

# Characteristics of Magistrates' Courts that Impede Access to Justice within Nairobi County

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## Abstract

In Kenya, access to justice remains a mirage for many especially the poor, the minorities and the vulnerable. Despite this there is scanty empirical data on factors that influence access to justice in Kenya. The broad objective of this study was to establish factors that impede access to justice in the Magistrates' courts within Nairobi. Specifically, it examined courts' characteristics and their implications on access to justice. The study was grounded on modernization theory and the New Public Management theory. It was designed as a descriptive survey and targeted the parties to cases within selected magistrates' courts, the lawyers, police and professional prosecutors, the court users' committees, representatives of the Law Society of Kenya, *Kituo Cha Sheria*, the Chief Justice, the Attorney General, the Director of Public Prosecutions and the Inspector General of Police. Purposive sampling was used in identifying the participating courts, while stratified random sampling and snowballing sampling techniques were employed to select the respondents. The sample size was 177. Out of the target sample, 152 responded meaning the response rate was 86%. Questionnaires, oral interviews and Focused Group Discussions were used to collect both qualitative and quantitative data. Quantitative data was analyzed using Statistical Package for Social Scientists (SPSS) and presented using text, charts, graphs, and frequency and percentage tables. The study found that the court did not have provision for people with physical disabilities, prosecutors and magistrates were few while adjournments contributed to case delays. The adversarial nature of court processes was seen as an impediment, low understanding of legal procedures and processes as well as low ICT usage were also identified as impediments to access to justice.

**Keywords:** Access to Justice, Court Characteristics, Physical Location, ICT, Alternate and Traditional Dispute Resolution, robes and wigs, specialized and Small claims courts

## 1.0 The Background and Literature Review

For many ordinary people, the quest for justice is hampered by lack of physical access to courts. Several considerations show that court structure as it is currently does not facilitate equal access to justice for all. These include the fact that most of the courts are found in urban areas whereas those in the rural areas where the majority of Kenyans reside are scattered and spread far and wide. Furthermore, absence of Alternative and Traditional Dispute Resolution mechanisms and specialized courts in the magistrates' courts in Kenya are characteristics that hamper access to justice.

The courts follow complex and unfriendly procedures; they do not provide information on their processes and procedures and do experience delays in determining cases. Proceedings in courts are taken in long hand that depicts them as mechanical, lacking a human face and archaic. The robes and wigs worn by judges also depict courts as old and static institutions while its use of the Latin language and legal jargon are themselves a barrier to court users who cannot understand them. As a consequence citizens do suffer alienation from the justice system. Many Kenyans remain unaware of their basic rights as the laws are in English language and there is no civic education program for them. This is a major hindrance to accessing justice, especially among the poor, the vulnerable and uneducated people (Okogbule, 2005).

Furthermore, Kenya does not have small claims courts. All legal disputes, regardless of their magnitude and value, are determined through the same court system. This has led to a backlog of cases in courts resulting in delay in the determination of cases whose subject matter value is less than the court expenses. The establishment of small claims courts will enable the majority of the Kenyan population to easily access courts with their various grievances. Presently, even the magistrates' courts, the lowest in the judicial hierarchy, are not accessible to the greater part of the population. Lodging claims in these courts is still too expensive and complicated for rural Kenyan people. Efforts made in the past to establish small claims courts have not borne fruits.

The 2010 Report of the Task Force on Judicial Reforms proposes the establishment of a small claims court (Government of Kenya 2010) and drafted Small Claims Court Bill 2010 incorporating the provisions of a similar bill published in 2007 by the Law Reform Commission. Both Bills never reached Parliament. Specialized courts that have so far been administratively established in the High Court at Nairobi are Family Division, Civil Division, Criminal Division, Constitutional and Judicial Review Division and Commercial and Tax Division. The Environment and Land as well as the Employment and Labor Relations court are established under Article 162 of the Constitution.

Another major attribute of the court that influences access to justice is capacity to adopt and utilize technology. Information Technology (IT) is a striking factor that is changing the world today. According to Anderson (2003), IT has profoundly changed the way large parts of humanity interact and communicate. It has increased accuracy; it has made information infinitely more available, and has facilitated communication across the globe. IT is attractive because it implies the promise of things becoming better and easier. Administering justice is an activity that is made up of having information available, communicating about it, and producing new information. It seems IT will affect the way the Judiciary works. Understanding such effects, and how they can be used to improve the administration of justice, should be useful (Anderson, 2003).

