook to provide land for the expansion of courts within the county, helping the Judiciary acquire title documents for the land on which the courts are currently built and also to include in their budgets some funds to furnish the courts. The Governors also indicated their willingness to partner with the Judiciary in the establishment of courts in the counties.

1.4 Court and Prison Visits

Close supervision of the court stations by the leadership of the Judiciary is critical in monitoring service delivery and staff welfare. During the period under review, the Chief Justice, the Deputy Chief Justice and the Chief Registrar made several visits to monitor and evaluate steps being taken to implement the Judiciary Transformation Framework and the challenges these activities faced. The CJ undertook visits to Gatundu, Bomet, Migori and Homa Bay Law Courts. The DCJ visited Eldoret, Bungoma, Kapsabet, Kibera, Mombasa, Kiambu, Nakuru, Machakos, and Tawa Law Courts.The CRJ visited courts in Mombasa, Shanzu, Kilifi, Malindi, Kapenguria, Kitale, Sirisia, Kimilili, Webuye, Bungoma and Butali.The DCJ also visited the prisons at Eldoret, Bungoma, Kapsabet, Shimo la Tewa and Nakuru.

The major concerns that emerged during these visits included staff shortage, lack of furniture, inadequate space, delayed staff promotions or conformations, the need to rationalize staffing in the Judiciary and implementation of proper mechanisms of recruitment and conditions of service. All these issues are being addressed.

1.4.1 Pilot Prisoners Legal Awareness Clinics Project (PLAC)

During the prison visits, a number of urgent and serious challenges faced by prisoners were identified, and which need attention. As a result, a multi-sectoral 'Prison Legal Awareness Clinic' project was developed to enhance access to justice by bridging the procedural knowledge gap for remandees, especially those who are unrepresented. The objective of the Project is to enhance the knowledge of remandees on the criminal justice process and procedures and their relevant rights in that regard.

The project partners will work with a select group of law students to set up an initiative that will enlighten prisoners on procedural aspects of the criminal justice system and their rights in this regard. The Judiciary will generate information materials for the remandees and provide logistical support for the implementation of the clinics at selected prisons.

The Office of the DCJ will implement this project with the Moi University School of Law, Riara Law School, Strathmore Law School, University of Nairobi School of Law, the Legal Resources Foundation and the Kenya Prisons Service. The project will run on a pilot basis in the following prisons: Nairobi Medium, Langata Women's, Kwale, Malindi, Nakuru Women's and Eldoret Women's.

1.5 Governance

In the first half of the period under review, the JSC investigated allegations of financial, procurement and human resource mismanagement against the then Chief Registrar of the Judiciary, Gladys Boss Shollei. The findings of these investigations led to the removal of the former CRJ from office[2]. The position was advertised, interviews conducted and on January 13, 2014, Ms. Anne Atieno Amadi was sworn in as the Chief Registrar of the Judiciary.

[2]*Report of the Investigation into Allegations against Chief Registrar of the Judiciary Gladys Boss Shollei, on October 18, 2014. (www.judiciary.go.ke)*

The second half of the reporting period was therefore a season for course correction. The new Chief Registrar of the Judiciary was tasked with the responsibility of streamlining the administrative and operational processes of the institution and restoring integrity and competence to these processes.

Informed by the audit reports that had been undertaken at the invitation of the Chief Justice, steps were taken to create and strengthen institutional policies, operational procedures, and accountability frameworks for the Judiciary while seeking the endorsement of the policy and management actions by the JSC. During the period under review, the new Chief Registrar appeared before the various Committees of the National Assembly including the Budget and Appropriations Committee, the Parliamentary Public Accounts Committee and the Parliamentary Departmental Committee on Justice and Legal Affairs to account for financial and administrative operations in the Judiciary and apprise the Committees of the systems being put in place for better institutional management.

1.5.1 Profiling Institutional Gaps and Challenges

In the period under review, the Judiciary received three key audit reports:

1. Judiciary's Internal Risk Management and Audit Report on Pending Bills.
2. Auditor General's Report for the FY 2010- 2011 and 2011-2012
3. Special Audit Report on the Judicial Service Commission and the Judiciary bythe Kenya National Audit Office.

These reports made very indicting revelations on the financial management in the Judiciary, and confirmed underlying concerns that prompted JSC to take disciplinary action against the former CRJ. JSC Commissioners, the CRJ, Directors and acting Directors appeared before the Parliamentary Public Accounts Committee (PAC) to respond to the audit queries.

Upon receiving the Auditor General's report, the CRJ considered it critical to engage in dialogue on the report at two levels:

(i) Three-day dialogue for Judiciary Senior Management June 10 and 15, 2014.
(ii) Two-day dialogue for Judicial Service Commission between June 18 and 20, 2014.

The senior management forum identified the weaknesses in the structures, systems and operational processes in the Judiciary and drew a comprehensive action plan on each issue for each directorate. The engagement of JSC focused on re-orienting the commission on its governance oversight role and to endorse the plan of action adopted by the management.

1.5.2 Strategy on Streamlining Financial Operations in the Judiciary

The Judiciary developed annual work plans for stations and spending units aligned to the budget and the Judiciary Transformation Framework (JTF). This was aimed at reducing waste and meeting the specific needs of end users. Each court and directorate took part in the preparation of

work plans and budgets for the FY2014/2015. This exercise informed the Budget Proposal Estimates presented to Parliament on May 19 and 20, 2014.

Consultative forums with court stations and spending units within the headquarters were held to develop budgets that were directly linked to the work plans and the JTF. Work plans for 115 court stations and 16 spending units were developed and submitted to JSC for approval. A Master Work Plan Report for the FY 2014/15 for all the spending units and the court stations linked with the goals and objectives of JTF (2012 – 2016) was compiled and submitted to JSC.

The Judiciary institutionalized weekly budget meetings aimed at tracking spending, addressing financial challenges and ensuring probity; bi-weekly meetings where Registrars and Directors deliberated on the framework of action, monitored and re-evaluated priorities and checked for and resolved problems. Quarterly meetings with the Registrars and Directors were introduced for continuous planning and evaluation to plan and track changes; and between management and JSC for the effective administration of the Judiciary. The objective of the meetings was to monitor and ensure effectiveness in the implementation of the transformation agenda, JSC policies, the Judiciary Action Plans and Programmes.

Through these meetings, the Judiciary was able to collectively identify the challenges and gaps, streamline processes and agree on specific action points while owning the agenda for the benefit of the Institution.

1.5.3 Pending Bills Review

During the period under review, the Judiciary instituted an audit of unpaid/pending bills was instituted to establish why there were occasional difficulties in meeting financial obligations. The Judiciary Internal Special Audit Report on Unpaid Bills revealed that the institution was in debt to the tune of KSh. 173,000,000 arising from irregular procurements. The disciplinary cases facing the then Deputy Chief Registrar of the Judiciary and three directors were partly linked to the findings of this report. The Judiciary created a committee with representatives from the Supply Chain Management Directorate, the Directorate of Finance and Accounts to verify the pending claims for payment.

Consequently, the Judiciary was able to pay KSh. 132,000,000, monitor expenditure and ensure effective implementation of activities. It also institutionalized budget meetings, which were held weekly to track spending, address financial challenges and ensure propriety in all financial dealings.

1.5.4 Reforms in Procurement

In order to streamline financial management and procurement processes, a Procurement Plan was developed and adopted, as was the Financial Management Manual. And in line with the Public Procurement and Disposal Act, 2005, the Judiciary Tender Committee was reconstituted.

1.5.5 Leases and contracts

Several leases and contracts were irregularly entered into. A comprehensive review of these agreements was undertaken and those that were found to have been irregular, inflated, or technically improperly drawn were terminated. This affected, among others, Elgon House, Rahimtulla Towers, and AFC Buildings across the country.

However, the demand for more space is still remains given the big increase in staff numbers. For example, the number of Judges rose from 47 in 2011 to 130, without a commensurate increase in space for their chambers and courtrooms. An additional 168 Magistrates were hired, all requiring space.

Initial decisions to lease premises for the expanded Court of Appeal in Nairobi encountered significant integrity challenges in the procurement process, resulting in disciplinary action against key Judiciary staff. In 2012, a Cabinet decision required the Kenya Revenue Authority (KRA) to transfer Forodha House to the Judiciary. Consultations have been ongoing and KRA commissioned an evaluation of the property to facilitate the transfer. The takeover of Forodha House would go a long way in alleviating the space challenges currently facing the institution in Nairobi.

1.6 Strengthening Institutional Policies and Procedures

The Special Audit of the Judiciary by the Auditor General[3] called for strengthening of systems, structures and policies for the management of the institution. In FY 2013/14, a number of key policies and manuals were finalized while the development of many others is in their final stages.

1.6.1 The JSC Charter

The Judicial Service Commission Charter sets out the principles, processes, standards and norms of the governing body. It was developed through an elaborate process and has been adopted as the guiding document governing the conduct of the Commission.

1.6.2 The Human Resource Policy Manual

The lack of an HR Policy Manual has been one of the major governance weaknesses in the institution. During the reporting period, the Judiciary Human Resource Manual and Related Administrative Policies and Procedures have been developed and adopted by the JSC. A staff skills audit that had been commissioned in 2012 was concluded, as well as a staff rationalization programme.

1.6.3 Transfer Policy

Transfers in the Judiciary have historically been a source of anxiety and grievance. The Judiciary Transformation Framework promised to have a transfer policy that would create predictability and minimize the use of transfers as an open- ended punishment tool. In the reporting period, a Transfer Policy for judges, judicial officers and judicial staff was developed through a consultative process. The policy was adopted by the JSC and is now fully operational for all level and cadres of employees.

[3] *Report of the Special Audit of the Judiciary by the Auditor-General*

1.6.4 Consolidated Procurement Plan

The Judiciary now operates with an approved Consolidated Annual Procurement Plan approved in accordance with the Procurement Regulations. Further, the Directorate of Supply Chain Management is in the process of preparing a Procurement Policies and Procedures Manual.

1.6.5 Pending Policies

The following policies have been developed and are in the final stages of validation pending their approval by the JSC in the FY2014/2015.

1. Draft Judiciary Training and Development Policy

2. Draft Disability Mainstreaming Policy
3. Draft Human Resource Strategic Plan
4. Draft Fleet Management Policy
5. Draft Information and Records Management Policy

1.7 Strengthening Accountability Frameworks for the Judiciary

1.7.1 Recruitment and Promotion of Judiciary Staff

Human resource management presented unique challenges for the Judiciary. Some of the issues as highlighted in the Special Audit Report include irregular recruitments and promotions, lack of job descriptions and irregular payment of allowances. The 36 members of staff who were irregularly promoted were re-designated.

The Directorate of Human Resource and Administration facilitated the recruitment, transfers, separation and confirmation of staff to various court stations. During the period under review, the staff rationalization exercise was concluded. The exercise covered all court stations and headquarters to address the recurring challenges relating to staff establishment.

1.7.2 Introduction of new pay-bill system

In collaboration with KCB and Safaricom Ltd, the Judiciary introduced the Paybill mode of payment of court fines and legal deposits, where litigants can conveniently pay fines or deposits. The money paid goes directly to the Judiciary KCB Account. The system is currently in use in ninety (90) of our courts and statistics indicate that there has been improvement in our revenue collection. Further, the Judiciary plans to have the Paybill system improved to cater for the users of Visa Cards.

1.8 Strengthening JSC Oversight on Judiciary Administration

The JSC restructured its committees and created the Administration of Justice Committee (AJC) and the Learning and Training Committee (LTC). The creation of the AJC was in recognition of the need to place the administration of justice at the core of JSC's functions. One of its main focus areas is reduction of case backlog. It is headed by Justice Aggrey Muchelule.

The Learning and Training Committee was also created to oversee training needs of the Judiciary. Their input will be important for the streamlining and implementation of training needs by the Judiciary Training Institute (JTI). They will also be responsible for spearheading the restructuring of JTI. It is chaired by Prof. Tom Ojienda.

1.9 Institutionalizing Performance Management

The mandate of the Directorate of Performance Management was to facilitate the institutionalization of performance management in the Judiciary as well as instilling a culture of result-based management. Some of the key outputs arising from the implementation of the activities were:

- Developing performance management and monitoring guidelines, training modules on performance contracting, monitoring, measurement and evaluation.
- Undertaking Judiciary Case Audit Survey
- Carrying out an Impact Evaluation Study, which provided baseline data and information in support of performance management.
- In collaboration with HR, the Directorate of Performance Management a developed draft Performance Appraisal System (PAS) Framework.
- Developing and sharing with JSC draft procedures on performance contracting, customer satisfaction, and Work Environment and Employee Satisfaction Surveys, Judiciary Strategic Plan Performance Appraisal, Monitoring and Evaluation.
- Developing the Judiciary Strategic Plan Roadmap

1.10 Public Engagement

10.1.1 Office of the Judiciary Ombudsperson

The Office of the Judiciary Ombudsperson Office (OJO) is a vital platform for interfacing with the public. OJO is mandated to process and resolve complaints by members of the public against Judiciary, complaints between Judiciary staff and complaints between the Judiciary staff against the Judiciary as an institution. It also plays an important public education role for the institution.

During the period under review, the OJO received 2000 complaints while 2551 cases were processed and closed. In order to enhance public access to information, the office ran a radio programme (Mizani ya Haki) on Radio Citizen. Fourteen (14) Radio shows were aired. OJO received complaints and suggestions from the public on delivery of justice through this programme. The programme was supported by GIZ.

The office also conducted spot checks in 27 court stations. The objective was to check on the running of court stations as per the Judiciary Transformation Framework. They were also intended to check on corruption issues.

Clinics were conducted in seven prisons and 16 court stations. OJO engaged the public and court users to gauge their level of satisfaction with service delivery by the Judiciary. Similarly, OJO participated in major Agricultural Society of Kenya Shows. This provided a good opportunity to engage with the public and other stakeholders. In all these ASK shows, OJO had a desk where staff explained complaints management procedures and received complaints from members of the public, which were duly processed.

The Judiciary Ombudsperson partnered with the Kenya National Human Rights Commission in complaints management by establishing a complaints referral mechanism. In these forums, partners in the justice chain discuss strategies of resolving complaints from the public. The members also receive the status of complaints referred to various partners. So far, this has had a positive impact on complaints resolution.

For the Office of the Judiciary Ombudsperson to be more effective will require additional resources; more staff including the creation of a counselling service; a strengthening of its legal regime; and further training of the Executive and Liaison Officers to be more responsive in complaints management.

10.1.2. Customer Care Training

The Office of the Chief Registrar of the Judiciary conducted five (5) one-day capacity building workshops for court customer care staff. Thirty two (32) stations benefited from the training and more will be covered in this continuous exercise. The objective is to increase awareness on the rights of our customers to seek court services and information on how to effectively serve the different interests of our clients, among others. This will improve Court Administration.

11.0 Stakeholders Collaboration

During the period under review, several stakeholder collaboration were undertaken within the context of the National Council on the Administration of Justice (NCAJ) as discussed in chapter four, as well as with individual agencies and institutions.

11.1 Refugee Consortium of Kenya (RCK)

A meeting was held with the Refugee Consortium of Kenya (RCK) to explore ways of pooling interpreters and ensuring they are available in all courts as and when needed. The initiative will also look into the issue of training of such interpreters.

11.2 National Transport Safety Authority (NTSA)

The Judiciary continued to collaborate with the National Transport Safety Authority (NTSA) in terms of providing magistrates and other court officers to mount courts on major highways in order to curb traffic offences on our roads and hence reduce road carnage. The mobile traffic courts were conducted in four phases: phase one began in August 2013 and ended in September, 2013; phase two began in November 2013 upto January, 2014; phase three began in March 2014 to June 2014; and phase four began in July and was to run up to December, 2014. The mobile traffic courts were called off in October as a result of an outcry from members of the public in parts of the country.

11.3 Engagement with academia

(a) Chief Justice's Legal Scholarship Initiative

As part of the Judiciary transformation process, the Chief Justice established a Legal Scholarship Initiative designed to encourage and promote the pursuit of knowledge and excellence in judicial practice. Judicial officers and staff from all cadres submit applications under the initiative; the applications undergo a rigorous assessment process resulting in the selection of suitable candidates for the scholarship. During the reporting period, Hon. Lorraine Ogombe, proceeded to study for Masters in law at the University of Washington School of Law in Seattle, USA.

(b) Strengthening the Relationship Between the Judiciary and the Academy

In August 2013, the Judiciary hosted two internationally acclaimed scholars, Prof. Ali Mazrui and Prof. Robert Martin. On 6th September, 2013, the Chief Justice handed over the Presidential Elections Petition, 2013 documents and materials to the Deans of all Law Schools for purposes of academic and scholarly inquiry.

12.0 Court Construction and Infrastructure

12.1 Court Constructions

As part of the transformation agenda, the Judiciary embarked on the construction of courts in different parts of the country. This, however, was faced with a number of challenges, including delays and apparent exaggeration of costs for some courts, which became the subject matter of audit queries and in some cases, the projects stalled altogether.

To address these challenges, the Chief Justice established the Infrastructure and ICT Committee chaired by the Registrar, Court of Appeal. The role of the Committee included overseeing the Judiciary's Master and Strategic Asset Plans, to consider and recommend infrastructural projects and information technology purchases for the Judiciary and to oversee the management and implementation of infrastructural and information technology projects and Judiciary's assets.

The other functions of the Committee included advising, recommending, facilitating and overseeing the purchasing, selling or leasing of assets for and of the Judiciary. The committee was also responsible for monitoring the effectiveness and implementation of management policies and procedures in respect of infrastructure and information technology matters, as well as matters relating to the maintenance, repair and replacement of buildings and other physical assets.

12.2 The Judiciary Performance Improvement Project (JPIP)

The Judiciary, in collaboration with JPIP, identified courts for rehabilitation through funding by World Bank. Kangema and Kitui were the pilot projects. Phase I of the rehabilitation works at Kangema and Kitui were completed and handed over to the Judiciary.

Inception reports and design layouts were prepared for: Engineer, Chuka, Kigumo, Molo, Nyando, Vihiga, Nyamira, Oyugis, Muhoroni and Tamu courts and rehabilitation works have commenced. Design layouts have been proposed for Kibera and Makueni court stations.

13.0 Conclusion and Outlook for 2014 / 15

The FY 2013/14 was characterised by streamlining of the governance and accountability arrangements. Considrable progress has been made in this regard and the ledaership of the Judiciary will ensure that these measures are followed through. The numnerous policy initiatives that also dominated the reporting period now enter into the implemttaion phase. These will require keen monitoring to ensure their success.

The Judiciary Fund, envisioned by Section 173 of the Constitution, is a critical factor in realizing its independence. The Judiciary has developed both the Judiciary Fund Regulations and Judiciary Fund Bill and submitted to Parliament for enactment. The development of these documents was participatory and drew participants from the Law Society of Kenya, National Treasury, Parliamentary Service Commission, the Kenya Law Reform Commission and representatives from the Judiciary. It is our hope that Parliament will move with speed to enact this legislation.

CHAPTER TWO

ACCESS TO JUSTICE

2.1 Introduction

Access to justice is both a fundamental constitutional right. Such is the importance of justice that, in the exercise of sovereign power, judicial authority ranks at par with executive and legislative authority.

Although judicial authority is derived from the people, it is exercised on their behalf through courts and tribunals in a system elaborated in the Constitution. Kenya's court system is hierarchical, with the Supreme Court at the apex, followed by the Court of Appeal below it, the High Court, the Environment and Land Court, the Employment and Labour Relations Court, the Magistrates' Courts, the Kadhi's Courts, Tribunals and Courts Martial.

2.2 Dispensation of Justice and Court's Performance

2.2.1 Background

Past State of the Judiciary and Administration of Justice Reports (SOJARs) have presented statistics on dispensation of justice and court's performance emerging from disparate information gathering techniques. Data collection has now improved given that performance management and

measurement has begun to take root as one of the tools for promoting accountability for results towards expeditious delivery of justice. Performance management and measurement has now become a framework for effective tracking and reporting progress on clearance and determination of cases; a mechanism for promoting efficiency in court registries; and a tool for focusing on initiatives that resonate with public expectations. This renewed focus is not only enabling all courts and employees to contribute to the overall better judicial performance, but is also aiding in improving accessibility and affordability of judicial services, as well as enhancing efforts to eradicate corruption in the Judiciary.

In the quest to continuously make informed policy decisions and for the Performance Management System (PMS) to be fully effective, timely, accurate and reliable data is critical. To this end, and in fulfillment of the undertaking that was given in the past two SOJARs to conduct a comprehensive case census, the Directorate of Performance Management conducted an audit on all pending cases in all courts between December 2013 and January 2014. Consequently, the results of the exercise, as contained in the Judiciary Case Audit and Institutional Capacity Survey, (JCAS) 2014, have been useful in scientifically guiding policy decisions, ranging from resource allocations to human resources deployments. In addition, the audit has been an invaluable instrument for deepening internal accountability.

The findings of the case audit (JCAS, 2014) now constitute the official definitive baseline data for the Judiciary and have provided the base for the trend analysis used in the subsequent sections of this report. Table 2.1 gives a comparison of what was reported by SoJAR 2012/13 and the findings of *Judiciary Case Audit and Institutional Capacity Survey (JCAS) of 2014*.

Table 2.1: Comparison of Pending Cases Between SoJAR 2012/13 and JCAS, 2014

Table 2.2 provides details for all the initiated and resolved cases as well as the Case Clearance Rate (CCR) for all the courts.

Table 2.2: Initiated Cases, Resolved Cases and the CCR by Court Type, FY 2013/14

Supreme Court	7	6	1
Court of Appeal	5,687	4329	1358
High Court	162,772	145,596	17176
Magistrate Court	485,976	274,649	211237
Kadhi's Court	3,318	1928	1390
Overall	657,760	426,508	231,252

COURT	INITIATED CASES	RESOLVED CASES	CASE CLEARANCE RATE $CR = \frac{Resolved\ Cases}{Initiated\ Cases} \times 100$
Supreme Court	67	27	40%
Court of Appeal	839	622	74%
High Court	46,277	27,204	59%
Magistrates Courts	346,741	271,939	78%
Kadhi's Courts	3319	2963	89%
TOTAL	397,243	302,755	**76%**

As shown in Table 2.1, the official baseline data for the Judiciary indicates that pending cases stood at 426, 408 as at 30th June, 2013. In total, the audit established that a total of 231,252 cases, which had been reported as pending by SoJAR 2012- 2013, had actually been finalized. The magistrates' courts had the highest number of over-reported pending cases at 211,237.

2.2.2 Courts Performance

During the FY 2013/14, a total of 397, 243 cases were filed in all the courts in the country. In the same period, a total of 302,755 cases were resolved by courts. This implies that the Judiciary had a Case Clearance Rate (CCR) of 76 per cent.

The Magistrate's Courts continued to receive the highest number of new cases at 346,741 (87.29%). This was followed by the High Court where 46,277 (11.65 %) cases were filed. In Kadhis courts, 3,319 (0.84%) cases were filed while in the Court of Appeal, 839 cases were filed. In the Supreme Court, a total of 67 cases were filed. In addition, the Subordinate Courts (i.e. Magistrates and Kadhis) have comparatively higher CCR than the superior courts owing to their comparatively higher number of resolved cases vis a vis the filed cases. Kadhi's court had the highest CCR at 89 per cent followed by Magistrates' Courts at 78 per cent. The Supreme Court had the lowest CCR at 40 per cent. Although the rise in the number of judges and magistrates, as well as improved work methods was expected to increase the rate at which cases were disposed of, there was a 90 per cent increase in demand for justice from courts, as demonstrated by filed cases in FY 2013/2014 as compared to the FY 2012/13.

2.2.3 Judiciary Caseload, FY 2013/2014

The total caseload for the Judiciary at the end of FY 2013/14 was 519,107 cases comprising of 155,195 criminal cases and 363,912 civil cases. Table 2.3 elaborates on caseload for various courts.

Table 2.3: Caseload by Court and Case Type, FY 2013/14

Court	**Broad Case Type**		
	Criminal	**Civil**	**Overall**
Supreme	-	46	46
Court of Appeal	506	2186	2692
High Court	15,144	149,525	164,669
Magistrates' Court	139,545	209,779	349,324
Kadhis' Courts	-	2,376	2,376
TOTAL	**155,195**	**363,912**	**519,107**

Magistrates' courts had the heaviest caseload for criminal matters at 139,545 cases while the court of appeal had the least at 506 cases. In regard to civil cases, the magistrates' court still had the highest number of pending cases at 209,779 cases while the Supreme Court had the least at 46 cases. The percentage caseload by court types is as highlighted in Figure 2.1.

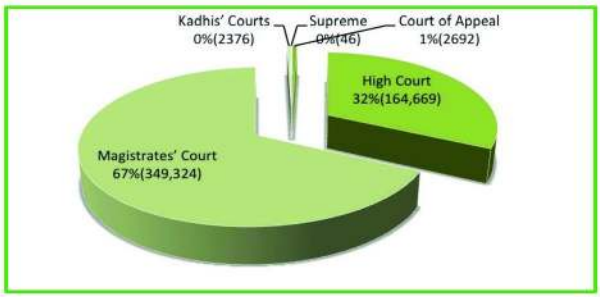


Figure 2.1: Percentage Caseload by Court Type

Magistrate's courts have the highest pending cases at 67 per cent, followed by high court at 32 per cent. The Court of Appeal has 1 per cent of the pending cases while the Supreme Court and Kadhi's court has less than one per cent. The comparative analysis of caseload by broad case type is as highlighted in Figure 2.2.

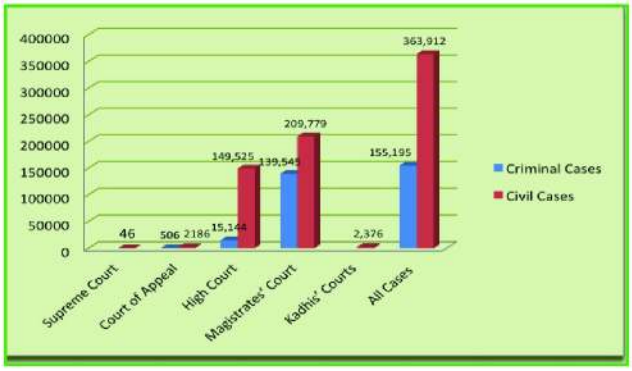


Figure 2.2: Caseload by Court Type and Case Type

From Figure 2.2, majority of the pending cases were civil in nature in all the court types. High court had the highest difference between criminal and civil cases.

2.2.4 Trend Analysis of Caseload

Judiciary has always aspired to reduce its caseload given the fact that increase in pending cases is an indication of delay in dispensation of justice. Annual comparison of caseload is therefore important in determining any significant deviations from the trend and hence appropriately intervenes. Table 2.4 shows the trend in the caseload numbers for FY 2012/13 and FY 2013/14.

Table 2.4: Trend in Caseload by Court and Case Type

Court	Criminal		Civil		Overall	
	2012/13	2013/14	2012/13	2013/14	2012/13	2013/14
Supreme	-	-	6	46	6	46
Court of Appeal	2514	506	1815	2186	4329	2692
High Court	13,666	15,144	131,930	149,525	145,596	164,669
Magistrates' Court	77,976	139,545	196,673	209,779	274,649	349,324
Kadhis' Courts	-	-	1,928	2,376	1,928	2,376
TOTAL	**94,156**	**155,195**	**332,352**	**363,912**	**426,508**	**519,107**

As at the end of the FY 2012/13, the total pending cases in the Judiciary were 426,505 while at the end of FY 2013/14, the total pending cases were 519, 107. Overall, caseload increased by 22 per cent from the FY 2012/13 to the FY 2013/14. From Table 2.4, it's only the Court of Appeal that managed to reduce its caseload from 4329 cases in the FY 2012/2013 to 2692 cases in the FY 2013/2014. Figure 2.3 illustrates the percentage increase in caseload by broad case types.

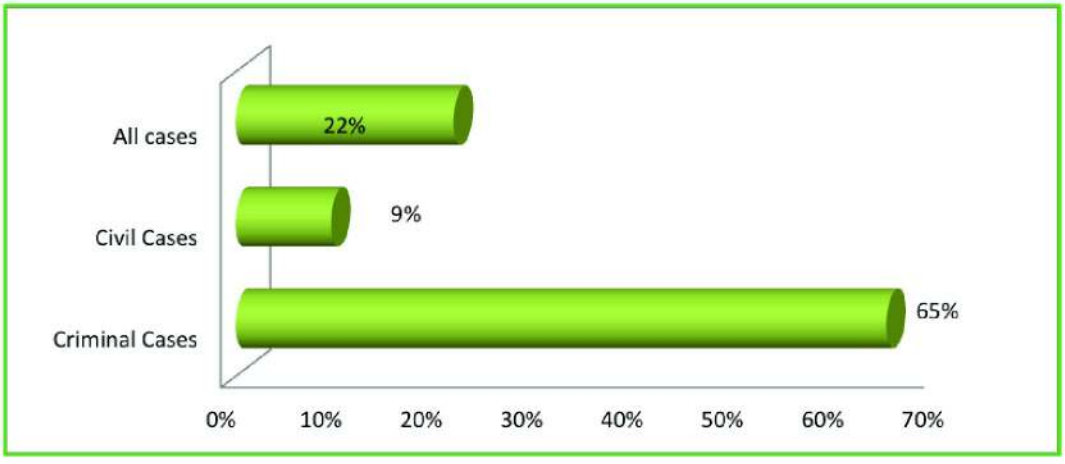


Figure 2.3: Percentage Increase in Caseload by Case Types, 2012/13-2013/14

Civil cases increased by 9 percent while criminal cases increased by 65 per cent. Although the number of civil cases in the courts is higher than criminal ones, the increase in the latter category signals that focus on resolution of criminal cases is a priority area. There is need therefore for the players in the justice chain to establish what may have contributed to the 65 per cent increase in criminal cases and consequently jointly enhance crime prevention measures. Details on the percentage increase in caseload for the other court types between the period 2012/3 and 2013/14 is as highlighted in Figure 2.4.

