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## List of Abbreviations

AIDS	Acquired Immune Deficiency Syndrome
CAJ	Commission on Administrative Justice
CPC	Criminal Procedure Code
CUEA	Catholic University of Eastern Africa
HIV	Human Immunodeficiency Virus
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICT	Information Technology and Communication
KLR	Kenya Law Reports
KNCHR	Kenya National Commission on Human Rights
Kshs	Kenya Shillings
LGBTIQ	Lesbian, Gay, Bisexual, Transgender, Intersex and Queer
NCLR	National Council for Law Reporting
NGEC	National Gender and Equality Commission
NGLHRC	National Gay and Lesbian Human Rights Commission
NGO	Non-Governmental Organization
NLC	National Land Commission
UDHR	Universal Declaration of Human Rights

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## Executive Summary

This Paralegal Resource Guide has been developed by the National Gay and Lesbian Human Rights Commission (NGLHRC) with the main objective of acting as a reference guide to paralegals across the Country on the legal framework and practice in Kenya. While it does not cover every area of law, the Resource Guide focuses on areas of the law that would be most beneficial to the Lesbian, Gay, Bisexual, Transgender, Intersex and Queer (LGBTIQ) Community in Kenya. The Resource Guide, while by no means conclusive or all-encompassing, seeks to offer guidance to paralegals in their response to human rights violations or in instances where LGBTIQ persons find themselves in conflict with the law.

The Guide is divided into 5 parts. The first, Part A gives the background and rationale for the Guide, its importance and purpose. It makes an introduction into who a paralegal is and what role they are expected to play in the community. Part B on Human Rights, offers an insight into the source of human rights laws at the national and international levels and elucidates on the international bill of rights as well as the Constitution of Kenya, 2010. It uses examples of cases to demonstrate how the courts have enforced specific human rights and fundamental freedoms. The Criminal Justice System forms the content of the Guide under Part C which highlights some of the crimes under Kenyan law, the legal provisions and guiding principles on arrest, bail and bond. The Guide points out some of the key institutions that are relevant in the enforcement of rights and fundamental freedoms. These are contained in Part D which highlights the judicial and quasi-judicial institutions' powers, functions and jurisdictions. Finally, the Guide under Part E recognizes the importance of evidence collection and documentation in the enforcement of human rights and fundamental freedoms.

# PART A:

## INTRODUCTION



## **CHAPTER ONE: INTRODUCTION**

### **1.1 WHY IS THIS RESOURCE GUIDE NECESSARY?**

The National Gay and Lesbian Human Rights Commission (NGLHRC) has for the past two years been going round the Country in an effort to inform and educate Lesbian, Gay, Bisexual, Transgender, Intersex and Queer (LGBTIQ) persons of their rights as enshrined in the Constitution of Kenya 2010. It was established that it was necessary for these rights of the people, duties and responsibilities of the government, obligations of the LGBTIQ community to the state to be compressed into a reference document so as to improve the quality of life of the community and expand their knowledge thereof.

### **1.2 RATIONALE**

The Penal Code<sup>1</sup> establishes that any person who permits a male person to have carnal knowledge of them against the order of nature, is guilty of a felony and is liable to imprisonment for fourteen years. This law has often been abused to cause situations where LGBTIQ persons are harassed by the police, members of the public in layered levels of stigmatization, discrimination, social exclusion, deprivation and abuse, coupled with lower levels of access to health care, employment, access to justice and economic advancement. They are made vulnerable on a whole number of structural fronts, such as gender, race, class and education.

The criminalization of homosexuality and same sex conduct is ultimately ineffective as a deterrent, leads to increased abuse of homosexuals, is an inefficient allocation of the State's resources in the fight against crime, results in the stigmatization of sex workers in society (impacting negatively on their ability to access everyday services and enjoy family lives), and undermines interventions to fight

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<sup>1</sup> Section 162,



the spread of HIV.

The purpose of this Paralegal Resource Guide is to provide various methods of redress including, but not limited to evidence collection, rights of accused persons, institution of suits as an individual or organization, police contacts among others. Legal services are an essential component of an effective human rights response to challenging the criminalization of homosexuality and same sex conduct. The legal services that are currently being provided by NGLHRC, which has a small team of four lawyers, is not sufficient to serve all parts of the Country where LGBTIQ persons rights are violated, hence the need for a resource guide that will be disseminated to the community for ease of reference and understanding of the rights as enshrined in the law and in pursuit of individual and communal justice.

90% of NGLHRC's mandate is the provision of legal representation and documentation – meaning it is an organization that aims to offer legal advice and provide strategic impact litigation that is in the best interests of LGBTIQ persons across the Country. In the year 2013, a team of NGLHRC lawyers held community consultations in ten towns<sup>2</sup> around Kenya. During this consultations, persons from the LGBTIQ community raised the challenges that they faced from State organs, hospitals, private persons, among others. It is this awareness that established the need for paralegal training.

In 2014-2015, NGLHRC embarked on a countrywide exercise aimed at educating and enlightening LGBTIQ persons on their rights and obligations as enshrined in the supreme law, duties and obligations of state organs and private persons towards queer persons and in other instances, provide the much needed assistance with their day-to-day legal problems, such as court representation in criminal trials, bail applications, security response mechanisms among others.

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<sup>2</sup> Nairobi, Thika, Nakuru, Eldoret, Kisumu, Nyeri, Meru, Mombasa, Lodwar, Garissa

This Resource Guide is therefore designed on the basis of the engagements that NGLHRC has had with the LGBTIQ community from 2013-2015. It is intended to be used as guide to paralegals, who often are the first point of call for LGBTIQ persons.

### **1.3 THE ROLE OF THE PARALEGAL RESOURCE GUIDE**

This Guide, being the first in Kenya; is a model booklet of reference for community-based paralegals trained by lawyers at NGLHRC, who form the integral components of NGLHRC's legal aid model. These 280 paralegals have been trained on basic law and human rights and have a duty to provide advice and assistance to members of the LGBTIQ community.

A paralegal, need not be a lawyer but someone who works in the legal field assisting lawyers in all aspects of the practice of law. Paralegals play leading and supportive roles in their towns and communities. Paralegals, who in this case are mostly community based human rights activists, become educators on the law and rights for people, and use their knowledge and experience to help people with legal or other issues.

### **1.4 ROLE OF A PARALEGAL**

The objective of the intense countrywide training by NGLHRC in 2014-2015 was to give insight on fundamental rights and freedoms as they are stipulated in the law. The role of paralegals includes but is not limited to: -

- a) give free legal advice
- b) educate people about their legal rights and how to enjoy and enforce them
- a) refer people to NGLHRC when the issue is complicated and requires a lawyer's engagement
- b) help prepare people for formal legal procedures, such as what to expect in a court case
- a) act as a link between communities and lawyers, and assist with taking statements,

interpretation and following up on cases

- b) help sort out problems among members of the LGBTIQ community as well as those between members of the community and the authorities through mediation and negotiation
- c) provide court support for people taking on formal legal challenges
- d) mobilize and advise members of the community for collective action to solve the problems that they are faced with

## PART B

# HUMAN RIGHTS



## **CHAPTER TWO: BILL OF RIGHTS**

### **2.1 INTRODUCTION AND DEFINITION OF KEY TERMS**

This Chapter focuses on human rights, it defines what rights are and highlights some of the main sources of human rights at the international and national levels.

Bill of rights - a formal declaration of the legal and civil rights of the citizens of any state, country, federation, and are enshrined in the supreme law of the land.

Human rights - are rights or entitlements inherent to all human beings, regardless of nationality, place of residence, sex, national or ethnic origin, color, religion, language, or any other status. Every person is equally entitled to the enjoyment of human rights without discrimination. These rights are all interrelated, interdependent and indivisible.

### **INTERNATIONAL BILL OF RIGHTS**

#### **2.2.1 UNIVERSAL DECLARATION ON HUMAN RIGHTS (UDHR)<sup>3</sup>**

The Universal Declaration of Human Rights, which was adopted by the United Nations General Assembly on 10 December 1948, was the result of the experience of the Second World War. With the end of that war, and the creation of the United Nations, the international community vowed never again to allow atrocities like those of that conflict happen again.

The Preamble recognizes the inherent dignity and the equal and inalienable rights of all members of the human family as the foundation of freedom, justice and peace in the world and proclaims the

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<sup>3</sup> Full text available at <http://www.un.org/en/universal-declaration-human-rights/> last accessed on 8 February 2017

advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want as the highest aspiration of the common people. The members of the United Nations, through the UDHR reaffirm their faith in “fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women and have determined to promote social progress and better standards of life in larger freedom.”

Countries, such as Kenya that have ratified the UDHR, have promised to achieve, the promotion of universal respect for and observance of human rights and fundamental freedoms. The UDHR provides for rights that the state is required to uphold. These include: -

- a) **Article 1**- All human beings are born free and equal in dignity and rights
- b) **Article 2** – Everyone is entitled to the rights and freedoms under the Declaration without distinction of any kind
- c) **Article 3** - Everyone has the right to life, liberty and security of person.
- d) **Article 5** - No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.
- e) **Article 7** - All are equal before the law and are entitled without any discrimination to equal protection of the law. This includes equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.
- f) **Article 8** - Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted them by the constitution or by law.
- g) **Article 9** - No one shall be subjected to arbitrary arrest, detention or exile.
- h) **Article 10** - Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of their rights and obligations and of any criminal charge against them
- i) **Article 11** - Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which they have had all the guarantees

necessary for their defense. No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed.

- j) **Article 12** - No one shall be subjected to arbitrary interference with their privacy, family, home or correspondence, or to attacks upon their honor and reputation. Everyone has the right to the protection of the law against such interference or attacks.
- k) **Article 14** - Everyone has the right to seek and to enjoy in other countries asylum from persecution. This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations.
- l) **Article 18** - Everyone has the right to freedom of thought, conscience and religion.
- m) **Article 19** - Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.
- n) **Article 20** - Everyone has the right to freedom of peaceful assembly and association.
- o) **Article 22** - Everyone, as a member of society, has the right to social security and is entitled to realization of the economic, social and cultural rights indispensable for their dignity and the free development of their personality.
- p) **Article 23** - Everyone has the right to work, to free choice of employment, to just and favorable conditions of work and to protection against unemployment.
- q) **Article 25** - Everyone has the right to a standard of living adequate for the health and wellbeing of themselves and of their family, including food, clothing, housing and medical care and necessary social services.
- r) **Article 26** - Everyone has the right to education. This includes free and compulsory education at the elementary and fundamental stages. Higher education shall be generally available and

accessible on merit.

### [INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS \(ICCPR\)](#)<sup>4</sup>

Before the adoption of the Universal Declaration on Human Rights in 1948, a broad agreement existed that the rights which were to be enshrined in the Declaration were to be transformed into legally binding obligations through the negotiation of one or more treaties. In 1966, two separate treaties, covering almost entirely all the rights enshrined in the Universal Declaration of Human Rights, were adopted: one for civil and political rights- the International Covenant on Civil and Political Rights (ICCPR); and one for economic, social and cultural rights- the International Covenant on Economic, Social and Cultural Rights (ICESCR). The ICCPR was adopted by the United Nations General Assembly on 16 December 1966 and entered into force on 23 March 1976.

Under the ICCPR States Parties have a responsibility to consider that, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world, recognize that these rights derive from the inherent dignity of the human person.

The ICCPR states that it is the obligation of states to promote universal respect for, and observance of, human rights and freedoms. These rights and freedoms include: -

- a) **Article 2** - All state parties are required to respect and ensure to all persons the recognition of the rights and in the ICCPR without distinction of any kind such as race, sex, color, language, religion, political or other opinion, national or social origin, property or other status. The ICCPR also requires states to ensure effective remedy for violation of the rights and freedoms

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<sup>4</sup> Full text available at <https://treaties.un.org/doc/publication/unts/volume%20999/volume-999-i-14668-english.pdf> last accessed on 8 February 2017



contained in the ICCPR.