There is concern over the rate at which courts in Kenya are taking up ICT. Technology in Kenya courts has been used mostly for routine matters. There is very little evidence of radically new ways of doing judicial work through technology. The capacity of the existing Judiciary to adopt technology has further been hampered by the slow implementation of legal and administrative reforms coupled with inadequate allocation of resources and their poor management (Mbote & Akech 2011). This study sought to determine the state of technology in the magistrates' courts in Nairobi County and how technology would influence accessibility to justice in the county.

The computerization of courts is very popular in reforming the Judiciary as was noted by the former Chief Justice of India, Justice M.N. Venkatchalaiah (1993), who observed that with computerization, status of cases is available on the internet and anybody can know the latest position of his/her case including judgments delivered. Litigants can also get a copy of the judgment from the internet. He further says that the Supreme Court and almost all High Courts in India, have enquiry centers where the litigant and the public can know the status of cases online. Computerization of courts facilitates members of the public to have direct contact with the courts even without going to their lawyers. According to Venkatchalaiah (1993), technology with an integrated flexible policy of disposal of cases helps litigants to keep track of their cases and to retrieve relevant information. A sophisticated technology makes the Judiciary very efficient (Anderson, 2003). This study examined the extent to which the Judiciary has adopted technology as a strategy of increasing access to justice in the magistrates' courts in Nairobi.

According to MoCB (2005) report on Ethiopia there is almost no organized expertise regarding judicial reform and information technology. The report further says that technology and the work of judicial organizations are worlds apart. However, because of its capacity to disseminate legal information at low cost, information technology, and particularly the internet, is regarded as an important means to improve access to justice as access to information potentially reduces the opportunity for corruption. Anderson (2003) opines that all courts transactions could be computerized leading to 'e-courts'.

Language used in the courts is a characteristic of the Court that can be a barrier to access to justice particularly when justice seekers use a language different from that of the courts. The right to a fair trial in the international conventions usually includes the right to be informed of the accusation in a language the accused understands. This right is recognized by the Kenya Constitution. The obvious remedy is usually to provide for translation of documents and interpretation of the spoken word. The most common form of interpretation available is consecutive, where every sentence or groups of sentences are translated after they have been spoken. A more advanced form of interpretation is simultaneous interpretation, where what is spoken is translated (nearly) at the same time. Presumably, this form of translation can save time in a hearing. Presence of a dedicated technology to facilitate simultaneous interpretation with microphones and earphones do go a long way in achieving this goal. Interpretation technology is used in all the international courts. This study sought to understand whether the courts under study use technology to facilitate interpretation of proceedings in the courts

### **3.0 Research Methodology**

The study employed descriptive research design. A descriptive research design is whereby facts and characteristics concerning an individual, group or situation are described. A descriptive research is concerned with the discovery of ideas and insights by allowing the study to be flexible enough to provide opportunity for considering different aspects of a problem under study (Bryman & Bell, 2003).

### 3.1 Unit of Analysis

The unit of analysis in this study was the magistrates' courts in Nairobi. Unit of observation included representatives of the various justice and legal sector players that interact with the magistrates' courts in Nairobi. These included court users committee, the advocates, professional and police prosecutors, Law Society of Kenya, ICJ, FIDA, the office of Ombudsman, Kenya National Commission on Human Rights and parties to criminal, civil and children cases over the period of study. Respondents drawn from the parties to cases were arrived at by dividing the annual number of cases in the year 2013 by 12 to obtain the monthly average. The Chief Justice, Attorney General, the Director of Public Prosecutions and the Inspector General of Police were targeted as the key informants

### 3.2 Target Population and Sample

The study adopted purposive (Patton, 1990), stratified and snowballing sampling techniques to identify the respondents. The population of this study consisted of different stakeholders that interact with magistrates' courts within Nairobi County. Purposive sampling was used in identifying the four courts under study within Nairobi, namely, Milimani, Kibera, and Makadara law courts as well as Children's Court (Milimani). These four courts have been in operation for a longer time compared to others. They also present fair distribution through the county. Ten percent (10%) of the population under each stratum was studied according to Gay (1996) who postulates that 10 to 20 percent of the population is sufficient for reliable findings. A total sample of 177 was studied.