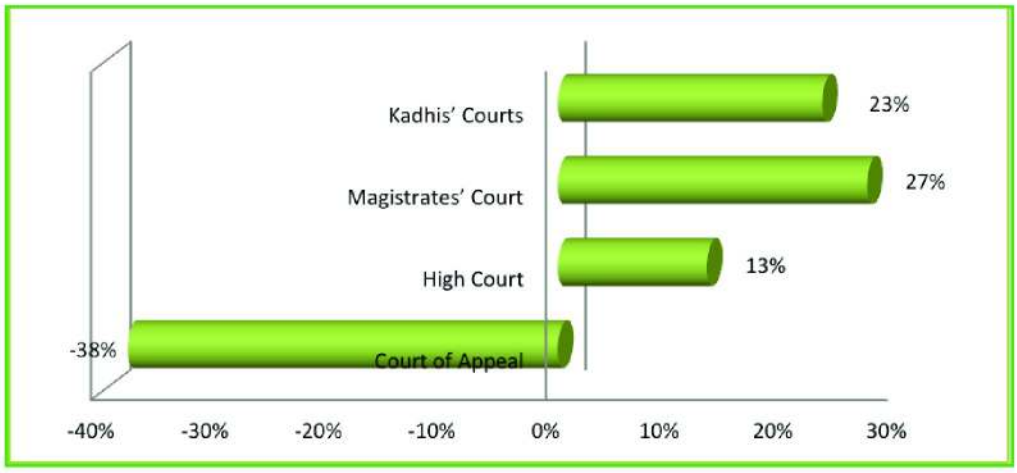


Figure 2.4: Percentage Increase/Decrease in Caseload by Court Types, 2012/13-2013/14

From Figure 2.4, the caseload for the court of appeal reduced by 38 per cent while that for the high court increased by 13 per cent. In regard to subordinate courts, the caseload for the magistrate's courts increased by 27 per cent while that Kadhi's court increased by 23 per cent.

2.2.2 Case Backlog

In the JCAS, all cases that were still in the system 12 months after they were first filed were classified as 'backlog'. As at 30th June 2013, a total of 311,852 cases had been in court for more than 12 months, representing 73 per cent of all the pending cases. Out of all the pending cases, 31 per cent had been in the system for more than 60 months; 29 per cent had been in the system for between 24 and 59 months; while 13 per cent were between 12 and 23 months old. In the Court of Appeal, 2,473 (57%) of all the pending cases were backlog, while 91,101 (86%) of the total pending cases in the High Court and 184,080 (67%) of the total in the magistrates courts were backlog.

The Survey further revealed that the leading causes of backlog included frequent adjournments occasioned by inconsistent court attendance by parties, as well as frequent and abrupt transfers of judicial officers, which has now been cured by the adoption of a transfer policy for judges and magistrates, and frequent adjournments by advocates. Other challenges identified by the survey as to contribute to backlog were inadequate personnel and other resources.

2.2.3 Case Disposal Speed and Reasons for Adjournment of Cases.

According to JCAS, one judicial officer on average handles 29 case hearings a week while disposing 33 cases each month. This implies that the Judiciary requires, on average, 1,140 days (3.12 years) to hear and determine all the cases in its system without admitting any new ones. Specifically, the High Court requires 4,566 days (12.51 years), Magistrates' courts require 899 days (2.46 years) and Kadhi's Court 681 days (1.87 years).
During the period under review, Judiciary also conducted an Impact Evaluation and Diagnostic.

Study to identify points of delay in a case process and their causes at each stage. This was intended to help in designing specific initiatives to reduce the identified delays that aim at reducing time to dispose of a case as well as reduce backlog. The study revealed that a case took on average of 667 days to be finalized. Overall, a case could take between one day and 8,324 days (22 years) to conclude. The study also revealed that 52.1 per cent of all cases sampled had legal representation whereas 47.9 per cent did not. Cases with legal representation took on average 523 more days to conclude than those without. The analysis also revealed the hurdles encountered in obtaining case file information, underscoring the need to streamline case processing at the point of data collection.

2.3 System of Courts and Disaggregated Case Types

2.3.1 The Supreme Court

Established pursuant to Article 163 of the Constitution and the Supreme Court Act, 2011, the Supreme Court has exclusive original jurisdiction to hear and determine presidential election petitions, considers appeals from the Court of Appeal, and issues advisory opinions to national and county governments and state organs. The Chief Justice is President of the Supreme Court, with the Deputy Chief Justice as Deputy President, and five other judges.

During the period under review, the Supreme Court handled 46 matters. At the end of the period, the percentage of pending cases in this court by type is as highlighted in Figure 2.5.

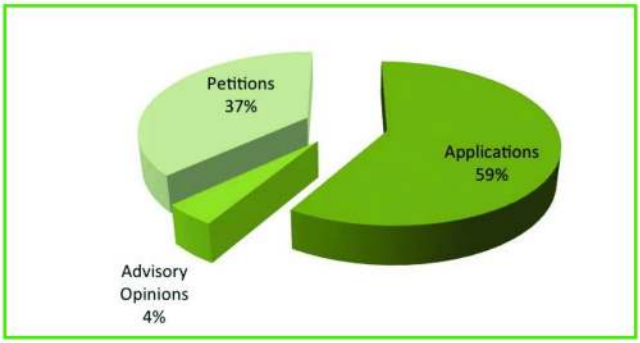


Figure 2.5: Percentage pending cases by type in Supreme Court, FY 2013/14

During the period under review, 59 percent (27) of the pending cases in Supreme Court were applications, 37 per cent were petitions and 4 per cent were advisory opinions. The trend analysis of pending cases by type in the Supreme Court is highlighted in Table 2.5.

Table 2.5: Trend analysis of Pending by Case Type, Supreme Court, FY 2013/14

Case Type	FY 2012/2013	FY 2013/2014	Percentage Increase
APPLICATIONS	2	27	1250%
ADVISORY OPINIONS	2	2	0%
PETITIONS	2	17	750%
TOTAL	**6**	**46**	**666%**

Between the FY 2012/13 and FY 2013/14, the pending Supreme Court applications increased from 2 to 27 (1250 per cent increase), pending advisory opinions did not change and the pending petition cases increased from two cases to 17 (750 per cent increase).

2.3.2 The Court of Appeal

Established pursuant to Article 164 of the Constitution and the Appellate Jurisdiction Act, the Court of Appeal handles appeals arising over the decisions of the High Court as well as any other court or Tribunal as provided for in law. The court comprised 26 Judges, against an establishment of 30. The Court is headed by the President of the Court of Appeal elected by judges of the Court. The Court of Appeal was decentralized during this reporting year. The Court now sits permanently in Nairobi, Malindi, Kisumu and Nyeri. Decentralization has been a success, with the Court in Malindi, Nyeri and Kisumu hearing current matters.

During the period under review, the Court of Appeal had 2692 pending cases spread across various case types as illustrated in Figure 2.5.

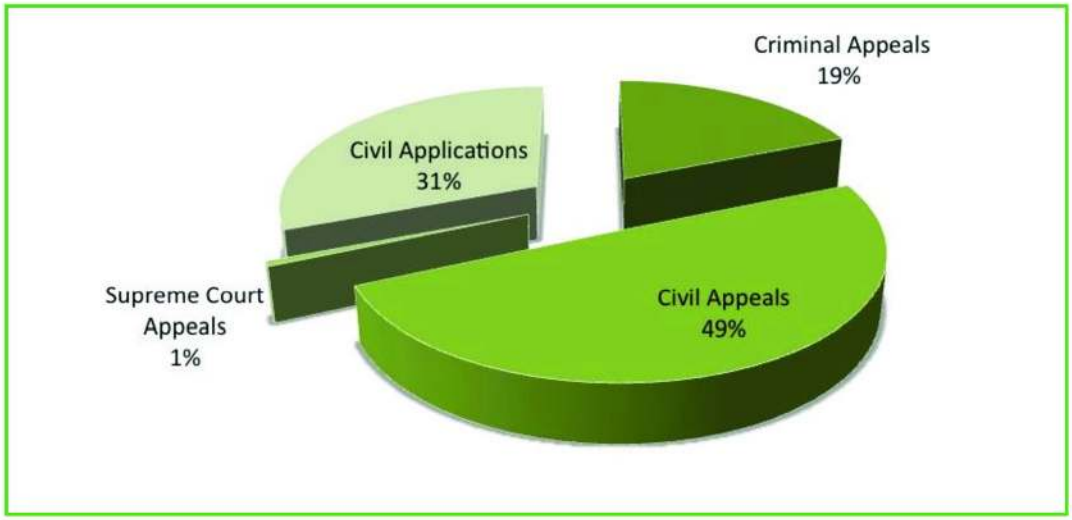


Figure 2.6: Percentage Pending Cases in Court of Appeal by Type, FY 2013/14

Civil appeal cases were the majority of pending cases at 49 per cent followed by civil applications at 31 per cent. Criminal appeals were at 19 percent and the least pending cases were Supreme Court Appeals at 1 percent. The trend analysis of pending cases in the Court of Appeal is given in Table 2.6.

Table 2.6: Trend Analysis of Pending Cases in Court of Appeal by Case Type, FY 2013/14

Case type	FY 2012/2013	FY 2013/2014	Percentage Increase/ Decrease
Criminal Appeals	2514	506	-79.9%
Civil Appeals	1110	1337	20.5%
Supreme Court Appeals	15	18	20.0%
Civil Applications	690	831	20.4%
TOTAL	**4329**	**2692**	-37.8%

Between the FY 2012/13 and FY 2013/14, Criminal Appeals reduced by 79.9 per cent[4]. All the other categories increased where the Civil Appeals increased by 20.5 per cent, Supreme Court Appeals by 20 per cent and Civil Applications by 20.4 per cent.

2.3.3 The High Court

The High Court of Kenya is established under Article 165 of the Constitution of Kenya. It has supervisory jurisdiction over all other subordinate courts and any other persons, body or authority exercising a judicial or quasi-judicial function. It has jurisdiction to hear all criminal and civil cases as well as appeals from the lower courts. The High Court has original jurisdiction in all criminal and civil matters and is a premier court in interpreting the Constitution, hears appeals from subordinate courts and tribunals and supervises all administrative bodies. The Constitution has also establishes the Industrial Court and the Land and Environment Court at the same level as the High Court. Industrial Court deals with labour and employment matters while the Land and Environment Court deals with land and environment matters and appeals from all tribunals dealing in land and environment matters.

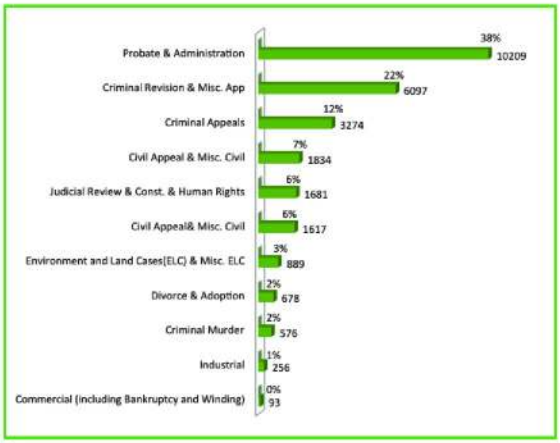
[4]*Notices of appeal that had been filed in Court of Appeal, and which JCAS of 2014 had captured as pending cases using notices of appeal, are actually not pending cases in Court of Appeal. In reality, these cases were yet to actualize in Court of Appeal since their respective records of appeal were still pending at the High Court.They are thus pending cases in the High Court.*

During the year under review, various types of cases were filed in the High Court. Figure 2.7 illustrates the percentage and absolute cases by type filed in the High Court.

Figure 2.7: Percentage Cases by type filed by High Court, FY 2013/14

Majority of the filed cases were Probate and Administration at 36 per cent. They were followed by Criminal Revisions and Miscellaneous Applications at 16 per cent. Commercial and bankruptcy cases were the least filed at 0.2 per cent. Just as with the filed cases, the number of the resolved cases in the High Court also differed across the various case types. Figure 2.8 illustrates the various case types that were resolved by the High Court.

Figure 2.8: Percentage Cases by type resolved by High Court, FY 2013/14



From Figure 2.8, Probate and Administration cases constituted the single highest number of resolved cases accounting for 38 per cent of the total, followed by criminal revisions and miscellaneous applications at 22 per cent. Commercial and bankruptcy cases were the least resolved at 0.3 per cent. At the end of the reporting period, the percentage of pending cases in the high court by broad case type is as illustrated in Figure2.7

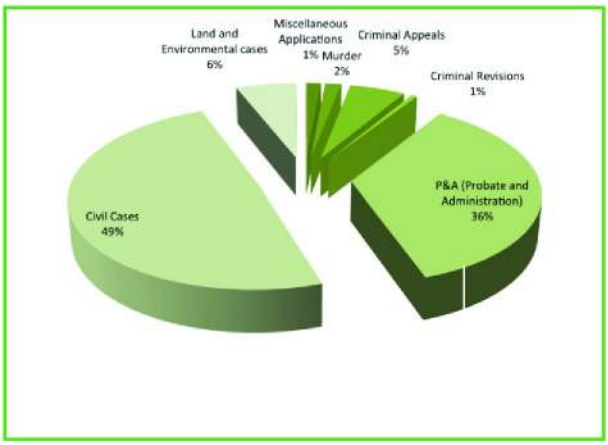


Figure 2.9: Percentage Pending Cases by Type in High Court, FY 2013/14

Civil cases comprising of Civil Appeals and Miscellaneous Civil, Judicial Review, Constitution and Human Rights, Commercial Cases, Industrial Cases and Divorce and Adoption cases, were the highest pending cases at 49 per cent. They were followed by probate and administration at 36 per cent and environmental and land cases at 6 per cent. Murder cases and miscellaneous applications cases were the least of the pending cases at 2 and 1 per cent respectively.

2.3.4 The Land and Environment Court

Established under Article 162(2) of the Constitution and the Environmental and Land Court Act, the Environment and Land Court is a superior court with the same status as the High Court. The Court has original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of the Constitution and with the provisions of the Environmental and Land Court Act or any other written law relating to environment and land. The court is also empowered to hear cases relating to public, private and community land and contracts. The court also exercises appellate jurisdiction over the decisions of subordinate courts or local tribunals in respect of matters falling within the jurisdiction of the Court. The court further exercises supervisory jurisdiction over the subordinate courts, local tribunals, persons or authorities in accordance with Article 165(6) of the Constitution.

2.3.5 The Employment and Labour Relations Court

Established under Article 162(2) of the Constitution and the Industrial Court Act, the Employment and Labour Relations Court (formerly known as the Industrial Court) is a superior court with the same status as the High Court. The Employment and Labour Relations Court was established for the purpose of settling employment and Industrial relations disputes and the furtherance, securing and maintenance of good employment and labour relations in Kenya. The court has exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with Article 162 (2) of the Constitution and the provisions of the Industrial Court Act or any other written law which extends jurisdiction to the court relating to employment and labour relations.

Table 2.7: Filed, Resolved and Pending Cases in Employment and Labour Relations, FY 2013/14

Case Type	Pending FY 2012/13	Filed FY 2013/14	Resolved FY 2013/14	Pending FY 2013/14	Percentage Change
Labour Disputes	3964	3089	1506	5520	39%
Petitions	19	105	34	90	374%
CBA's	26	340	276	90	246%
Misc Applications	19	188	79	122	542%
Totals	**4028**	**3722**	**1895**	**5822**	45%

2.3.6 Magistrates' Courts

Established under Article 169 of the Constitution and the Magistrates' Court Act, the Magistrates' Court is one of the subordinate courts in Kenya. The Magistrates' Court has jurisdiction and powers in proceedings of a criminal nature as are for the time being conferred on it by the Criminal Procedure Code or any other written law. The Court also has jurisdiction and powers in proceedings of a civil nature in which the value of the subject matter in dispute does not exceed specified amounts in regard to each cadre of the Court. Any person who is aggrieved by a decision of the Magistrates' Court can appeal to the High Court.

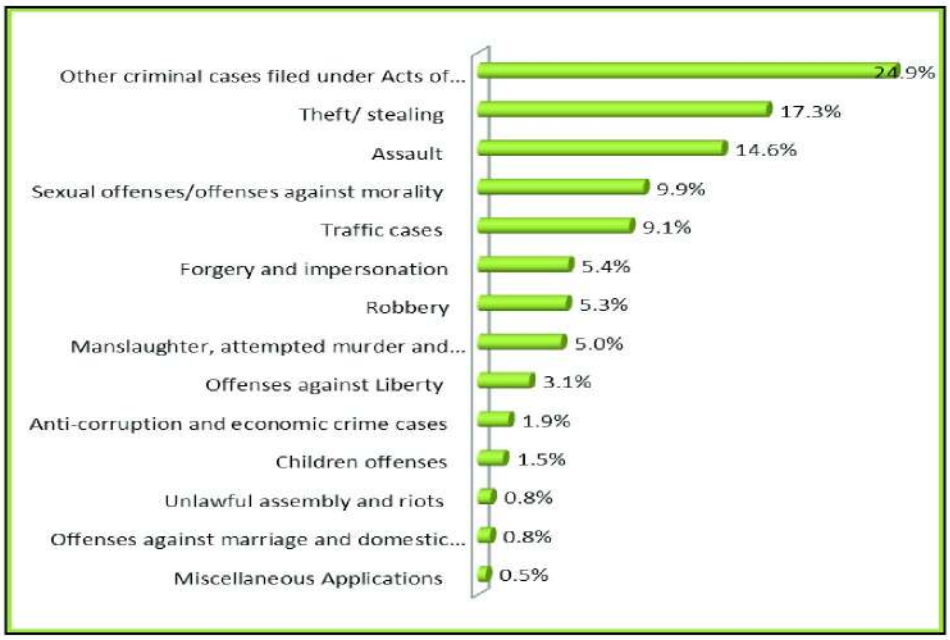
The pending criminal cases in magistrates' courts at the end of the period under review are highlighted in Table 2.9

Table 2.9: Pending Criminal Cases by Type, Magistrates' Courts

Type of Criminal Case	FY	FY 2013/2014
Theft/ stealing	13440	24,052
Assault	11365	20,339
Sexual offenses/offenses against morality	7727	13,828
Traffic cases	7065	12,643
Forgery and impersonation	4222	7,556
Robbery	4119	7,371
Manslaughter, attempted murder and attempted suicide	3887	6,956
Offences against liberty	2423	4,336
Anti-corruption and economic crime cases	1457	2,607
Children offences	1200	2,148
Unlawful assembly and riots	615	1,101
Offences against marriage and domestic obligations	592	1,059
Miscellaneous Applications	389	696
Other criminal cases filed under Acts of Parliament	19397	34,712
Total	**77898**	**139,545**

Among pending criminal cases in magistrates' courts, theft/stealing cases were the majority at 24, 052 cases followed by Assault cases at 20,339. Sexual offenses were the third highest pending criminal cases at 13,828. In addition, miscellaneous applications were the least pending at 696 cases. The percentage pending criminal cases is illustrated in Figure 2.12.

Figure 2.12: Percentage of pending criminal cases by type, Magistrate's Courts, FY 2013/14



The highest single category of pending criminal cases was assault at 24.9 per cent and the least was miscellaneous applications at 0.5 per cent. During the period under review, the pending civil cases in the Magistrates' Courts increased from 196,751 in 2012/2013 to 209,919 in 2013/2014 FY. Table 3.10 elaborates on the absolute pending civil cases by type for magistrates' courts at the end of the FY 2013/14.

Table 3.10: Pending Civil Cases by Type, Magistrates' Courts, FY 2013 /14

CIVIL	FY 2012/2013	FY 2013/2014
P&A (Probate and Admin)	11,007	11,740
Miscellaneous Applications	1,947	2,077
Commercial Cases	15,755	16,805
Running down	23,345	24,900
Land and environmental cases	7,192	7,671
Industrial cases	4,609	4,917
Matrimonial cases	4,570	4,874
Adoption cases	3,954	4,217
Ad Litem cases	7,033	7,502
Tort	56,266	60,015
Other civil cases	61,073	65,200
	196,751	**209,919**

Majority of the pending civil cases in the magistrates courts were torts at 60,015 followed by running down cases at 24,900 cases. Adoption and miscellaneous applications were the least pending cases at 4,217 and 2,077 cases respectively. Figure 2.11 presents the pending criminal cases by type in percentages.

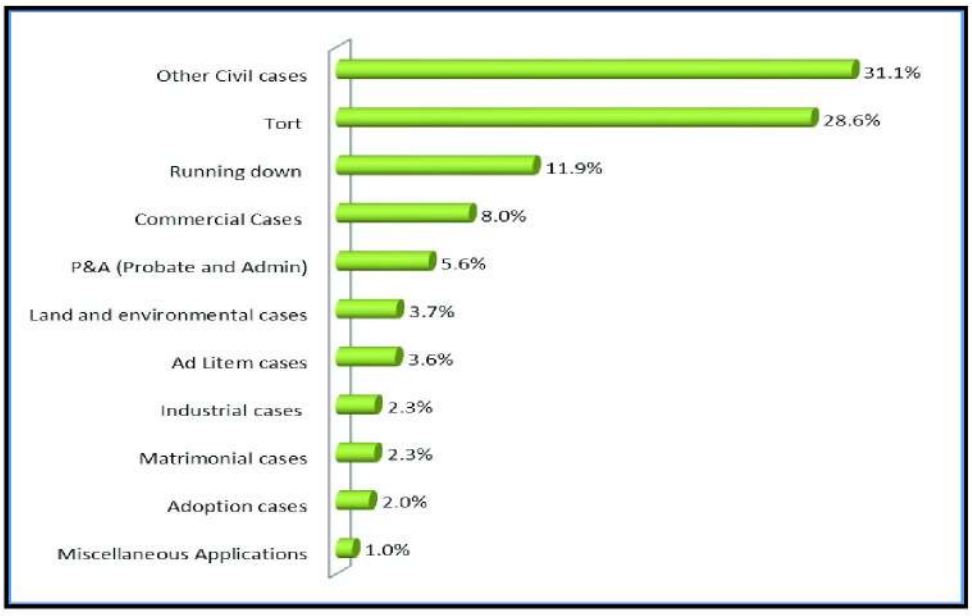


Figure 2.13: Percentage of Pending Civil Cases by Type, Magistrate's Courts, FY 2013/14

The specific category with the highest percentage pending cases is Torts at 28.6 per cent followed by running down at 11.9 per cent. Adoption and miscellaneous application have the least pendency at 2 and 1 per cent respectively.

2.3.7 Kadhi's Courts

Kadhis Courts are established under Article 170 of the Constitution and the Kadhis' Courts Act. The Kadhis' Court is one of the subordinate courts in Kenya. Their jurisdiction is limited to the determination of questions of Muslim Law relating to personal status, marriage, divorce or inheritance in proceedings in which all the parties profess the Muslim Religion and submit to the jurisdiction of the Kadhis' courts.

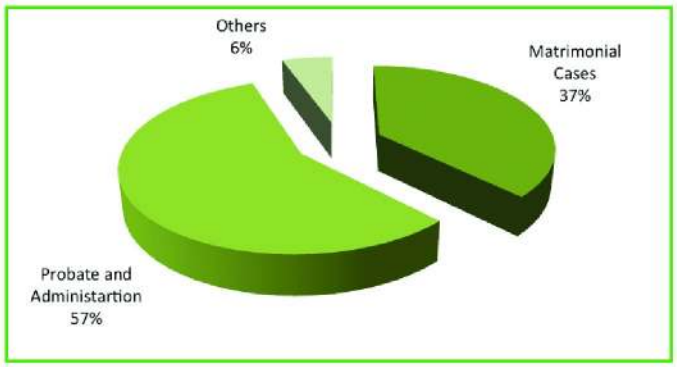
As illustrated in Table 3.11, the total pending cases in Kadhis courts stood at 2,376 at the end of the reporting period which was a 23.24 percentage increase as compared to the FY 2012/13.

Table 3.11: Pending cases by type in Kadhis courts

Case type	FY 2012/2013	FY 2013/2014	Percentage Increase
Matrimonial Cases	722	890	23%
Probate and Administration	1100	1356	23.27%
Others	106	131	23.58%
TOTAL	**1,928**	**2,376**	23.24%

Of the pending cases in Kadhis court, matrimonial cases were 890, probate and administration were 1356 and other civil cases were 131. The percentage change in pendency of cases in Kadhis courts is highlighted in Figure 2.14.

Figure 2.14: Percentage Pending cases by type in Kadhi's courts, FY 2013/14



Probate and administration forms the bulk at 57 per cent, followed by matrimonial causes at 37 per cent and finally other civil matters of personal law at 6 per cent as illustrated in Figure 2.14.

2.4 Institutionalizing Performance Management Institutionalizing performance management has been considered as one of the key ingredients of improving access to justice in the Judiciary. Extensive stakeholder engagement on the adoption of a robust Performance Management System (PMS) was undertaken during the period under review. In addition, new performance measurement tools were developed and piloted and are awaiting formal adoption. One such tool is the Monthly Court Statistics Reports which shows the performance of courts in terms of Case Clearance Rate and Disposition Time of cases for various courts. The Judiciary has fully instituionalised performance management and measurement.

2.5 Efforts to Increase Access to Justice

2.5.1 Increasing the Number of Judges and Magistrates

The total population of judges, magistrates and Kadhis in the Judiciary stood at 622 by June, 30th 2014. The Judiciary had seven Supreme Court judges, 26 Court of Appeal judges, 70 High Court judges, 15 Environment and Land Court judges, 12 Industrial Court judges, 457 Magistrates, and 35 Kadhis. A human resource mapping exercise carried out by the JSC, established that the Judiciary, as currently structured, is operating with a 41% staff deficit. Judicial officers form only 13% of total staff of the Judiciary. Therefore, even with the recruitments of new judicial officers, hired after the staff mapping exercise, the numbers of judges, magistrates and kadhis are still way below the numbers required to achieve efficiency.

Further, judicial officer numbers were affected by the vetting exercise carried out by the Judges and Magistrates Vetting Board (JMVB). During the vetting exercise, not all the judicial officers were available fulltime for duty. The vetting of judges and magistrates, initially expected to last only one year, found several officers unfit to serve. This meant that even though they had appealed for review, and were still members of the Judiciary, they could not be assigned court duty.

The increase in the number of Court of Appeal judges has reduced the waiting period for determination of appeal cases from 12 years to about 3 years. In fact, efficiency has improved to the extent that Courts of Appeal in Malindi, Nyeri and Kisumu are now dealing with current cases where the waiting period on civil cases in under one year. Increasing the total number of judges in the High Court, Environment and Land Court and Industrial Court would also significantly reduce caseload for each judge in these courts. In 2014, the Judicial Service Commission submitted 25 nominees for appointment as High Court judges. Out of the 25, the President appointed only 11 judges at that time. The remaining 14 have subsequently been appointed.

Inadequate numbers of judges and magistrates undermines the institution's ability to efficiently deal with caseload. There is dire need to further increase judicial officers and staff numbers. Based on current caseload in the system, and without any new filings, the High Court, Magistrates' Courts and Kadhis Courts would require 12.5 years, 2.5 years and 1.9 years to clear the current backlog.

In addition to hiring new judicial officers, the Judiciary has invested heavily in training and building capacity for all cadres of staff, with a view to improving efficiency and performance in dispensation of justice. As discussed in this Report, the Judiciary Training Institute conducted various trainings and workshops for judges and magistrates. These trainings contributed to the growth of jurisprudence. Furthermore, judicial exchanges were carried out. Supreme Court judges

visited the Constitutional Court of Colombia, and the United Kingdom Supreme Court. Also established during the reporting period was a Law Clerks Exchange Programme between the Kenyan Supreme Court and the South African Constitutional Court.

2.5.2 Decentralization, New Courts, Circuits and Mobile Courts

Access to justice also requires the reduction of physical distance to courts. The Constitution and the Judicial Service Act require that a High Court be established in every County. There is the additional requirement to establish a magistrate's court in every district. The court expansion strategy through investment in physical infrastructure, establishment of new courts and sub-registries; and use of mobile courts are some of the interventions that have been used in the reporting period.

The Judiciary embarked on an ambitious expansion programme with a view to bringing access to justice closer to the people. Decentralization of the courts helped reduce case backlog and bring justice closer to the people.

With the exception of the Supreme Court, which is based in Nairobi only, all other courts are decentralized. Court of Appeal stations have been established in Malindi, Kisumu and Nyeri. In the reporting period, the Judiciary opened a new Court of Appeal Registry in Kericho County. In addition, the court holds circuits in Mombasa, Nakuru, Eldoret, Busia, Kisii and Meru.

The High Court has also established High Court Sub-Registries at Voi, Bomet, Migori, Lodwar, Kitui and Narok which conduct mobile court circuits.

Initiatives in the Subordinate Courts include establishment of two new courts and 19 mobile courts. Two new Magistrates' Courts were established at Githongo and Mbita. Various mobile courts were carried out over the course of the year in 19 different areas around the country. Mobile courts ensure that cases which would otherwise not have been taken to court are heard without undue inconvenience to litigants and witnesses and we will continue to streamline the guidelines on mobile court visits regularly.

To improve delivery of justice in traffic matters, Magistrate Courts also introduced mobile traffic courts, which were launched in 2013. The Safety First Campaign was borne out of a partnership between the National Transport and Safety Authority (NTSA), Judiciary, Prisons Department, Traffic Police and public transport operators in July, 2013. The mounting of traffic courts on major highways was not only meant to check on the increase in road traffic accidents but also to reduce inconvenience to travelers and motorists by shortening the litigation process traffic offenders undergo from the time of arrest to the time their case is dispensed with by the courts.

The mobile traffic courts were conducted in four phases: phase one began in August 2013 and ended in September, 2013; phase two began in November 2013 upto January, 2014; phase three began in March 2014 to June 2014; and phase four began in July and was to run up to December, 2014. The mobile traffic courts were called off in October as a result of an outcry from members of the public in parts of the country including Kisumu, Kisii, Meru, Maseno, Machakos (Mavoko) and Kakamega. In all the four (4) phases, the mobile traffic courts were successful but the initiative met several challenges leading to suspension of the mobile traffic courts on 1st October, 2014.

2.5.3 Infrastructure Improvement

As discussed in chapter seven below, the Judiciary invested heavily in infrastructure developments. These included construction of new courts, refurbishment of existing dilapidated court buildings, building toilets and customer care centres.

Several projects were carried out. For instance, refurbishments of the Courts of Appeal at Nyeri and Mombasa are ongoing ahead of the official handing over by the contractors. In Kisumu, the stalled new Court Complex was completed, and the Court of Appeal has been allocated an entire floor in the new court building. The Chief Justice opened the Kisumu Court in March, 2015. The new court has sufficient space for courtrooms, chambers and registries.

The High Court also undertook many projects including building of new courts, refurbishment and maintenance of court buildings in various High court stations. These included Busia, Murang'a, Lodwar, Homa Bay, Meru, Kitale, Kericho, Machakos, Mombasa, Malindi, Kisii, Nyeri, Garissa, Naivasha, Kerugoya and Kisumu. In total, 35 magistrate courts buildings and toilets were constructed and refurbished across the country. Most of these projects are still ongoing.