- b) **Article 6** - Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of their life.
- c) **Article 7** - No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected, without their free consent, to medical or scientific experimentation.
- d) **Article 8** - No one shall be held in slavery; slavery and the slave-trade in all their forms shall be prohibited. No one shall be held in servitude.
- e) **Article 9** - Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. A person may only be deprived of their liberty where the law sets the specific grounds and procedure for deprivation of liberty. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for their arrest and shall be promptly informed of any charges against them. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement. Anyone who is deprived of their liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of their detention and order their release if the detention is not lawful. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.
- f) **Article 10** - All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.
- g) **Article 12** - Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose their residence.

- h) **Article 14** - All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against them, or of their rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.
- i) **Article 15** - No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. If the law changes after the offence has been committed, a person cannot receive a heavier punishment or penalty but can benefit from a lighter punishment.
- j) **Article 16** - Everyone shall have the right to recognition everywhere as a person before the law.
- k) **Article 17** - No one shall be subjected to arbitrary or unlawful interference with their privacy, family, home or correspondence, or to unlawful attacks on their honor and reputation. Everyone has the right to the protection of the law against such interference or attacks.
- l) **Article 18** - Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of their choice, and freedom, either individually or in community with others and in public or private, to manifest their religion or belief in worship, observance, practice and teaching.
- m) **Article 19** - Everyone shall have the right to hold opinions without interference. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive

and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of their choice.

- n) **Article 20** - Any propaganda for war shall be prohibited by law. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.
- o) **Article 21** - The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others.
- p) **Article 22** - Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of their interests.
- q) **Article 23** - The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.
- r) **Article 26** - All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. This prohibits any discrimination and guarantees to all persons equal and effective protection against discrimination on any ground such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.
- s) **Article 27** - In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.

## [INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS \(ICESCR\)](#)<sup>5</sup>

The International Covenant on Economic, Social and Cultural Rights (ICESCR) was adopted by the United Nations General Assembly on 16 December 1966, and has been in force from 3 January 1976. It commits its parties to work toward the granting of economic, social, and cultural rights.

The rights guaranteed under the ICESCR include: -

- a) **Article 3** - The States Parties have an obligation to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set in the Covenant.
- b) **Article 5** – Prohibits any State, group or person from engaging in an activity or performing an act aimed at the destruction or limitation of any of the rights or freedoms contained in the Covenant. This also means that where a right is not stated specifically in this Covenant, a state cannot deny or violate that right on the basis that it is not in the Covenant.
- c) **Article 6** - The States Parties recognize the right to work, which includes the right of everyone to the opportunity to gain their living by work which they freely choose or accept, and will take appropriate steps to safeguard this right.
- d) **Article 7** – Recognizes the right of everyone to the enjoyment of just and favorable conditions of work. This includes fair wages, a decent living for themselves and their families, safe and healthy working conditions and equal opportunity for promotion.
- e) **Article 11** – Recognizes the right of everyone to an adequate standard of living including adequate food, clothing and housing and to the continuous improvement of living conditions.
- f) **Article 12** – Recognizes the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.

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<sup>5</sup> Full text available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/ICESCR.aspx> last accessed on 8 February 2017

- g) **Article 13 and 14** – States parties are obligated to recognize and respect the right of everyone to education directed to the full development of the human personality and the sense of its dignity. Primary education shall be compulsory and available free to all.

## 2.3 KENYAN BILL OF RIGHTS

The Bill of rights in Kenya is enshrined under chapter four of the Constitution of Kenya, 2010 (the Constitution).

### *Overarching Principles of the Constitution*

#### 1. **Rights and fundamental freedoms**

Article 19 of the Constitution recognizes the Bill of Rights is an integral part of Kenya’s democratic state and is the framework for social, economic and cultural policies. The purpose of recognizing and protecting human rights and fundamental freedoms is to preserve the dignity of individuals and communities and to promote social justice and the realization of the potential of all human beings.

#### 2. **Application of the Bill of Rights**

Article 20 of the Constitution states that the Bill of Rights applies to all law and binds all State organs and all persons. Every person shall enjoy the rights and fundamental freedoms in the Bill of Rights to the greatest extent consistent with the nature of the right or fundamental freedom. In applying a provision of the Bill of Rights, a court shall develop the law to the extent that it does not give effect to a right or fundamental freedom; and adopt the interpretation that most favors the enforcement of a right or fundamental freedom.

#### 3. **Implementation of rights and fundamental freedoms**

Article 21 of the Constitution makes it a fundamental duty of the State and every State organ to

observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights.

#### **4. Enforcement of Bill of Rights<sup>6</sup>**

Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened, meaning that one does not have to wait for a violation to happen and can proceed to court on the basis of an existing threat of violation.

Who can file court proceedings to enforce rights and freedoms under the Constitution?

- a) a person acting in their own interest
- b) a person acting on behalf of another person who cannot act in their own name
- c) a person acting as a member of, or in the interest of, a group or class of persons
- d) a person acting in the public interest
- e) an association acting in the interest of one or more of its members

#### **5. Limitation of rights and fundamental freedoms**

A right or fundamental freedom in the Bill of Rights shall not be limited except by law. Any limitation of a right or fundamental freedom must be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including: -

- (a) the nature of the right or fundamental freedom
- (b) the importance of the purpose of the limitation
- (c) the nature and extent of the limitation

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<sup>6</sup> Article 22

- (d) the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others
- (e) the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose

## **6. Fundamental Rights and freedoms that may not be limited**

Article 25 of the Constitution totally prohibits the limitation of the following rights and fundamental freedoms: -

- (a) freedom from torture and cruel, inhuman or degrading treatment or punishment
- (b) freedom from slavery or servitude
- (c) the right to a fair trial
- (d) the right to an order of habeas corpus.

### *An Analysis of Key Constitutional Rights and Freedoms*

#### **1. Article 26 - Right to life**

Every person has the right to life. The life of a person begins at conception. A person shall not be deprived of life intentionally, except to the extent authorized by the Constitution or other written law. For instance, Kenyan law provides for the punishment of death for offences such as treason and murder. The High Court of Kenya has stated that the Constitution authorizes the death penalty. This has however been challenged at the Court of Appeal, which is yet to rule on the constitutionality of the mandatory death penalty.

**Jackson Maina Wangui & another v Republic [2014] eKLR**

The petitioner and interested party were charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. They were both sentenced to death and appealed against the sentence. The court held that the punishment by a mandatory death sentence prescribed under Section 204 of the Penal Code, Cap 63 of the Laws of Kenya or any other written law is authorized under the Constitution of Kenya. It is not contrary to the general rules of international law and/or treaties and conventions ratified by Kenya, and does not offend Article 26 of the Constitution.

2. **Article 27 - Equality and freedom from discrimination**

Every person is equal before the law and has the right to equal protection and equal benefit of the law. Equality includes the full and equal enjoyment of all rights and fundamental freedoms. Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres. **The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, color, age, disability, religion, conscience, belief, culture, dress, language or birth.**



**VMK v CUEA [2013] eKLR**

This was a case filed by a young female adult against blatant discrimination at the workplace for period of (7) years for reasons of gender, pregnancy and HIV/AIDS status. The Claimant **VMK**, was employed by the Respondent **CUEA** in March, 2000 in the position of a Telephone Operator on casual basis earning a monthly salary of Kshs .7,000/=. She was not given a letter of appointment and did not earn any allowances. The Claimant, worked alongside two male employees. The law establishes in the Employment Act, 2007 provides the basic standards of employment in Kenya. Later on, the petitioner was dismissed for being HIV positive. The HIV/AIDS test and disclosure of her status to other people was done without her consent. She therefore sued her employer for compensation for violation of her rights.

Section 5 of the Employment Act prohibits any form of discrimination, including on HIV/ AIDS status, in the workplace relating to recruitment, promotion, training or other policies. The HIV and AIDS Recommendation, 2010, No. 200 prohibits discrimination on the basis of one's real or perceived HIV status and also prohibits forced HIV testing.

In this particular case, the court held that no one should be discriminated upon and the petitioner was awarded damages that amounted to Kshs. 6,971,346/=-.

3. **Article 28 - Human dignity**

Every person has inherent dignity and the right to have that dignity respected and protected.

Dignity means the state or quality of being worthy of honor or respect. Everyone should be treated with respect.

4. **Article 29 - Freedom and security of the person**

Every person has the right to freedom and security of the person, which includes the right not to be:-

- (a) deprived of freedom arbitrarily or without just cause
- (b) detained without trial, except during a state of emergency, in which case the detention is subject to Article 58<sup>7</sup>;
- (c) subjected to any form of violence from either public or private sources
- (d) subjected to torture in any manner, whether physical or psychological
- (e) subjected to corporal punishment
- (f) treated or punished in a cruel, inhuman or degrading manner.

5. **Article 30 - Slavery, servitude and forced labor**

A person shall not be held in slavery or servitude. A person shall not be required to perform forced labor.

6. **Article 31 - Privacy**

Every person has the right to privacy, which includes the right not to have their person, home or property searched, their possessions seized, information relating to their family or private affairs unnecessarily required or revealed and or the privacy of their communications infringed.

7. **Article 32 - Freedom of conscience, religion, belief and opinion**

Every person has the right to freedom of conscience, religion, thought, belief and opinion. Every person has the right, either individually or in community with others, in public or in private, to manifest any religion or belief through worship, practice, teaching or observance, including observance of a day of worship. A person may not be denied access to any institution, employment or facility, or the enjoyment of any right, because of the person's belief or religion.

8. **Article 33 - Freedom of expression**

Every person has the right to freedom of expression, which includes: -

- (a) freedom to seek, receive or impart information or ideas

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<sup>7</sup> A state of emergency may be declared only when the State is threatened by war, invasion, general insurrection, disorder, natural disaster or other public emergency; and the declaration is necessary to meet the circumstances for which the emergency is declared

- (b) freedom of artistic creativity
- (c) Academic freedom and freedom of scientific research.

The right to freedom of expression does not extend to propaganda for war, incitement to violence, hate speech or advocacy of hatred that constitutes ethnic incitement, abuse of others or incitement to cause harm or is based on any ground of discrimination.<sup>8</sup> In the exercise of the right to freedom of expression, every person shall respect the rights and reputation of others.

9. **Article 34 - Freedom of the media**

Freedom and independence of electronic, print and all other types of media is guaranteed, but does not extend to any expression specified in Article 33 (2).

10. **Article 36 - Freedom of association**

Every person has the right to freedom of association, which includes the right to form, join or participate in the activities of an association of any kind. A person shall not be compelled to join an association of any kind. Any legislation that requires registration of an association of any kind shall provide that

- (a) registration may not be withheld or withdrawn unreasonably
- (b) There shall be a right to have a fair hearing before a registration is cancelled.

Eric Gitari v Non- Governmental Organizations Co-ordination Board & 4 others [2015] eKLR<sup>9</sup>

In accordance with the requirements for registration of a non-governmental organization, on or about 2 April, 2013, the petitioner sought to reserve with the Board for the purposes of registration of a non-governmental organization, the names Gay and Lesbian Human Rights Council; Gay and Lesbian Human Rights Observancy and Gay and Lesbian Human Rights Organization. He was advised by the Board that all the proposed names were unacceptable and should be reviewed. On 19 March, 2013,

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<sup>8</sup> Some of the grounds of discrimination are provided under Article 27 (4) of the Constitution. It is important to note that this is an open list which contemplates that there may be other grounds of discrimination not listed.

<sup>9</sup> Available at <http://kenyalaw.org/caselaw/cases/view/108412/> last accessed 8 February 2017

the petitioner then lodged the names Gay and Lesbian Human Rights Commission; Gay and Lesbian Human Rights Council and Gay and Lesbian Human Rights Collective for reservation. Together with the names, the petitioner sent a letter to the Board dated 19 March, 2013 demanding to know why his application had been rejected.