Table 1: Target Population and Sample

| Category                                  | Description              | Population | Sample | Percentage (%) |
|---|--------------------------|------------|--------|----------------|
| Parties in civil cases<br>( for a month)  | Primary Respondents      | 665        | 67     | 37.8           |
| Lawyers                                   |                          | 443        | 45     | 25.4           |
| Parties in criminal cases (for a month)   |                          | 395        | 40     | 22.5           |
| Police prosecutors                        |                          | 22         | 3      | 1.7            |
| Professional prosecutors                  |                          | 26         | 3      | 1.7            |
| Parties in Children's cases (for a month) |                          | 82         | 8      | 4.5            |
| Courts' Users Committee                   | Focused Group discussion | 28         | 5      | 3              |
| Chief Justice                             | Key informants           | 1          | 1      | 3.4            |
| Attorney General                          |                          | 1          | 1      |                |
| Inspector General                         |                          | 1          | 1      |                |
| LSK Chairman                              |                          | 1          | 1      |                |
| Kituo Cha Sheria                          |                          | 1          | 1      |                |
| FIDA                                      |                          | 1          | 1      |                |
| Total                                     |                          | 1667       | 177    | 100            |

### 3.3 Research Instruments

The study used a structured questionnaire, in-depth interview and focused group discussions to collect data.

### 3.4 Data Analysis

Both qualitative and quantitative methods were used in analyzing data. Quantitative data was summarized and presented using tables and expressed in percentages that enabled easy interpretation and illustration with regard to the study variables. Statistical Package for Social Scientist (SPSS) version 20 was used to analyze quantitative data. Qualitative analysis was conducted to supplement the quantitative analysis. Qualitative data was used in strengthening interpretation of quantitative data by corroborating it together.

### 4.0 Summary of Findings

The majority (% of the respondents were involved in court case for the first time. Qualitative data showed those who had won a case were likely to once again seek court services as compared to those who had lost. The study revealed it was easy to locate Magistrates' courts and that on average navigating magistrates' court buildings was not thought to be complicated. The court, the study established, did not have provision for people with physical disabilities and those who are visually impaired. Both the number of serving magistrates and prosecutors was found to be insufficient to deal with the ever increasing caseload, hence the backlog and delay. Adjournment was cited as a major contributing factor to case delays, as was the transfer policy. Litigants felt

they received low level of support from courts' staff but less than half of the respondents felt that members of staff were responsive and helpful. Qualitative data showed the magistrates displayed high temperament while in court. Complex legal procedures contributed to delays in determining cases, while small claims avenues were unknown, non-existent, or not fully used. The study revealed that a large population of court users found it difficult (71.4%) to get service from magistrates' courts, and attributed this to bureaucracy. However, the study established that there was no connection between magistrates' wearing wigs and robes and access to justice. In addition, majority of respondents (78.5%) disagreed that court jargon was easily understood and thought that it was an impediment to access to justice, even though interpretation services were provided in the courts. The number of interpreters was, however, found to be insufficient and in some instances less than accurate. Sign language facility was lacking in the courts. The study further revealed that while to 43% of respondents the adversarial system of litigation in which the winner takes it all was an impediment, the court proceedings were perceived to be complex thereby impeding access to these courts. In addition, the use of ICT was low and failure to embrace technology was seen as a major cause of delay and backlog of cases.

### Conclusion

The study found that court characteristics, such as the insufficient number of magistrates and prosecutors, adjournments, and lack of both small claims courts and courts for petty crimes to a large extent have contributed to low access to courts. In addition, the adversarial nature of court processes, low understanding of legal jargon, procedures and processes, low ICT usage, lack of provision of facilities for People With Disabilities (PWD) and the distance to be travelled to the nearest courts were found to be impediments. However, the study showed that locating magistrates' courts in Nairobi and navigating in them and the wearing robes and wigs were not impediments to access to justice. Regarding robes and wigs, the majority thought that they do not enhance the court's authority and respect.

### Recommendations

Bearing in mind court characteristics identified in this study as the cause of impediment to access to justice the study recommends following:

- i) More courts should be established, and the number of both magistrates and prosecutors increased. This is informed by revelation from the study that showed shortage of magistrates and prosecutors is an attribute that has led to an impediment to access to justice.
- ii) Judicial officers' transfer need to be more controlled and structured. This is based on the findings by the study that showed respondents' observations that magistrates' transfers were *ad hoc* leading to disruption of case proceedings. Interference with court proceedings was cited as an impediment to access to justice.
- iii) Specialized courts to deal with small civil claims should be established in the magistrates' courts.
- iv) ICT solutions, and the necessary training to make use of ICT solutions should be extended to magistrates' courts and their staffs
- v) Facilities and infrastructure for (PWD) --should be put up.
- vi) The Judiciary should train its translators for non speakers of the official court languages of English and Kiswahili

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