2.5.4 Reducing Procedural and Administrative Barriers to Justice.

In tandem with constitutional requirements, the Judiciary is striving to remove procedural bottlenecks that hamper access to justice in courts. In consultation with the Rules Committees, the Chief Justice gazetted several new rules. To enhance expeditious and efficient disposal cases at the Supreme Court, the Hon. Chief Justice and President of the Supreme Court appointed a Rules Committee. The Rules Committee is chaired by Hon. Justice (Prof.) J. B. Ojwang. Its mandate is to review the Supreme Court Act, 2011, Supreme Court Rules, 2012, Supreme Court (Presidential Election Petition) Rules, 2013, and to identify the gaps in the Act, Rules and Directions, and to examine other legislation which have a bearing on the working of the Supreme Court. The Committee is in the final stages of preparing its report for onward submission to the Hon. Chief Justice and publication by the Hon. Attorney General.

The Court of Appeal also drafted Rules of Practice to guide practice and procedures in court stations and registries. The Rules seek to harmonize processes in the filing of appeals and applications so as to ensure registry procedures are simple and uniform, thus enhancing service delivery. The Rules have been forwarded to the Attorney General for review ahead of their gazettement.

Measures to improve service delivery saw the introduction of the Mpesa mode of payment. The Magistrates Court introduced Mpesa services in November, 2013. In collaboration with Kenya Commercial Bank (KCB), the Paybill system was launched in 13 pilot court stations. Currently, ninety (90) Magistrate Courts are using the platform to collect court fees, fines and cash bails. Since the rolling out of the paybill system, KSh. 240,621,049 has been paid through Mpesa. This mobile money payment method has improved efficiency since traffic offenders can

now pay their fines instantly, thus saving time for litigants. The system faced challenges including technical capacity of staff members to deal with digital issues. In addition, delays in connectivity between KCB and Safaricom caused delays in transaction confirmations but most of these challenges have been overcome.

2.5.5 People Centeredness and Public Engagement

Public participation is one of the national principles of governance outlined in the Constitution. The Judiciary engaged the public in the administration of justice at various levels. Court Users Committees (CuCs), customer care desks in all stations and having trained personnel helped clients receive proper assistance in our court stations.

High Court and Magistrate Court Stations conducted open days and actively participated in ASK Shows countrywide in a bid to explain court processes and procedures to members of the public. Various court stations engaged in outreach programmes such as visiting children's homes, remand homes and prisons. Suggestions boxes also helped stations receive feedback from members of the public, as well as staff on how to improve services.

CHAPTER THREE

JURISPRUDENCE

3.1 Introduction

The dispensation of justice through the development of sound jurisprudence is the reason why the Judiciary exists. During the period under review, courts made significant determinations on a broad range of issues thereby making the Judiciary an important guardian of Kenya's new Constitution and settling emerging issues of law. These included important decisions on Electoral Law; Devolution; Land and Environment; Family Law; Labour Law; the Bill of Rights, ranging from civil and political rights to socio-economic rights. The discussion below provides an overview of the key jurisprudential developments that occurred in our court system in the FY2014/2015.

3.2 Electoral Disputes

The Supreme Court determined a number of electoral disputes on appeal. In the process, the Court considered and settled a number of important questions of law. The most significant of these were: Jurisdiction of the Court of Appeal in electoral appeals; Burden and standard of proof in election disputes; Declaration of election results and the implications; Mode of issuing electoral results after polling; Vitality of time-lines in the initiation and pursuit of an electoral cause; Requirements relating to scrutiny and recount of votes by a Court; Tests applicable in ascertaining due compliance with the Constitution, the statutes and the relevant Regulations, during the conduct of elections; Human error in election irregularities; Fairness and finality factors in the resolution of electoral disputes and; Electoral rights of Kenyans in the Diaspora.

(a) The Jurisdiction of the Court of Appeal in electoral appeals

One of the main issues before the Supreme Court in Dickson Mwenda Githinji v. Gatirau Peter Munya & 2 Others was whether the Court of Appeal had exceeded its jurisdiction by delving into matters of fact, contrary to the provisions of s. 85A of the Elections Act, 2011. The Supreme Court held that fact-based enquiries are outside the scope of the Court of Appeal owing to the need for timely settlement of election disputes under Art. 87(1) of the Constitution as read together with s. 85A of the Elections Act, 2011. The Supreme Court outlined in detail what the phrase "matters of law only" applied as a function of an express constitutional scheme requiring electoral disputes to be settled in a timely fashion. That by limiting appeals to the Court of Appeal in election cases to points of law only, section 85A of the Elections Act, 2011 was directed at both litigants who were dissatisfied with the judgment of the High Court in an election petition and the Court.

In Fredrick Otieno Outa v Jared Odoyo Okello and 4 Others, the Supreme Court stated that by limiting the scope of appeals to the Court of Appeal to matters of law only, s. 85A restricted the number, length and cost of petitions and, by so doing, met the constitutional command in Art. 87 with regard timely resolution of electoral disputes. The Supreme Court held that the phrase "matters of law" characterized three elements: a) the technical element, which involved the interpretation of a constitutional or statutory provision; b) the practical element, which involved the application of the Constitution and the law to a set of facts or evidence on record; and, c) the evidentiary element which involved the evaluation of the conclusions of a trial Court on the basis of the evidence on record.

3.2.2 The Burden and Standards of Proof in Electoral Cases

The Supreme Court had to deal with the question of proof in election petitions and, although it addressed itself to almost all the election matters, the burden and standards were settled in the Munya, Raila Odinga, Nathif Jama Mohammed, Outa, Obado, Wanjohi, Wetangula and Kidero cases. In a nutshell, the court held that it is the burden of the petitioner to prove to a threshold slightly above a balance of probability, but below that of beyond reasonable doubt. Subsequently, that in ascertaining due compliance with the Constitution, the Elections Act and the relevant Regulations, during the conduct of elections, the court will apply both qualitative and quantitative tests in that sequence. That in determining whether elections were free and fair, first, the court examines compliance with the law to ascertain whether a substantial attempt to comply with the applicable laws was made. If the attempt doesn't meet the threshold of substantial, then the qualitative analysis will be applied to determine whether the failure to comply was grave enough to prejudice the outcome.

3.2.3 The Declaration of Election Results and Mode of Issue

The issue of what constitutes 'a declaration of electoral results' gave rise to divergent judicial opinions in both the High Court and the Court of Appeal. The Supreme Court finally settled the issue in the case of Hassan Ali Joho & Another v. Suleiman Said Shabal & 2 Others. The main issue before the Court was whether the 28 days limitation period for filing an election petition began running after the declaration of election results by the Independent Electoral and Boundaries Commission, as provided by article 87(2) of the Constitution, or after the publication of the election results in the Kenya Gazette as provided by section 76(1) (a) of the Elections Act. The Court pronounced that declaration of election results took place at every stage of tallying and is a continuous process that ends with the issuance of Form 38 to the winner. The first declaration took place at the polling station; the second declaration at the Constituency tallying centre and the third declaration at the County returning centre. Thus, the declaration of election results is a continuous process ending with the issuance of the certificate in Form 38 to the winner of the election. The Court further noted that the issuance of the certificate in Form 38 terminates the mandate of the returning officer who acts on behalf of the Independent Electoral Boundaries Commission and shifts jurisdiction over electoral challenges to the Election Court.

3.2.4 Timelines in the Initiation and Pursuit of Electoral Causes

The Supreme Court stated that the principle of timely resolution of election disputes was a deliberate constitutional design that was not negotiable through court process. The court also held that the issuance of Form 38, being the final declaration of election results, triggered the timeframe within which to lodge an election petition and not the gazettement of those declared results as stated in section 76(1)(a) of the Elections Act. Consequently, the court found that section 76(1)(a) unconstitutional to the extent that it is inconsistent with the provisions of article 87(2) of the Constitution.

In Evans Odhiambo Kidero and 4 Others v. Ferdinand Ndung'u Waititu and 4 Others, the petitioners' main ground of appeal before the Supreme Court was that the Court of Appeal acted without jurisdiction when they determined an incompetent appeal filed beyond the prescribed timelines contrary to Art. 87(1) of the Constitution and s. 85A of the Elections Act. The appeal to the Court of Appeal had been filed 72 days after the delivery of the High Court's judgment, notwithstanding the provisions of section 85A of the Elections Act, that provided that electoral appeals from the High Court to the Court of Appeal had to be filed within 30 days of the delivery of the High Court's judgment. The Court of Appeal had held that s. 85A of the Elections Act, being a statutory timeline, was not as strict as the timelines in the Constitution itself; and so a court of law could, in the interest of justice and according to the Court of Appeal Rules, extend the period within which a petitioner could lodge an appeal. On that basis, the Court of Appeal heard and allowed the appeal, and thus invalidated the election of the Governor and Deputy Governor of Nairobi.

The Supreme Court overturned the Court of Appeal's decision and held that the principle of timely resolution of election disputes as set by the Constitution and the Elections Act is not negotiable and courts should not stand in the way of expeditious delivery of justice. S. 85A of the Elections Act is neither a legislative accident nor a routine legal prescription; it is a product of a constitutional scheme that required electoral disputes to be settled in a timely manner. Thus in the Kidero case, the Supreme Court asserted that the mandatory nature of the timelines under the Elections Act and the Constitution had already been determined in various decisions of the Court of Appeal itself and affirmed by the Supreme Court.

3.2.5 Human Error in Election Irregularities

The Court of Appeal in Dickson Mwenda Githinji v Gatirau Peter Munya & 2 Others held that simply stating that human error was responsible for the mistakes was not proof of existence of the error. That, whereas human error could be an excuse for tallying mistakes, a party that raised that excuse had to prove the existence of human error. Human error was not a blanket excuse that justified and excused any arithmetic, collating or tallying mistakes. Human error was neither an excuse for all errors or mistakes in transposition nor was it an excuse for failure to have statutory forms duly signed by authorized persons. The court stated human error may be excusable if it was a single, isolated and random occurrence; however, when the mistakes or errors were multiple and persistent such mistakes ceased to be human errors and pointed towards an inefficient, negligent, careless or even deliberate occurrence of the errors and that affected the credibility of the declared results.

In the instant case, the court found that the mistakes on record did not reveal a pattern in favour of any one candidate but showed that there were multiple errors and mistakes that went towards the overall integrity and credibility of the figures entered for each candidate. Due to the multiplicity of the mistakes, there were indications that human error was not a plausible explanation for all the irregularities identified. It could not therefore be said that human error was the cause of the mistakes with certainty because there was no evidence.

3.2.6 Fairness and Finality of Electoral Dispute Resolution Process

Following the decision in the *Joho case* that declared section 76(1)(a) of the Elections Act unconstitutional, various petitions were filed before the courts seeking clarification on the effect of that decision on other election disputes. In *Mary Wambui Munene v Peter Gichuki King'ara & Others,* the Supreme Court settled the issue of whether its declaration in the Joho case, that section 76(1)(a) of the Elections Act, 2011 is unconstitutional, had retrospective effect, and whether that would invalidate the proceedings in other cases that had been filed before the Joho decision.

In the *Wambui* case, the respondent's election petition was filed in the High Court within the time limit imposed by section 76(1)(a) of the Elections Act but was 6 days out of time according to the Supreme Court's interpretation (in the Joho case) of article 87(2) of the Constitution. The High Court dismissed the petition for lapse of time. On appeal, the Court of Appeal overturned the decision.

On appeal, the Supreme Court affirmed the High Court's position that the matter of timelines in electoral disputes was not a technicality but a deliberate means to finality in electoral dispute resolution as had been pronounced in the *Joho* case. On those grounds, the Supreme Court granted the appeal in the *Wambui* case and upheld the Independent Electoral Boundaries Commission's declaration that Wambui had won the election.

In allowing the appeal, the Supreme Court also stated the effect of a declaration of invalidity of a statute as had been the case pertaining to Section 76(1) (a) of the Elections Act in *Joho*. It determined that where a statute is determined to be unconstitutional, it automatically follows that it was unconstitutional from the moment the inconsistency arose. In the case of section 76(1)(a) of the Elections Act, the court traced the invalidity back to the effective date of the Elections Act.

In the *Joho* case, the Supreme Court affirmed its position by holding that, the declaration of invalidity of section 76(1)(a) of the Elections Act, applied retrospectively, because the Elections Act was an essential derivative of the Constitution and necessarily incorporated the element of time and timelines. However, the court explained that where a statute is deemed unconstitutional, it does not necessarily follow that all acts previously done are invalidated. That, whereas in general, laws have a prospective outlook, legitimate interests and rights may have accrued prior to a declaration of unconstitutionality. That there is therefore, a justification for adopting a case by case approach where the Court may exercise discretion, including to determine that a declaration of unconstitutionality of a statute will apply prospectively. The Court thus cautioned that such recourse, however, should be limited in view of the overriding principle of the supremacy of the Constitution and that "as a matter of finality of court processes, parties cannot reopen concluded causes of action."

3.2.7 Withdrawal of Certificate of Results

In *Steven Kariuki v George Mike Wanjohi & 2 Others,* the Court of Appeal, upholding the Supreme Court decision in *Hassan Ali Joho & another v Suleiman Said Shahbal & 2 Others,* held that the certificate of results (Form 38), issued after the final tally of results, declared the winner of the election and terminated the mandate of the returning officer and shifted jurisdiction with respect to the challenges relating to the electoral process to the election court. When the matter moved to the Supreme Court, the court found that the returning officer could not, after issuing the certificate of results in favour of the 1st respondent, have subsequently cancelled it and issued a fresh Form 38 to the appellant. The returning officer having declared the 1st respondent as the winning candidate, and duly issued the Form 38, became functus officio. There was neither scope for the returning officer to withdraw a declaration of the election result once made or to cancel the certificate issued in favour of the winning candidate, nor was there a mandate to rectify the Form 38. Once the votes were polled, counted and results declared, it would be perilous to allow the Returning Officer to nullify the result, purportedly in rectification of some error. That would not only have affected the very sanctity of the election process, but also encroached on the powers of the Election Court.

3.2.8 Voting by Kenyans in the Diaspora

New Vision Kenya (NVK Mageuzi) & 3 Others v IEBC & 5 Others involved the right to vote amongst Kenyans living in the diaspora. The appellants sought declarations from the High Court that Kenyan citizens in the diaspora possessed a fundamental and inalienable right to be registered as voters and to vote and/or seek elective office pursuant to article 38(3)(a) and (b) of the Constitution; and that the failure by the IEBC to provide the diaspora with the opportunity to register and vote was a violation to their fundamental right to vote and a contravention of article 82(1) of the Constitution which provided for the progressive registration of citizens residing outside Kenya and the progressive realization of their right to vote. The Appellants also sought to have the IEBC ordered by the court to declare and set up more polling centers over and above Embassies and Consulates and deploy IEBC officials as Returning Officers or to collaborate with host electoral bodies to provide similar services. The High Court had dismissed that petition, hence the appeal. The Court of Appeal held that albeit missing out on the 4th March, 2013 general elections, the appellants were entitled to seek the court's intervention to ensure that in future, more Kenyans in the diaspora had the opportunity to vote. Hence, their decision to pursue this appeal to its logical conclusion was sound and proper in order for them to seek directions to issue to the IEBC in particular, and the State in general, to take remedial measures to avoid a repeat of the 4th March, 2013 scenario in so far as Kenyans in the diaspora were concerned. The court held that Parliament ought to enact legislation under Article 82 of the Constitution in order to equip the IEBC to take steps towards ensuring the progressive realization of the right to vote for Kenyans living in the diaspora. The Court stated:

"Article 82(1) (e) of the Constitution leaves no doubt that the right to vote of Kenyans in the Diaspora is to be achieved progressively. Article 82, which requires Parliament to enact legislation on elections requires Parliament to enact legislation that among other things provides for "the progressive registration of citizens residing outside and the progressive realization of their right to vote… though the proximity of the time span between the time IEBC was requested to take remedial action to facilitate the appellants participate in the then impending general election for 4th March, 2013 may have been too short for the IEBC to make any meaningful suitable arrangement to accommodate the

appellants' desire to participate in the said past election, we are of the view that directions on the way forward as regards future preparedness was feasible, ..."

3.3 Devolution

3.3.1 The Correct Procedure for the Removal of a Governor from Office

In a decision upholding the principle of separation of powers, the court in *Martin Nyaga Wambora & 3 Others v. Speaker of the Senate & 6 Others,* held that the role of the court in the removal of a Governor from office is solely to decide on the rights of the individuals and not to enquire how the County Assembly and the Senate performed the duties in regard to which they had discretion. Themainissueinthiscasewas whether the County Assembly and the Senate were best placed to determine whether a motion for removal of a governor was in accordance with the Constitution and to determine the correct procedure for the removal of a Governor from office. The court stated that the process of removal of a Governor was hierarchical and sequential in nature involving three steps. First, was the initiation of a motion to remove the Governor by a member of the County Assembly; second comes consideration of the motion by members of the Assembly; and third, was the Speaker of the Assembly forwarding the County Assembly's resolution to the Senate for hearing of charges against the Governor. The court held that they had neither been vested with jurisdiction to initiate a motion, consider a resolution nor hear the charges against the Governor.

3.3.2 Mandate of County Governments

In *Nairobi Metropolitan PSV Saccos Union Limited & 25 others v. County Government of Nairobi & 3 Others* the court had to determine the constitutionality of the Nairobi City County Finance Act of 2013 that granted the Nairobi County Government the power to vary parking charges. The court held that s. 5(c) of the Fourth Schedule to the Constitution of Kenya, 2010 gave county governments exclusive mandate over transport within the respective counties including traffic and parking. Further, Art. 209(4) of the Constitution empowered the national and county governments to impose charges for the services they provide. The court thus found that the county governments had lawful authority to vary parking fee charges within their counties.

In *Robert N. Gakuru & Others v. Governor Kiambu County & 3 Others,* the Kiambu County Government had enacted and passed the Kiambu Finance Act, 2013 that sought to levy taxes on every stone transported from the County's quarries. The Applicants petitioned the court to make a declaration that the Act violated the provisions of the Constitution because, inter alia, there had been no public participation in its enactment; that the Act contained unreasonable and punitive provisions that led to double taxation; and that the proposed taxes to be levied by the Act were out of the scope of taxes that could be levied by County governments as provided under Art. 209 of the Constitution. The court declared the Kiambu Finance Act, 2013 null and void as proper public participation had not been undertaken before the said Act was enacted and because the provisions of the Act contravened the provisions of the Constitution as it contained levies and/or taxes that County Governments were not empowered to impose.

In *Okiya Omtata Okoiti & 3 others v Nairobi City County & 5 Others,* the issue before the court was whether the regulation and management of water sanitation services and water services providers was a matter exclusively within the jurisdiction of county governments, in view of the provisions of Arts. 185(2), 186(1) and 187(2) of the Constitution or whether it was a mandate shared with the national government. The court held "that the provision and management of water services is a shared function, distributed between the two levels of government. Article 6(2) of the Constitution recognizes the fact that the governments at the national and county levels are distinct and inter-dependent. It enjoins them to conduct their mutual relations on the basis of consultation and cooperation. With regard to water provision, they should perform their respective functions in the spirit of consultation and co- operation, and in accordance with the legislation, policies and standards set by the state, bearing in mind the provisions of section 7 of the Transitional Provisions which require such adaptations as will ensure accord with the Constitution."

In *John Kinyua Munyaka & 11 others v. County Government of Kiambu & 3 Others,* the Kiambu County Government had enacted the Kiambu Alcoholic Drinks Control Act, 2013 whose object was to regulate the production, sale and distribution of alcoholic drinks. The legislation contained provisions specifying where liquor could be sold, who could be licensed to sell it, hours within which it could be sold and it created offences and penalties for non-compliance. The Petitioners sought to have the Act declared unconstitutional on grounds that it contravened their constitutional rights; was retrospective; and that there was no public participation in its enactment. The court held that a determination of the constitutionality of a statute requires the courts to consider the purpose and effect of the relevant statute and section thereof. If either the purpose or effect infringed a right guaranteed by the Constitution, the statute or section in question had to be declared unconstitutional. The object of the said Act was to provide for licensing and regulation of the production, sale, distribution, consumption and outdoor advertising of alcoholic drinks and connected purposes. The court found no conflict with the Constitution and upheld the Kiambu Alcoholics Drinks Control Act, 2013.

3.3.3 Transfer of Health Services to County Governments

In Republic v Transition Authority & Another ex parte Kenya Medical Practitioners, Pharmacists and Dentists Union (KMPDU) and 2 Others, the petitioners challenged the decision of Transition Authority directing the transfer of health services to County governments on the grounds that, inter alia, the respondents had failed to engage all key stakeholders before transferring health care services to County governments and that they had not determined the readiness of Counties to take up devolved functions, particularly regarding health services, as required by s. 24 of the Transition to Devolved Government Act. The court dismissed the application and allowed the transfer of health services to county governments on the basis that the applicants had failed to furnish the court with sufficient material to show that the criteria under s. 24 of the Transition to Devolved Government Act had not been satisfied.

3.3.4 Intergovernmental Relations

County Government of Nyeri v. Cabinet Secretary, Ministry of Education, Science and Technology & Another concerned the scope of intergovernmental disputes within the Intergovernmental Relations Act. Specifically, the dispute related to selection of Form One students in County schools within Nyeri County. The petitioner was the County Government of Nyeri while the respondent was a State organ. The court sought to determine the question as to whether the dispute was one between a County and National Government to which dispute settlement mechanism under the Intergovernmental Relations Act would apply. The court held that a dispute between governments is a dispute in relation to the functions and exercise of powers between the different levels of Government. The court found that the dispute before court in this case was an allegation of violation of fundamental rights and freedoms as provided for under Article 22, 23 and 27 of the Constitution and therefore the court saw no reason to hold that it was an intergovernmental dispute simply because the County Government of Nyeri was the Petitioner and an entity of the National Government was the Respondent.

In *Republic v County Secretary Murang'a County Government ex-parte Stephen Thiga Thuita,* the ex-parte applicant had obtained an award of Ksh. 49,635 against the Municipal Council of Murang'a at the Murang'a Principal Magistrates court. The Applicant complained that the Murang'a County Government had declined to settle the award stating that it was an award against the Municipal Council and not the County

Government. The court noted that with the emergence of county governments, the assets and pre-existing liabilities of the defunct local authorities were to be shared between those county governments and the National Government. Under the Transition to Devolved Government Act, the Transition

Authority was the body established to prepare and validate an inventory of all the existing assets and liabilities of government, other public entities and local authorities and subsequently come up with the criteria to determine the transfer of previously shared assets, liabilities of the government and local authorities. The court held that at the time of the application, there was no evidence that this criteria was in place and thus without such criteria, it would be premature to attribute the local authorities' pre-existing liabilities to the county governments.

3.3.5 Removal of Members of County Public Service Boards

In *Mundia Njeru Geteria v. Embu County Government & 3 Others,* the petitioner challenged the procedural requirements relating to the removal from office, of members of County Public Service Boards. The court held that, requirements for removal from office under section 58(5) of the County Governments Act were such that any removal had to be based on grounds set out for the removal of members of a constitutional commission under article 251(1) of the Constitution and had to be via a vote of not less than 75% of all members of the National Assembly. Under that provision, a holder of such office could be removed from office only for serious violations of the Constitution or any other law, gross misconduct in the performance of an office holder's functions or otherwise, physical or mental incapacity to perform the functions of the office, incompetence or bankruptcy.

3.3.6 Jurisdiction of Industrial Court in regard to Impeachment of Elected Officials

In Nick Githinji Ndichu v Clerk, Kiambu County Assembly and Another, the issue was whether the Industrial Court had the jurisdiction to handle a dispute concerning the impeachment of an elected official, in this case the Speaker of a County Assembly. Central to the determination of this case was whether for purposes of the Industrial Court, there lies a distinction between an employee and an elected official and whether there was any difference between impeachment and termination of employment. The court held that ss. 2 & 12 of the Industrial Court Act dealing with jurisdiction of the Industrial Court do not make a distinction as to whether a person offering services for a wage is employed or elected. The important issue was that there was a dispute with a person who had a contract of service in which services were provided for a wage or salary. By that token, the Industrial Court decided that it hadjurisdiction.

3.4 Fundamental Rights and Freedoms

3.4.1 Freedom from Discrimination

In Baby 'A' (Suing through the mother EA) and Another v. Attorney General and 5 Others, the Petitioner had been born with both male and female genitalia and a lab report had a question mark in the column indicating the Petitioner's gender; a result of which the Petitioner had not been issued with a birth certificate. The Petitioner claimed that the question mark in the medical documents offended the Petitioner's right to legal recognition, human dignity and freedom from inhuman and degrading treatment. The court noted that under s. 2a of the Births and Deaths Registration Act, in order to register the birth of a child, one of the prescribed particulars to be provided included the sex of the child. Neither the Births and Deaths Registration Act nor the Interpretation and General Provisions Act defined the term 'sex.' However, Form 1, (The Register of Births) in the Schedule to the Registration of Births and Deaths Act indicated that the sex of a child was either male or female. There was no categorization offered for a child with both male and female genitalia. Stating that Baby A and other intersex persons were entitled to all the rights provided for in the Constitution, the court pointed out that there was an obvious lack of guidelines and regulations in the case of intersex children; and on how medical examinations and eventual corrective surgery, if needed, would be carried out.

The court further held that Parliament was the proper forum for purposes of the enactment of legislation concerning such guidelines and regulations. The court held that the fact that an intersex person did not fall within the definite criterion of being distinctively male or female did not negate his or her rights as a human being in whom rights and freedoms were inherent. The court therefore partially allowed the petition; it found no evidence that the Petitioner's rights had been violated but made findings that the Petitioner's birth should be registered and that legislation should be enacted by Parliament governingintersexpersons.

In Rose Wangui Mambo & 2 Others v. Limuru Country Club & 15 Others,the Petitioners were female fully paid-up members of the 1st respondent, Limuru Country Club, and had served in senior positions at the club. They brought a petition seeking declaratory orders that a by-law that had been made by the club's Board of Directors barring lady golfers from participating in the club's General Meetings was unconstitutional;that due process was not followed in their suspension and removal from their positions in the club; and sought an order quashing their expulsion from the club and their subsequent reinstatement to their earlier positions in the club. The main issue was whether a private members club's by-law barring female golfers from participating in its general meetings was discriminatory or against a breach of fundamental rights and freedoms as contained in the Constitution. The court ultimately stated that whereas membership of private clubs was by its nature discriminatory, in that it restricted membership to particular groups, any kind of discrimination perpetrated by the club through a by-law against its members was unconstitutional. By virtue of the by-law in question being rendered voidandunconstitutional,theresultant disciplinary processagainst the petitioners wasalso void. The court found that the Club's by-law in question was not only discriminatory, but contrary to the Club's constitution, Article 27 of the Constitution of Kenya, 2010 and not permissible in a just and democratic society. The resolution to exclude female golfers was thus found unconstitutional, null and void and an order of reinstatement of the petitioners was made.

In Republic v Kenya National Examinations Council & Another ex-parte Audrey Mbugua Ithibu JR the applicant was the holder of a Kenya Certificate of Secondary Education awarded to him by the Kenya National Examinations Council (KNEC) in 2001. In 2008, he was diagnosed and treated for gender identity disorder and depression at Mathari Hospital and was still undergoing treatment for the two conditions. The applicant then changed his name from Andrew Mbugua Ithibu to Audrey Mbugua Ihtibu. Thereafter, he embarked on changing the particulars on his national identity card, passport and academic papers so as to reflect his gender from male to female. Specifically in the instant matter, the applicant sought the removal of the gender mark from his KCSE certificate so that the certificate did not have any gender mark.

The court noted that the imposition of a candidate's gender mark was not a requirement of the law under Rule 9 of the Kenya National Examinations Council (Kenya Certificate of Secondary Education Examinations) Rules 2009. It could have been done as a tradition to assist in the proper identification of a candidate, but it was not a tradition backed by any rules. The court further noted that the applicant had satisfactorily demonstrated that his situation was unique and that had to be considered when addressing his application. Rule 9(3) of the Kenya National Examinations Council (Kenya Certificate of Secondary Education Examinations) Rules 2009 provided that KNEC could withdraw a certificate for amendment or for any other reason where it considered necessary. It therefore had the legal backing to comply with the applicant's request. Where it failed to do so, then the court could issue an order of mandamus to compel it to perform its duty. The court thus issued an order of mandamus to compel KNEC to recall the applicant's KSCE certificate issued in the name of Ithibu Andrew Mbugua and replace it with one in the name Audrey Mbugua Ithibu and that the replacement certificate was to be without a gender mark.

3.4.2 Right to Life

Micro and Small Enterprises Association of Kenya, Mombasa Branch v. Mombasa County Government & 43 Others, concerned the protection offered to the opportunity to earn a living through hawking. In exercise of powers provided under Art. 186 and the Fourth Schedule of the Constitution of Kenya 2010, the Mombasa County Government removed hawkers and prevented them from operating their businesses at certain places in Mombasa. The powers exercised included trade development and regulation. The petition was based on the contention that no notice had been issued to the traders before their removal and that there had been a violation of their right to life as they had lost their means of earning a living.

The court found that the Petitioners' socioeconomic rights did not arise from the payment of a license fee. The payment of license fees did not create those rights but was merely a means of raising revenue for government expenditure. Therefore, the court stated that the failure to pay license fees did not take away social security rights and other socioeconomic rights, protected under Art. 43 of the Constitution. The court further averred that in the circumstances, it was necessary to balance the rights of the Petitioners to earn a living by hawking and the public interest in regard to security, safety, the general convenience of vulnerable groups and, in this circumstance, the development of tourism as an important revenue earner for the County and the country. Further, the public interest in the free flow of people and traffic along roads and streets was also an important consideration.

The court thus ordered the Respondents to permit hawking outside of the Mombasa Central Business District at designated times and places, subject to the daily or weekly payment of levies, and on condition that no structures were erected on the street. Such permission would take into account the interests of other stakeholders, security concerns, cleanliness and decongestion of the streets.