By a letter dated 25 March 2013, the Board wrote to the petitioner's Advocates advising that sections 162, 163 and 165 of the Penal Code criminalizes gay and lesbian liaisons, and that this was the basis for rejection of the proposed names for the NGO. The Board relied on regulation 8(3)(b) of the NGO Regulations of 1992 as the basis for rejecting the request. The regulation provides that the Director of the Board can reject applications if **“such name is in the opinion of the director repugnant to or inconsistent with any law or is otherwise undesirable”**.

#### **Eric Gitari v NGO Coordination Board**

The court held that “the purpose of recognizing and protecting human rights and fundamental freedoms is to preserve the dignity of individuals and communities and to promote social justice and the realization of the potential of all human beings... The Board and this Court are constitutionally mandated, when applying the Constitution, to give effect to the non-discrimination provisions in Article 27 and the national values and principles set out in Article 10, which include, at Article 10(2), **“human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized.”** An interpretation of non-discrimination which excludes people based on their sexual orientation would be in conflict with the principles of human dignity, inclusiveness, equality, human rights and non-discrimination. To put it another way, to allow discrimination based on sexual orientation would be counter to these constitutional principles.” The court ruled that the petitioner was allowed to register the organization.

**11. Article 37 – Right to Assemble, demonstrate, picket and petition**

Every person has the right, peaceably and unarmed, to assemble, to demonstrate, to picket, and to present petitions to public authorities.

**12. Article 39 - Freedom of movement and residence**

Every person has the right to freedom of movement. Every citizen has the right to leave, enter, remain in and reside anywhere in Kenya.

**13. Article 41 - Labor relations**

Every person has the right to fair labor practices. This includes the right to fair remuneration, to reasonable working conditions, to form, join or participate in the activities and programmes of a trade union and to go on strike.

**14. Article 43 - Economic and social rights**

Every person has the right to:

- a) the highest attainable standard of health, which includes the right to health care services, including reproductive health care
- b) accessible and adequate housing
- c) reasonable standards of sanitation
- d) be free from hunger, and to have adequate food of acceptable quality
- e) to clean and safe water in adequate quantities
- f) social security
- g) education

**15. Article 48 - Access to justice**

The State shall ensure access to justice for all persons. Fees which are required to be paid have to be reasonable and not be a barrier to access justice.

**16. Article 50 - Fair hearing**

Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial

tribunal or body.

Every accused person has the right to a fair trial, which includes the right: -

- (a) to be presumed innocent until the contrary is proved
- (b) to be informed of the charge, with sufficient detail to answer it
- (c) to have adequate time and facilities to prepare a defense
- (d) to a public trial before a court established under this Constitution
- (e) to have the trial begin and conclude without unreasonable delay
- (f) to be present when being tried, unless the conduct of the accused person makes it impossible for the trial to proceed
- (g) to choose, and be represented by, an advocate, and to be informed of this right promptly
- (h) to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly
- (i) to remain silent, and not to testify during the proceedings
- (j) to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence
- (k) to adduce and challenge evidence
- (l) to refuse to give self-incriminating evidence
- (m) to have the assistance of an interpreter without payment if the accused person cannot understand the language used at the trial
- (n) not to be convicted for an act or omission that at the time it was committed or omitted was not -
  - a. an offence in Kenya
  - b. crime under international law;
- (o) not to be tried for an offence in respect of an act or omission for which the accused person has previously been either acquitted or convicted
- (p) to the benefit of the least severe of the prescribed punishments for an offence, if the

prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing

(q) if convicted, to appeal to, or apply for review by, a higher court as prescribed by law.

In the event that evidence is obtained in a manner that violates any right or fundamental freedom in the Constitution, it must be excluded if makes the trial unfair, or if it would be detrimental to the administration of justice.

An accused person charged with an offence, other than an offence that the court may try by summary procedures, is entitled during the trial to a copy of the record of the proceedings of the trial on request and has the right to a copy of the record of the proceedings within a reasonable period after they are concluded, in return for a reasonable fee as prescribed by law.

If a person is convicted of a criminal offence, they have the following options:

- a) to appeal to a higher court e.g. from a magistrate's court to the High Court or from the High Court to the Court of Appeal
- b) to petition the High Court for a new trial if:
  - i. in appeal to the highest court has been dismissed
  - ii. if no appeal was filed, when there is new and compelling evidence

In the interest of justice, a court may allow an intermediary to assist a complainant or an accused person to communicate with the court.

# PART C

## CRIMINAL JUSTICE SYSTEM





## CHAPTER THREE: CRIMES

### 3.1 INTRODUCTION AND DEFINITIONS

Chapter three of this Guide focuses on some of the offences under Kenya's criminal law. The list of crimes is not exhaustive but illustrative of some of the common offences that members of the LGBTIQ community could potentially be charged with. This part, as with the rest of the Guide has been informed by the nature of cases documented by the NGLHRC legal team in the period between 2013-2015.

**Crime** - is an act committed or omitted, in violation of a public law, either forbidding or commanding it. It can also be a breach or violation of some public right or duty due to a whole community.

**Criminal intent** - The intent to commit a crime: malice, as evidenced by a criminal act

**Criminal liability** – refers to the responsibility for any illegal behavior or act that causes harm or damage to someone or something. In legal terms it is liability for which mens rea (Latin for "guilty mind") does not have to be proven in relation to one or more elements comprising the actus reus (Latin for "guilty act") although intention, recklessness or knowledge may be required in relation to other elements of the offence.

**Offence** – is a breach of a law or rule; an illegal act. A thing that constitutes a violation of what is judged to be right or natural.

**Offender** – Is a person who commits an illegal act.

**Victim** – Is a person harmed by a criminal act or omission.

## 3.2 SELECT CRIMES

This section highlights some of the crimes under the Penal Code, Cap 63 of the Laws of Kenya and other laws. It uses examples of cases related to the crime discussed in order to demonstrate how Kenyan courts have dealt with those crimes.

**Treason** - Any person who, owing allegiance to the Republic of Kenya imagines, or intends the death or wounding, or the imprisonment or restraint, of the President; levies war in Kenya against the Republic; or is a defender to the enemies of the Republic, or gives them aid or comfort, in Kenya or elsewhere is guilty of the offence of treason.

Any person who is guilty of the offence of treason shall be sentenced to death.

### **Obuon v Republic [1983] eKLR**

The appellant Joseph Ogiddy Obuon was charged and convicted by a Court Martial held at Langata Barracks with the offence of committing a civil offence of intending to overthrow the government by unlawful means contrary to section 69(i)(a) of the Armed Forces Act, chapter 199, Laws of Kenya, that is to say, treason, contrary to section 40(1)(a)(iii) of the Penal Code. The court held that the conviction and sentence to death of the appellant was certainly not against the evidence which was accepted and believed by the Court Martial and so the appeal of the appellant was dismissed.

**Murder** - Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder. Any person convicted of murder shall be sentenced to death in accordance with Section 203 and 204 of the Penal Code.

In the case of **Jackson Maina Wangui & another v Republic [2014] eKLR** –The petitioner had appealed to court against the death penalty imposed on him for the crime of murder. The court held that the enforcement of the death penalty is, the provisions of the Criminal Procedure Code.

Sections 330, 331 and 332 of the CPC contains specific provisions with regard to the execution or commuting of the death penalty. When an accused person is sentenced to death, the court shall inform them of the time within which, if they wish to appeal, their appeal should be filed. A certificate under the hand of the Registrar or other officer of the court that passed the sentence of death and naming the person condemned, shall be sufficient authority for the detention of the person who has been sentenced to death.

Once a person has been sentenced to death, the presiding judge shall forward to the President a copy of the notes of evidence taken in the trial, with a written report signed by the judge containing any recommendation or observations on the case he may think fit to make. The President, after considering the report, shall communicate to the judge, or their successor in office, the terms of any decision to which they may come thereon, and the judge shall cause the tenor and substance thereof to be entered in the records of the court.<sup>10</sup>

**Robbery with violence** - Any person who steals anything, and either immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained, is guilty of the felony termed robbery. The Penal Code establishes that if the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately before or immediately after the time of the

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<sup>10</sup> The President has to sign the death warrants before any execution is done. The last execution was in 1986. Currently there is a *de facto* moratorium on the death penalty in Kenya.

robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death.

**Prostitution** – This is the practice or occupation of engaging in sexual activity with someone for payment.

The Penal Code under Section 153 and 154 establishes that every male person who knowingly lives wholly or in part on the earnings of prostitution; or in any public place persistently solicits or importunes (pursues) for immoral purposes, is guilty of a felony.

A male person, unless he proves otherwise, is deemed to be knowingly living on the earnings of prostitution if it can be proved that: -

- a) he lives with or is habitually in the company of a prostitute; or
- b) he has exercised control, direction or influence over the movements of a prostitute in a way that shows that he is aiding, abetting or compelling her prostitution with any other person, or generally

Every woman who knowingly lives wholly or in part on the earnings of prostitution, or who is proved to have, for the purpose of gain, exercised control, direction or influence over the movements of a prostitute in such a manner as to show that she is aiding, abetting or compelling her prostitution with any person, or generally, is guilty of a felony.

**Unnatural offences** – The Penal Code under Sections 162 and 163 states that any person, who permits a male person to have carnal knowledge of them against the order of nature, is guilty of a felony and is liable to imprisonment for fourteen years. Further, any person who attempts to have carnal knowledge of them against the order of nature is guilty of a felony and is liable to imprisonment for seven years.

In **John Onzere Kambi v Republic [2013] eKLR**, the particulars of the charge were that the appellant; “Unlawfully and intentionally caused penetration of his genital organ (penis) into the genital organ (anus) of” the complainant. The assailant had committed an offence of sodomy against the complainant who was a minor. Section 5 of the Sexual Offences Act, which defines the offence known as “**Sexual Assault**” incorporates such offences as sodomy, rape and defilement. That section reads that any person who unlawfully penetrates the genital organs of another person with any part of the body of another or that person; is guilty of an offence termed as sexual assault.”

**Rape** – As defined in the Sexual Offences Act, a person commits the offence termed rape if they intentionally and unlawfully commits an act which causes penetration with their genital organs and the other person does not consent to the penetration; or the consent is obtained by force or by means of threats or intimidation of any kind.

The elements that must be proved in a rape case are: -

- a) penetration
- b) lack of consent or consent obtained by force, intimidation or threats

The punishment for rape is imprisonment for a minimum of ten years and maximum life imprisonment.

**Defilement** - A person who commits an act which causes penetration with a child is guilty of an offence termed defilement. The Sexual Offences Act Section 8 establishes that a person who commits an offence of defilement with a child aged: -

- a) eleven years or less shall upon conviction be sentenced to imprisonment for life.
- b) twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.

- c) sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years.

## CHAPTER FOUR: ARREST

### 4.1 DEFINITIONS

**Arrest** - is using legal authority to deprive a person of their freedom of movement.

**Arrest warrant** - is a document issued by a judge or magistrate that authorizes the police to take someone accused of a crime into custody.

An arrest warrant is issued by the competent authority upon showing of probable cause, which means a warrant may be issued if a reasonable person would believe the information at hand is sufficient to suggest criminal activities. An arrest warrant is also issued in an event where an accused person fails and or refuses to attend to court hearings or mentions.

**Probable cause**- means a reasonable belief of the police officer in the guilt of the suspect, based on the facts and information prior to the arrest. For instance, an arrest without a warrant may be legitimate in situations where the police officer has a reasonable belief that the suspect has either committed a crime or is about to commit a crime.

**Search**- means the examination of a person's premises (including business, vehicle or home) by law enforcement officers looking for evidence of the commission of a crime. During a search, the police or other law enforcement officer may take away certain materials and items as evidence or for further examination.