3.4.3 Right to Accessible and Adequate Housing In William Musembi & 13 Others v. Moi Education Centre Co. Ltd & 3 Others, the petitioners approached the court alleging violation, inter alia, of their right to housing guaranteed under Art. 43 of the Constitution. They alleged that they were all residents of City Cotton and Upendo villages situated in Nairobi, South C Ward, in which they have been living since the late 1960s till they were evicted. At the core of the petition was the question whether, in carrying out the eviction of the Petitioners from land which admittedly the petitioners had no legal title to, the Respondents violated the Petitioners' rights as alleged. The court held that:

"An eviction of the nature undertaken by the respondents does not just violate the right to housing. Encompassed in a person's dwelling is their family life, their ability to take care of their children; their ability to live a secure and dignified life. When they are denied their shelter, their dignity, security, and privacy is impaired.... It is therefore the finding of this court that by their actions which deprived the petitioners of their housing and rendered them homeless, the respondents did violate the petitioners' rights guaranteed under Articles 28, 29, 43, 53 and 57 of the Constitution." The court further stated that:

"It is important for its officers to remember that its cardinal duty and the duty of all its officers is to safeguard the rights of all, without discrimination, but particularly so, the rights of the vulnerable in society, the poor, children, the elderly and persons with disability. Its officers should never be used to carry out the unlawful acts of any citizen, however powerful."

The court thus made orders for compensation of each of the Petitioners by both the 1st Respondent, Moi Educational Centre Limited, and by the State.

In June Seventeenth Enterprises Ltd v. Kenya Airports Authority and 4 Others, the petition involved evictions and demolitions without notice. The petition was filed by a limited liability company on behalf of 223 other persons being former inhabitants of KPA Maasai Village, Embakasi within Nairobi. The petitioner alleged that Respondents demolished all dwelling and commercial structures and evicted the occupants from the suit property without notice. They asserted that their rights and fundamental freedoms under the Constitution had been violated including their fundamental rights to accessible and adequate housing under Art. 43. The Petitioner further argued that the occupants were entitled to reasonable notice before the eviction was carried out hence there was a violation of Art. 47 of the Constitution that entitled every person to fair and reasonable administrative action. The court held that:

"The right to be free from arbitrary, unfair evictions and demolition of property is anchored in the values of the Constitution under Article 10 among them human dignity, human rights and social justice. More particularly, evictions directly violate the State's responsibility to provide access to housing and to reasonable standards of sanitation, to water, education and food.

The court further stated that "Article 43 of the Constitution imposes on the State a positive duty to ensure access by its citizens to social economic rights. While access to these rights is progressive and is dependent on the availability of resources, Article 21(1) imposes on the State the duty to, "observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights." The duty to observe, respect and protect implies that the State has a responsibility to refrain from interfering directly or indirectly with the enjoyment of these rights. Not only is a positive duty imposed by the Constitution to ensure access to these rights but a negative one as well to ensure that the State does not impair the enjoyment of these rights"

The court thus held that the State was liable for violation of the rights of the occupants of the suit property under Arts. 28, 29, 43 and 47(1) of the Constitution. It also found that the State had violated Article 21 by failing to develop and enact a policy and legislation to deal with forced evictions. The court thus ordered each of the 223 persons represented in the proceedings by the Petitioner be awarded damages for violation of their fundamental rights and freedoms.

3.4.4 Right to Clean and Safe Water

Okiya Omtatah Okoiti& 3 others v Nairobi City County & 5 Others consolidated suits challenging the appointments of new members of the Board of Directors and the Chairperson of the Nairobi City Water and Sewerage Company Ltd. The Petitioners submitted, inter alia, that water is a strategic national resource and cannot be owned or managed by individuals or institutions; and that the residents of Nairobi City County have a constitutional right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair, including to a water service provider led and managed according to the law, so as to ensure the efficient supply of good quality, affordable, reliable, and sustainable water and sewerage services. The court stated that:

"...it is evident that water provision is essential to the health and wellbeing of citizens, and to the realization of other rights such as the right to health. The importance of its provision and management cannot be underestimated, and the Constitution and international covenants impose positive obligations on the state to ensure that it is available to all, and have included an additional obligation on the state to ensure that it is available to vulnerable groups, such as women and communities in marginalized areas of the country."

Further the court affirmed that "under the provisions of Article 21(2) of the Constitution, the state had an obligation to take legislative, policy and other measures, including the setting of standards, to achieve the progressive realization of the rights guaranteed under Article 43, under which the right to water was guaranteed. The achievement of that right was dependent on the proper regulation and management of water and sanitation services, and of the entities that have the duty of service provision."

After analyzing the evidence proffered regarding the process of appointment of the directors of Nairobi Water and Sewerage Company, the court declared that the purported appointment of directors was unlawful, unconstitutional and null and void; quashed the appointment and directed that the appointment of the directors be carried out afresh in accordance with the law.

3.4.5 Right to Education

In S K K v. D A L, the issue was whether the court could set aside orders of payment of school fees at a specified school, transfer of the subject children from one school to another, and stay of proceedings pending appeal. Important to children's rights and particularly their right to education, the court stated that:

"...orders for maintenance of children and relating to their education cannot be stayed. Stay of such orders would not be in their best interests. Children have a fundamental right to education. They must be kept in school. Staying the orders of 23rd May 2014 would have the effect of forcing the children out of school."

In John Kiplangat Barbaret & 3 Others v. Attorney General and 4 Others, the petition concerned Sagamian Primary School which was established in 1973 and was registered by the Ministry of Education under Code No. 24/68 and by the National Examination Council as an Examination Centre and given the Code No. 56314. Sometime in the year 1979, the school was burnt down and as a result it was closed down and deregistered by the 2nd Respondent. Following its closure, a new school, Mogoyuet Primary School, was established and registered as an Examinations Centre. The students and teachers who were at Sagamian Primary School were transferred to the new school and the property on which Sagamian Primary School was situated was transferred and registered in favour of the 4th Respondent in the year 1980. This status quo remained until the year 2000 when the community, dissatisfied with the new school, renovated the burnt school and continued offering education to students. The Petitioners hence sought orders demanding the Respondents to re-register Sagamian Primary School as a public school, recognize and register it as a National Examinations Centre, and provide it with all education facilities, including employment of teachers just like all other primary schools in the Republic of Kenya. The court held that:

"The Second Respondent denied the children of Sagamian Primary School their right to free and compulsory basic education. Without any lawful justification, it failed to provide them with funds and other facilities accorded to other public schools thereby denying them the chance to realise their right to education. Further, Article 21 (1) of the Constitution places a fundamental duty on the state and every state organ to observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights. By failing to support the efforts of this marginalised community to realise their right to education, the State acted and is acting retrogressively..... In failing to register Sagamian Primary School as a public school, the Second Respondent has occasioned the curtailment, and has curtailed the enjoyment by the Petitioners, and students of the school, their right to education and also prevented them from benefitting from the law. The breach and failure by the Second Respondent resonates on the Third and Fifth Respondents' equal failure and denial to provide the school with teachers."
The Respondents were ultimately directed to re-register Sagamian Primary School as a public school, recognize and register it as a National Examinations Centre, and provide it with all education facilities, including employment of teachers just like all other primary schools in the Republic of Kenya.

In G N v. Chumani Secondary School Board of Management, the issue before the court was whether suspension or expulsion from school of a student minor under a disciplinary process following his fighting in school with another student was a breach of his right to education and flouted the best interest of the child; and whether, therefore, an order for reinstatement of the student to school could be granted. The court held that:

"The defendant/respondent's concern on the security of the other students, or of the student, upon return of the student to the school cannot override the paramountcy of the student's right to education and his best interest in pursuing education qualification by taking the final secondary school examinations. I find that the student has a clear right to education and to his interests being held in paramount regard as against the defendant/respondent's authority to discipline the student in the circumstances of this case where the applicable law – section 35 of the Basic Education Act, No. 14 of 2013 has not been shown to have been complied with. The balance of convenience lies with promoting the student's rights as against the defendant/respondent."

An order for the immediate reinstatement to the school by the defendant/respondent of the student was therefore issued.

In *J K (Suing on behalf of C K) v. Board of Directors of R School & Another,* the petitioner filed the matter on behalf of her son, C K, alleging violation of the son's rights. She alleged that the school rule that prohibited boys from wearing dreadlocks was discriminatory on the basis of their gender and therefore violated Art. 27 of the Constitution. She alleged that the failure to allow C K back to school violated his right to education under Art. 43 and that requiring him to shave his dreadlocks violated his rights to culture as guaranteed under Art. 44. She contended that dreadlocks were a part of the culture of Jamaica where C K's father is from and where C K visited regularly. The court held that "The "hair length rule" under attack in the instant case was not discriminatory and was not therefore in breach of article 27 of the Constitution. A code of conduct which applied a conventional standard of appearance was not, of itself, discriminatory.

In Gabriel Nyabola v Attorney General & 2 Others, the Petitioner brought a suit challenging the Government policy of funding public secondary schools to the exclusion of private ones. He argued that the policy was discriminatory and a violation of the Constitution, the Children Act and various international instruments to which Kenya was a party; and that the right to basic education included secondary education which ought to have been enjoyed by every Kenyan child, irrespective of whether he or she attended public or private secondary school.

The court opined that inequality in treatment was not per se prohibited. The question as to whether discrimination was fair or unfair, hence illegal, was to be weighed against the rationality test. The aim of the inequality ought to have been aimed at achieving a certain legitimate governmental objective. The court stated that in order to progressively realize the free secondary school education, the Government had to give priority to public schools that served the majority of students across the country. Under Art. 43(3) of the Constitution, the State had the obligation to give priority to the most vulnerable and marginalized in the society. That meant that the funding of children in private schools, while a goal to be progressively realized, its immediate application would have undermined affirmative action. The court thus concluded that the failure by the State to provide financial and in-kind assistance to private schools was not discriminatory. The distinction between children in private and public school was intended to achieve the overall goal of progressively providing free education to all children in the future.

Republic v Public Procurement Administrative Review Board & 3 others Ex-Parte Olive Telecommunication PVT Limited was a case of significant national importance as it involved what is widely known as the 'Laptop Project'. It involved the tender for the supply, delivery, installation and commissioning ICT integration in devices and solutions for primary schools in Kenya. The court stated that:

"Before delving into the merits of the application, we wish to emphasise that the matter the subject of this application and judgment is a very important project for this country. The matter revolves around what is popularly known in this country as the "Laptop Project". It is a project of the Government of Kenya by which the Government undertook in part fulfilment of the requirements of Articles 43(f) and 53(1)(b) of the Constitution which provide that every person has a right to education and that every child has a right to free and compulsory basic

education. The role played by education in the development of a nation cannot be overemphasized. In our view the rights and freedoms guaranteed under the Constitution cannot be realized and meaningfully enjoyed unless the society is properly, efficiently and sufficiently informed and in this era of information technology, access to global sources of information such as internet and other related forms of information is no longer a luxury but a necessity."

3.5 Labour Relations

In *Coastal Bottlers Ltd v. George Karanja,* the issue was whether every correspondence by an employer creating rights and obligations in an employment relationship needed to be countersigned by the employee in order to become binding. The court held that it was alive to the fact that a contract of employment could consist of terms contained in a series of separate documents and memoranda published by an employer to their staff. It was therefore not valid for an employer to submit that express terms published and applied on staff were only mere policy guidelines. Not every correspondence by the employer creating rights and obligations in employment relationship required to be countersigned by the employee in order for it to become binding. For example, the employee need not sign a letter of promotion, salary review and transfer once the employer had exercised that right or discretion.

In the matter of *Sarah Wanyaga Muchiri v. Rt Rev Bishop Henry Kathii and Another,* the issue was whether an employer could limit or attempt to limit the right of an employee to dispose of his/her wages by insisting that they pay for the improvement of their professional skills. The court held that the claimant had not refused to undergo the required training. She had a desire to do so but was incapacitated by compelling financial commitments. The Respondents were only prepared to refund 50% of the cost of training on condition that the claimant passed the examinations. In other words, a failure would have meant no refund. The court stated that had the Respondents wanted to retain the claimant in employment and at the same time wanted her professional skills enhanced, they were very much capable of sponsoring her fully even if it meant recovering the costs gradually from her salary.

The court noted that improving the claimant's professional skills would not only have benefited the Respondents but the Claimant as well. On that account, the court determined that the claimant's termination was unfair stating that s. 17(11) of the Employment Act of 2007 prohibited any employer from limiting or attempting to limit the right of an employee to dispose of his or her wages in a manner he or she saw fit. The court stated that as a parent, the Claimant's priority was to educate her child and to repay her loan. The Respondents' requirement for the Claimant to enroll herself in an accountancy course not only limited her right to use her wages as she pleased, but also amounted to an unfair labour practice; rendering her dismissal unfair, and one that was outside of the justification set out in section 45(1) of the Employment Act of 2007.

In the case of *Pravin Bowry v Ethics & Anti- Corruption Commission,* the claimant was one of four former assistant directors (legal services) of the Kenya Anti-Corruption Commission (KACC) now repealed and replaced by the Ethics and Anti- Corruption Commission (EACC). His employment was terminated on the basis that the office of the assistant director (legal services) was abolished by the new Act and therefore the employment of the claimant was no longer tenable. The directors' employment contract provided for full remuneration in the event of premature termination of the contract, although this clause had been deleted from the claimant's contract of service despite him being of the same status and recruited in the same manner as the other assistant directors. The main issue was whether the deletion of clause (XI) from the claimant's contract of service constituted discrimination and was, therefore, unlawful.

The court held that the difference in treatment with regard to termination of his contract vis-à-vis his counterparts was too profound in terms and in financial consequences that it aroused a sense of shock in any reasonable person's mind. In the absence of any reasonable explanation, the court had no other alternative but to conclude that the motivation for the discrimination, whatever it may have been, was unconscionable, and for that reason inequitable, unjust and unlawful.

3.6 Land and Environment Matters

In *Joseph Letuya & 21 others v Attorney General & 5 Others,* the court was challenged to determine whether an indigenous community, the Ogiek community, had recognisable rights arising from their occupation of parts of East Mau forest and also whether in the circumstances, the rights of the Ogiek community had been infringed by their eviction and subsequent allocation of their land to other people. The court held that the applicants were indeed recognised as indigenous and minority groups. Thus they were specifically and differentially affected and discriminated against by the fact of their eviction. Their right to life, dignity and economic and social rights had been infringed when the said land was allocated to other people contrary to the very purpose of excision of the said forest land. The court also questioned the legality of the eviction process and urged that all titles issues irregularly were to be revoked and the members of the Ogiek Community who were not given land were to be settled outside the critical catchment areas.

In *Friends of Lake Turkana Trust v Attorney General & 2 Others,* the matter of contention was an alleged memorandum of understanding entered into by the Government of Kenya and Government of Ethiopia in 2006 for the purchase of 500 MW of electricity from Gibe III as well as an $800 million grid connection between Ethiopia and Kenya. The Petitioner argued, inter alia, that the Gibe III project would have severe impact on Lake Turkana hence the communities will be adversely affected; that the Government of Kenya had failed to act as a public trustee, in violation of Article 62 and 69 of the Constitution, by failing to conduct a full, proper and thorough comprehensive impact assessment on the potential effects of construction and operation of Gibe III before committing itself; and that the Government of Kenya repeatedly declined to disclose the nature and details of the 2006 Memorandum of Understanding with the Government of Ethiopia nor to disclose how environmental concerns in regard to the project had been addressed.

On its jurisdiction to intervene and address issues arising from any agreement entered into between the Kenyan Government and Ethiopian Government for the purchase of electricity from Ethiopia, the court held that the Petition had no foreign state or foreign and/or intergovernmental entity as a party that would make it (court) incompetent to hear and determine the petition. The court stated that the fact that the subject matter of the petition was an agreement entered by the Kenyan Government with the Ethiopian State, and that the alleged violations of the rights of the Petitioner arose in a transboundary context, and may have originated from transactions that were undertaken in Ethiopia, did not on their own operate to limit access to the Court, or its jurisdiction.

The court found that it was evident from the evidence that there was a likelihood of adverse impact of the Gibe III hydroelectric Project on Lake Turkana and the communities that depend on the lake for their livelihood. However, no report or evidence had been tendered by the Petitioner as to the actual effect of the Gibe III hydroelectric project and the infringement of its rights in this respect, hence the court could not therefore at that stage make a finding that the Petitioner's rights to dignity, life, livelihood and cultural and environmental heritage had been infringed, in the absence of concrete evidence in this regard. On the right to information, the court stated that the Respondents, the State, were trustees of the environment and natural resources and owed a duty and obligation to the Petitioner to ensure that the resources of Lake Turkana were sustainably managed utilized and conserved, and to exercise the necessary precautions in preventing environmental harm that may arise from the agreements and projects entered into with the Government of Ethiopia in this regard.

The court partially allowed the Petition granting orders directing the Government of Kenya and other Respondents to make full and complete disclosure to the Petitioner of each and every agreement or arrangement entered into or made with the Government of Ethiopia relating to the proposed purchase of electricity from Ethiopia and/or the Gibe III project. The court also directed the Government of Kenya and other Respondents to take the necessary steps and measures to ensure that the natural resources of Lake Turkana were sustainably managed, utilizedandconserved in any engagement with, and in any agreements entered into or made with the Government of Ethiopia relating to the purchase of electricity.

In *John Kamau Kenneth Mpapale v. City Council of Nairobi & 7 Others*, the Petition was filed on behalf of the Mutindwa Market Self-Help Group, a group formed by traders who operated at Mutindwa Market. The traders had put up business stalls on public utility land and paid hawkers fees to the local authorities. Their stalls were subsequently demolished to pave way for the construction of roads. The petition challenged the demolition and the question arose as to the nature of the rights enjoyed by the traders over the land. The traders
claimed their right to participate in the planning process leading up to the demolition was violated. They also contended that they had not been given notice or been heard before their livelihoods and their ability to earn a living was curtailed.

Dismissing the petition, the Court decided that the rights of the traders over the land were the rights of temporary licensees. As temporary licensees, the traders were entitled to a reasonable notice to vacate the land without any reason being given to explain the requirement for them to vacate the land. Additionally the Court explained that the economic and social rights recognized in Art. 43 of the Constitution were inapplicable to the demolition exercise as the property was not utilized as a residential informal settlement but was utilized as business premises. The Court also found that the Petitioners as traders could not be treated as a minority or marginalized group. The Court also held that where private interest and public interest clashed, public interest would prevail. Generally, the court explained, the Petitioners' rights over the public utility land and the employment opportunities created by it could not be asserted against the expansion of a public road.

3.7 Family Law

U M M v I M M concerned the division of matrimonial property as provided for under the Matrimonial Property Act vis-à-vis Art. 45(3) of the Constitution. The Plaintiff sought to share and divide property held in the names of her former husband, the defendant (I). The main issue before the court was whether the equality contemplated by Art. 45(3) of the Constitution was an automatic 50:50 sharing of matrimonial property upon dissolution of the marriage and whether the Court could apply Art. 45(3) in resolving the dispute where the disputed properties were all acquired before the promulgation of the Constitution of Kenya, 2010.

The court found that sections 2, 6 and 7 of the Matrimonial property Act, 2013 fleshed out the right provided by Art. 45(3) of the Constitution. By recognizing that both monetary and non- monetary contribution must be taken into account, it was congruent with the constitutional provisions under Art. 45(3) of the Constitution that parties to a marriage are entitled to equal rights at the time of the marriage, during the marriage and at the dissolution of the marriage. The court further stated that:

"At the dissolution of a marriage each partner should walk away with what he/she deserves. What one deserves must be arrived at by considering her/ his respective contribution whether it be monetary or non-monetary. The bigger the contribution, the bigger the entitlement. Where there is evidence that a non-monetary contribution entitles a spouse to half of the marital property, then the Courts should give it effect. To hold that article 45(3) decrees an automatic 50:50 sharing could imperil the marriage institution. It would give opportunity to a fortune seeker to contract a marriage, sit back without making any monetary or non-monetary contribution, distress the union and wait to reap half the marital property. That would be oppressive to the spouse who makes the bigger contribution and that cannot be the sense of equality contemplated by Article 45(3)."

In *J L N & 2 others v. Director of Children Services & 4 Others,* WKN and CWW entered into a surrogacy agreement with JLN who agreed to be a surrogate mother by undergoing in vitro fertilization. Following the delivery of the children, the issue arose as to whether CWW should be registered as the mother of the children in the Acknowledgement of Birth Notification, as required under the Births and Deaths Registration Act rather than JLN, the birth mother. The Hospital, the 3rd respondent, informed the 1st respondent, the Director of Children Services, of the circumstances concerning the birth of the twins. The Director took the view that the children were in need of care and protection and as a result, his officers took them and placed them under the care of a Children's Home. The main issue before the court was whether a woman who gave birth under a surrogacy agreement would be recognized as a birth mother and a parent under the law.

The court, while acknowledging that Kenya did not have a law that governed surrogacy and related issues, noted that in the absence of a law on surrogacy, the Hospital was entitled to seek guidance on the issue from the Director. Under section 38(1) of the Children Act, the Director was required to safeguard the welfare of children and in particular, to assist in the establishment, promotion, co-ordination and supervision of services and facilities designated to advance the wellbeing of children and their families. In the alternative, the Hospital was entitled to seek guidance from the Principal Registrar of Births and Deaths. The Hospital therefore did not violate the petitioner's rights to privacy when it informed the Director of the surrogacy arrangements between the petitioners. The court, however, held that the Director had violated the rights and fundamental freedoms of the Petitioners by taking away the children in a manner that could not be justified under the Children Act, and had caused them distress and embarrassment by taking away the children. The court found that their right to human dignity under Art. 28 of the Constitution had been violated. The petition was thus allowed in part with the case against the Hospital dismissed and the Director to pay each of the Petitioners damages.

3.8 Selected Decisions Affecting Other Organs of Government

3.8.1 Mandate of the National Land Commission vis-à-vis the Ministry of Lands, Housing and Urban Development

Since the establishment of the National Lands Commission, disagreements have arisen regarding the powers and functions of the National Lands Commission and the Ministry of Lands, Housing & Urban Development. *In the Matter of the National Lands Commission* under Article 163(6) of the Constitution of Kenya, the National Lands Commission sought an advisory opinion on the respective roles of the ministry and the Commission. The main issue before the court was whether the dispute concerning the powers and functions of the National Land Commission vis-à- vis those of the Ministry of Lands, Housing & Urban Development were those that raised a justiciable issue and whether the High Court would have been the best forum to resolve that dispute. The court held that the National Land Commission, as a state organ established under article 67(1) of the Constitution and recognized under article 248(2) (b), had the capacity to request the Supreme Court for an advisory opinion.

It was also held that under the National Land Commission Act, 2012 (Act No. 5 of 2012), section 5(2)(b) all land vested in the people and was to be administered by the National Land Commission. Therefore, the applicant as the State organ entrusted with the function of managing public land on behalf of both the national and county governments, has a broad mandate that cuts across both spectra of national and county governments. The Court further held that the instant reference involved matters concerning county government; in particular, as the relevant issues involved the administration and management of public land, at both the national and the county level, precisely as contemplated under articles 62(2) and 67(2) of the

Constitution. From the terms of the Constitution, the applicant (National Land Commission) was a shared institution at the two levels of government, and did not fall within the exclusive sphere of the National Government.

3.8.2 Roles of the Inspector General of Police and the National Police Service Commission

In *International Centre for Policy and Conflict v. Attorney General & 2 Others,* the applicants challenged the decision of the Inspector General of Police in appointing and deploying 47 county police commanders to aid in the coordination of security activities within counties. They contended that that was a power of the National Police Service Commission and not the Inspector General. The court held that whereas the Inspector General was vested with the powers of appointment and assignment of any members of the police service, the powers to transfer were reserved for the Commission. In this case, the Inspector General merely deployed county police commanders to ensure no vacuum was created in the security system following the implementation of the devolved system of government. The court regarded this to be a temporary measure amounting to an assignment of duties and not a transfer.

3.8.3 Presidential Consent in the Transfer of Beach Plots

In *Attorney General & 6 Others v. Mohamed Balala & 11 Others,* the Mombasa Law Society petitioned the High Court for an order prohibiting the Appellants from requiring or insisting on presidential consent as a precondition before transferring 1st and 2nd row beach plots. They contended that it was illegal and discriminative against the owners of the beach plots. The High Court held that there was no legal basis for requiring consent to be produced when registration of a transaction over beach plots was carried out and also that such requirement amounted to discrimination. The respondents went to the Court of Appeal challenging the High Court decision. The Court of Appeal ruled:
"Article 40 that deals with protection of the right to own property allows the owner of land to use, transfer, enjoy and control his/her private property. Therefore, a condition of obtaining presidential consent before transferring the plot limits the owner's right to property and is an unnecessary clog or fetter to that freedom and indeed freedom to contract… National security would ordinarily triumph over the rights of an individual. It is however in such instances that the court must be convinced that it is absolutely necessary before sanctioning it. Furthermore, such a decision must be based on the law so as to prevent abuse. There is currently no law to govern this presidential fiat, leaving it open to misuse and abuse. This was considered by the learned Judge and she found correctly that it amounted to a breach of the Constitution for contravening the national values under Article 10 of the Constitution, among them being the rule of law."

3.8.4 Enforceability of a Presidential Promise

Amongst the main issues in *Lucy Mirigo & 550 Others .v Minister for Lands & 4 Others,* was whether a promise by the President to alienate or allocate land was enforceable in law. The Court of Appeal held that an order of mandamus could not issue to enforce a promise that was not underpinned by a statutory provision. Additionally, a promise of this kind implies something to be done in the future and it could neither create nor convey an interest in land. Thus, the promise by the former President of Kenya, Mzee Jomo Kenyatta, to allot land did not vest any interest in the suit property on the appellants. Moreover, it was trite law that a future
interest in land was void if it did not vest within the stipulated time frame. The Court held that it was the mandate of the National Land Commission to investigate issues of historical land injustices and to recommend appropriate redress as per Art. 67(1)(e) of the Constitution. It was not the duty of the courts to allocate land and more so the judicial remedy of mandamus was not created to settle ownership disputes or to confer title to land.

3.8.5 Payment of Withholding Tax By Non-Residents

In *Motaku Shipping Agencies Ltd v. Commissioner of Income Tax,* the appellant, under a ship management agreement made with vessel owners from foreign countries, was supposed to procure professional and managerial services for certain vessels during visits to Kenyan ports. The vessel owners remitted funds for the procurement of the services. The Commissioner of Income Tax carried out a tax audit and issued assessment notices for the payment of taxes including withholding tax for payments made by the appellant to service providers. The Commissioner of Income Tax argued that the appellant was a resident and the income had been derived in Kenya and that, therefore, the appellant was obligated to pay income tax, including withholding tax. On the other hand, the appellant argued that in procuring the services, the appellant was merely acting as an agent to principals who were non-residents from foreign countries and not required to pay withholding tax.
The Court agreed with the appellant; it found that the Income Tax Act did not provide for taxation with respect to management or professional fees made by a non-resident even if the payment was made to a resident. Since the appellant was acting in the capacity of an agent for foreign non- resident principals, the appellant was not under an obligation to retain portions of the service provision payments and to remit the same to the Commissioner of Income Tax as withholding tax.

3.8.6 Placing Public Officers Serving on Secondment on Probation

In *Silas Kipruto & Another v. County Government of Baringo & Another,* the claimants were civil servants who had been seconded to the county government of Baringo by the Public Service Commission. The County Government of Baringo terminated their service and argued that the claimants were on probation and could therefore be dismissed. The issue before the court was whether public officers serving on secondment could be placed on probation. The court held that public officers serving on secondment could not be placed on probation since such officers were not newly appointed officers. It was therefore untenable for any authority in the county government to place experienced officers on probationary service.

3.8.7 Digital Migration

Communications Commission of Kenya & 5 Others v. Royal Media Services & 5 Others originated from the High Court where Royal Media Services and 5 others sought orders to compel the Communications Commission of Kenya (CCK) to issue them with Broadcasting Signal Distribution (BSD) licenses and frequencies. Royal Media Services also sought an order restraining the CCK from switching off their analogue frequencies, broadcasting spectrums and broadcasting services pending the issuance of a BSD license. The High Court dismissed the petition holding that Royal Media Services and the other media petitioners were not entitled to be issued with a BSD license merely on the basis of their established status or legitimate expectation. Further, that the implementation of the digital migration was not a violation of the petitioners' fundamental rights or their intellectual property rights.
On appeal, the Court of Appeal set aside the decision of the High Court by holding, inter alia, that:

(a) the Communications Commission of Kenya was not the independent body contemplated by article 34(3) (b) & (5) of the Constitution and therefore could not grant the BSD licenses, and,

(b) the direction for the then respondents to air the appellants' (now respondents') Free to Air (FTA) programmes without their consent was a violation of the appellants' intellectual property rights and was thus null and void.

When the matter came before the Supreme Court, the main issues for determination were whether CCK violated the intellectual property rights of the content producers (respondents) by authorizing the transmission of the respondents' broadcasts without the respondents'

consent; and whether a legitimate expectation for the grant of a Broadcasting Signal Distribution (BSD) license can arise on account of substantial/ massive investments in the broadcasting sector.

The Supreme Court held that CCK had exclusive powers under section 5(1) of the Kenya Information & Communications Act to issue broadcast licenses. Section 5B thereof guaranteed the independence of CCK in the performance of its functions. However, the promises made to the respondents on account of their substantial investment in broadcast infrastructure, and upon which they claimed legitimate expectation for the grant of BSD licenses emanated from the Permanent Secretary, Ministry of Information, Communications & Technology. Under the Kenya Information & Communications Act, the Permanent Secretary had no role in the granting or cancellation of a BSD license or any other broadcast licenses. It was therefore unlawful for the Permanent Secretary to make such promises to the 1st and 2nd respondents.

The Court further held that although CCK deployed the procurement procedure in the Public

Procurement & Disposal Act, in granting a BSD license to the 5th appellant (Pan African Network Group Kenya, Limited) and denying the same to the 1st, 2nd & 3rd respondents, that decision was not informed by the imperatives of the values of the Kenyan Constitution as decreed in article 10.

Given the fact that the subject matter of the license was a critical public resource and whose capitalization the Kenyan public had an interest in, CCK was bound to conduct its affairs more responsibly & transparently. Instead CCK chose to be hamstrung by the technicalities of procedure as if it were an ordinary procurement of goods and services. It was operating as if the Constitution did not exist.

3.8.8 "Pleasure Doctrine" in Kenya's Public Service

In the Matter of Richard Bwogo Birir v Narok County Government and 2 Others, the Petitioner was appointed as the Executive Committee Member for Livestock and Fisheries in the County Government of Narok. Later, the 2nd Respondent, the Governor of Narok County, wrote him a letter of dismissal; the Petitioner filed a suit alleging infringement of his fundamental rights and freedoms under the Constitution. Conversely, the Respondents submitted that the dismissal was not unlawful and was done in accordance with the County Governments Act, 2012. The Respondents further contended that the relationship between the Petitioner and the 1st Respondent, the Narok County Government, was contractual one and as such could be lawfully terminated. A primary issue that arose was whether the 'pleasure doctrine' was applicable in Kenya's public service; and whether the dismissal of a public servant under the pleasure doctrine amounted to contravention of the constitutional and statutory provisions.