## 4.2 INTRODUCTION

An arrest is generally made with an arrest warrant. An arrest may be made without a warrant if probable cause and urgent circumstances are presented at the time of the arrest.

The police officer might also arrest the suspect to prevent the suspect's escape or to preserve the evidence. A warrantless arrest may be invalidated though, if the police officer failed to demonstrate urgent circumstances and probable cause.

## 4.3 GENERAL PRINCIPLES OF ARREST

### 4.3.1 Rights of an arrested person

Under Article 49 of the Constitution of Kenya an arrested person has the right: -

- a) to be informed promptly, in a language that the person understands, of:
  - i. the reason for the arrest
  - ii. the right to remain silent
  - iii. the consequences of not remaining silent
- b) to remain silent
- c) to communicate with an advocate, and other persons whose assistance is necessary
- d) not to be compelled to make any confession or admission that could be used in evidence against the person
- e) to be held separately from persons who are serving a sentence
- f) to be brought before a court as soon as reasonably possible, but not later than
  - i. twenty-four hours after being arrested
  - ii. if the twenty-four hours ends outside ordinary court hours, or on a day that is not an

ordinary court day, the end of the next court day

- g) at the first court appearance, to be charged or informed of the reason for the detention continuing, or to be released
- h) to be released on bond or bail, on reasonable conditions, pending a charge or trial, unless there are compelling reasons

A person shall not be remanded in custody for an offence if the offence is punishable by a fine only or by imprisonment for not more than six months.

In making an arrest the police officer or other person making it shall actually touch or confine the body of the person to be arrested, unless there be a submission to custody by word or action.<sup>11</sup> If a person forcibly resists the endeavor to arrest them, or attempts to evade the arrest, the police officer or other person may use all means necessary to effect the arrest using reasonable force.

#### 4.3.2 Searches

##### a) Search of a place entered by person sought to be arrested

If a police officer or other person with authority to arrest demands to enter a premises because he believes that the person he wants to arrest has entered into or is within any place, they shall be allowed free entry into the place.<sup>12</sup>

##### b) Search of arrested persons

Whenever a person is arrested by a police officer under a warrant which does not provide for the taking of bail, or under a warrant which provides for the taking of bail but the person arrested cannot

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<sup>11</sup> Section 21, Criminal Procedure Code

<sup>12</sup> Section 22, Criminal Procedure Code



furnish bail; or without warrant, or by a private person under a warrant, and the person arrested cannot legally be admitted to bail or is unable to furnish bail, the police officer making the arrest, or, when the arrest is made by a private person, the police officer to whom he makes over the person arrested, may search that person and place in safe custody all articles, other than necessary wearing apparel, found upon them.

c) Arrest by police officer without warrant

A police officer may, without an order from a magistrate and without a warrant, arrest

- a) any person whom he suspects upon reasonable grounds of having committed a cognizable offence
- b) any person who commits a breach of the peace in their presence
- c) any person who obstructs a police officer while in the execution of their duty, or who has escaped or attempts to escape from lawful custody
- d) any person in whose possession anything is found which may reasonably be suspected to be stolen property or who may reasonably be suspected of having committed an offence with reference to that thing
- e) any person whom he suspects upon reasonable grounds of being a deserter from the armed forces
- f) any person whom he finds in a highway, yard or other place during the night and whom he suspects upon reasonable grounds of having committed or being about to commit a felony
- g) any person whom he finds in a street or public place during the hours of darkness and whom he suspects upon reasonable grounds of being there for an illegal or disorderly purpose, or who is unable to give a satisfactory account of themselves
- h) any person having in their possession without lawful excuse, the burden of proving which excuse shall lie on that person, any implement of housebreaking
- i) any person for whom he has reasonable cause to believe a warrant of arrest has been issued

## CHAPTER FIVE: BAIL AND BOND

### 5.1 DEFINITIONS

**Bail** – An agreement between an accused person or their sureties and the court setting conditions for the release of an accused person on condition that the accused person will attend court when required, and that should the accused person abscond, in addition to the court issuing warrants of arrest, a sum of money or property directed by the court to be deposited, will be forfeited to the court.

**Bail hearing** – a proceeding in which the court determines whether an accused person should be released on certain conditions or held in custody pending trial.

**Bond** – An undertaking, with or without sureties or security, entered into by an accused person in custody under which they bind themselves to comply with the conditions of the undertaking and if in default of such compliance to pay the amount of bail or other sum fixed in the bond.

**Pretrial Detention** – The confinement of arrested and accused persons in custody pending the investigation, hearing and determination of their cases.

**Pretrial Detainees** – Accused persons who have been formally charged and are awaiting the commencement of their trials; accused persons whose trials have begun but have yet to come to a conclusion; persons who have been convicted by a court of first instance but who have appealed against their sentences or are within the statutory limits of doing so.

**Remandee** – An accused person detained in a prison pending the determination of his or her case.

**Security** – A sum of money pledged in exchange for the release of an arrested or accused person as a guarantee of that person’s appearance for trial.

**Surety** – A person who undertakes to ensure that an accused person will appear in court and abide by bail/bond conditions. The surety puts up security, such as money or title to a property, which can be forfeited to the court if the accused person fails to appear in court.

## INTRODUCTION

Article 49(1)(h) of the Constitution of Kenya gives an arrested person the right “to be released on bond or bail, on reasonable conditions, pending a charge or trial, unless there are compelling reasons not to be released.” Further, Article 49(2) of the Constitution provides that “A person shall not be remanded in custody for an offence if the offence is punishable by a fine only or by imprisonment for not more than six months...”

### 5.2.1 Statutory provisions on bail or bond

The Criminal Procedure Code (CPC) gives an officer in charge of a police station or a court power to grant bail or bond to a person accused of any offence except the offences of murder, treason, robbery with violence, attempted robbery with violence and any related offence.<sup>13</sup> The bond can be with or without sureties. The law provides that “The amount of bail shall be fixed with due regard to the circumstances of the case, and shall not be excessive.”<sup>14</sup> Before a person is released on bail, they must execute a bond with one or more sureties as decided by the police officer.<sup>15</sup>

A person can appeal to the High Court to review the bail terms issued by a subordinate court or a

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<sup>13</sup> Section 123(1) Criminal Procedure Code, Chapter 75 of the Laws of Kenya.

<sup>14</sup> Section 123(2) of the Criminal Procedure Code

<sup>15</sup> Section 124 of the Criminal Procedure Code

police officer, this includes reduction of the amount of bail.<sup>16</sup>

A number of other laws also contain provisions that deal with bail. These laws are the Children’s Act, the Prevention of Terrorism Act and the National Police Service Act. The Children’s Act empowers courts to grant bail to child offenders pending their appearance before a Children’s court.<sup>17</sup>

The Prevention of Terrorism Act 2012 provides that the rights of an arrested person specified under Article 49(1)(f) of the Constitution may be limited in order to ensure the protection of the suspect or any witness, to ensure that the suspect avails themselves for examination or trial or does not interfere with the investigations, to prevent the commission of an offence under this Act, or to ensure the preservation of national security.<sup>18</sup>

The National Police Service Act gives a police officer investigating an alleged offence, save for an offence against discipline, broad discretionary power to “require any person to execute a bond in such sum and in such form as may be required,” on condition that the person shall duly attend court if and when required to do so.<sup>19</sup> However, this power is to be “exercised in strict accordance with the Criminal Procedure Code.”<sup>20</sup> A person who refuses or fails to comply with the bond requirements commits an offence.<sup>21</sup>

The foregoing provisions of the Constitution and other laws seek to regulate administration of the right to bail and pretrial detention-that is the confinement of accused persons in facilities such as

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<sup>16</sup> Section 123(2) of the Criminal Procedure Code

<sup>17</sup> Children Act, Section 185(4)

<sup>18</sup> Section 35 Prevention of Terrorism Act 2012

<sup>19</sup> Section 51(3) National Police Service Act

<sup>20</sup> Section 53(3) National Police Service Act

<sup>21</sup> Section 53(2), National Police Service Act

police cells or prisons, pending the investigation, hearing, determination or appeal of their cases. Administering these laws entails balancing the rights of suspects and accused persons to liberty and to be presumed innocent with the public interest.

### 5.2.2 Rights of Victims of Crime

It is important to point out that for the first time in Kenya's history, the Constitution now recognizes and seeks to protect the rights of victims of crime. Article 50(9) requires Parliament to "enact legislation providing for the protection, rights and welfare of victims of offences." Parliament has now enacted this legislation, in the form of the Victim Protection Act 2014. This Act recognizes and gives effect to the rights of victims of crime.<sup>22</sup>

Secondly, this Act seeks to protect the dignity of victims of crime through, among other things, the provision of better information.<sup>23</sup> Third, it seeks to promote cooperation among government departments, organizations and agencies involved in working with victims of crime.<sup>24</sup>

In particular, under this Act the victims of a crime have an impact on the bail decision making in two significant ways: -

- a. It imposes a duty on the courts to "ensure that every victim is, as far as possible, given an opportunity to be heard and to respond before any decision affecting him or her is taken"<sup>25</sup>
- b. It gives victims of crime the right "to have their safety and that of their family considered

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<sup>22</sup> Section 3(a) Victim Protection Act 2014

<sup>23</sup> Section 3(b) Victim Protection Act 2014

<sup>24</sup> Section 3(c) Victim Protection Act 2014

<sup>25</sup> Section 4 Victim Protection Act 2014

in determining the conditions of bail and release of the offender.”<sup>26</sup>



### 5.3 GENERAL PRINCIPLES OF BAIL AND BOND

Ordinarily, bail and bond terms are based on the decision or discretion of the police officer or the magistrate or judge. There is no set guide on the amount of bail or bond that should be given for specific offences. However, a person with authority to grant bail or bond must be guided by the

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<sup>26</sup> Section 10(1)(b) Victim Protection Act 2014

following principles: -

1. The right of accused person to be presumed innocent

Every accused person shall be presumed innocent (Article 50(2) of the Constitution). This is the primary reason for the requirement of the Constitution that an arrested person has the right to be released on bail or bond. The presumption of innocence dictates that accused persons should be released on bail or bond whenever possible.

The presumption of innocence also means that pretrial detention should not be a punishment. It also means that accused persons or suspects should not be treated as convicts and should not be subjected to the same rules and regulations as people who have already been convicted. According to Article 10(2)(a) the ICCPR<sup>27</sup>, provides that “accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons.”<sup>28</sup> The ICCPR further states that accused children should be separated from adults and brought as speedily as possible for adjudication.<sup>29</sup>

2. Accused Person’s Right to Liberty

Every accused person has the right to liberty. As a general rule, therefore, every accused person should not be detained, but should be released subject to their guarantee to appear for trial. Pretrial detention should therefore be a measure of last resort, and the criminal justice institutions should make every reasonable effort to avoid pretrial detention.<sup>30</sup>

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<sup>27</sup> International Covenant on Civil and Political Rights

<sup>28</sup> See also the United Nations Standard Minimum Rules for the Administration of Non-Custodial Measures

<sup>29</sup> Article 10(2)(b)

<sup>30</sup> Article 6 United Nations Standard Minimum Rules for the Administration of Non-Custodial Measures; Article 13 United Nations Standard Minimum Rules for the Administration of Juvenile Justice

### 3. Accused's obligation to attend trial

Bail and bond provide guarantees that accused persons will attend trial. They are securities that aim to procure the release of an accused person from legal custody together with an undertaking that they will appear for trial.

### 4. Right to Reasonable Bail and Bond Terms

Bail or bond amounts and conditions shall be reasonable, given the importance of the right to liberty and the presumption of innocence. This means that bail or bond amounts and conditions shall be no more than is necessary to guarantee the appearance of an accused person for trial. Accordingly, bail or bond amounts should not be excessive, that is, they should not be far greater than is necessary to guarantee that the accused person will appear for their trial. On the other hand, bail or bond amounts should not be so low that the accused person would be tempted into forfeiting the bail or bond amount and fleeing (commonly referred to as "jumping bail").

Secondly, bail or bond conditions should be appropriate to the offence committed and take into account the personal circumstances of the accused person. In the circumstances, what is reasonable will be determined by reference to the facts and circumstances prevailing in each case.<sup>31</sup>

Since the ultimate goal of bail or bond is to guarantee that an accused person attends their trial, it is important to underscore that Article 49(2) of the Constitution does not necessarily mean that all persons accused of committing offences that are punishable by a fine only or by imprisonment for not more than six months are entitled to free bonds or release on personal recognizance. Accordingly, in this context police officers and judicial officers have the power to impose appropriate bail or bond terms when releasing such offenders. Unless they do so, "there is a real probability that many persons who are charged with offences that attract only fines or that attract imprisonment for six months or less, will not bother to turn up in court for their trials

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<sup>31</sup> Republic v Taiko Kitende Muinya [2010] eKLR.



[thereby increasing] the volumes of pending cases in leaps and bounds.”<sup>32</sup>

5. Bail determination must balance the rights of the accused persons and the interest of justice. On the one hand, police officers and judicial officers should endeavor to preserve the freedom of an accused person, who is presumed to be innocent and should be allowed to keep the fabric of their life intact by, for example, maintaining employment and family and community ties. Preserving the liberty of an accused person also permits them to take an active part in the planning of their defense. On the other hand, the State has a duty to prosecute those who commit crimes, which may entail qualifying the individual right to liberty.

The State has a duty to ensure public safety between the time of arrest and trial of accused persons, and a duty to protect the integrity of the criminal justice system. This means that where there is convincing evidence that an accused person may undermine the integrity of the criminal justice system, by, for example, intimidating witnesses or interfering with the evidence, then a need arises to either deny such a person bail or bond, or set stringent bail or bond terms.

Equally, where there is convincing evidence that the accused person will endanger a particular individual (for example, victims of the crime) or the public at large, or even commit a serious crime, it also becomes necessary to subject an accused person to pretrial detention. The interests of justice therefore demand the protection of the investigation and prosecution process against possible interference by accused persons. It is therefore important for police officers and judicial officers to appreciate that the public have an interest in the effective prosecution of offences.

In appreciating the need to balance the rights of accused persons with the interests of justice, the

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<sup>32</sup> Republic v Joseph Wambua Mutunga & 3 others [2010] eKLR

Constitution states that an accused person can only be denied bail or bond where the court establishes that there are compelling reasons for the person not to be released. This means that an accused person can be denied bail or bond if the prosecution presents convincing evidence to justify the denial, by for instance proving that the release of an accused person is risky even when appropriate conditions for their release have been made.

#### 6. Consideration for the rights of victims of crime

Police officers and judicial officers should consider the views of victims before making decisions that affect them. In particular, police officers and judicial officers should consider the safety of victims and victims' families in fixing the amount of bail and the release conditions for suspects and accused persons. Second, victims should be informed about bail conditions imposed on suspects and accused persons, particularly those designed to protect victims and victims' families. Third, victims who have so requested should be kept informed about any bail applications made by suspects and accused persons, and the outcomes of such applications.

## 5.4 BAIL AND BOND DECISION-MAKING

### 5.4.1 Bail and Bond in the Police Station

At a police station, a suspect may be released on cash bail, with or without sureties, or personal (free) bond or recognizance. The Police Force Standing Orders<sup>33</sup> require the officer in charge of a police station to release any person arrested on a minor charge on the security of cash bail, as a general rule, unless the officer has good grounds for believing that the arrested person will not attend court when

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<sup>33</sup> At the time of publication of these Policy Guidelines, the Police Service Standing Orders were awaiting parliamentary approval to replace the Police Forces Standing Orders

required to do so.<sup>34</sup> This cash bail should be handed over to the court by the date on which the arrested person should appear in court, and a receipt obtained.<sup>35</sup>

In case a person who has been released on bail fails to appear in court, the officer in charge of the police station should apply to the magistrate for a warrant of arrest. At this point, the magistrate may either order the cash bail to be forfeited (if it is demonstrated that there are sufficient grounds that justify an order for forfeiture), or retained on court deposit until such time as the accused person appears.<sup>36</sup> It should be noted that the Police Standing Orders are categorical that a person who is released from custody on either bail or bond can only be required to appear before a magistrate on a specified date, and that “Under no circumstances will a prisoner who is released on bond be required to appear at a police station or other place.”<sup>37</sup>

Where the accused person violates bail or bond terms, the police should cancel the bail or bond, re-arrest them, bring them to the police station, and take them to court. In practice, police decision-making on bail and bond can be unpredictable: -

- a) Police officers sometimes do not give bail and bond on reasonable terms. In some cases, police officers deny accused persons bail as a form of punishment. Further, police officers do not usually explain their bail and bond decisions.
- b) Police officers only grant bail and bond to persons accused of minor offences, and leave bail decision making in serious offences to the courts. Where the police do not grant bail, the accused person should be produced in court within 24 hours of arrest. Accordingly, a person accused of serious offences such as murder or robbery with violence is likely to be detained, and can only be released on bail once produced before court.

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<sup>34</sup> Police Force Standing Orders, Order 9(i).

<sup>35</sup> Order 9(ii).

<sup>36</sup> Order 9(iii)

<sup>37</sup> Order 9(x).

- c) Police officers tend to detain persons who have committed petty offences, contrary to Article 49(2) of the Constitution. Included in this category are persons accused of committing offences such as loitering, creating a disturbance, being drunk and disorderly, and possessing illicit liquor. Even more disturbing, some police officers have detained persons accused of committing offences that are not known to law, contrary to Section 50(n) of the Constitution, which gives an accused person the right not to be convicted for an act or omission that was not an offence under the law at the time of the commission or omission
- d) Many accused persons are unable to afford cash bail of amounts as low as Kshs. 1000 due to poverty. Such persons are therefore detained in police custody.
- e) Police officers typically do not inform accused persons that they have a right to be released on bail and in some cases even extort bribes from them. The administration of bail and bond in traffic offences presents special challenges. Decision making here seems arbitrary, and the amount of bail is left to the discretion of the Divisional Traffic Officer. Further, while the police are concerned that there is a high rate of absconding (that is, failing to attend court after paying cash bail), the public find the process of complying with the requirement to attend court unduly punitive, particularly where the offences are committed in locations where they do not reside.

#### 5.4.2 Bail and Bond in the Courts

The courts have powers under the Constitution and the Criminal Procedure Code<sup>38</sup> to grant an accused person's bail or to release them upon executing a bond with sureties for their appearance. The exercise of these powers entails the performance, by a magistrate or judge, of the following judicial and administrative functions: -

- a) determining whether or not an accused person should be granted bail

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<sup>38</sup> Criminal Procedure Code is the main legislation on procedure for administration of substantive criminal law in Kenya

- b) determining the amount of bail
- c) attaching suitable conditions to the grant of bail
- d) verifying security documents e.g. title deeds, vehicle log books
- e) approving sureties
- f) releasing accused persons who have been granted bail from police custody or prisons
- g) committing accused persons who have been denied bail to police custody or prisons
- h) reviewing bail terms and conditions

The performance of the foregoing judicial and administrative functions has been characterized by numerous challenges: -

- a) lack of uniformity in how the courts determine whether or not to grant accused persons bail, both in terms of procedure and substance. As a result, it is difficult for accused persons to predict how their bail applications will be determined.
- b) presently, there is no procedure for applying for bail. In many magistrates' courts, the practice is that an accused person who seeks to be released on bail pending trial will raise their hand when arraigned in court and request the presiding judicial officer for bail. Alternatively, the magistrate grants bail to the accused person without any such application, and therefore without establishing from the accused person whether or not the bail terms are affordable. Any accused person who complains about the bail terms is simply told to seek a review from the court that is to conduct the hearing. Although some magistrates' courts inquire from accused persons whether they can afford bail, they find this approach to be time consuming due to their heavy workloads.
- c) On the other hand, an accused person who seeks to be released on bail in the High Court is required to make a formal application, failure to which the application will often not be considered.

### 5.4.3 Factors to be considered in bail or bond applications

The primary factor considered by the courts in bail decision-making is whether the accused person will appear for trial if granted bail. A particular challenge the courts face since the promulgation of the Constitution of 2010 is determining the existence of compelling reasons for denying an accused person bail, particularly in serious offences.

According to the decisions of the courts, the determination of whether there are compelling reasons that can justify the denial of bail should be made by evaluating whether or not the accused person will attend their trial. In practice, the courts have made this evaluation by considering the following non-exhaustive factors:

- a) The nature of the charge or offence and the seriousness of the punishment to be meted if the accused person is found guilty –

Where the charge against the accused person is serious, and the punishment heavy, the courts assume that there are more probabilities and incentives for the accused person to abscond, whereas in case of minor offences there may be no such incentives.<sup>39</sup>

- b) The strength of the prosecution case

An accused person should not be subjected to pretrial detention where the evidence against them is tenuous, even if the charge is serious. Conversely, it may be justifiable to subject an accused person to pretrial detention where the evidence against the accused person is strong. For example, where all the prosecution witnesses have testified, and the accused person is aware of the weight of the prosecution's case against them, it is presumed that such a person has an incentive to abscond and should therefore be denied bail.<sup>40</sup>

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<sup>39</sup> *Watoro v Republic* (1991) KLR 220; *Republic v Danson Mgunya & another* [2010] eKLR; *Jennifer Atieno Oduol v Republic* [2006] eKLR

<sup>40</sup> *Republic v Margaret Nyaguthi Kimeu* [2013] eKLR. 36 *Republic v Joseph Wambua Mutunga & 3 others* [2010] eKLR. 37 See, e.g., *Republic v Lucy Njeri Waweru & 3 others* [2013] eKLR.

c) Character and antecedents of the accused person

Although the character and past history of the accused person do not by themselves form the basis for denial of bail or bond, they may justify the refusal of bail or bond if they are combined with other adverse factors. The failure of the accused person to observe bail or bond terms on previous occasions is a good ground for denying bail or bond.

d) Likelihood of interfering with witnesses

Where there is a likelihood that the accused will interfere with prosecution witnesses if released on bail or bond, they may be denied bail or bond. However, bail or bond will only be denied if: -

- i. There is strong evidence of the likelihood of interfering with prosecution witnesses, which is not contradicted or denied,
- ii. The court cannot impose conditions to the bail or bond to prevent such interference. For example, where the accused person has been provided with witness statements, and therefore knows the identities of the prosecution witnesses and the nature of the evidence that these witnesses will adduce at trial, there is a real likelihood that the accused person may contact the witnesses. The likelihood that such an accused person may contact witnesses “could probably inflict genuine fear and anxiety in the potential prosecution witnesses,” and therefore constitutes a compelling reason for the denial of bail.<sup>41</sup> In this regard, defilement cases present a special challenge. In some cases, such as defilement where families of the accused and the victim negotiate to settle the case out of court, the court may deny the accused bail until the witnesses, especially the victim, have testified. The same approach is adopted in murder cases.<sup>42</sup>

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<sup>41</sup> Republic v Margaret Nyaguthi Kimeu [2013] eKLR.

<sup>42</sup> Republic v Lucy Njeri Waweru & 3 others [2013] eKLR.

e) The need to protect the victim or victims of the crime from the accused person.