The 'Pleasure doctrine' was an old English legal principle under which public officers within Her Majesty's service held office at the pleasure of the Crown. By reason of that doctrine, the public officers in her Majesty's service could not question their dismissal from office in judicial proceedings and could only initiate other remedial measures such as political intervention. The court held that all persons holding public or state office in Kenya were servants of the people of Kenya. Despite the level of rank of state or public office as may be held, no public or state officer was a servant of the other but all were servants of the people. Thus, the idea of servants of the crown was substituted with the doctrine of servants of the people.

Removal from public or state office was therefore constitutionally chained with due process of law. At the heart of due process were the rules of natural justice. Thus, the pleasure doctrine for removal from a state or public office had been replaced with the doctrine of due process of law. Article 236 of the Constitution on protection of public officers was particularly clear on the demise of the pleasure doctrine in Kenya's public or state service.

3.8.9 Distribution Royalties not Subject to Customs Duty

In the case of *Republic v Kenya Revenue Authority, Exparte Bata Shoe Company (Kenya) Limited,* the Kenya Revenue Authority demanded taxes for royalties paid by the Applicant, Bata Shoe Company (Kenya) Limited to an entity known as Bata Brands, for the use of the Bata trademark. The Applicant explained that the royalties were paid as a percentage from sales made from locally manufactured shoes and imports from Bata-related suppliers and third party suppliers. It further elaborated that the royalties were not being made directly or indirectly to suppliers of the imported goods. The Court held that the royalty fees paid to Bata Brands were paid for the use of the Bata trademark in Kenya and had no relationship to the price of imported products. The royalties were not paid as part of a condition of sale for imported goods within the terms of rule 9(i)(c) of the Fourth Schedule to the East African Community Customs Management Act, 2004. Therefore, the Applicant had no obligation to pay tax on such royalties.

3.9 Other Notable Decisions

3.9.1 *Banks Cannot Vary Interest Rates Arbitrarily* In *Margaret Njeri Muiruri v. Bank of Baroda (Kenya) Limited,* the Court of Appeal ruled that it was morally wrong and unconscionable for financial institutions to change interest rates without notifying the borrowers. The court held that under s. 44 of the Banking Act, a bank could not increase its rates without the approval of the Cabinet Secretary in charge of finance and that, it was, in the instant case, the duty of the bank to produce evidence of such approval, which it did not.

"We have found in the above discussion that there was no evidence that the interest rate charged by the respondent was in accordance with section 44 of the Banking Act. We have found that it was manifestly excessive, and, in the words of the trial judge, morally wrong. We have further expressed the view that the clause relied on to charge the interest that led to this exorbitant indebtedness was not only unconscionable and without notice to the appellant, but was bad for failure to accord with the relevant provisions of the law. In addition we have found that the bank owed a statutory and fiduciary duty of care to the appellant and the deceased's estate."

3.9.2 Non-Registration of a Collective Bargaining Agreement

In a claim for unfair termination of his employment contract, the Claimant in *Said Ndege v. Steel Makers Ltd* sought leave to refer to a Collective Bargaining Agreement that was unregistered. The Collective Bargaining Agreement was entered into by the Respondent (the employer) and the Kenya Engineering Workers Union (the Union) on September 23, 2011 and was effective from January 1, 2011 for two years. Further to that agreement, the Respondent deducted KSh. 338 from the Claimant's wages on a monthly basis. The Collective Bargaining Agreement was not registered as required by s. 60 of the Labour Relations Act, 2007. In opposition to the Application for leave, the Respondent argued that the Collective Bargaining Agreement was unregistered, and that it was the Union's role to litigate over the terms of the Collective Bargaining Agreement, not the Claimant as an individual, and that the Union ought to have been joined as party to the suit.

The main issue was whether an unregistered Collective Bargaining Agreement was legally enforceable by the parties or Court. Section 59(5) of the Labour Relations Act was explicit that a collective agreement became enforceable and had to be implemented upon registration by the Industrial Court, but effective from the date agreed by the parties. Section 60 of the Act placed a primary obligation upon the employer to submit the collective agreement within 14 days of conclusion to the Industrial Court for registration. If the employer failed to submit the collective agreement for registration, the trade union was given the leeway to submit it to the Court for registration.

The Court asserted that it was both a Court of law and a Court of equity; and equity always moved in to moderate and constrain unfair dealing consequences that arose from the conduct of a party such as the Respondent where a statutory obligation was placed upon it but for unexplained reasons it failed to fulfill such statutory obligations.

3.9.3 Public Notices About Suspended Employees Pending Investigations

In the case of Wilberforce Ojiambo Oundo v Regent Management Limited, the main issue was whether it was proper labour practice to put up public warnings concerning a suspended employee in regard to whom investigations were still ongoing. The timing of the public notice in this case was instructive as it was made during the currency of the claimant's suspension. The court held that an employee on suspension remained innocent until proved otherwise. In addition, such an employee had a legitimate expectation that they would at the very least be given an opportunity to respond to any adverse findings arising out of the investigation. Since there was no evidence that the claimant had breached any of the allegations, the public notice was unwarranted and was made in bad faith.

3.9.4 Certificate of Search Is Not Conclusive Proof of Actual Ownership of a Motor Vehicle

In *Superfoam Ltd & another v Mbero,* the Court made a determination on whether a certificate of search with respect to a motor vehicle was conclusive proof of ownership of a motor vehicle. Section 8 of the Traffic Act (Cap 403) states that the person in whose name a vehicle is registered shall, unless the contrary is proved, be deemed to be the owner of the vehicle. It was the Court's finding that a certificate of search from the Registrar of motor vehicles would show the owner of the motor vehicle according to the records held by the Registrar. The Court elaborated that it was possible for a motor vehicle to be sold without the official records reflecting the sale. The Court, in dismissing the appeal, accepted various documents and a sale agreement as evidence of ownership of a motor vehicle.

3.9.5 Application of the Principle of Mercy to the Grant of Injunctions

In *Al-Jalal Enterprises Limited v Gulf African Bank Limited,* the Plaintiff obtained a loan and had only repaid a fraction of it and was in default in making repayments. The value of the property offered as security was alleged to be significantly more than the value of the loan. The Defendant threatened to sell the property via a public action in exercise of the power of sale. In opposition to the sale, the Plaintiff argued that the loan agreement was invalid as the charge instrument was invalid and the agreement and the interest charged were illegal under Sharia banking law. The Plaintiff sought an injunction to halt the intended sale.
The court held that the property in question had been turned into a commodity for sale by offering it as security and that the Plaintiff had persistently been in default of making loan repayments. The Court decided that the contention that the sale agreement and the charge instrument were invalid appeared to be an excuse and an afterthought. The Plaintiff had not raised such issues when the security agreement was executed and had taken the loaned amount on the terms offered in the agreement. While the Court found that the threshold for the grant of an injunction had not been met, as a court of equity and a court of mercy, it decided to direct the Plaintiff to comply with an order for the repayment as a relief against the threatened sale. The application to halt the sale was thus allowed subject to repayment term.

3.9.6 The Court of Appeal's Jurisdiction to Review ItsDecisions

In *Nguruman Limited v. Shompole Group Ranch & Another,* the applicant made an application for review or in the alternative for correction of the orders given by the Court of Appeal. The Court of Appeal ruling for which review was being sought, was not decided on the basis of a misapprehension of the requirements of rule 5(2)(b) of the Court of Appeal Rules but was decided on the basis of an interpretation that the relief sought could be granted on grounds of the overarching principle of substantive justice. The Court of Appeal, in that ruling had noted that there was no legal provision allowing for a notice of appeal lodged in a later decision to be used in an application for a stay of execution of an earlier decision.

The five-judge bench ruled that neither the Appellate Jurisdiction Act nor the Court of Appeal Rules contained any provision for review of the Court of Appeal's final orders but it has been held where that the Court of Appeal had residual jurisdiction to reopen appeals, albeit in very limited circumstances. Rule 57(2) of the Court of Appeal Rules, in particular, granted the Court of Appeal jurisdiction to vary or rescind an order made by the Court of Appeal pursuant to an application. The three-judge bench decision, for which review was being sought, was made pursuant to an application and it could be rescinded. Article 48 of the Constitution of Kenya 2010 gave open-ended access to justice including access to ask the Court of Appeal to re-open, re-hear and re-determine a finally concluded matter. Further, Art. 20(3)(a)(b) enjoined the Court of Appeal to interpret the law in such a way as not to withhold a right including a right to access justice. Further, the Court was required to administer justice without undue regard to technicalities as prescribed under Art. 159(2)(d) of the Constitution.

3.9.7 *Court Exercising Residual Jurisdiction to Review its Decisions from Which There Were No Appeals*

One of the main issues before the Court of Appeal in *Benjoh Amalgamated Limited & another v Kenya Commercial Bank Limited* was whether the Court had residual jurisdiction to review its own decisions. In dismissing the application seeking to have the Court review and set aside the judgment against the applicants, the Court held that where the Court was one of final resort, and notwithstanding that it had not explicitly been statutorily conferred with the jurisdiction to reopen a decided matter, it had residual jurisdiction to do so in cases of fraud, bias, or other injustice with a view to correct the same. That jurisdiction was to be invoked with caution and only in cases whose decisions were not appealable to the Supreme Court.

Prior to the 2010 Constitution, the Court of Appeal took the view that it did not have jurisdiction to review its own decisions and that the only power it had with regard to review was in relation to the 'slip rule' under Rule 35 of the Court of Appeal Rules, 2010. Further, in this case, the court held that its inherent power under Rule 2(1) of the Court of Appeal Rules, 2010 was exercisable in hearing appeals when it was still a court of last resort. The Court of Appeal noted that case law on the issue of review showed that there were two conflicting principles that emerged namely the "finality principle", which did not support review, and the "justice principle", which advocated for limited review on the basis that the purpose of litigation was to do justice to the litigating parties. The "finality principle" was urged on the basis of public interest as a public policy issue and was anchored on the need for stability and consistency in law while the "justice principle" was urged on the basis of justice to the parties and to boost the confidence of the public in the judicial system.

3.9.8 Jurisdiction of the Judges and Magistrates Vetting Board

The Judges and Magistrates Vetting Board was set up to vet the suitability of all the judges and magistrates in office prior to the promulgation of the Constitution of Kenya, 2010. The Board vetted a number of judicial officers and declared some unfit to serve. The Board's establishment under the Vetting of Judges and Magistrates Act and some of its declarations, triggered various lawsuits challenging its jurisdiction and scope.

The Supreme Court has clarified the position in the *Judges and Magistrates Vetting Board v Kenya Magistrates and Judges Association*, where the main issue was whether the Judges and Magistrates Vetting Board (Vetting Board) had jurisdiction to vet the conduct of judicial officers that occurred after the effective date of the Constitution of Kenya, 2010. The court's majority decided that the Vetting Board could only consider the conduct of judicial officers arising before the coming into force of the Constitution of Kenya, 2010.

The new Constitution mandates the Judicial Service Commission to determine the suitability of judicial officers and staff. Therefore, the jurisdiction of the board does not extend to activities that occurred after the promulgation of the Constitution of Kenya, 2010. The Court further held that the Vetting Board, in discharging its mandate per section 23 of the Sixth Schedule to the Constitution, could only investigate the conduct of judges and magistrates who were already in office on the effective date of the new Constitution.

Another case that touched on the jurisdiction of the Vetting Board was the case of *Judges and Magistrates Vetting Board & 2 Others v Centre for Human Rights and Democracy & 11 Others*. In this case, the main issue for determination was whether, in effect, the provisions of section 23(2) of the Sixth Schedule to the Constitution of Kenya, 2010 and section 22(3) of the Vetting of Judges and Magistrates Act, No 2 of 2011, ousted the supervisory jurisdiction of the High Court. The majority opinion was that section 23(2) of the Sixth Schedule to the Constitution ousted the jurisdiction of the High Court and any other court to review a decision of the Judges and Magistrates Vetting Board and also excluded the powers of the High Court to exercise original jurisdiction in claims brought as a consequence of a decision of the Vetting Board. It was further held that according to the provisions of s. 23(1) of the Sixth Schedule to the Constitution of Kenya 2010, the purpose of the vetting process is to ensure that judges and magistrates abided by the national values and principles of good governance and complied with the requirements of Art. 259 of the Constitution. Art. 259 requires, among other things, that the Constitution be interpreted in a manner that promotes its purposes, values and principles and advances the rule of law, human rights and fundamental freedoms in the Bill of Rights.

The Chief Justice emphasized that in interpreting the Constitution, Courts have to take cognizance of Kenya's unique historical context and that the locus classicus case on statutory ouster, the Anisminic case, would not apply in interpreting Art. 23(2) of Kenya's new Constitution. The Chief Justice stated that the purpose of our theory of constitutional interpretation was 'to rescue the weakness of comparative jurisprudence, while at the same time building on its strengths.' When considering comparative jurisprudence from foreign jurisdictions, the Chief Justice stated that it was important to consider Kenya's unique Constitution whose provisions such as those in Art. 1, 23, 159 and 259 emphasize the sovereignty of the people; or Art. 10 on principles and values which apply to the interpretation and application of the Constitution; or whether such jurisdictions have legislation similar to our Supreme Court Act, which introduces Kenya's historical context into the interpretation of the Constitution.

"If the answers to these questions are in the negative, then the common law doctrines found in other jurisdictions, foreign cases and foreign constitutions, must be interpreted in such a manner as to reflect our modern Constitution, and our unique conditions and needs."

3.10 Conclusion

Kenya's courts have certainly made significant contribution to the development of jurisprudence. All the hierarchies of courts have settled important questions of law many of which have arisen within the context of the Constitution, 2010. The development of jurisprudence has benefited from a close interface between the Judiciary and the academy, as well as exchange programs with courts of comparable standing in other jurisdictions from all over the world. Under the auspices of JTI/JTS, Judges and judicial staff from the Supreme Court, Court of Appeal and High Court participated in exchange programs in Columbia, South Africa and Korea. The Judiciary also hosted a number of delegations from other jurisdictions for colloquia on emerging issues in comparative jurisprudence. The Judiciary's commitment to develop a robust, indigenous and progressive jurisprudence remains strong.

CHAPTER FOUR

INTER-AGENCY COLLABORATION IN THE JUSTICE SECTOR

4.1 Introduction

The National Council on the Administration of Justice (NCAJ) is established under s. 34 of the Judicial Service Act (No. 1 of 2011). It is a high-level policymaking, implementation and oversight coordinating mechanism as reflected in its membership that is composed of State and Non- State Actors from the justice sector. Its mandate is to ensure a coordinated, efficient, effective and consultative approach in the administration of justice and reform of the justice system. The NCAJ, which is comprised of over 30 State and Non State justice agencies, is the sector's foremost co-ordinating mechanism. During the reporting period, NCAJ undertook a number of activities as highlighted below:

4.2 Launch of NCAJ Strategic Plan 2012-2016

A product of several months of consultation with all stakeholders, the official launch of the NCAJ Strategic Plan and Court Users Committee(CUC) Guidelines by the. Chief Justice in June 2013 marked the beginning of an important phase in NCAJ's institutional growth and national stature. The Strategic Plan outlined the direction that the NCAJ will follow in delivering on its mandate, providing a comprehensive plan of action premised on a series of strategic issues and objectives. Five strategic issues were identified to be addressed during the Plan period. These include: review legal and policy frameworks for NCAJ and the entire justice sector; strengthen the institutional operation framework for NCAJ and its membership; mobilise resources for efficient and effective administration of justice; to coordinate, monitor and evaluate strategies on the administration of justice; and operationalize Court Users Committees. These have guided the activities and programs of the NCAJ during the reporting period.

4.3 Court Users Committees Operationalization

The establishment and development of CUCs was a core agenda for the NCAJ during the reporting period. All court stations have CUCs. A Court Users Committee (CUCs) is a forum that brings together actors in the administration of justice as well as users in the justice system to address problems within the sector by all agencies and stakeholders concerned. CUCs provide an avenue to address matters in the administration of justice while enhancing public participation and stakeholder engagement; developing public understanding of court operations; promoting effective justice sector partnerships and advancing the application of Alternative Dispute Resolution mechanisms. CUCs also serve to promote accountability and improvement of performance by Courts and all actors within the justice chain. The membership of CUCs as far as is practicable reflects that of the NCAJ. However, across the country at the various court stations the constitution of these important institutions varies, as the CUCs are at liberty to invite members on an ad hoc or permanent basis according to that particular CUCs needs.

The Chief Justice launched the CUCs Guidelines as a tool for the establishment and operationalization of CUCs across the country that will serve to complement the enduring transformation agenda of the justice sector institutions at the court station level.

To further strengthen the institution of CUCs, several activities were undertaken. These include training CUCs in Makadara, Kibera, Nyando and Bomet in conjunction with the Witness Protection Agency on the rules and court procedures under the Witness Protection Act. Site visits were carried out to the Othaya CUC to discuss Traditional Dispute Resolution Mechanisms (TDRM). During this visit, members of the NCAJ Technical Committee interacted with 200 Elders from Othaya County who led TDRM initiatives and raised awareness of Article 159 of the Constitution. Towards increasing the capacity of CUCs, 15 student researchers were recruited in a collaborative initiative between NCAJ and GIZ.

A documentary programme on CUCs was developed and subsequently aired on national television raising national awareness of the role, functions and importance of Court Users Committees. As part of this public awareness and outreach campaign, IEC materials on NCAJ and particularly CUCs were produced, published and disseminated to every court station. These included 120 pop-up banners, 500 posters, 1000 pamphlets on CUCs Guidelines and 1500 litigant brochures. In June 2014, representatives from the NCAJ Technical Committee attended a KNCHR facilitated Kwale CUC Open Day and the Judiciary facilitated Bomet Open Day. These events raised awareness of the activities of NCAJ and the opportunities for sector wide collaboration at the grassroots.

Recognising that CUCs have succeeded in playing an increasingly critical role in achieving the objectives of judicial transformation and bolstering service delivery in the justice sector, NCAJ, in partnership with GIZ, hosted the Inaugural National CUCs Conference in November 2013. The forum was convened to review the progress made by CUCs and draw resolutions on the way forward from a CUC perspective. A total of 280 participants attended the Conference and arrived at far-reaching resolutions that impacted the operations of CUCs and the NCAJ Secretariat.

4.4 Court Users Committee Reports

The NCAJ secretariat undertook a compilation of data and reports from all CUCs countrywide through which the NCAJ Secretariat developed a comprehensive report on the work of all CUCs. The report contained information on, inter alia, the number of members in each CUC; activities of note undertaken by each CUC; the particular priority areas as identified by each CUC; and their respective opportunities, challenges and recommendations for future activities. Ranging from 8 members in Winam and Garsen to 42 members in Meru, the average number of members in CUCs across the country is 23 members. CUCs carried out a range of activities during the reporting period including prison visits, outreach amongst local community associations, open days, public sensitization forums and barazas, visits to children's homes, workshops and stakeholder engagements, and legal clinics. CUCs also identified priority areas issues for interventions, which need to be addressed. These include:

- Negative Public Perception
- Unequal Access to Justice
- Complex Court Procedures
- Unnecessary and Arbitrary Arrests
- Case Backlog
- Corruption
- Unavailability of Police Files and Witnesses
- Shoddy investigation of cases
- Inadequate court and police cells
- Lack of holding cells for children and women,
- Lack of Mobile Courts;
- Brokers within the Court
- Lost Files
- Prisoners Transportation and Security
- Unavailability of police files leading to poor service delivery
- Transport of clients to Court
- Difficulties in Bail/Bond administration
- Sensitization/ Education of Stakeholders
- Limited access to information and feedback mechanisms for litigants
- Inadequate Institutional Capacity
- Actualization of ADR
- To enlighten stakeholders and the public on Court Procedures
- Ensure all relevant stakeholders are responsible for what they do so as to avoid conflict of interest
- Lack of coordination and communication in the justice sector
- Unequal access to justice for the poor, vulnerable and marginalized exacerbated with lack of legal aid to deserving persons.

Lack of resources and funds for CUC activities was a major challenge faced by CUCs. CUCs faced significant difficulties, such as procuring venues for meetings and activities, paying transport and other allowances for members, and the development and procurement of IEC materials. On the basis of the experiences and contextual circumstances of each CUC, the report contained detailed recommendations from each CUC that will form the basis of NCAJ strategies for the next financial year.

4.5 NCAJ Secretariat

During the reporting period the NCAJ secretariat undertook and participated in various activities towards enhancing a coordinated, efficient, effective and consultative approach in the administration of justice and reform of the justice system in Kenya. Towards improving the operational capacity of NCAJ it engaged and received funding from JPIP for the implementation of a number of activities. NCAJ Secretariat job descriptions were finalized and presented before the JSC, which considered and approved the request for recruitment and secondment of the Secretariat which directly and positively impacted on the effectiveness of the Secretariat.

NCAJ attended the Kenya Magistrates and Judges Association (KMJA) National Conference during which a resolution was made to initiate and finalize the development of an NCAJ-KAM Illicit Trade Manual to facilitate the work of investigators, prosecutors and judicial officers. NCAJ also attended a validation meeting for the draft child justice bill at which proposals by the NCAJ Technical Committee were adopted and resulting in according amendments to the bill. As part of an interagency collaborative effort, NCAJ took part in the Criminal Appeals Service Week at Kamiti Maximum Prison during which 3,500 criminal appeals were heard and 1587 prisoners were released leading to decongestion of the Prison.

NCAJ benchmarked with the National Economic and Social Council on the operation of national level Secretariats and the implementation of nationwide strategies. During this important process NCAJ undertook a review of strategies in its Secretariats operations. Other activities by NCAJ were the presentation to the National Dialogue on the Role of Law in Wildlife Conservation. Through this Dialogue, far-reaching resolutions were arrived at aimed at conserving wildlife through sector wide collaboration. NCAJ was appointed onto the Sentencing Taskforce that during the reporting period held its inaugural meeting and finalized its terms of reference and work plan. The Taskforce to critically review sentencing and sentencing policy in Kenya will commence its activities in earnest in the next financial year.

4.6 NCAJ Technical Committee

The NCAJ Technical Committee continued to hold meetings throughout the year developing the Council's programme of work; scheduling and preparing for Council's meetings; researching and proposing reforms policy for the sector; and reviewing and

implementing reports from CUCs and developing strategies for their improvement. The Technical Committee deliberated on the Truth Justice and Reconciliation Commission Report, the UNODC Alternatives to Imprisonment Report; and to prepare for the Inaugural CUCs National Conference. The Technical Committee appointed representatives to the JTI Alternative Dispute Resolution Committee. The Technical Committee also developed a Joint Strategy on National Security.

4.7 NCAJ Council

During the reporting period, the NCAJ Council held quarterly meetings during which issues of multi- sectoral importance were discussed. The Council deliberated on a range of issues including land reform, alternatives to imprisonment, and the role of NCAJ in the implementation of the Constitution, national security, sexual offences, and illicit trade. In June, 2014, the Inaugural Council Retreat was held in Nanyuki during which several legislative and policy developments affecting the justice sector were extensively discussed.

4.8 NCAJ Special Committees

During the period under review, several NCAJ Special Committees and taskforces were established to address emerging issues in the justice sector. These included Committees on Land, Sexual Offences, Illicit trade, Bail and Bond; and Sentencing Policy Guidelines.

4.8.1 NCAJ Special Committee on Land

The Special Committee on Land was appointed by the Council during its meeting held on 5th September, 2013. The Committee, which comprised eight justice sector agencies[5], was established to consider the special issue in depth and make recommendations for consideration by the full NCAJ Council. Specifically, the Special Committee on Land was to establish a framework for regulation of professionals in land matters; establish a regime on the renewal of leases and consider the draft regulations/guidelines on renewal of leases as developed by the Ministry of Lands, Housing and Urban Development, and the National Land Commission; consider the digitization of records and processes at the land registries; and conceptualize a complaints and disputes resolution mechanism for land matters.

The recommendations of the Report of the Special Committee on Land which include the development of a comprehensive policy or Guideline on renewal of leases; fast tracking and prioritization of digitization; fast tracking and prioritization of modernization of land registries; and the strengthening the framework for regulation of professionals in land matters can be found in the table below:

5 *Commission on Administrative Justice (CAJ), Office of the Judiciary Ombudsperson, National Land Commission (NLC), Ministry on Lands, Housing and Urban Development, Law Society of Kenya (LSK), Inspector-General of Police, Directorate of Criminal Investigation, and the Kenya Private Sector Alliance (KEPSA). The Special Committee on Land was chaired by Mr. Otiende Amollo, Chair, CAJ.*

Table 4.1: Regime for Renewal of Leases

No.	Category	Status	Shortcoming(s)	Recommendations	Responsibility
REGIME FOR RENEWAL OF LEASES					
1.	Policy and Legislative	Governed by the Land Act, 2012 (previously the Government Land Act) Ad hoc administrative policies for specific cases	There is no comprehensive policy document on renewal of leases	Development of a comprehensive policy or Guidelines on renewal of leases, setting out the service period, eligibility, application timeline, grounds for rejection of application, public participation and redress mechanisms. The Policy or Guidelines should be published and publicized.	Ministry of Lands, Housing and Urban Development National Land Commission
2.	Procedure for Renewal of Leases	Application made to the County Government and then forwarded to the Ministry of Lands for action. Ministerial Tender Committee then considers the recommendations of the Directorate.	There is lack of information on the contents and procedure for renewal of leases The procedure for renewal of leases is complicated and lengthy	The requirements and procedure for renewal of leases should be simplified and publicized to the public.	Ministry of Lands, Housing and Urban Development National Land Commission

No.	Category	Status	Shortcoming(s)	Recommendations	Responsibility
1.	Policy and Legislative	Grounded on the Constitution, National Land Policy, Land Registration Act, National Land Commission Act, National Crime Research Centre Act and the Universities Act, 2012	The system is still mainly manual Inadequate resources (technical and budgetary allocation) Poor status of most of the land registries Outdated procedures and practices Missing data Change management (staff attitude)	Fast tracking and prioritization of digitization Allocation of adequate resources and diversification of resource mobilization for digitization Fast tracking and prioritization of modernization of land registries Capacity building and sensitization on the system The National Treasury should allocate sufficient resources to ODPP and Police to enhance their investigation and prosecutorial capacity. A Central Crime Database should be established to store all collated crime related data for sharing by public agencies	Ministry of Lands, Housing and Urban Development National Land Commission National Treasury County Governments Kenya ICT Board Office of the Attorney General Kenya Law Reform Commission Office of the Director of Public Prosecutions
2.	Status of	Commenced over 10 years ago to create a National Land Information Management System Lands Records Conversion Centre created Bulk Titling Centre and Work Flow Tracking System			

No.	Category	Status	Shortcoming(s)	Recommendations	Responsibility
		established Commenced modernization of land registries and development of National Geodetic Framework		concerned with administration of criminal justice. The database should be managed by the National Crime Research Centre as co-ordinator of all crime research related studies in the country.	

FRAMEWORK FOR REGULATION OF PROFESSIONALS IN LAND MATTERS

Table 4.2: Digitization of Land Records and Processes

No.	Category	Status	Shortcoming(s)	Recommendations	Responsibility
1.	Advocates	The Advocates Act and the Law Society of Kenya Act The institutional framework include the Law Society of Kenya, Advocates Complaints Commission and the Judiciary	Legal and capacity constraints for the Commission to conduct investigations Limited resources for the Commission Limited knowledge on the Commission Divergent actions and uncertainties in the disciplinary processes	Strengthening of the Advocates Complaints Commission Adequate resource allocation to the Commission Evaluation and strengthening of complaints handling strategies Escalation of public awareness on the Commission Synchronization of the activities of bodies involved in the disciplinary process	Law Society of Kenya Office of the Attorney General Kenya Law Reform Commission Advocates Complaints Commission Judiciary National Treasury
2.	Surveyors	Regulated under the Surveys Act Act provides for offences and penalties The Professional Practice and Ethics Committee established by the Institute of Surveyors of Kenya deals with professional conduct Ministry of Lands exercises regulation over the Surveyors	Inadequate legal and regulatory framework of professional ethics Lack of specific mechanisms for disciplinary procedures Lenient sanctions Limited powers and resources for the institutions dealing with professional conduct	Review of the Act to strengthen the regulatory framework Strengthening of the Professional Practice and Ethics Committee Awareness creation on the regulatory framework	Ministry of Lands, Housing and Urban Development Institute of Surveyors of Kenya Office of the Attorney General Kenya Law Reform Commission
3.	Valuers	Regulated under the Valuers Act, which creates the Valuers Registration Board to register and consider issues of professional conduct of valuers Provides for offences and sanctions Ministry of Lands exercises regulation over the valuers.	Lack of clarity and knowledge of the regulatory framework and complaints handling Leniency of the sanctions	Review of the Act to strengthen the regulatory framework Awareness creation on the regulatory framework	Ministry of Lands, Housing and Urban Development Office of the Attorney General Kenya Law Reform Commission
4.	Estate Agents (Realtors)	Regulated under the Estate Agents Act which creates the Estate Agents Registration Board to register Estate Agents and handle complaints of professional misconduct. The Act establishes a Code of Conduct and empowers the Board to enforce it. Creates offences and sanctions The Ministry exercises regulation over Estate Agents	Lack of clear timelines for disciplinary proceedings Lenient sanctions	Review of the Act to strengthen the regulatory framework Awareness creation on the regulatory framework	Ministry of Lands, Housing and Urban Development Office of the Attorney General Kenya Law Reform Commission
5.	Physical Planners	Regulated under the Physical Planners Registration Act which creates a Board to	The regulatory framework is inadequate Lenient sanctions and lack of knowledge about the regulatory	Review of the Act to strengthen the regulatory framework Awareness creation on the	Ministry of Lands, Housing and Urban Development Office of the Attorney

No.	Category	Status	Shortcoming(s)	Recommendations	Responsibility
		register and regulate the conduct of Physical Planners. Provides for offences and sanctions Ministry of Lands exercises regulation over the Physical	framework	regulatory framework	General Kenya Law Reform Commission
6.		Regulated under Universities Act, 2012 and National Crime Research Centre Act. The Acts provide for creation of University Senate and the Governing Council respectively to formulate research policy and programmes. Section 7 of the National Crime Research Centre Act provides for functions of the Governing Council which involves formulation of research	The Research Policy of the National Crime Research Centre is weak because it lacks a regulatory body to implement the findings and recommendations of research reports carried out by the National Crime Research Centre.	Review of the National Crime Research Centre Act to allow for the creation of a regulatory body to implement the findings and recommendations of research reports carried out by the National Crime Research Centre. Review of the Universities Act, 2012 to create a regulatory body to implement the findings and recommendations of academic staff designated to conduct research. Develop rules and regulations pertaining to the work of Researchers to enhance their professional ethics, efficiency and	Office of the Attorney General Kenya Law Reform Commission National Crime Research Centre Ministry of Education
7.		programmes of the Centre.		Research findings and recommendations from both institutions should be advertised in various media to ensure wide circulation and public awareness and their launch and dissemination.	

Table 4.3. Complaints and Disputes Resolution Mechanisms

No.	Category	Status	Shortcoming(s)	Recommendations	Responsibility
1.		Ministry of Lands has a complaints handling mechanism Ministry is in the process of developing Rules and Regulations which will incorporate complaints handling National Land Commission has established a complaints handling mechanism The Commission has commenced the development of a policy on Alternative Disputes Resolution in land matters Commission on Administrative Justice has been handling complaints relating to land The National Crime Research Centre has been receiving complaints on crime	The complaints handling mechanism at the Ministry faces the challenges of lack of capacity, delay caused by the spread of land registries and poor records management. Unresponsiveness on inquiries made	Strengthening of the Ministerial complaints handling mechanism Adequate resourcing for the Ministerial complaints handling mechanism Capacity building for staff Adoption of electronic complaints handling mechanism and creation of linkages among the land registries and other key stakeholders Awareness creation on the complaints infrastructure Promotion of alternative disputes resolution methods The National Treasury should allocate sufficient resources to Office of the Director of Public Prosecutions and Police to enhance their investigation and prosecutorial capacity	Ministry of Lands, Housing and Urban Development National Land Commission Commission on Administrative Office of the Attorney General The National Treasury Kenya Law Reform Commission National Crime Research Centre
2.(a)	Disputes Resolution	The Environment and Land Courts handle matters of environment and land The Magistrates Courts have jurisdiction to handle environment and land matters within their pecuniary	The Environment and Land Courts are not in every County or District Lack of knowledge on the presence and jurisdiction of the Land Courts Lack of clarity on the status and role of the Land Tribunals, Land Control Boards and Provincial Administration in	The status and role of the Rent Restriction Tribunal, Land Control Boards, Land Tribunals and Provincial Administration in land matters should be clarified. Establishment of Environment and Land Courts in every County or District as is practicable	Judiciary Office of the Attorney General

No.	Category	Status	Shortcoming(s)	Recommendations	Responsibility
		jurisdiction with the appeal lying in the Environment and Land Courts. Land Tribunals no longer have jurisdiction to determine land matters	relation to land matters. Lack of clarity on the status of the Rent Restriction Tribunal Lack of consistency and coordination among the various Courts leading to conflicting orders on the same issues	Awareness creation about the jurisdiction and location of the Environment and Land Courts Robust engagements among the various courts to ensure certainty and consistency	
(b)	Alternative Disputes Resolution	Anchored in the Constitution, Environment and Land Courts Act and the National Land Policy. Is suitable for resolving historical land disputes, inter-community disputes and disinheritance caused by underlying social and cultural practices.	Limited appreciation of the role of alternative disputes resolution in land matters	Promotion of alternative disputes resolution methods in handling land matters Sensitization of the public on alternative disputes resolution methods	Judiciary Ministry of Lands, Housing and Urban Development National Land Commission Commission on Administrative Justice

4.8.2 NCAJ Special Committee on Sexual Offences

During the Inaugural Retreat of the NCAJ, the Council resolved to establish an NCAJ Special Committee on Sexual Offences to urgently review the draft policy; examine the proposed amendments based on the experience of the implementation of the Sexual Offences Act to date, and to propose an appropriate institutional structure to continue the multi-sectoral implementation of the Sexual Offences Act. The Special Committee held several stakeholder engagement workshops with the NCAJ Technical Committee, which resulted in extensive proposals for the amendment of the Sexual Offences Act including establishment of a permanent national authority to oversee the implementation of the SOA and coordinate the multi-sectoral stakeholders involved in the administration and implementation of the Act.

The Special Group also made general observations and recommendation in regard to the review and update of the SOA policy envisaged under s. 46 of the Sexual Offences Act; the legal dilemma of dealing with sex among minors; the correlation between harsh minimum sentences and lack of apparent reduction in cases of sexual offence; whether the SOA ought to deal with instances where parties choose to settle their cases out of court; training of police officers in handling survivors of Sexual and Gender Based Violence; adequate provision for sexual harassment under the SoA; and ensuring that the register of convicted sexual offenders is fully operationalized and updated on a regular basis.

4.9 Enforcement Manual to Combat Illicit Trade in Kenya

The KMJA and Kenya Association of Manufacturers (KAM) in partnership with NCAJ led the process of developing an enforcement manual to combat illicit trade. The Chief Justice launched the Manual in February 2014 in Malaba. Currently the Special Working Group is leading the implementation phase of the manual and several regional training programs are underway. These trainings have made the various enforcement officers across the justice sector to sit together for the very first time and discuss collaboration in dealing with illicit trade.

4.10 Highlights of Select NCAJ Agencies in the Administration of Justice

During the period under review, all NCAJ agencies continued to discharge their mandates satisfactorily even as they faced numerous legal, operational, institutional and resource challenges. The culture of cooperation and collaboration is beginning to take root in the justice sector and this should be nurtured and strengthened. Here below I present highlights of a few of the activities and challenges of select NCAJ agencies.

4.10.1 Office of the Director of Public Prosecutions

During the reporting period, the Office of the Director of Public Prosecutions (ODPP) recorded significant gains in service delivery in the criminal justice system. This is one of the most dynamic NCAJ agencies. During the period under review, the ODPP received and registered a total of 111,566 matters, which comprised criminal trials in the High Court and Subordinate Courts, appeals, revisions, applications, MLA and Extradition requests, advice files and complaints. The overall conviction rate stood at 82% up from 75% in the previous reporting period.

Table 4.5: ODPP Registered Matters ,2013/14

Matter	*Registered*	*% Proportion*
Appeals (in Supreme Court COA and HC)	4,574	41
Criminal Trials (HC and SCoK)	89,332	80.1
Revisions	916	0.8
Applications	3974	3.6
Etradition and MLA Requests	91	0.1
Advice Files	7,627	6.8
Complaints	5,052	4.5
Total	111,566	100

The key highlights during the reporting period were:

(i) Access to Justice

The ODPP has ensured that it continues to provide services to the public and stakeholders in an efficient and effective manner. It opened additional 18 County Offices bringing the total to 47 County Offices, which has enhanced access to prosecutorial services nationally.

(ii) Enhancement of Institutional Reform and Restructuring

The Office has finalized the development of foundational policy documents and operationalized top management positions in order to ensure efficient prosecutorial processes and procedures. In order to enhance quality prosecutions, the Office created specialized thematic units focusing on

the criminal sector. A key highlight was the increase of staff complement from 357 to 671. Staff have been deployed to the County levels where they continue to execute and support the prosecution mandate.

Table 4.6: ODPP Staff Complement

Current staffing levels	**2011/2012**	**2012/2013**	**2013/2014**
Total No. of Staff	185	357	671
Growth		93%	88%

(iii) Professionalization of Prosecution Services

The ODPP has embarked on taking over charging decisions in all courts by ensuring the presence of prosecution counsel at all levels of the Court systems. Further, the Office is piloting the screening of files to ensure only those that meet the thresholds of prosecution are filed in court. The Office continues to organize and build capacity enhancement programmes for its entire staff in thematic areas. This has seen an increase not only in the quality of prosecutions but also in the overall efficiency of the Office. A total of 548 officers were trained during the reporting period.

Table 4.7: ODPP Training Programme

TRAINING PROGRAMME		
1.	Trial Advocacy	70
2.	Counter Terrorism	30
3.	Wildlife Crimes	40
4.	International Crimes	21
5.	Cyber Crimes	25
6,	SGBV	60
7.	Human Trafficking	30
8.	Induction	167
9.	Computer Applications	7
10.	Customer Care	23
11	Fraud Investigation and Prevention	5
12.	Electronic Records Management	4
13.	International Institute of Certified Forensic Investigation Professionals (IICFIP) Global Forensic Conference	5
14.	Records Management	5
15.	Refresher Course for Drivers	9
16.	SLDP 22/10–29/11/2013	12
17.	Senior Management Course	6
18.	Supervisory Skills	5
19.	Tailor Made Course for Heads of Departments 3/2–7/2/2014	21
20.	Trial Advocacy—Electornic Evidence and Financial Analysis	
	Total	**548**

(iv) Automation and Modernization

The ODPP initiated development of the automated and integrated case management system which entails business process audit and gap analysis. The second phase relates to business process optimization and the design/automation of the case management system. The Office fully operationalized the ICT and communication departments. This resulted in the launching of a new and interactive website as well as a growing social media presence. The ODPP continues to roll out an intense training programme focused on creating and enhancing ICT skills among staff.

(v) Strengthening and Promotion of Collaboration And Interagency Cooperation

The ODPP held its 2nd Annual ODPP Convention at the Kenya School of Government, Nairobi attended by all staff members. The theme of the Convention was Prosecution Service within a Balanced Working Environment. The Office participated in various national and international forums in various thematic areas for instance the 18th International Association of Prosecutors (IAP) Annual Conference and General Meeting in Moscow, Russia.

(vi) Law Reform

The ODPP is dedicated to building policy and legislative frameworks aimed at ensuring a cohesive and effective criminal justice system. In that regard, the Office participated in the development and review of key legislation such as the Cybercrime and Computer Related Offences Bill, Criminal Procedure Code and Penal Code.

(vii) Witness and Victim Facilitation

The Office supports the enhanced protection and facilitation of victims and witness through all the stages of the criminal sectors from reporting to conviction. The office actively contributed in the drafting of the Victims and Witness Protection Bill.

4.10.2 Probation and Aftercare Services

Probation and Aftercare Service strives to promote and enhance the administration of justice, community safety and public protection through provision of social inquiry reports, supervision and reintegration of non-custodial offenders, victim support and social crime prevention.
Increasingly, the mandate of the department of Probation and Aftercare Service is expanding rapidly owing to the central role it plays in criminal justice delivery. Most of the functions relate to issues of bail, sentencing, and pre-release decision- making within the criminal justice system. At present, the department has the responsibility in enforcement of various non-custodial Court orders particular to each individual, offence and sentence; interventions in the lives of offenders placed on various statutory supervision orders with the aim of reducing re-offending and

effecting behaviour change; promotion of harmony and peaceful co-existence between the offender and the victim/community through reconciliation, victim protection and participation in crime prevention initiatives; reduction of penal overcrowding by supervising select ex-prisoners in the community and facilitating prison decongestion programmes; reintegration of ex-offenders and Psychiatric offenders into the community.

The above functions are executed in the light of the underlying and shared responsibilities of all criminal justice agencies which related with crime reduction and public protection. The implementation of the above functions is anchored on department's statutory mandates, that is, Probation of Offenders Act and Community Service Orders Act, (which also form its core programmes) as well as deriving further mandates from the Criminal Procedure Code, Sexual Offences Act, Borstal Institutions Act, The Penal Code, Power of Mercy Act, Victim Protection Act, among others.

(a) Resource Allocation

The funds being allocated to the department for operational costs remain marginal. In the FY 2013/14, the department received Ksh.133,988,466 to cover court work, offender supervision, office supplies, and running of Probation Institutions) excluding the personnel emolument. This is very inadequate and significantly inhibited the capacity of the department to optimise its operations especially in relation to court inquiries and supervision of court orders. Similarly, the number of probation officers has reduced from a high of 650 the previous year to 592 during the reporting period. There is urgency in increasing the number of probation officer to accommodate increased demands for its services arising from (a) the increased number of magistrates and judges; (b) work created by the Power of Mercy Committee and (c) the Psychiatric Offenders at Mathari Mental Hospital where the department has established a permanent liaison office.

(b) Court Work

The practice of probation work in court has evolved over the years. Probation officers have gone beyond the tradition probation practice and as court officers, they are now engaged in provision of reports related to (a) Presentence reports for probation orders and community service orders (b) bail information reports for bail decision making (c) victim impact statements (d) reports on Alterative Dispute Resolutions. Some of these practices have not found full legal backing.

(i) Probation Orders For the last 12 months (July 2013 to June 2014), a total of 13,235 Probation Order Court inquiries were made by officers and Presentence reports prepared. Out of that number, 9,492 offenders were placed on probation. As at the end of June 2014, there were 12,159 probationers (those serving probation orders) under probation order supervision. Several CSO committees were held to review the programme progress at national and county levels

(ii) Community Service Order (CSO) During the reporting period, a total of 39,512 cases were referred from courts for CSO. Of this number, 37,433 offenders were found suitable and served their sentences under community service orders. During the same period, 36,568 offenders completed their CSO terms out of which 35,475 completed/worked satisfactorily (30,518 males and 4954 females) while 771 absconded work and their warrants of arrest are in force. Arresting those who do not comply with community service work especially in urban slums is still a great challenge. 120 magistrates were sensitized on the application of CSO while 330 work agency supervisors were retrained Several offender empowerment projects were also initiated in poultry keeping, bee keeping, green house farming and agro forestry. A total of 33 states stations were funded to implement CSO Offender Empowerment projects. 1563 offenders gained from the project at a cost of Ksh. 7 million. These provided the offenders with an opportunity for skills transfer and to start their own ventures and desist from crime. Several CSO committees were held to review the programme progress at national and county levels.

(iii) Prison Decongestion through High Court Sentence Review

Prison decongestion exercises where carried out with probation officers providing Sentience review reports. A total of 6,422 convicted prisoners had their sentences reviewed and ordered to serve various alternatives measures to imprisonment a majority of whom were offloaded to service community service orders.

(iv) Support to Ex-offenders on Aftercare Cases involving clients in need of assistance were discussed and approved for education empowerment and provision of technical tools/ implements with a total of Kshs.4.1 million being disbursed to empower needy offenders throughout the country.

(c) Policy and Legislation

The Department has initiated the review of the Probation of Offenders Act Cap 64 and that of the Community Service Orders Act Non 10 of 1998. This will see more non-serious offenders serve alternative sentences and thus ease overcrowding of the penal institutions and also help in addressing other operational challenges including legal anchorage for new functions.

The Department is playing a critical role in Bail decision making with the preparations of Bail information reports both at the High Court and Magistrates Courts. To bolster this, a Bail Information and Supervision Bill has been initiated to purely cater for Probation Service bail work that is currently not well anchored in law nor in the Bail and Bond Policy Guidelines.

(d) Infrastructure and Office Construction

There has been investment in the construction of office blocks and inmates hostels to increase access to justice; and address customer satisfaction and accommodation challenges. These have been undertaken in the following stations: Nairobi Probationers Inmates hostels (2 blocks); Kiambu office extension; Thika probation office extension, Githunguiri office extension; Makindu probation office; Taveta probation office; Bondo probation office; Siaya office extension; Imenti North (Meru Central); Athi River Probation Office; Molo office extension; Othaya office block; Shanzu probation inmate Hostel; and Kisii County probation office.

New construction projects have been initiated in the following stations: Nakuru Probation Girls Hostel, Siaya Probation Girls inmates Hostel, Lamu Mpeketoni, Msambweni, Makweni, Turkana (Kakuma), Nyeri, Kisauni, Kabarnet, Kapsabet, , Kisumu East (Winam Court) and Nyandarua South (Engineer). Establishing new probation offices to bring services closer to the people in Kakuma (Turkana County), Rusinga Island (Homa Bay County), Kisauni (Shomo la Tewa) and Msambweni.

(e) Information Communication and Technology

The use of ICT forms a key component of reforms in service delivery. The department has fully adopted its usage amidst challenges. During the period in question, 16 computers have been issues for fieldwork. There is still serious need for more computers to ease court work and generally improve on case management practices Development of web-based Offender Record Management System to ease offender data capture, storage,

sharing and retrieval electronically. However, the system is, still experiencing challenges mostly associated with internet service provision and has also not anchored all the functions

(f) Challenges

The Department of Probation and Aftercare Services face several challenges still persist as enumerated below:

(a) Courts are creating more work for probation officers including engagement with Alternative Dispute Resolution (ADR) and Victims work yet no additional resources or operational guidelines have been developed.

(b) Escalation of serious crimes including terrorism placing high demands on the performance of the department including bail reports in spite of limited resources.

(c) Similarly, the society has very low tolerance for crime that in some instances it does not appreciate non-serious offenders to serve non-custodial measures in the community.

(d) Generation of social advisory reports to courts and other penal release organs is greatly hampered by reduced government funding in spite of increased workload related to Bail decision making and Alternative dispute resolution.

(e) Inadequate transport/vehicles to carryout supervision. The department still operates 1978 Land Rovers which break down frequently and are uneconomical to run with the meager resources available.

(f) Lack of Inadequate training for probation officers to build competencies to address emerging demands from criminal activities and to adapt modern evidence based supervision and rehabilitation programmes.

(g) The Probation Service offender records management system (ORMS) often experiences connectivity problems affecting generation of reports to court. The inability to complete LAN installation as a result of reduced funding compounds this problem.

(h) The current number of probation officers is not adequate to meet the demands of all magistrates and High Court. A huge number of officers have left the service to join County governments and Constitutional Commissions while others have exited due to natural attrition. This has left the Department with a deficit, which poses a serious challenge in service delivery, as there is no immediate replacement.

4.10.3 Kenya Law Reform Commission (KLRC)

The Kenya Law Reform Commission has a statutory and ongoing role of reviewing all the laws of Kenya to ensure that it is modernized, relevant and harmonized with the Constitution. Following the promulgation of the Constitution in 2010, the Commission has an additional mandate of preparing new legislation to give effect to the provisions in the Constitution.

In addition, both the County Governments Act No. 17 of 2012 and the Kenya Law reform Commission Act, No. 19 of 2013, require the Commission to assist county governments and ministries/ departments/agencies (MDAs) in the preparation and reform of their legislation. In satisfying this mandate, the Commission recognizes that the Constitution requires new laws to ensure that county governments have adequate support to enable them to perform their functions and that MDAs have the requisite legal frameworks under which they may successfully execute their mandate.

During the period under review, the Commission was able to achieve the following:

First, the development of the legislation required to implement the Constitution. The Commission, together with the Office of the Attorney General and the Commission for the Implementation of the Constitution, ensured that the requisite laws were developed within the timelines set out in the Fifth Schedule of the Constitution.

Second, the development of over fifty (50) model laws on the functions of the county governments as captured in the Fourth Schedule of the Constitution. The county governments are required to customize the model laws so as to suit each county's unique needs.

Third, assisting a number of MDAs with the review and harmonization of their respective legislative frameworks with the Constitution.

Fourth, with the support of the European Union through the Bridging Divides in Accountable Governance Programme, the Commission also carried out a provisional audit of all laws of Kenya and prepared a report on the same. The overall objective of the audit was to facilitate the full implementation of the Constitution and ensure that the laws of Kenya are responsive to wider targets of social, economic and political development. This will, in the long term, help in the achievement of Kenya's development blueprint, Vision 20103, which aims to make Kenya a newly industrialized middle income country by the year 2030. The Report contains a detailed audit of existing laws for review on a priority basis and identifies new laws to be developed and enacted. The actual process of review of all the laws is a long-term project of the Commission and will be undertaken in close collaboration with stakeholders.

Fifth, following the enactment of the Kenya Law Reform Commission Act, the Commission successfully transformed from being a department in the former Ministry of Justice, National Cohesion and Constitutional Affairs to being a State Corporation.

The Commission made significant achievements during the reporting period under review. However, the realization of these important milestones was not without challenges. First, a significant number of MDAs do not have in place policy on their respective mandated areas. Only recently have a number began to develop these policies. Implementation of the Constitution is therefore sometimes delayed where disputes and disagreements on policy have cropped up either between a ministry and its departments or agencies, a ministry and its experts, taskforces or between two ministries.

Secondly, on occasion, there is a lack of consensus amongst stakeholders that has resulted in delays in the publication of relevant bills and in some instances has resulted in more than one bill on the same subject that subsequently results in delay and confusion.

Thirdly, the Commission has not been able to create additional capacity to deal with the increased volume of work following the promulgation of the Constitution of Kenya 2010 and the enactment of the County Governments Act. Despite the increased workload, the number of researchers and legislative drafters at the Commission has not increased from the numbers prior to the promulgation of the Constitution.

Fourthly, the terms of the Commissioners ended on 3 June 2013 and the appointment of new commissioners has not yet been done leading to the staling of some policy decisions and operations at the Commission.

4.10.4 National Police Service[6]

During the year 2014, the Service faced numerous challenges. The trend of crime and insecurity was worsened by, among others, terrorism, proliferation of small arms and light weapons, inequity in resource distribution, organized crime, drug and substance abuse, community boundary disputes, and ethnic rivalry.

In the year 2014 the overall crime recorded was 69,736 cases, which was a decrease of 2456 cases, or 3%, as compared to 2013, which recorded 71, 832 cases. Despite the decrease in crime, the country experienced major incidents with high death rates and injury to people and loss of property in Nairobi, Coast, North Eastern and North Rift Regions in particular.

[6]*The data on the National Police Service is presented on a calendar year basis.*

During the reporting period, the police made several gains. These include arresting 77 persons for offences related to inter-tribal/communal conflicts and arraigned in court. A total of 318 suspects were arrested in relation to acts of terrorism and arraigned in court. 274 suspects were arrested in relation to radicalization before being arraigned in court.

A total of 84 cases of cattle rustling and 192 cases of stealing stock were reported. A total of 22,095 live stocks were raided but 5,743 were recovered whereby 37 people were killed and 52 others injured. 391 illegal firearms and 5,166 ammunitions were recovered. A total of 1513 suspects (1478 Kenyans and 36 of other Nationalities) were arrested for drug trafficking and substance abuse and were arraigned in court. 427 persons were arrested for dealing in contraband goods and were arraigned in court. A joint KDF and NPS operation recovered the stolen firearms and some suspects were arrested.

On road safety, a total of 5,661 accidents were reported in 2014, which is a decline from 6,121 reported in 2013. A total of 2910 fatal accidents victims were recorded, which is a drop by 216 cases of the previous year. This was due to introduction of tamper proof speed governors, enforcement of alcohol breathalyzers, utilization of speed guns, introduction of cashless fare systems and regulating night travel of PSV buses.
The Police Service still faces a number of challenges some of which could be addressed through modernizing ICT infrastructure; increasing the police population ration to the international standards of 1:450; equipping police with motor vehicles/aircrafts for mobility; enhancing community policing; and enhanced peace initiatives in cattle rustling prone areas.

4.11 Conclusion

The collaboration in the justice sector is strengthening. Many of the agencies are undertaking various reforms and these are being cross-referenced throughout the chain. However,
the resource deficit is still huge and a joint resource raising strategy is needed. Further, of all the organs of State only Parliament is unrepresented in the NCAJ and consideration needs to be made to have the Judicial Service Act amended to provide for Parliamentary membership. This will ensure that policy and legislative proposals for the justice sector enjoin a priori government-wide consultation.

CHAPTER FIVE

HUMAN RESOURCE MANAGEMENT AND DEVELOPMENT

5.1 Introduction

The major human resource challenges identified for the 2013/2014 financial year included the review and expansion of the staff establishment, finalization of human resource policies and manuals, streamlining discipline, improving staff benefits and pay schemes, and expanding staff training and development. Significant progress was made on these fronts during the reporting period. A comprehensive staff rationalisation exercise was conducted; a Judiciary Human Resource Manual was developed and is being implemented; several disciplinary decisions were taken; recruitment of personnel was carried out and staff benefits and pay schemes were operationalized. Several other policies are at advanced stage of development or validation.

5.1.1. StaffRationalisation

A Human Resource Mapping exercise was undertaken, with the overall objective of creating and developing a relevant and reliable human resource database for the purpose of addressing current and future challenges in the human resource management function in the Judiciary. The human resource mapping exercise covered all employees of the Judiciary, including judicial officers.

5.1.2. Judiciary Establishment

It was observed that the Approved Establishment (2009) had 7,689 authorized posts, a staff establishment of 4,562 (in-post), and a negative variance of 3,127, translating to a staff deficit of 41% against the approved posts. The establishment has not been reviewed or updated since 2009 and, therefore, does not effectively address the staffing needs of the transforming Judiciary. Similarly, Constitution 2010 brought about changes in the Judiciary. New courts and offices were established, including the Supreme Court, Chief Registrar, Registrars, Tribunals and Directorates, among others.
The Staff Establishment (2009) did not adequately address the manpower needs of the new Judiciary. A new staff establishment was developed, taking into account factors imposed by the Constitution and the changing needs of the institution.

5.1.3. Staffing Gaps

The proposed establishment recommends an optimal staffing of 5,534 personnel. It was noted that with the current in-post of 4,562 personnel, the variance will be reduced to 972, translating to a staff deficit of 18%. Court stations accounted for 64% of the staffing gaps, while Headquarters accounted for 36 % of the deficit, as illustrated in Table 5.1 below.

Table 5.1: Overall Staffing Gaps

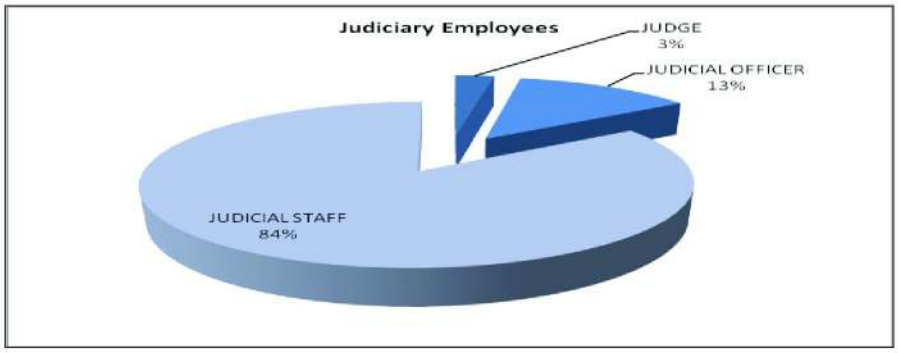
Row Labels	Sum of Proposed	Sum of In Post	Sum of Variance	% Variance	Proportion
Court Stations	4729	4055	-674	12%	64%
Headquarters Administration	805	507	-298	5%	36%
Grand Total	**5534**	**4562**	**-972**	**18%**	**100%**

5.1.4. Staff Demographics and Distribution

5.1.5. Employee Composition

The Judiciary's overall staff strength was 4,562 - comprising of 130 Judges (3%), 589 Judicial Officers (13%) and 3,843 staff (84%).

Figure 5.1: Summary of Staff In-Post



5.1.3.2 Age Analysis

The Judiciary workforce is relatively young with an average age of 39.46 years. The age range is between 20 - 70 as illustrated in Figures 5.2, 5.3 and 5.4 below:

Figure 5.2: Age Analysis

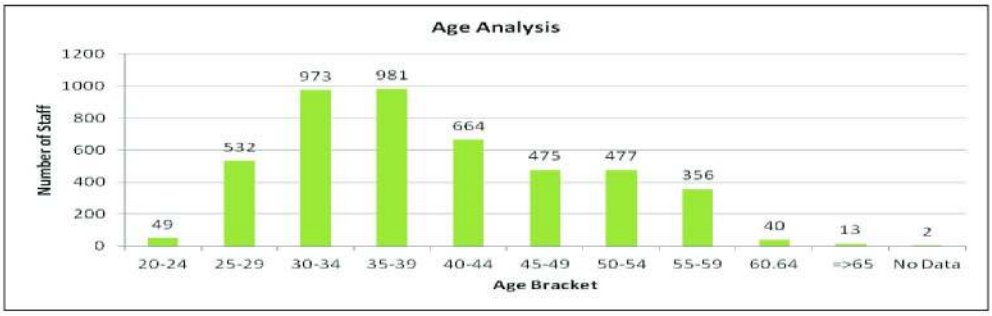


Table 5.2: Age Profile by Cadre

SN.	CADRE	AGE BRACKET									
		24-25	25-29	30-34	35-39	40-44	44-49	50-54	55-59	=>60	Total
1	Judges				2	11	33	35	21	28	130
2	Executive Assistant	0	0	0	3	13	56	71	92	3	238
3	Support Staff	14	106	141	129	100	51	61	48	5	676
4	Clercal Officers	15	173	290	349	174	103	71	46	1	1238
5	Process Server/Bailif	0	2	4	18	19	19	34	41	8	145
6	Executive Officer	0	2	6	7	3	7	13	34	2	74
7	Secretarial	0	7	48	106	84	44	78	29	3	400
8	Accountant	1	33	65	53	14	26	22	12	0	226
9	Magistrate	0	4	155	126	90	54	30	9	0	468
10	Telephone Operator	0	0	2	14	6	4	6	5	0	37
11	Librarian	0	0	1	10	14	11	2	4	0	42
12	Archivist	0	0	6	6	10	10	6	3	2	43
13	Security	6	27	44	36	29	17	7	3	0	173
14	Hrm Officer	0	15	23	11	15	9	9	3	0	86
15	Driver	1	13	45	54	35	14	13	3	0	184
16	Perfomance Mgt Officer	0	1	2	3	2	0	2	2	0	12
17	Kadhi	0	2	4	8	6	2	6	2	0	30
18	Procurement Officer	2	15	6	9	5	3	6	1	0	52
19	Legal Researcher/Law Clerk	0	20	57	6	7	0	0	0	0	91
20	Store Keeper	8	30	25	11	6	0	0	0	0	88
21	Communication Officer	0	6	3	1	1	3	0	0	0	15
22	Auditor	0	1	3	1	1	0	0	0	0	7
23	Registrar	0	0	0	1	5	0	0	0	0	6
24	Programe Officer	0	2	1	1	0	0	0	0	0	4
25	Chief Of Staff	0	0	0	0	1	0	0	0	0	1
26	Chief Registrar	0	0	0	0	0	1	0	0	0	1
27	Commission Officer(Jsc)	0	0	1	0	0	0	0	0	0	1
28	Deputy Chief of Protocol	0	0	1	0	0	0	0	0	0	1
29	Deputy Chief Registrar	0	0	0	1	0	0	0	0	0	1
30	ICT Officer	1	11	36	5	5	1	1	0	0	60

SN.	CADRE	AGE BRACKET									
		24-25	25-29	30-34	35-39	40-44	44-49	50-54	55-59	=>60	Total
31	Finance Officer	0	0	2	6	7	6	1	0	0	25
32	Artisan	0	0	2	1	0	1	3	0	0	7
	Grand Total	**48**	**470**	**905**	**971**	**650**	**442**	**442**	**336**	**24**	**4562**

Note: Staff in the 55 - 60 age bracket as highlighted above

A total of 802 employees (excluding Judges) are aged 50 years and above, accounting for 18.2% of all staff. It was also established that 360 (8.2%) of the above number are in the near-retirement age of 55 years and above.