As indicated above under the section on statutory provisions on bail, the views of the victims of crime must be considered when the decision for bail is being made. If the victim(s) are under potential threat from the accused person, the court can deny bail.

f) The relationship between the accused person and potential witnesses

Here, the courts reason that if the accused person is either related to the witnesses or stands in a position of influence vis-à-vis the potential witnesses, there could arise a legitimate anxiety about the impact the accused person might have on the witnesses, if they are released pending trial.<sup>43</sup>

g) Child offenders

Where the accused person is a minor, the denial of bail or bond is considered not to be in the best interests of the accused person, who is a minor.

h) The accused person is a flight risk

Where the accused person is a foreigner who does not have a fixed abode or fixed hosts in the country and Kenya does not have an extradition treaty with the accused person's country, there is a presumption that they are a flight risk and may therefore fail to attend trial if granted bail or bond.<sup>44</sup> The reasoning for this presumption is that it would be impossible to prevail upon such a country to return its national to Kenya to be prosecuted should they abscond after being granted bond or bail.

i) Whether accused person is gainfully employed

The courts also consider the fact that an accused person is gainfully employed to enhance the likelihood that they will attend trial. However, it should not matter whether or not the accused person is a casual laborer or is engaged in permanent and pensionable employment. Accordingly, the fact that the accused person is a casual laborer should not, in itself,

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<sup>43</sup> Republic v Taiko Kitende Muinya [2010] eKLR.

<sup>44</sup> Republic v Ahmad Abolafathi Mohamed & another [2013] eKLR.



constitute the basis upon which the court determines whether or not to grant bail.<sup>45</sup>

j) Public order, peace or security

Whether the release of an accused person will disturb public order or undermine public peace or security.<sup>46</sup> Pretrial detention may be necessary to preserve public order where it is demonstrated that the public response to an offence is such that the release of the accused person would be likely to lead to a public disturbance.

k) Protection of the accused person

Whether pretrial detention is necessary to protect the accused person.<sup>47</sup> This would happen if for example the accused person lives in the same community where they committed the crime and there is a real threat of retaliation from the community.

Although courts are supposed to be guided by these factors in their bail decision-making, they do not always explain their decisions. This leads, for example, to situations in which one magistrate denies bail while another allows bail in similar circumstances, or set different bail term and amounts for similar offences. It is also important for the courts to recognize that due to personnel and resources constraints, accused persons often spend inordinately long periods in detention before their cases are concluded.

#### 5.4.4 Bail Supervision

Once a court has granted an accused person bail, and attached the conditions thereto that are deemed necessary to ensure that the accused person attends court as and when required, there ought to be mechanisms for effectively monitoring the accused person in appropriate cases. This is referred to as bail supervision, whose aim is not only to assist the accused

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<sup>45</sup> Republic v Joseph Wambua Mutunga & 3 others [2010] eKLR

<sup>46</sup> Republic v Pascal Ochieng Lawrence [2014] eKLR.

<sup>47</sup> Jennifer Atieno Oduol v Republic [2006] eKLR

persons to attend court as and when required, but also to comply with bail conditions, such as refraining from interfering with witnesses. In this sense, the mechanisms for monitoring an accused person should be based on the risks they pose as determined at a bail hearing.

Bail supervision entails tasking a probation officer to supervise an accused person who has been released on bail, with the goal of ensuring that the accused person complies with bail conditions and attends court as and when required. The problem of absconding is worsened by gaps in the approval of sureties, who should play a critical role in ensuring that accused persons attend court and adhere to bail conditions.

It is the responsibility of the court, working together with the prosecution and the police, to determine the suitability of sureties. However, it seems that there are no clear procedures for the approval of sureties, given the different practices adopted by the subordinate courts and the High Court. Indeed, the police have complained that the courts do not involve them in the verification of sureties, yet somehow expect them to trace accused persons who have absconded.

#### 5.4.5 Forfeiture or Release of Bail or Bond

If an accused person fails to appear in court as and when required on one or several occasions, the court can determine that they have absconded (jumped bail). When this happens the bail or bond is forfeited and cannot be released to the accused person or the sureties. In certain instances, a surety may be prosecuted when an accused person absconds trial or be compelled to produce them in court.

Once the case has been heard and determined, or terminated either through withdrawal of the charges or death of the accused person, the court orders the bail and or bond to be released to the depositor.

## PART D

### KEY INSTITUTIONS



## **CHAPTER SIX: COURTS AND QUASI JUDICIAL BODIES**

### **6.1 INTRODUCTION**

Various institutions have been mandated, either by the Constitution of Kenya or by other laws to play critical roles in the administration of justice. This part of the reference guide highlights some of these key institutions, their mandates and how one can access their services. Some of these institutions have a positive role to play in ensuring the right of access to justice and often complement each other.

#### **6.1.1 THE JUDICIARY**

The Judiciary is one of the three arms of Government established under Chapter 10 of the Constitution. It is independent from other government organs and functions. It provides a forum for the just resolution of disputes in order to preserve the rule of law and to protect the rights and liberties guaranteed by the Constitution.

The Judiciary is headed by the Chief Justice and divided into two units: the technical unit, comprised of the courts, and the administrative unit, which consists of departments for administration, personnel, accounts, procurement, planning, library services, Information, Communication and Technology (ICT) and the National Council for Law Reporting (NCLR).

The mandate of the Judiciary is the administration of justice and judicial matters.

The functions of the Judiciary include: -

- hearing and determination of criminal and civil disputes
- constitutional interpretation and protection of rights and liberties for all
- probate and administration
- formulation and implementation of judicial policies
- compilation and dissemination of legal information for effective administration of justice.

The Judiciary undertakes its functions through the Supreme Court, Court of Appeal, High Court, Magistrates' Courts, Kadhis' Courts, Judicial Service Commission and National Council for Law Reporting.

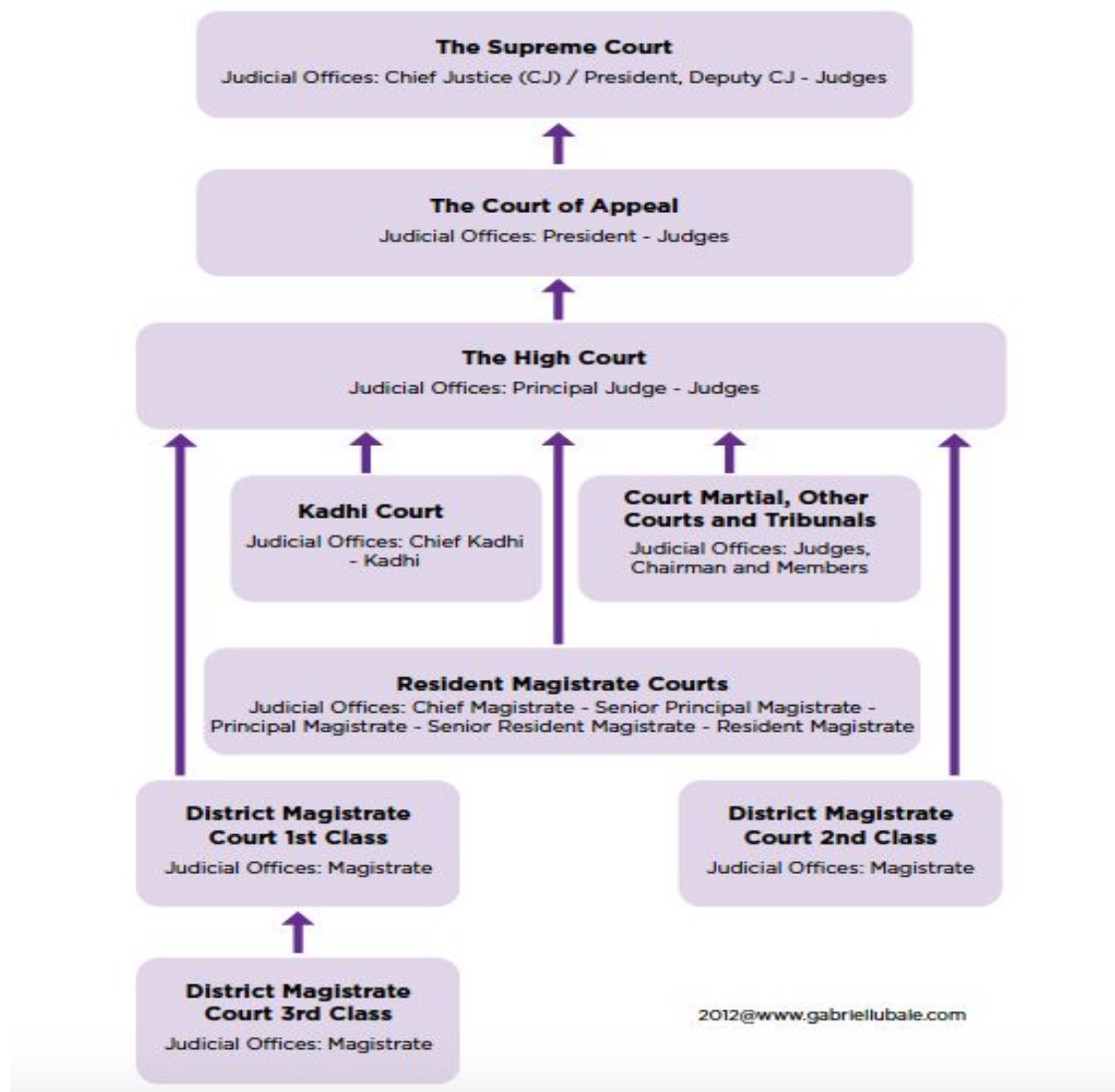


Figure 1 Hierarchy of the Kenyan Courts

## 6.2 KENYA'S COURT SYSTEM

### 6.2.1 THE SUPREME COURT

The Supreme Court was established by Article 163 of the Constitution. It is composed of the Chief Justice, who is the president of the Court; the Deputy Chief Justice, who deputizes the Chief Justice as the vice-president of the court; and five other judges.

The Supreme Court has exclusive original jurisdiction to hear and determine disputes relating to the elections of the President of Kenya.<sup>48</sup> It also has appellate jurisdiction to hear and determine appeals from the Court of Appeal and any other court or tribunal as provided for by national legislation that relates to interpretation or application of the Constitution of Kenya or to matters of general public importance. Appeals from the Court of Appeal to the Supreme Court are as a matter of right in any case involving the interpretation or application of the Constitution and in any other case in which the Supreme Court, or the Court of Appeal, certifies that a matter of general public importance is involved.<sup>49</sup>

The Supreme Court may review a certification by the Court of Appeal and either affirm, vary or overturn it. The Supreme Court may give an advisory opinion at the request of the national government, any State organ, or any county government with respect to any matter concerning the county government. The decisions of the Supreme Court bind all other courts, except the Supreme Court. This means that the Court of Appeal or the High court for example, cannot overturn or contradict the decision of the Supreme Court.

### 6.2.2 THE COURT OF APPEAL

The Court of Appeal was initially established by an Act of Parliament in 1977 after the demise of the

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<sup>48</sup> This means that someone can file such a case directly at the Supreme Court without going to the other courts first.

<sup>49</sup> Article 163(5) of the Constitution of Kenya

East African Community, under which the Court of Appeal for East Africa had operated as a department. Under the Constitution, the Court of Appeal is established under Article 164.

The Court of Appeal consists of a number of judges, being not fewer than 12 (twelve), as may be prescribed by an Act of Parliament and the Court is to be organized and administered in the manner prescribed by an Act of Parliament. The Court comprises of a President of the Court of Appeal who is elected by the judges of the Court of Appeal from among themselves.

The Court of Appeal is a superior court of record therefore it sets precedents. Meaning that the courts below it are bound by its decisions. It has limited original jurisdiction<sup>50</sup> and was created to hear appeals from the High court. The only moment the Court Appeal can have original jurisdiction is in punishment for contempt of court, and when stating execution of orders of the High Court.

The practice and procedure of the Court of Appeal are regulated by the rules of court made by the Rules Committee constituted under the Appellate Jurisdiction Act (Cap. 9). The Act provides that an uneven number of at least three judges shall sit for the determination of any matter by the court. The decision of the court shall be according to the opinion of a majority of the judges who sat for the purposes of determining that matter. The president of the Court of Appeal is elected from among the judges of the Court. The Court has jurisdiction and powers to hear and determine appeals from the High Court of Kenya and any other court or tribunal.