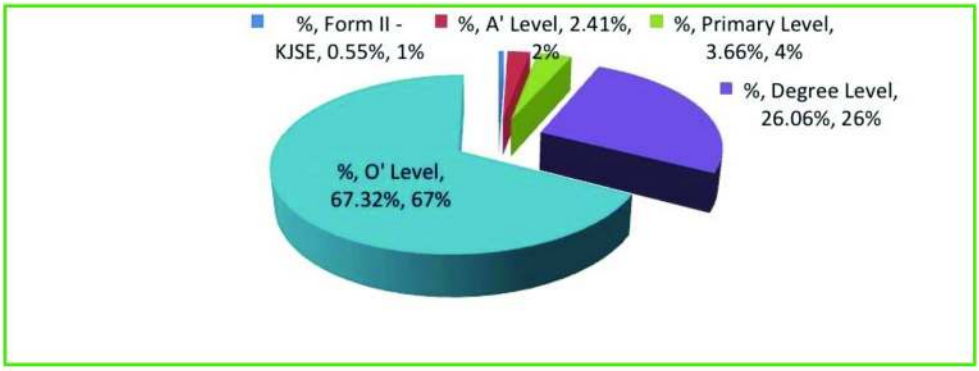
5.1.6 Gender Analysis

Staff distribution by gender is relatively balanced. Out of the 4,562 employees, 2,064 are female, while 2,498 are male, accounting for 45.2% and 54.8% respectively. This trend is manifested across all age groups.

5.1. 7 Employee Education Levels

As illustrated in Figure 6 below, 1,189 employees, accounting for 26.06% of the workforce, are university degree holders in various disciplines and specializations. Of these, 839 (70.56%) had postgraduate qualifications, while eight were PhD holders. The analysis revealed that there were 110 A' Level, 3,071 O' Level and 25 Form Two (KJSE) staff. Staff of primary level education numbered 16. Figure 7 presents the qualifications profile in the Judiciary. Law degree takes the lead, followed by Business, Finance/Accounting and Sociology-related studies.

Figure 5.3: Employee Education Peak



5.1.8 Professional Qualifications

Judiciary employees, especially staff, have significantly embraced further studies to enhance their skills. In addition to academics, it was established that 2,691 employees had aquired various professional qualifications.

5.2. Development of Human Resource Policies

During the reporting period, a number of human resource related policies were developed or at an advanced stage of validation. The Judiciary Human Resource and Procedures Manual was developed and approved by the JSC. The Training and Development Policy, Disability Policy, Sexual Harassment Policy, Information and Records Management Policy and Fleet Management Policy were developed.

5.3 Recruitment and Appointments

During the period under review, JSC advertised and competitively appointed officers to the positions listed in Table 2.1 below. These appointments considered various factors including, regional balance, gender, disability and affirmative on marginalized areas among others.

Table 5.3: Positions Filled During FY 2013/2014

Category of Staff	No Appointed/Recommended	Remarks
Judges	25	25 recommended for appointment. 11 appointed by the President.
Judicial Officers	1	
Judicial Staff	35	Included JSC Staff and Legal Researchers for Judiciary
Appointment to Tribunals	12	National Environment Tribunal- Chair Sports Dispute Tribunal- Chair and 8 members Political Parties Dispute Tribunal-Chair Legal Education Appeals Tribunal-Chair

5.4. Promotions

During the year under review, JSC considered cases of promotion of both Judicial Officers and staff. The Commission resolved that all magistrates attend suitability interviews. Cases of promotion of Judicial Staff were also considered and the Commission directed that the process of staff rationalization be concluded before the cases were processed. The rationalization was completed and the promotion of judicial staff commenced.

5.5 Promotions Disciplinary and Other Cases

The Commission received and processed a total of 87 disciplinary and other cases which included 31 appeals and reviews from previous decisions relating to judicial officers and staff during the reporting period. Decisions on 59 of the cases were made and communicated to the affected staff. On the other hand, 28 cases were pending before the Commission at various levels as indicated in table 2.2.

Table 5.4: Summary of Discipline and Other Cases handled in FY 2013 / 2014

Nature of cases	*No of cases submitted to the JSC*	*No. of cases finalized*	*No. of cases pending*	*Remarks*
Discipline cases	47	20	27	• 18 cases await court decision. • 2 cases await vetting by the Judges and Magistrates Vetting Board. • 7 cases under investigation
Retirement on grounds of public interest	3	3	0	
First Appeals	26	26	0	
Reviews	4	3	1	• 1 case awaited court decision
Further appeals	1	1	0	
Retirement on medical grounds	1	1	0	
Resignations	3	3	0	
Retirement under 50 year rule	2	2	0	
Total No. of cases handled	**87**	**59**	**28**	

5.6 Management of Complaints Against Judges

Pursuant to Article 172 (1) (c) of the Constitution, the Judicial Service Commission has the mandate to discipline judicial officers and staff of the Judiciary. This mandate includes receiving complaints, investigation and removal from office.

During the year under review, the commission received a total of 36 complaints of different nature from the members of the public. Of the 36 received, 20 were admitted and set down for hearing, eight complaints were admitted for preliminary and further investigations; and eight were dismissed for either raising issues of appeal or for being frivolous.

5.7 Pay and Benefits

5.7.1 Pay Increase and Engagement with SRC

In 2013/14, the Judiciary reviewed and significantly improved the terms and conditions of Judiciary employees. At the same time, JSC held a series of consultations with the Salaries and Remuneration Commission (SRC), which led to several decisions where SRC set the remuneration and benefits of all State officers serving in the Judiciary. All allowances for State officers were consolidated and capped at 40% of the set total gross remuneration package, while 60% of the set gross remuneration is basic salary. All other allowances not specified in the Circular issued after the setting of the salaries ceased to be payable. SRC also set the maximum medical cover for all employees of the Judiciary.

5.7.2 Benefits: House and Car Loan Schemes

The staff mortgage scheme was initiated in 2011/2012. By the close of 2013/14, a total of KSh1.68 billion had been disbursed to 151 employees of all cadres. In the FY 2013/14, KSh. 500 million was allocated to the scheme, but demand exceeded the amount allocated.

Judiciary staff also continued to benefit from the car loan scheme. Since its establishment in FY 2012/2013, a total of KSh. 254 million had been disbursed by 2013/14, benefitting a total of 152 employees.

5.8 Training and Capacity Building

To respond to capacity building and training needs, the Judiciary Training Institute mounted a number of trainings as discussed in detail in Chapter Six. Individual directorates also conducted training programmes.

CHAPTER SIX

TRAINING UNDER JUDICIARY TRAINING INSTITUTE

6.1 Introduction

The Judiciary Transformation Framework (JTF) identifies the revival and revitalization of the Judiciary Training Institute (JTI) as a critical component of its programs. Indeed, one of the goals of the Key Result Areas (KRA) identified under the JTF is the Growth of Jurisprudence and Judicial Practice. The JTI is, in large part, tasked with coordinating and innovating ways of achieving this KRA, in addition to its overall function as an incubator of ideas in the administration justice.

A large institution such as the Judiciary requires an intellectual, learning and reflections hub. This role has been played JTI, which executed its triple mandate of training, research, and constructive engagement in 2013/2014 with considerable success.

JTI undertakes its mandate through various training programmes and seminars, public lectures, research, and other forms of discourses targeting all cadres of Judiciary staff, and, where appropriate, members of the academy and the public at large.

In the FY2013/2014, the total number of Judiciary employees trained by JTI stood at 1, 979. This included judges, magistrates, kadhis and staff, and focused on a broad range of issues from jurisprudence to induction. Other trainings targeting both judicial and administrative staff were undertaken (See Tables 6.1; 6.2; and 6.3 below for the full list). For the first time, trainings for staff were included, budgeted and planned for. This is a break from the past where trainings for judges were prioritized, with minimal training for magistrates and hardly any for staff.

6.2. Continuous Judicial Education for Judicial Officers (CJE)

Continuous Judicial Education (CJE) for judges, magistrates and kadhis was mainstreamed in FY 2013/2014. This was also a break from the past because all magistrates now attend mandatory one- week training. Previously, only select magistrates were trained depending on the identified area and their specialization. In 2013/2014, Judges selected their courses from a wide variety on offer, and attended three-day training on topical issues relevant to their work. The full list of trainings for judges and magistrates are in Table10.1 further below. Themes for Judges Training, 2013/2014, covered a wide range of issues[7].

JTI offered a one-week Continuous Judicial Education Program training programme (MCJE) targeting all magistrates in the country. The trainings were offered seven times in 2013/14.

[7] *Land & Environment Law; Constitutionalism and the Rule of Law: A Conversation with Ali Mazrui; Constitutional Conference and Judicial Exchanges on the implementation of Social and Economic Rights: Supreme Court Judges visit to Bogota and Medellin, Colombia; Judgment Writing; Hot Issues in Criminal Law and Procedures; Principles of Constitutional Interpretation; Emerging Issues at the Court of Appeal; Judicial Dialogue on HIV; Lecture by Justice Edwin Cameron; Social & Economic Rights; Basic Computer Skills for Judges; ADR Basics for Judges;*

Human Rights for Judges; Hot Issues in Civil & Commercial Law; Hot Issues in Constitutional Law and Adjudication; Computer Refresher Course; Time & Stress Management for Judges; Court of Appeal Retreat; Human Rights & Equality Jurisprudence.

The topics covered in the MJCE were varied[8].

6.3 Research and Policy

During the reporting period, JTI led discussions for the development of various policies for the Judiciary. These included the Sexual Harassment Policy, as well as policies on Alternative Justice Systems (AJS), Sentencing, and Interlocutory Injunctions.

6.4. Intra-Institutional Dialogue

JTI hosted two forums to give the Judiciary the opportunity to discuss issues of concern to the institution. On 14th March, 2014, JTI hosted a collegiate workshop of Resident Judges, Heads of Divisions, Presiding Judges of the Court of Appeal, Principal Judge, President of the Court of Appeal and the Chief Justice on emerging issues in Interlocutory Injunctions Jurisprudence. The forum was organized to give key Judiciary leaders an opportunity to reflect on the emerging trends in courts' responses to applications for interlocutory injunctions. This came about because of the attitude of members of the public and the political class towards some of the injunctions the courts had issued in the recent past.

On 15th March, 2014, JTI organized all Resident Judges, Heads of Divisions, Heads of Stations and Deputy Registrars to discuss leadership and management in the Judiciary.

[8]Time *and stress Management for Judicial Officers; Equality Law and Practice (Jurisprudence) in the New Constitution; International Law, Comparative Law and the Constitution; Hot Issues in Constitutional Law; Principles of Sentencing; The Law and Practice of Temporary Injunctions; The Pragmatics of Order 11 for the Judicial Officer; In and Outside the Courtroom: Judicial Decorum, Personal Growth and other matters of concern to Magistrates; My Life in the Law: Profiles in Judicial Courage and Excellence; Experiential Team Building; Intellectual*

One of the more innovative courses offered at JTI in 2013/14 were Law 101: Basic Legal Knowledge for Court Assistants and Legal Administrative Assistants. The overriding aim of this course was to introduce Court Assistants (Law Clerks) and Legal Administrative Assistants (Secretaries) to the working of courts in Kenya and provide basic functional knowledge and skills that they need to effectively support the judicial function in the administration of justice[9].

In April 2014, JTI, in partnership with the National Council for People with Disabilities, hosted a three-day training titled, "Sensitization of Judiciary Customer Care Staff on the Needs of Persons with Disabilities". This was a pilot programme and 40 Judiciary staff who manage Customer Care Desks in various courts were trained.

6.5 Public and Institutional Lectures

The Judiciary Training Institute and the Supreme Court of Kenya hosted two world-renowned scholars, Prof Ali Mazrui and Prof Robert Martin, in Kenya in August 2013.The two scholars were in Kenya for a series of engagements with Judicial Officers and members of the public. They both held a discussion forum with Judges of the Supreme Court on 15th August, 2013, sharing views on the Rule of Law and Constitutionalism.

On 16th August 2013, Prof Mazrui (now deceased) delivered a public lecture at the University of Nairobi which was followed by a dinner and lecture by Prof. Martin to all Judges at the Intercontinental Hotel. Prof Martin also gave a lecture to Nairobi- based Judges at the High Court in Milimani and to Magistrates at the Judiciary Training Institute.

Further, on 26th August 2013, Hon. Justice Marsha Pechman, the Chief Judge of the US District Court for the Western District of Washington, delivered a lunch time lecture to Judges of the High Court in Nairobi on techniques for dealing with case backlog.

Property and Counterfeit with Anti-Counterfeit Authority; Trial

Advocacy, with Justice Advocacy Africa; Teaching techniques, in partnership with the American Embassy in Nairobi and the Federal Judicial Centre, United States of America; New Developments in Bail/Bond Jurisprudence; Principles of Fair Trial; Hot Issues in Criminal Law &

Procedure; Advanced Judicial Writing Part I and II.

[9]*The modules covered in the course included: The Structure of The Court System; The Case File Cycle; Basic Court Procedures Including Trial Processes; Basic Record Management System and Registry Operational Manuals, Basic English-Swahili Interpretation and Smart Practices in Court Interpretation and Court Assistantship.*

6.6 Hosting Judicial Exchanges

With the support of the Ford Foundation, JTI organized a benchmarking trip for Judges of the Supreme Court of Kenya to Colombia between 13th and 27th September, 2014. And with the support of the World Bank under the Judiciary Performance Improvement Program (JPIP), JTI also organized a benchmarking tour of some Judges of the Court of Appeal to the Constitutional Court in South Africa between 7th and 14th June, 2014.

JTI also hosted visitors from the region who came to benchmark with the Kenyan Judiciary. These included the Judicial Service Commission from Uganda; the Acting Chief Justice and other judges from Uganda and judges from South Sudan. A team from Rwanda made up of senior police officers from all over sub-Saharan Africa also paid a visit to JTI while on a tour of Kenya.

6.7 New Frontiers

6.7.1 The Alternative Justice Systems Project

The Constitution, in Article 159 (2), mandates the Kenyan Judiciary, in the exercise of its judicial authority, to inter alia to "promote traditional dispute resolution mechanisms." This is to be read in conjunction with the aspirations of the people of Kenya exuding pride in their ethnic, culture, cultural heritage and religious diversity. The need to initiate, promote and interface traditional justice system with the judicial system cannot therefore be gainsaid.

The Chief Justice spearheaded an embryonic initiative by commencing conversations with the Nchuri Nchekе, Meru Council of Elders on 12th May, 2012 and subsequently mandated JTI to facilitate further engagement and explore how the Judiciary can respond to the constitutional commandment that it mainstreams traditional justice systems.

JTI established a small technical team to spearhead efforts to engage and collaborate with key stakeholders to embark on an initiative to explore the viability, challenges and opportunities towards interfacing, establishing and operationalizing an indigenous alternative dispute resolution system ("Alternative Justice System"). This was with a view to supporting the Judiciary's goal of making justice more accessible to the Kenyan people. We

expect, ultimately, this initiative to be spearheaded through the Court Users Committees. To this extent, the JTI took the initiative to study this issue and engage with all stakeholders with a view to generating adequate knowledge on which policy decisions can be grounded. Ultimately, the idea is to suggest concrete ways informed by intellectual reflection, empirical evidence, and practical experience of administering traditional justice systems in consonance with the values and objects of the Kenyan Constitution. Thus, the end point will be to generate possible models, laws or policies that can be used to promote, protect and implement AJS in Kenya.

6.7.2 An Introduction on Sexual Offences and Gender Based Violence for Magistrates and Judges

The passing of the Sexual Offences Act brought with it a paradigm shift in the manner in which society would deal with sexual offences. In its path it challenges some of the cultural norms with regard to marriage, the age of consent for sexual intercourse, and gender biases, creating statutory offences and providing minimum sentences ultimately took away the discretion of magistrates in sentencing. JTI put together a task force made up of judges and magistrates from across the Judiciary to come up with a draft curriculum to address this gap and the need for every judicial officer to understand the nuances of this law.

6.7.3 The Child and the Law: Bolts and Nuts

The Children Act is the comprehensive law on how children who come into contact with the law are to be treated by the justice system. It provides for the actors and structures and defines their various roles. The Juvenile Justice System has not yet attained the cohesiveness, visibility and accessibility required to ensure access to justice to children when they come into contact with the justice system. The Children Magistrate has very wide powers under the Children Act to ensure just that. JTI under its training and development mandate put together a technical team of magistrates and judges to propose a curriculum for the training of all Magistrates and Judges who may be interested.

6.8 ConstructiveEngagement

In the period from July 2013 to June 2014, JTI partnered with various development partners to hold forums to discuss matters of mutual interests with stakeholders. This is referred to as Constructive Engagement and its ultimate aim is to enhance the skills and competencies of judicial officers and stakeholders on emerging issues in law. Constructive engagement also creates a forum for stakeholders to speak with each other regarding matters of mutual interest. A brief summary of these meetings is enumerated below.

6.8.1. 1st National Dialogue on Environment and Wildlife Crimes

Kenya's wildlife has, for decades, supported Kenya's economy and grown steadily to be one of the leading foreign exchange earners. Increased cases of poaching and other wildlife crimes pose a great threat to this. JTI in partnership with the African Network for Animal Welfare (ANAW) and Kenyans United Against Poaching (KUAPO) came together to provide a forum for various stakeholders to discuss innovative ways of dealing with poaching and other wildlife crimes. This forum was dubbed the First National Dialogue on Environmental and Wildlife Crimes and it was held on 20th December, 2013 at the Amboseli Serena Safari Lodge. The participants were drawn from government law enforcement agencies including the Judiciary, Kenya Revenue Authority, National Police Service, Kenya Airports Authority, Office of the Director of Public Prosecution as well as non - governmental organizations involved in the conservation of wildlife including Wildlife Direct, Kenyans United Against Poaching (KUAPO) and African Fund for Endangered Wildlife.

This forum, which was followed up by two more National Dialogues, came in the wake of increased incidences of poaching, mainly of elephants and rhinos, and cases of export containers with wildlife trophies being intercepted at the Mombasa Port and other international exit points. The original forum was founded on the assumption that many poaching suspects evade justice due to the traditional limited charges drawn against them and difficulties in proving some of those charges to the required evidential standards. In the circumstances, the first Dialogue focused on innovative ways of ensuring persons arrested on suspicion of poaching do not go unpunished.

Since then, we have partnered to host two more Dialogues. TheDialoguespassedcriticalresolutions to expedite the eradication of devastating wildlife and environmental crimes in Kenya and avert a looming national crisis. These resolutions included the proposing of amendments to the Wildlife Act 2013; developing a multi-agency training curriculum to build the capacities of wildlife law- enforcement agencies, exploring the possibility of creating special wildlife courts for prosecuting wildlife crimes, and raising sufficient public awareness concerning offences and penalties as extolled in the Act. Special committees appointed to implement these resolutions have already completed their tasks.

6.8.2 Symposium on Public Interest Litigation and the Enforcement of Article 43 Rights
The forum was held in collaboration with the International Development Law Organization (IDLO) on 21st February, 2014 with participants drawn from the Judiciary and the civil society. The aim of the forum was to consider the role of and challenges in public interest litigation in enforcing the rights outlined in Article 43 of the Constitution (on social and economic rights), both from a judges' and practitioners' perspectives. Discussions also centered on Article 43 rights in Kenya and the role of public interest litigation in enhancing the rule of law and social justice.

6.8.3 Symposium on Article 22 Rules and the Enforcement of the Bill of Rights

The symposium was held on 7th March, 2014 with participants drawn from the Judiciary, academia and civil society to discuss the rules promulgated by the Chief Justice under Article 22 of the Constitution on the enforcement of the Bill of Rights.

6.8.4 Stakeholder Validation Forum for the Draft Environment and Land Court Practice Directions

The Environment and Land Court came into existence pursuant to Article 162(2) (b) of the Constitution. It is, therefore, a court in its nascent stages and there was need to formulate draft practice rules to address amongst other issues the jurisdiction of subordinate courts to handle environment and land disputes. There was also need to discuss possible amendments to the Environment ad Land Court Act No.19 of 2011. It is against this backdrop that the judges and other stakeholders met to discuss the Environment and Land Court Rules on 8th March, 2014.

6.8.5. Forum on Emerging Issues on Interlocutory Injunctions

A meeting to discuss interlocutory injunctions was held on 14th March, 2014 at JTI. It was organized in the wake of concerns raised by members of the National Assembly and the Senate over the issuance of ex-parte injunctions against various coordinate arms of Government. The forum brought together judges of the High Court, Court of Appeal and Supreme Court to discuss the emerging issues and principles in the granting of interlocutory injunctions including the need to consider public interest.

6.8.6. Reflections on Alternative Dispute Resolution: Way Forward

Fully cognizant of the escalating backlog in our courts and relying on the mandate given to the Judiciary at Article 159(1) of the Constitution, JTI organized a one day expert dialogue on Alternative Dispute Resolution(ADR) in Kenya. The stakeholders invited included LSK, CIArb, Kenya National Human Rights Commission, FIDA-K, Department of Refugee Affairs, National Assembly, Commission on Administrative Justice and academics from Strathmore University and the University of Nairobi. The aim of the forum was to explore best practices in using and mainstreaming ADR to court processes to tackle the perennial problem of case backlog while presenting the would be litigants with the numerous benefits that ADR

has to offer. As a result of this conversation, an ADR Committee which draws membership from LSK, Judiciary and CIArb was formed to spearhead court annexed ADR in line with Article 159(1) of the Constitution.

6.8.7. Seminar on Human and Constitutional Rights of Intersex persons

The Constitution at Article 27 provides for equal protection and equal benefit before the law and prohibits discrimination by the state on various rounds including sex. With the upsurge in cases of transgender persons seeking to enforce their rights under the constitution, JTI organized a seminar on Human and Constitutional Rights of Intersex persons on 20th May, 2014. Participants were drawn from within the Judiciary, other government departments including immigration, Prisons, National Police Service and from civil society including Kenya National Commission on Human Rights, Legal Resources Foundation and Faraja Foundation. Candid discussions on the challenges facing transgender persons in Kenya and the rights of intersex and transgender persons were held. The forum was held in conjunction with Transgender Education and Advocacy.

6.8.8. Counter Terrorism Law and Procedures in the Context of the Constitution and International Human Rights Law

As Kenya reeled from the increased terrorist attacks, questions of whether the Judiciary was being lenient to the terrorism suspects and whether the suspects in terrorist cases had a right to bail as provided for at Article 49(h) of the Constitution arose. The forum was held against the backdrop of allegations from some sections of the public that the Judiciary was not assisting other arms of government involved in the war on terror. The question of granting of bail and that of whether there could be a balance between security and rights as enshrined in the Constitution were some of those discussed. The forum was held at JTI on 29th and 30th May, 2014. It brought together participants from the judiciary led by The Chief Justice, Office of the Director Public Prosecutions led by the Director of Public Prosecutions, NIS led by the Director, Financial Reporting Centre. The forum underscored the need for multi- agency cooperation in the fight against terrorism.

6.9 Challenges

The challenges facing JTI are first, capacity constraints, two, space limitations, and three, cultural and perception problems. The JTI establishment is not at its optimum. However, it is going through a comprehensive process of completing its Strategic Plan which, once adopted by the JSC, will address the capacity deficiencies.

Secondly, JTI is also hindered in carrying more than two programs on location because of space limitations. JTI is currently housed in a rented premise and has been since 2008. The premise has two classrooms and no boarding facilities, which leads to a large proportion of the training budget being spent on accommodation. In addition, there are unassailable business and institutional cases for JTI to obtain its own premises rather than rent. Both business and institutional imperatives necessitate that the Institute's leadership spends a considerable part of the next few years ensuring that JTI will have its own facilities for training and accommodation.

Thirdly, there are many stakeholders who do not see the value in training. They believe that a judicial officer should sit and preside over cases all year round. There also those who do not believe that training should include judiciary staff. However, these notions have been dispelled through the Judiciary Transformation Workshops. Though these were not actual trainings the staffs were eager to learn and implement the lessons learned from the workshops. Subsequent trainings for the judicial staff have attracted huge numbers with requests for more training.

7.1 JTI: The Future

JTI has a bright future. On short term goal that has been achieved is for JTI to induct all new staff and this is now happening, including newly recruited magistrates and judges. The next important culture JTI aims to inculcate is a culture of Continuous Judicial Education for all judicial officers that are offered annually to kadhis, magistrates and judges.

Another important issue is to have the largest component of JTI budget be paid by funds from the Exchequer. Currently, the JPIP program, which is a loan from the World Bank, meets the cost of the bulk of the training programs mounted by JTI.

The most important aspect of the training programs is to have programs that are offered to the Judiciary staff. Of the 5,000 staff employed in the Judiciary, only 600 are judicial officers (judges, magistrates and kadhis). The remaining 4,400 are judiciary staff. Though it is possible to mount training for all judiciary staff annually, the current staffing levels at JTI make it impractical to do. The current approach is to mount trainings for different cadres each year in order to meet the desire and hunger for training.

TABLES: A SUMMARY OF JTI TRAININGS, 2013/2014

JTI held several trainings for different groups of Judges as shown in the table below. The Judges chose the trainings from a list which had been sent to them in advance, and this enabled them to plan their diaries better to minimize conveniences to litigants. It also ensured that they attended only those trainings that interested them. The following training activities were conducted for judges:

Table 6.1 No. of Judicial Officers Trained (Continuous Judicial Education)

S/No.	Name of Training	No. Trained	Remarks
1	Continuous Judicial Education for Judges	130	Total of 22 trainings in different thematic areas were offered to Judges who had the option of attending a maximum of 4 trainings
2	Continuous Judicial Education for Magistrates and Kadhis	450	Total of 7 5-day trainings were offered each required to attend training.

Trainings for Judicial Officers and Staff

In the period under review, JTI held a number of trainings to equip non-judicial staff with appropriate skills to perform their responsibilities better.

Table 6.2: No of Judicial Officers and Staff Trained (Specialized Short Courses)

S/No.	Name of Training	No.	Remarks
1	Intellectual Property, copyright & Anti-counterfeit Laws	35	Training conducted in partnership with local partners
2	Teaching Techniques for judicial officers	25	Participants included Judges and Magistrates
3	Teaching skills for Trial Advocacy	10	Participants included Magistrates.
4	Trial Advocacy for Magistrates	20	Training conducted in partnership with international partner.
5	Counter- Terrorism	10	Participants included magistrates
6	Intensive Pilot Course on Injunctions	20	Magistrates
7	Customer Care Skills	100	Participants were Judiciary customer care staff.
8	Law 101 for court Assistants and administrative Assistants	300	Participants were court clerks and secretaries
9	Leadership & Management	250	Participants included two representatives from each court stations.
10	High Court Registry Operation Manual	75	Registry staff and Deputy Registrars from all stations

JTI conducted induction trainings for a total of 220 newly recruited employees to acquaint them with general operations, policies and value of the Judiciary to develop their capacity. The table below provides a summary of induction trainings conducted:

Table 6.3: No of Staff Inducted

S/No.	Name of Training	No. Trained	Remarks
1	Induction for newly recruited directorate staff	168	Staff hired to strengthen the directorates
2	Induction for Chief Registrar of the Judiciary	1	Presentations were made by Registrars, Directors and Commissioners from JSC.
3	Induction for Newly recruited Resident Magistrates	51	

CHAPTER SEVEN

FINANCE AND INFRASTRUCTURE

7.2 Overall Financial Overview

7.2.1 Judiciary Funding in the National Context

The Judiciary participates in the national budget-making process as a member of the Governance, Justice, Law and Order Sector (GJLOS)10 to ensure efficiency and effective functioning of the system of courts at all levels. Under Vision 2030's Second Medium Term Plan (2013 –2017), Transforming Kenya: Pathway to Devolution, Socio-economic Development, Equity and National Unity, the Government has pledged to "provide full support to the ongoing transformation of an independent Judiciary by providing it with adequate human and financial resources and with political support".

For the purposes of budgeting and allocation of public resources, the Judiciary operates under the single programme, Dispensation of Justice, which is in turn divided into two sub-programs: 'Access to Justice' and 'Judicial Services'. Although the GJLOS sector proposal includes the Medium Term Expenditure Framework (MTEF) ceilings for the Judiciary, the budget estimates for the Judiciary are directly submitted to the National Assembly in line with the Constitution.

Among the organs of Government, the Judiciary receives the lowest share in the allocation of the revenue. For the FY2013/14, the Executive was allocated KSh. 437 billion. Parliament received KSh. 20 billion while the Judiciary was allocated KSh. 15.7 billion. These shares are represented in the pie chart in Figure 6.1.

Figure 7.1: Revenue Allocation to State Organs in 2013/14

Source: GoK, Budget Policy Statement, 2014.

10The GJLOS sector comprises 14 sub-sectors that include the Ministry of Interior and Coordination of National Government, the Office of the Attorney General and Department of Justice, the Directorate of Public Prosecution(DPP), the Judiciary, the Judicial Service Commission (JSC), the Ethics and Anti-Corruption Commission (EACC), the Kenya National Commission for Human Rights(KNCHR), the Registrar of Political Parties (RPP), the Witness Protection Agency(WPA), the National Police Service Commission(NPSC), the Independent Electoral and Boundaries Commission (IEBC), the National Gender and Equality Commission (NGEC), the Commission for Implementation of the Constitution (CIC), and the Independent Police Oversight Authority (IPOA).

Although the proportion allocated to the Judiciary has been rising, it is still inadequate to cover the operations of courts that are scattered in all parts and Counties in the country. In 2012/13, Kenya's budgetary allocation to the Judiciary was 3 per cent of the sharable revenue, a proportion which was also maintained in 2013/14.

7.1.2 Resource Requirement Versus Resource Allocation

Although budgetary allocation to the Judiciary has improved significantly over the years, rising by 21.5 per cent, 92.8 per cent and 61.1 per cent in the past three financial years, respectively, the institution is still underfunded. Allocations continue to fall short of the requested budget since the resource requirements have never been met.

Notably, Judiciary budget allocations have fallen 5 per cent below requests in the FY2011/12, 19 per cent short in the FY2012/13, and 23 per cent in the FY 2013/14. Generally, the budget deficit has increased over time from 5 per cent in 2011/12 to 23 per cent in 2013/14.