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<sup>50</sup> The court only hears certain cases for the first time.



The Court of Appeal has powers to:

- a) determine a case finally
- b) order for a trial
- c) order for a retrial
- d) frame issues for the determination of the High Court
- e) receive additional evidence or order that it be taken by another court

### 6. 2. 3 THE HIGH COURT

The High Court is established under Article 165 of the Constitution and it consists of a number of judges to be prescribed by an Act of Parliament. The Court is organized and administered in the manner prescribed by an Act of Parliament. There are 20 High Court stations in the Country.<sup>51</sup>

The Court has a Principal Judge, who is elected by the judges of the High Court from among themselves. The High Court is duly constituted by one Judge sitting alone. However, there are instances where two or more High Court Judges may be required to determine certain kinds of cases.

Jurisdiction of the High Court: -

- a) unlimited original jurisdiction in criminal and civil matters
- b) to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened
- c) to hear an appeal from a decision of a tribunal appointed under the Constitution or national legislation to consider the removal of a person from office, other than a tribunal appointed under Article 144
- d) to hear any question respecting the interpretation of the Constitution including the

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<sup>51</sup> <http://www.judiciary.go.ke/portal/page/high-court> last accessed 8 February 2017

determination of: -

- i. the question whether any law is inconsistent with or in contravention of the Constitution
  - ii. the question whether anything said to be done under the authority of the Constitution or of any law is inconsistent with, or in contravention of the Constitution
  - iii. any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government
  - iv. a question relating to conflict of laws under Article 191
  - v. any other jurisdiction, original or appellate, conferred on it by legislation
- e) The High Court does not have jurisdiction in respect of matters reserved for the exclusive jurisdiction of the Supreme Court under the Constitution or falling within the jurisdiction of the courts under Article 162 (2) of the Constitution.
- f) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court (Court of Appeal and Supreme Court). Also being a superior court of record means that the decisions of the High Court as precedents, are binding on the subordinate courts.
- g) Although the High Court has unlimited original jurisdiction in civil and criminal cases, in actual practice it will hear those criminal cases which cannot be tried by the subordinate courts i.e. murder and treason whereas in civil cases, it has unlimited original jurisdiction and can hear any civil dispute. The High Court has power to pass any sentence authorized by law.
- h) In addition to the ordinary civil and criminal jurisdiction of the High Court, there are other matters, which can only be heard by the High Court for example cases touching on enforcement of human rights.

### 6.2.3.1 Special Powers of the High Court

The High Court enjoys special powers and jurisdiction in certain specific matters as conferred to it by the Constitution and other laws. Some of these are: -

#### a) Supervisory Jurisdiction

The Constitution confers specific powers on the High Court to exercise supervisory jurisdiction in any civil and criminal proceedings before subordinate courts and may make such orders, issue such summonses and give such directions as may be appropriate for the purpose of ensuring that justice is duly administered by such courts. This includes the power of the High Court to transfer proceedings from one court to the other.

To invoke the supervisory jurisdiction of the High Court a person must have exhausted all other available remedies and rights of appeal. In exercise of its supervisory powers under judicial review, the High Court may issue any of the prerogative orders of: -

- i. Mandamus – The literal meaning of mandamus is “we command”. This is an order issued by the High Court to any person or body commanding them to perform a public duty imposed by law or state. The order is available to compel administrative tribunals to do their duty e.g. to compel a licensing board to issue a license where someone has applied and met the criteria.
- ii. Certiorari – The term means to “be informed”. This is an order issued by the High Court directed at an inferior court institution exercising judicial or quasi-judicial functions to have the records of the institution’s proceedings presented to the High Court in order to:
  - o to secure an impartial trial
  - o review an excess of jurisdiction

- o challenge an ultra vires<sup>52</sup> act
  - o correct errors of law on the face of the record
  - o quash (overturn) a judicial decision made irregularly and against the rules of natural justice
- iii. Prohibition – This is an order issued by the High Court to prevent an inferior court or tribunal from hearing or continuing to hear a case either in excess of its jurisdiction or in violation of the rules of natural justice.
- iv. Writ (Order) of Habeas Corpus – Habeas corpus means, “produce the body”, dead or alive. This order is issued where the personal liberty of a person is denied by arrest and confinement without legal justification. By issuing this order, the High Court calls upon the person or authority holding the person or body to answer by what authority it is they continue to withhold the individual. An order of habeas corpus aims at securing the release of such persons held without legal justification.

#### b) Interpretation of the Constitution

The Constitution provides that where any question as to the interpretation of the Constitution arises in any proceedings in any subordinate court, and the court is of the opinion that the question involves a substantial question of law, the court may, and shall if any party to the proceedings so requests, refer the question to the High Court.<sup>53</sup>

The High Court shall be composed of an uneven number of judges, not being less than three when it determines the constitutional question referred to it. The decision of the High Court is binding on the court that referred the question to the High Court and it must decide the case in accordance with the High Court’s decision.

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<sup>52</sup> In excess of legal authority

<sup>53</sup> This is often referred to as a constitutional reference

c) Admiralty Jurisdiction

Under Section 4 of the Judicature Act the High Court has the power to hear and decide “matters arising on the high seas or in territorial waters or upon any lake or other navigable inland waters in Kenya”.<sup>54</sup>

d) Election jurisdiction

Under the National Assembly and Presidential Election Act, the High court has special powers to hear and determine disputes arising from the national electoral process. The High Court may make an order as it deems fit, including the nullification of the election results upon hearing of a petition presented to it by a voter or loser in the election. For the High Court to nullify the election of a member of Parliament, the petitioner must prove that an election offence has been committed.

e) Succession/Probate jurisdiction

The Probate Division of the High Court has jurisdiction to hear any application, make orders related to inheritance or administration of the estate of a deceased person.

#### 6.2.4 MAGISTRATES COURT

Before the adoption of the Constitution of Kenya, 2010, the Magistrates’ courts were created under the Magistrates Courts Act.<sup>55</sup> They were reconstituted under Article 169 of the Constitution. They handle civil and criminal matters depending on the rank of the magistrate.

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<sup>54</sup> Chapter 8 of the Laws of Kenya

<sup>55</sup> Chapter 10 of the Laws of Kenya

**The hierarchy of magistrates' courts in descending order is as follows:**

**Chief Magistrate**

**Senior Principal Magistrate**

**Principal Magistrate**

**Senior Resident Magistrate**

**Resident Magistrate**

#### 6.2.5 KADHIS' COURTS

Article 170 of the Constitution establishes the Kadhis' Courts to deal with questions of Muslim law relating to personal status, marriage, divorce and inheritance in proceedings in which both parties profess the Muslim religion and submit to the jurisdiction of the Kadhis' courts.

#### 6.2.6 SPECIALIZED COURTS AND TRIBUNALS

In addition to the courts mentioned above, there are Children's Courts that deal with matters relating to children and Anti-Corruption Courts to deal with matters relating to corruption and integrity. Tribunals may be established under various laws made by Parliament to deal with specific matters. They adhere to the same service standards as the ordinary courts and usually conclude their cases in a shorter time. A person who is dissatisfied with a tribunal's decision may appeal to another tribunal or to the minister in charge or to the High Court. Examples of tribunals include: -

- Employment and Labor Relations Court (ELRC): This court was previously referred to as the

Industrial Court which and is established under Article 162(2) (a) of the Constitution of Kenya. The main objective of this court is to settle employment and industrial relations disputes and seeks to further and maintain good employment and labor relations in Kenya. It decides trade disputes between employers and employees. Cases such as dismissal of employees, non-payment of dues to employees can be taken to the ELRC, which has the same status.

- Land Disputes Tribunals: disputes relating to land issues such as the division of land and boundaries of land
- Rent Restriction Tribunal: disputes between landlords and tenants of residential houses
- Business Premises Tribunal: cases involving landlords and tenants of business premises such as shops and hotels.

## QUASI JUDICIAL SYSTEM

In addition to courts and tribunals, there are specific institutions that have been established with the mandate to carry out certain functions that provide justice. Some of these institutions have been highlighted below: -

### 6.3.1 THE WITNESS PROTECTION AGENCY

The object and purpose of this Agency is to provide the framework and procedures for giving special protection, on behalf of the State, to persons in possession of important information and who are facing potential risk or intimidation due to their co-operation with the prosecution and other law enforcement agencies. The functions of the Agency are to: -

- a) establish and maintain a witness protection programme
- b) determine the criteria for admission to and removal from the witness protection programme
- c) determine the type of protection measures to be applied

- d) advise any Government Ministry, department, agency or any other person on the adoption of strategies and measures on witness protection
- e) Perform such other functions as may be necessary for the better carrying out of the purpose of this Act.



A person can be put on witness protection after assessment of the risks that they face and information that they hold. The Agency can be contacted at the following address:



WITNESS PROTECTION AGENCY

Toll Free: 0800 720 460, Hotlines: 0711222441, 0725222442 |Email: [info@wpa.go.ke](mailto:info@wpa.go.ke)

### 6.3.2 NATIONAL LAND COMMISSION

The mandate of the National Land Commission (NLC) is drawn from the National Land Policy of 2009, Constitution of Kenya 2010, National Land Commission Act, 2012, the Land Act 2012 and the Land Registration Act of 2012. Pursuant to Article 67(2) of the Constitution, the functions of the Commission are: -

- a) to manage public land on behalf of the national and county governments
- b) to recommend a national land policy to the national government
- c) to advise the national government on a comprehensive programme for the registration of title in land throughout Kenya
- d) to conduct research related to land and the use of natural resources, and make recommendations to appropriate authorities
- e) to initiate investigations, on its own initiative or on a complaint, into present or historical land injustices, and recommend appropriate redress
- f) to encourage the application of traditional dispute resolution mechanisms in land conflicts
- g) to assess tax on land and premiums on immovable property in any area designated by law
- h) to monitor and have oversight responsibilities over land use planning throughout the Country

Under the National Land Commission Act, the Commission shall:

- a) on behalf of, and with the consent of the national and county governments, alienate public land
- b) monitor the registration of all rights and interests in land
- c) ensure that public land and land under the management of designated state agencies are

- sustainably managed for their intended purpose and for future generations
- d) develop and maintain an effective land information management system at national and county levels
  - e) manage and administer all unregistered trust land and unregistered community land on behalf of the county government
  - f) develop and encourage alternative dispute resolution mechanisms in land dispute handling and management.

The National Land Commission can be contacted at the following address:

Ardhi House, 1<sup>st</sup> Ngong Avenue, Off Ngong Road,  
P.O. Box 44417 – 00100,  
Telephone: 020- 2718050  
Email: [info@landcommission.go.ke](mailto:info@landcommission.go.ke)

### 6.3.3 KENYA NATIONAL COMMISSION ON HUMAN RIGHTS

The Kenya National Commission on Human Rights (KNCHR) is an autonomous national Human rights institution established under Article 59 of the Constitution with the core mandate of furthering the promotion and protection of human rights in Kenya. The management team consists of five commissioners and the Secretariat. The operations of the KNCHR are guided by the United Nations-approved Paris Principles on the establishment and functioning of independent national human rights institutions.<sup>56</sup>

An individual whose rights have been violated or threatened can report to the Commission for

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<sup>56</sup> The Commission has been accredited by the International Coordinating Committee of National Human Rights Institutions (ICC), which is based in Geneva at the Office of the High Commissioner for Human Rights, as an ‘A status’ institution which means that the Commission has been found to be in compliance with the Principles.

appropriate assistance and redress. The Commission has a complaints department that receives, evaluates and responds to human rights violations and injustices. The Commission has authority to commence independent enquiries into human rights issues and to issue advisory opinions to the government or other agencies.