Table 7.1: Judiciary Budgetary Requirement Versus Allocation

Financial Year	Requirement	Allocation	Percentage cut
2011/12	KSh. 4.597 billion	KSh. 4.371 billion	5%
2012/13	KSh. 14.99 billion	KSh. 12.157 billion	19%
2013/14	KSh. 22.075 billion	KSh. 16.9 billion	23%

In the FY2011/12, the resource envelope required by the Judiciary to implement core functions assigned to it by the Constitution was about Ksh4.597 billion against which an allocation of KSh. 4.371 billion was made. The following year, the resource requirement increased sharply to Ksh14.991

billion but an allocation of only KSh. 12.157 billion was made. In 2013/14, the case was made for a resource envelope of KSh. 22.075 billion but the allocation fell short by 23 per cent – delivering only KSh. 16.9 billion.

These recurrent shortfalls have continued to pose a major challenge to the implementation of programmes and projects in the Judiciary. In addition, the persistent inadequate allocation of resources has resulted in delays in the achievement of Vision 2030 milestones and to undermine the goals envisioned in the third pillar of the Judiciary Transformation Framework.

7.3 Recurrent Expenditure

The Constitution demanded reforms in the Judiciary that led to expansion in its establishment which, however, is still operating a 41% staff deficit. This led to sharp increase in recurrent budget in the financial year 2011/12. The approved expenditure for the recurrent budget compared to the total was 81 per cent of the 2011/12 and grew to 87 per cent in 2013/14. The recurrent budget rose by 85 per cent in 2011/12, 66 per cent in 2012/13 and 10 per cent in 2013/14. The absorption level of the recurrent budget has been within the target at 99.9 per cent, 98.4 per cent and 98.3 per cent for 2011/12, 2012/13 and 2013/14 respectively.

Table 6.3 shows the approved estimates and actual expenditures for the recurrent budget over the period under review. It also shows the ratio of recurrent vote to the overall budget, growth in allocations as well as the utilization levels.

Table 7.2: Analysis of Recurrent Expenditure

	2011/12		2012/13		2013/14	
	Approved Expenditure (Million) KSh.	**Actual Expenditure (Million) KSh.**	**Approved Expenditure (Million) KSh.**	**Actual Expenditure (Million) KSh.**	**Approved Expenditure (Million) KSh.**	**Actual Expenditure (Million) KSh.**
Recurrent	6,142	6,137	10,221	10,025	11,215	11,016
Total Vote	7,546	7,311	12,157	11,961	13,911	12,673
Recurrent as % Total	81%	84%	84%	84%	81%	87%
% Growth over previous year	85%		66%		10%	
% Utilization-Recurrent		99.9%		98.4%		98.3%

7.3.1 Overview of Recurrent Vote Expenditure Trend

The transformation of the Judiciary is an imperative decreed by the Constitution, which has resulted in the expansion of the institution's establishment. Consequently, the recurrent budget in the financial year 2011/12 rose sharply in order to cater for personnel emoluments for the increased number of staff.

The approved allocation for the recurrent budget was 81 per cent of the total allocation in 2011/12 (at KSh. 6.142 billion) and grew to 87 per cent in 2013/14 (at KSh.11.215 billion). The recurrent vote increased by 85 per cent in 2011/12, then by 66 per cent in 2012/13 and 10 per cent in 2013/14.

Table 7.3: Budget Implementation by Sub-Programme

Year	**2011/12**		**2012/13**		**2013/14**	
	Approved Estimates (KSh. Million)	**Actual Estimates (KSh. Million)**	**Approved Estimates (KSh. Million)**	**Actual Estimates (KSh. Million)**	**Approved Estimates (KSh. Million)**	**Actual Estimates (KSh. Million)**
Access to Justice	4,673	4,435	7,544	7,513	7,621	6,989
Judicial services	2,873	2,876	4,613	4,448	4,256	4,226
Total Expenditures	**7,546**	**7,311**	**12,157**	**11,961**	**11,877**	**11,215**

RecurrentBudget

Absorption for the recurrent budget during this period has been within target at 99.9 per cent, 98.4 per cent and 98.3 per cent for the financial years 2011/12, 2012/13 and 2013/14, respectively.

Table 7.4: Absorption levels for recurrent budget

Financial year	**2011/12**	**2012/13**	**2013/14**
Absorption rate	99.9%	98.4%	93.3%
Cuts in allocation	+46.1%		-2.8%

Budgetary allocation for the recurrent vote decreased by 2.8 per cent in 2013/14. It had initially increased by 46.1 per cent in the 2011/12. Nonetheless, compensation paid to employees grew gradually from 37 per cent in 2011/12 to 50 per cent of the total approved budget in 2013/14. The growth was occasioned by improved terms of service for existing employees and recruitment of new employees into various cadres. The budget supported the tremendous improvement in the terms of service of current employees and the massive recruitment of new staff to various cadres. Although staff numbers have increased, occasioning a rise in the recurrent budget, the Judiciary is still operating at 41 per cent of the established capacity as per 2009 ceilings established by the JSC. Use of goods and services rose from 24 per cent of the budget in 2011/12 to 38 per cent in 2012/13 and declined to 33 per cent in 2013/14.

There was a sharp decline in expenditure on acquisition of non-financial assets from 17 per cent of the total budget in 2011/12 to 2 per cent in 2012/13 and a marginal increase in 2013/14 to 3 per cent. During the financial year 2011/12 the Judiciary acquired non-financial assets, including motor vehicles to enhance service delivery. Grants and other transfers remained constant at 3 per cent for the first two years for the period under review and marginally declined to 2 per cent in 2013/14. The Semi-Autonomous Government Agencies that receive funding from Judiciary include the National Council for Law Reporting (NLRC), the Political Parties Dispute Tribunal (PPDT) and the Auctioneers Licensing Board (ALB).

7.3 Development Expenditure

The Constitution requires the Judiciary to make its services accessible throughout the country. Legislation further makes it imperative for the Judiciary to establish a High Court station in every county and a magistrate's court in every district. In this regard, Judiciary under its transformation framework, embarked on an elaborate plan to construct new courts, renovate and upgrade existing facilities as well as establish courts in areas previously underserved. In the financial year 2013/14, the Judiciary purposed to spend Ksh8.65 billion on development.

The approved estimates and actual expenditures for the development budget show a rise in allocations as well as the utilization rates for the period under review.

Table 7.5: Analysis of Development Expenditure

	2011/12		2012/13		2013/14	
	Approved Expenditure (Million) KSh	Actual Expenditure (Million) KSh.	Approved Expenditure (Million) KSh.	Actual Expenditure (Million) KSh.	Approved Expenditure (Million) KSh.	Actual Expenditure (Million) KSh.
Development	1,404	1,174	1,936	1,936	2,696	1,657
Total -vote	7,546	7,311	12,157	11,961	13,911	12,673
Development as % Total	19%	16%	16%	16%	19%	13%
% Growth over previous year	138%		37.9%		39.2%	
% Total vote Utilization		73.6%		99%		61%

The share of the development vote in the total Judiciary budget has been declining each year from 19 per cent in 2011/12 to 13 per cent in 2013/14. In 2011/12 the development approved allocation increased by 138 per cent compared to the previous year. It then increased by 37.9% and 39.2% in FY 2012/13 and FY 2013/14 respectively. The increase in the development budget was necessitated by the need to construct new court stations and refurbish dilapidated court structures. The absorption rate of the development funds declined from 99 per cent in FY 2012/13 to 61 per cent in 2013/14.

During the period under review, budget utilisation was on target for the recurrent vote but a few challenges were experienced on the development vote. In general, the recurrent budget was well absorbed during the period 2011/12 – 2013/14, but there was a downward fluctuation in expending the development vote in the financial year 2013/14 due to suspension of construction works owing to challenges in the procurement process and supervision. The total budget allocated to the Judiciary during the financial year 2013-14 was KSh.17. 8273 billion split into KSh.11.877.3 billion and KSh. 5.950 billion for the recurrent and development votes, respectively.

7.3.1 Overview of Development Budget Expenditure

The need to build new courts and rehabilitate dilapidated structures, as well as the acquisition of new technologies, has necessitated an increase in the Judiciary's development budget. The share of the development vote in the total Judiciary budget declined from 19 per cent in 2011/12 to 16 per cent in 2012/13 and 13 per cent in 2013/14, but in real terms, the development vote has shown a consistent upward trend from the year 2009/10. In the financial year 2011/12, the development approved allocation increased by 138 per cent to KSh. 1.404 billion compared to the financial year 2010/11. It then increased by

37.9 per cent to Ksh1.936 billion in the financial year 2012/13 and then again by 39.2 per cent to KSh. 2.696 billion in the financial year 2013/14. However, the absorption rate of the development funds declined from 99 per cent in the financial year 2012/13 to 61 per cent in the financial year 2013/14.

7.4 Expenditure Analysis

The expenditure and allocation trends for the Judiciary are shown in Figure 7.2 and Figure7.3 respectively

Figure 7.2: Expenditure Analysis

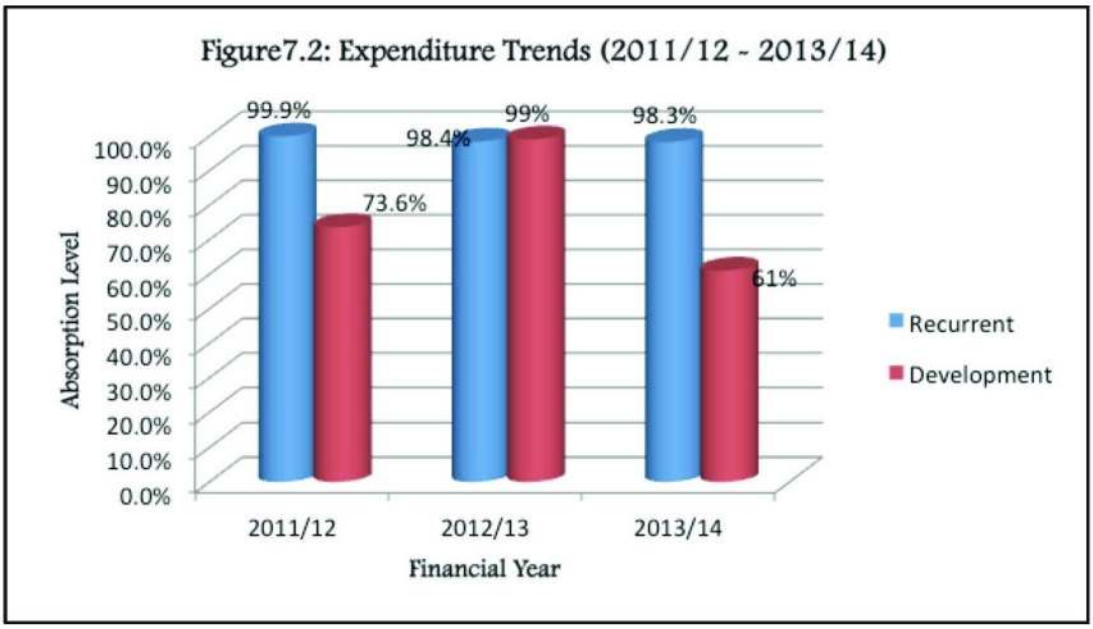
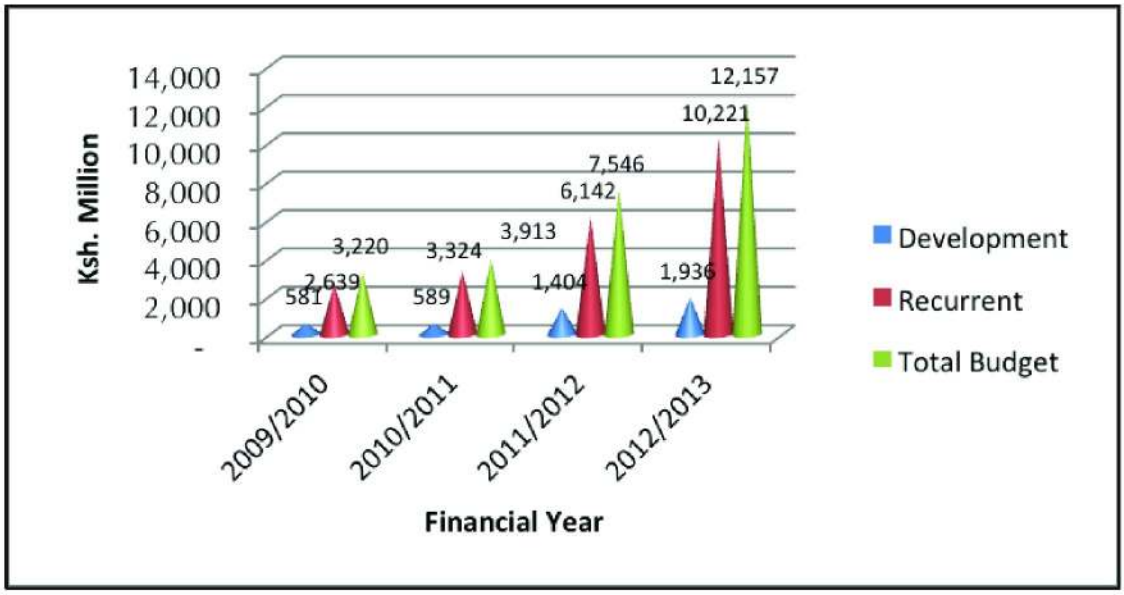


Figure 7.3: Analysis of Allocation



7.5 Infrastructure Development

7.5.1 Courts Construction Works

Investment in court infrastructure has over the years been under-funded in the face of rising demand for formal justice services. In the past year especially, the Judiciary invested heavily in tackling this problem by increasing the institution's technological, organizational and human resource capabilities. The Judiciary's infrastructure development plan sets out to fulfill its statutory obligation to build a High Court in every county in the next 10 years.

Between the financial years 2011/12 and 2013/14, construction works were ongoing in seven courts (Nyeri, Malindi, Kisumu, Migori, Naivasha, Narok and Busia) at a contracted total cost of KSh. 894.9 million. In the financial year 2011/12, Naivasha Phase I was completed and the whole project concluded during the 2012/13 financial year. Other projects concluded in 2012/13 are Narok Phase II and Busia. In the financial year 2013/14, construction works were completed in Nyeri, Malindi, Migori, and 90 per cent of Kisumu courts was done. During the entire period, a total of KSh. 826.8 million was paid out for these works.
Prefabricated court buildings are being erected in seven other court stations in Bomet, Othaya, Marimanti, Wanguru, Garsen, Tawa and Runyenjes and are expected to be completed in the FY2014/15.

7.5.2 Courts Refurbishments

Over 70 per cent of existing court buildings require renovations. Refurbishment and renovation of courts is geared towards ensuring that court buildings are safe for occupation, user-friendly and accessible to users and accommodate the needs of persons with disabilities.
Fourteen High Courts in Muranga, Malindi, Kisumu, Nakuru, Kericho, Meru, Kerugoya, Homa Bay, Nyeri, Bungoma, Kitale, Milimani Law Courts, Kisii, Kakamega, are being rehabilitated and refurbished at a cost of KSh.380 million. Further, an additional seven magistrates' courts were also refurbished in Bomet, Migori, Lodwar, Eldama Ravine, Kimilili, Kilifi and Nyahururu. The works were ongoing, with completion expected within the financial year 2014/15.

Table 7.6: Large capital investment, 2013 / 2014

Project	Location	Contract Cost (KSh. Million)	Expected final cost (KSh. Million)	Contract Date	Expected completion date	Contract completion date	Completion Stage			Budget Provision (Ksh. Million)		
							2011/12	2012/13	2013/14	2011/12	2012/13	2013/14
Nyeri Court	Nyeri	166.4	189	-	complete	complete	Phase I complete	90%complete	complete	40	70	19
Malindi court	Malindi	285.7	-	-	complete	complete	Phasel 90% Complete	95% complete	completed	100	41	46
Kisumu court	Kisumu	221.3	334.5	4.09.2012	21.12.2013	21.03.2014	55% Complete	65% complete	90% complete	94	10	149
Migori court	Migori	31.5	39.3	4.10.2012	02.09.2013	07.10.2013	80% Complete	95% complete	completed	30	24	22
Naivasha court	Naivasha	36.8	42.4	-	complete	complete	Phase I complete	complete	complete	30	26	0
Narok court	Narok	20.5	61	-	-	-	Phase I complete	Phase I complete	Phase II begun	25	0.8	0
Busia court	Busia	162.7	-	-	-	complete	90% complete	complete	complete	100	0	0
Prefabri-cated courts	Bomet	81.7	81.7	15.01.2013	18th April 2014	4.10.2013	Tendering complete	75% complete	75% complete	-	240	
	Othaya	81.7	81.7	15.01.2013	Othaya – 18th April 2014	Othaya - 31.10.2013	Tendering complete	70% complete	80% complete	-		

Project	Location	Contract Cost (KSh. Million)	Expected final cost (KSh. Million)	Contract Date	Expected completion date	Contract completion date	Completion Stage			Budget Provision (Ksh. Million)		
							2011/12	2012/13	2013/14	2011/12	2012/13	2013/14
prefabricated courts	Marimanti	81.7	81.7	15.01.2013	Marimanti – 18th April 2014	Marimanti – 1.11.2013	Tendering complete	50% complete	60% complete	-		
	Wanguru	81.7	81.7	15.01.2013	Wanguru – 18th April 2014	Wanguru – 4.11.2013	Tendering complete	40%	60% complete	-		148
prefabricated courts	Garsen	99.9	99.9	23.01.2013	Garsen – 25.09.2013	Garsen – 15.11.2013	Tendering complete	35%	65%	-		
	Tawa	99.9	99.9	23.01.2013	Tawa – 26.09.2013	Tawa – 22.12.2013	Tendering complete	65%	70%	-		
	Runyenjes	99.9	99.9	23.01.2013	Runyenjes –13.11.2013	Runyenjes – 30.11.2013	Tendering complete	15%	5%	-		

7.5.3 Infrastructure Outlook for 2014/2015

The number of judges of High Court judges is set to increase from 47 in 2011 to 120, representing a 155 per cent increase. This creates demand for new infrastructure (i.e. courtrooms, chambers, libraries, registries, vehicles) and human resources in all the counties. Equally, the number of magistrates will have risen by 37 per cent since 2011, thus requiring new courts across the country. The existing capacity of court buildings is inadequate.

There are currently 21 High Courts in the country, many of which share buildings with magistrates' courts. Most of these stations are overcrowded, making them inefficient in handling cases while posing safety and sanitary risks. Upgrading such facilities is necessary to address a myriad of infrastructure related issues including the shortage of courtrooms; deteriorating buildings that undermine the functionality and safety of judicial officers, staff, litigants and the public.

A recent survey11 indicated that 25 per cent of the court stations do not have adequate courtrooms. Consequently, matters are heard in turns or held in judicial officers' offices which are however adequate in only 30 per cent of the stations. About 22 per cent of stations do not have public toilets. There are no holding cells in 16 per cent of the stations. Adequate holding facilities (space for remanded defendants comprising separate facilities for females, males, and juveniles) are found in only 41 per cent of the court stations. There is therefore need to expand these facilities and build registries, exhibit stores and other public amenities such as customer care desks and waiting bays.

In the next financial year, additional resources will be required from the Government of Kenya to finance an expanded courts development plan. In the financial year 2014/15, the Judiciary expects to construct 13 new High Court stations for which funding has already been secured both from the government (3 courts) and World Bank – JPIP (10 courts). He construction of 5 magistrates'' courts are expected to commence in the FY2014/15 in Mbita, Lokichar, Kapsowar, Habaswein and Mutito. A further 10 magistrates'/Kadhis' courts are to be renovated and refurbished.

[11] *Judiciary Case Audit and Institutional Capacity Survey, 2014*

7.6 Criteria for Allocation of Funds

The Judiciary has developed transparent criteria to share resources among the court stations equitably. Several parameters including number of judicial officers, number of staff, caseload, and state of infrastructure, geographical coverage, mobile courts and distance were initially proposed. After lengthy deliberations by various committees, the Judiciary has now settled three:

(i) Number of Judges and Judicial Officers in the station;
(ii) Number of Staff in the court station;
(iii) Number of cases lodged in the station in a year.

The three factors were chosen because they are easily measurable and data is available and not susceptible to manipulation. It should however be noted that the three factors drive costs differently. Weights were therefore allocated as follows:-

(a) No. of Judges, Magistrates and Kadhis – 50%
(b) No. of Staff – 30%
(c) Annual Caseload – 20%

In order to gauge the variances caused by the new criteria, the Judiciary has adopted use of statistics collated by the Performance Management Directorate for the financial year 2013/14.

The number of Judges and judicial officers in the stations are readily available from the respective registrars. Records of the Staff Rationalisation

Committee were used to establish distribution of staff across stations. The proposed criteria for the allocation of funds pays attention to the current statistics by endeavoring to reach the ultimate requisite numbers by taking into account the total number of cases being filed annually; total number of Judges and judicial officers; and total number of staff. Achieving this goal, however, involved making difficult choices regarding scarce resources. In order to assist court stations to document the resources needed and prioritising resource allocation to core activities, the Judiciary has ring fenced the non-discretionary items and development fund that will provide a single yardstick against which all courts are to be evaluated.

In the past few years, the Judiciary has increased access to justice by constructing courts closer to the people, de-congesting current facilities through renovations to improve the physical quality of existing courts.

7.7 Revenue

Total revenue collected in 2013/14 rose to KSh. 2.11 billion, up from KSh.1.48 billion recorded in 2012/13, representing a 42 per cent increase. This increase was attributed to the automation and diversification of the revenue and deposits collection systems.

7.8 Development Partners' Funding

Persistent funding shortfalls have continued to pose a major challenge to in the implementation of transformation programmes and projects. The inadequate allocation of resources results in delays in the achievement of the Vision 2030 and the goals envisioned in the third pillar of the Judiciary Transformation Framework. Since the Constitution allows the Judiciary to receive funding support to supplement the available exchequer funds in the implementation of projects and programs, three development partners are working in partnership with the institution. Development partner funding contributes significantly to resourcing development activities. During the financial year 2013/14, the total development budget was Ksh5.95 billion, with donor contribution accounting for 36 per cent. However, even with this development partners' contribution, the total budget was still not sufficient to deliver all the prioritised projects.

7.8.1 United Nations Development Programme (UNDP)

The Judiciary sought support from the United Nations Development Programme to coordinate and implement technical and financial aspects of the Judiciary Transformation Framework through a multi-donor basket fund. Project management arrangements have taken due consideration of the fact that the financial and non-financial support to the Judiciary is received from different partners with different engagement modalities with the Judiciary and the national government. The support has been running since May 2013 and will lapse in June 2016.

The $1,430,099 financing agreement with the UNDP was signed in June 2013 and the first implementation plan was expected to start in July 2014 and run until June 2015. The various areas of intervention supported under the project referred to as 'the Judiciary Transformation Support Project (JTSP), 2013-2016' are focused on two outcome areas: people-focused delivery of justice; and strengthened capacity within the Judiciary to deliver on its mandate.

The key project outputs include the development and deployment of processes and systems enabling access to court services by citizens including special interest groups. This support would also facilitate the development and embedding of Alternative Dispute Resolution (ADR) mechanisms into the law and the development and implementation of a comprehensive Judiciary information, education and communication strategy. Additionally, the support would strengthen the public complaints mechanism in the Judiciary and operationalise the National Council for the Administration of Justice. Court User Committees operating framework and guidelines implemented. Some of the other objectives include establishing a performance management system informed by a comprehensive job evaluation as well as effective coordination. It also seeks to develop the capacity of the Judiciary Training Institute to monitor and report on training, strengthen and increase judicial practices through sharing of information and knowledge is strengthened, and ensure the implementation of a reviewed Judiciary ICT policy and ICT strategy.

Among the activities proposed to contribute to each of the outputs include: technical assistance to a number of departments and offices of the Judiciary on select areas; a variety of capacity development initiatives for judicial and administrative staff of the Judiciary; strategic and policy consultations on strategy and policy development; stakeholder forums at the national, regional and county levels; consultancies and experts for the development of strategic and management documents, issue papers and other requisite documentation; coordination of development partners assistance to the Judiciary; media engagement around information sharing; digitization and documentation of records at different courts; procurement of equipment; publication of documentation through different mediums; procurement of systems and development of software for different management and administration functions; among others.

7.8.2 Judiciary Performance Improvement Project (JPIP)

The World Bank signed a Financing Agreement with the National Treasury on December 5, 2012 to develop management capacity in the Judiciary. The Judicial Performance Improvement Project (JPIP) aims to support and achieve the objective of the Judiciary Transformation Framework.

It is the first major partnership between the Judiciary and the World Bank. The World Bank's investment in Kenya's efforts recognizes, quite rightly, that an inefficient and ineffective Judiciary can undermine socio-economic and political growth with negative consequences for the whole the society. Its key objective is to improve the performance of the Judiciary to enable it provide its services in a more effective, efficient and accountable manner.

The project comprises of four components; which include Court Administration and Case Management – with an allocation of KSh. 3.4 billion; Judiciary Training and Staff Development – with an allocation of KSh.1.36 billion; Court infrastructure -- allocated KSh. 4 billion; and Project Management, which will receive KSh. 765 million.

Table 6.3: Allocation and expenditure of JPIP funds.

Project component	Proportion of funds	Sum in billions
Court infrastructure and case management	40%	KSh. 12.324
Judicial training and development	11%	KSh. 3.447
Court infrastructure	40%	KSh. 13.568

The total budget for the 2013/14 work plan was US$30.97m (KSh. 2.6 billion).

The overall expenditure at the end of the financial year 2013/14 was KSh. 321million, translating into an absorption rate of 12.3 per cent. Court administration absorbed 3.8 per cent of the allocated budget, case management 4.5 per cent and court infrastructure only 6.7 per cent. Most notable is the fact that the activities listed under these components required long preparation procedures involving procurement, recruitment of specialists/ experts as well as purchase of high capital items. These could not be done in the first year of implementation and the performance of these components is expected to greatly improve in the subsequent periods. JPIP is currently in its second year of implementation.

7.8.3 The Ford Foundation

The Ford Foundation pledged a US$1 million grant to the Judiciary to support capacity development for the Supreme Court. The project seeks to develop the capacity of judges, clerks and legal researchers of the Supreme Court of Kenya in order to enhance its capacity to play its constitutionally mandated role. It is designed are four components, namely, nurturing of transformative human rights jurisprudence; capacity building on devolution and intergovernmental dispute resolution; judicial exchange and visiting programme and judicial knowledge management.

The overall objective of this project is to build the capacity of the Supreme Court of Kenya through training and judicial dialogue in order to effectively play its leadership role. Specifically, it seeks to nurture progressive, sound and quality jurisprudence by building local and transnational communities of judicial practice and experience within the Supreme Court and other courts. It also aims to increase strategic engagement between the Judiciary and legal practitioners, academia, and civil society on constitutional development through constitutional interpretation; and provide accessible materials and resources through which the courts and the public can develop an understanding of human rights and other selected constitutional themes. Additionally, the projects seeks to promote inter-branch and inter-court constitutional dialogue on select issues that affect the enforcement of constitutional rights; and provide knowledge, skills and intellectual tools for strategic constitutional adjudication on human rights, devolution and integrity.

7.9 Staff Capacity

Professional and competent staff were hired to strengthen and enhance capacity in the finance and accounting functions both at the headquarters and in the field. A total of Offices were also established in 14 regions across the country with 91 finance staff recruited and deployed in all court stations at the beginning of the 2013/2014 financial year.

In each region, a Regional Assistant Director of Finance or Regional Principal Accountant was posted to ensure oversight in all accounting units at the stations. The regional offices act as a liaison between the court stations and the headquarters.

As a result, the new staff strength has enabled the Judiciary to plan better and make the budget process more integrated as it now involves all stakeholders, from the stations upwards.

7.10 Challenges in implementing the Budget

7.10.1 International Funding Standards

The international benchmark for funding judiciaries is 2.5 per cent of the total national budget. During the period under review, the Judiciary received 1.3%, way below the accepted international standard. This inadequate resource allocation to the Judiciary impacts negatively on the implementation of its core mandate.

The Judiciary has from year to year been under- funded and it lacks financial autonomy. To- date its finances and administration are directly

controlled by the Ministry of Finance and there is urgency to operationalize the Judiciary Fund. The institution labours under the burden of inadequate courtrooms, chambers, staffing, equipment, and other facilities.

The total development budgetary allocation to the Judiciary for the fiscal year 2014 accounts for a paltry 1.3 per cent of the total national budget at a time when the institution is required to undertake massive physical expansion across the country, hire judges, magistrates and staff to serve a growing and increasingly litigious population. A further increase in allocation to the Judiciary to more than 2 per cent of the national budget is a required to structural and human resource capacity of the justice system, building trust and confidence in the institution, and deepening the ethos of independence and integrity.

The Judiciary can properly discharge its functions in dispensing Justice only if it enjoys administrative and financial autonomy. Delivery of justice depends on many factors such as numerical strengths of the judicial personnel, their competence and training; the Judiciary must be assisted by an administrative staff with adequate equipment supervised by a diligent court administration.

Courts of law discharge judicial functions in chambers and courtrooms that should be adequately furnished with modern equipment and should be manned by efficient registrars, secretaries, judge's clerks, recorders, interpreters, assessors (where necessary). Deficiency or inadequacy in any of these essential administrative capacities results in delays in the administration of justice.

The oft-repeated criticism of the Judiciary usually revolves around ineffectiveness, delays, and incompetence, mostly perceived and rarely factual as all these are often "resource-related".

7.11 Supply Chain Management

The resources and assets of the Judiciary are managed with the objectives of maximizing efficiency, promoting fair competition, integrity and fairness in the procurement of goods and services.

The supply chain and management system has undergone re-engineering during the period under review. Systems and structures are being put in place and developed to ensure enhanced service delivery, accountability and transparency. This will continue into the next period. For instance, capacity (personnel) building, organizational and devolved structures for the directorate are still under implementation. The Procurement Manual to guide decision-making has been made; the Contracts Management Office has been created but still requires a clear staffing structure; ICT compliance Supply Chain Management procedures and processes still under implementation. In some areas where systems are lacking, such as Stores functions, tendering and contracts management, initial work has commenced. There is now an Approved Procurement Plan for the FY2014/2015. In addition, a list of prequalified suppliers has been approved, making it easy to manage the procurement of goods and services.

Dated the 18th November, 2015.

WILLY MUTUNGA,
Chief Justice and President of the Supreme Court of Kenya.

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