The Commission can be contacted at the following address:

CVS Plaza 1<sup>st</sup> Floor, Kasuku Lane, Off Lenana Road,

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

Landline: +254-020-3969000

Mobile: 00733 78 00 00 / 0736 78 00 00

Mobile: 0724 256 448 / 0726 610 159

General Enquiries: [haki@knchr.org](mailto:haki@knchr.org)

Complaints: [complaint@knchr.org](mailto:complaint@knchr.org)

#### 6.3.4 NATIONAL GENDER AND EQUALITY COMMISSION

The National Gender Equality Commission (NGEC) is a constitutional Commission established by an Act of Parliament<sup>57</sup> in August 2011 in line with Article 59 of the Constitution. NGEC derives its mandate from Articles 27, 43, and Chapter fifteen of the Constitution; and the National Gender Equality Commission Act, with the objectives of promoting gender equality and freedom from discrimination. The functions of the Commission as provided in Section 8 of the National Gender and Equality Commission Act 2011 are: -

- a) to promote gender equality and freedom from discrimination in accordance with Article 27 of the Constitution
- b) monitor, facilitate and advise on the integration of the principles of equality and freedom from discrimination in all national and county policies, laws, and administrative regulations

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<sup>57</sup> The National Gender and Equality Commission Act

in all public and private institutions

- c) act as the principal organ of the State in ensuring compliance with all treaties and conventions ratified by Kenya relating to issues of equality and freedom from discrimination and relating to special interest groups including minorities and marginalized persons, women, persons with disabilities, and children
- d) co-ordinate and facilitate mainstreaming of issues of gender, persons with disabilities and other marginalized groups in national development and to advise the Government on all aspects thereof
- e) monitor, facilitate and advise on the development of affirmative action implementation policies as contemplated in the Constitution
- f) investigate on its own initiative or on the basis of complaints, any matter in respect of any violations of the principle of equality and freedom from discrimination and make recommendations for the improvement of the functioning of the institutions concerned
- g) work with other relevant institutions in the development of standards for the implementation of policies for the progressive realization of the economic and social rights specified in Article 43 of the Constitution and other written laws
- h) co-ordinate and advise on public education programmes for the creation of a culture of respect for the principles of equality and freedom from discrimination
- i) conduct and coordinate research activities on matters relating to equality and freedom from discrimination as contemplated under Article 27 of the Constitution
- j) receive and evaluate annual reports on progress made by public institutions and other sectors on compliance with constitutional and statutory requirements on the implementation of the principles of equality and freedom from discrimination
- k) work with the Kenya National Commission on Human Rights, the Commission on Administrative Justice and other related institutions to ensure efficiency, effectiveness and complementarity in their activities and to establish mechanisms for referrals and

collaboration in the protection and promotion of rights related to the principle of equality and freedom from discrimination

- l) prepare and submit annual reports to Parliament on the status of implementation of its obligations under this Act
- m) conduct audits on the status of special interest groups including minorities, marginalized groups, persons with disabilities, women, youth and children
- n) establish, consistent with data protection legislation, data bases on issues relating to equality and freedom from discrimination for different affected interest groups and produce periodic reports for national, regional and international reporting on progress in the realization of equality and freedom from discrimination for these interest groups
- o) perform such other functions as the Commission may consider necessary for the promotion of the principle of equality and freedom from discrimination
- p) perform such other functions as may be prescribed by the Constitution and any other written law

The Commission can be contacted through the following address:

P. O. Box 27512-00506, Nairobi, Kenya. Solutions Tech Place, Upper Hill

Telephone number +254 203213199 | FAX: +254 203213199

Email: [info@ngeckkenya.org](mailto:info@ngeckkenya.org)

<http://www.ngeckkenya.com>

### 6.3.5 COMMISSION ON ADMINISTRATIVE JUSTICE

The Commission on Administrative Justice (CAJ) was established under the Commission on Administrative Justice Act pursuant to Article 59 of the Constitution.

The functions of the Commission include: -

- a) investigating complaints of abuse of power, unfair treatment, manifest injustice or unlawful,

- oppressive, unfair or unresponsive official conduct within the public sector
- b) inquiring into allegations of maladministration, delay, administrative injustice discourtesy, incompetence, inefficiency or ineptitude within the public service
  - c) recommending compensation or other appropriate remedies against persons or bodies to which the Act applies
  - d) provide advisory opinions or proposals on improvement of public administration, including review of legislation, codes of conduct, processes and procedures
  - e) taking appropriate action in conjunction with other State organs and Commissions responsible for the protection and promotion of human rights to facilitate the promotion and protection of the fundamental rights and freedoms of the individual

The Commission can be contacted through the following address:

2<sup>nd</sup> Floor, West End Towers

Opposite Aga Khan High School off Waiyaki Way – Westlands

P.O. Box 20414 – 00200 NAIROBI.

Telephone: +254-20-2270000/2303000/2603765/2441211/8030666

Email : [info@ombudsman.go.ke](mailto:info@ombudsman.go.ke)

# PART E

## DOCUMENTATION



## CHAPTER SEVEN: EVIDENCE COLLECTION AND DOCUMENTATION

### 7.1 INTRODUCTION

In order to prove an act or violation of one's rights, it is important to collect proof of that violation or to document that violation. Evidence collection and documentation are critical in the legal field and must be undertaken with precision and care. Proof of an act or violation can be done through primary or secondary evidence. For public documents, one can use either primary or secondary evidence whereas the contents of a private document can only be proved by primary evidence except in instances where Section 68 of the Evidence Act<sup>58</sup> allows use of secondary evidence.

### 7.2 PRIMARY AND SECONDARY EVIDENCE

Primary evidence would be the document itself produced in court for court inspection and perusal. For instance, where a document is executed or signed in several parts then each part is going to be primary evidence of the document. An example of this is situation where you have a tenant and a landlord and signatures on both their parts are essential for a tenancy agreement. Where a document has been executed in counterpart and some of the parties have only signed the counterpart each counterpart is primary evidence against the parties executing it.

Primary evidence means the document itself produced for the inspection of the court. Where a document is executed in several parts, each part is primary evidence of the document. Where a document is executed in counterpart, each counterpart being executed by one or some of the parties only, each counterpart is primary evidence as against the parties executing it.<sup>59</sup> Primary evidence

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<sup>58</sup> Proof where no attesting witness found - If no such attesting witness can be found, it must be proved that the attestation of one attesting witness at least is in their handwriting, and that the signature of the person executing the document is in the handwriting of that person.

<sup>59</sup> Section 61, Evidence Act



means an original document or one of several original documents. For example, if an agreement is signed in triplicate, each copy is considered to be an original and therefore primary evidence.

Secondary evidence on the other hand refers to copies of an original and include:<sup>60</sup>

- a) Certified Copies - These are copies made from the original by mechanical processes which in themselves ensure the accuracy of the copy, and copies compared with those copies; copies made from or compared with the original
- b) Mechanical Copies of the original, these include photocopies
- c) Copies compared with the mechanical copies; read word for word to certify correctness
- d) Copies made from or compared with the original
- e) Counterparts of documents as against parties who did not execute them; in the employment contract, offer is signed by employer acceptance by the employee
- f) Oral accounts of the contents of a document given by a person who has seen it. Mechanical copies are favored more than oral accounts which are often tainted by one's perception of the issues

### **When is secondary evidence admissible?**

Section 67 of the Evidence Act is the basis of what is called the best evidence rule, the provision that documents must be proved by evidence. The allowance of secondary evidence is a concession by the law to allow the second best. The optimal will be to have the document itself or whatever would comprise the primary evidence. It is rarely the case that secondary evidence is permissible where you could bring in primary evidence.

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<sup>60</sup> Section 66 of the Evidence Act, Cap 80 of the Laws of Kenya

Secondary evidence can be allowed in the following instances<sup>61</sup> :-

1. Essentially you can use secondary evidence where a notice to produce is given by a court as provided for under Section 69(i) of the Act. “When the document to be proved is itself a notice.”
2. Where the existence condition or contents of the original are shown to have been admitted by the adversary or their representative. There is no contestation so you can produce secondary evidence.
3. When the original has been lost or destroyed or when the original cannot be produced within a reasonable time for reasons other than the fault of the person who wishes to rely on it. In this case destruction or loss has to be testified to by witnesses who saw the document destroyed or have knowledge of its loss. The destruction or loss is a matter to be ascertained by the Court and once it is ascertained that the loss occurred without the fault of the person seeking to rely on the evidence, secondary evidence can be tendered.
4. When the original is of such a nature as not to be easily movable for instance writings on a building.
5. When the original is a public document for which a certified copy may be tendered.
6. When the original is a document of which a certified copy is allowed by the Evidence Act or any other law.
7. When the original consists of numerous accounts or other documents which cannot be conveniently examined in court and the fact to be proved is a general result of the whole collection, the secondary evidence may be given.
8. The original is in possession or power of the adverse party.
9. It is in the possession of a person outside the court’s jurisdiction; and one could not enforce the requirement that they produce.
10. When in possession of a person who is immune from the court’s process; or any person not

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<sup>61</sup> Section 68, Evidence Act

legally bound to produce the document.<sup>62</sup>

In all these instances, if a notice to produce the document is served on a person, and they do not produce the original, secondary evidence of the document may be given. Essentially when one gives a notice to produce they would be seeking the best evidence and only when they fail to get the best evidence can they go ahead and produce secondary evidence.

There are certain cases where the law does not require one to give a notice to produce, for example: -

- when the document is itself a notice then you do not give a notice to produce. There is no essence of notifying the person if what is required is a notice itself. This is to avoid redundancy because if the document is a notice of motion, you need not give another notice.
- when from the nature of the case the adverse party knows that he will be required to produce the document.<sup>63</sup>

Lakman Ramji v. Shivji Jessa & Sons (1965) E.A. 125

This case considered a situation where the document was in the power and possession of the adverse party. It was a suit for the payment in respect of extra work done under a building contract. The case for the defendant was that it had been agreed between the parties that a set sum would be accepted in settlement and that a cheque had been tendered and accepted. Evidence at the trial showed that the cheque was sent to the applicant in an envelope with a letter which stated that the cheque was in full and final settlement. The Applicant agreed that there was such an agreement but alleged that he had only received the cheque without a covering letter. A carbon copy of the letter was produced and the trial court relied on it, together with a receipt at the back of the cheque. On appeal the question was whether the evidence of the carbon copy had been properly received. It was held that in the

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<sup>62</sup> Section 68(1) (a) (iii) Evidence Act

<sup>63</sup> Section 69 of the Evidence Act

circumstances it was not an unreasonable inference that the Applicant had received the covering letter.<sup>64</sup>

Sugden V. Lord St. Leonards (1876) QBD 15

The deceased made his will 5 years prior to his death. During the last 2 years of his life, he was sick at this time, his daughter kept the box which contained the will. She constantly opened the box and read the will's contents. Unfortunately, the will got lost and could not be found. At the trial, it was claimed that she could recite the contents of the will and her solicitors suggested that she write out the purport of the will from her recitation. The question was whether this transcript of the will was admissible as secondary evidence of the lost will? The court held that it was admissible as secondary evidence.

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<sup>64</sup> The court relied on Sections 68 and 69 of the Evidence Act

## CONCLUSION

The Paralegal Resource Manual is part of NGLHRC's ongoing work to enhance access to justice and bring to life the constitutional right of public participation of LGBTIQ individuals living in Kenya. The Paralegal Resource Manual is meant to increase knowledge of the rights entitled to LGBTIQSOGIE (Queer) persons by the Constitution of Kenya and understanding of the functioning of the judiciary system by;

- allies and community based activists
- paralegals, and
- the Queer community itself

NGLHRC believes that it is necessary for the rights of Queers, the duties and responsibilities of the government, and obligations of the community to the state to be compressed into a document so as to improve the quality of life of the community and expand their knowledge thereof. For a copy of this Resource Guide, please contact NGLHRC at (020) 4400525 or [info@nglhrc.com](mailto:info@nglhrc.com).

## REFERENCES

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