

***FROM THE HANDS TO THE EYE; THE ROLE OF KENYA SIGN LANGUAGE IN  
REALIZATION OF THE RIGHT TO ACCESS TO JUSTICE FOR THE DEAF  
COMMUNITY IN KENYA***

**UNIVERSITY OF NAIROBI**

**FACULTY OF LAW**

**MASTER OF LAWS**

**GPR 699: RESEARCH PROJECT**

**JISEVE KAREN KHANGU**

**G62/34263/2019**

**SUPERVISOR: DR. NANCY BARAZA**

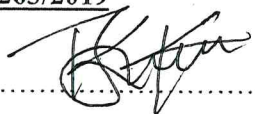
**DECLARATION**

I **KAREN KHANGU JISEVE** do hereby declare that this is my original work and that it has not been submitted for the award of the degree or any other academic credit in any other university.

**KAREN KHANGU JISEVE**

**G62/34263/2019**

Signed.....



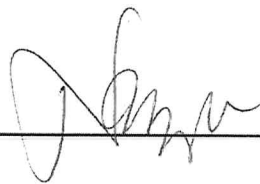
Date.....

28/03/2023

Supervisor: This thesis has been duly submitted with my approval as the University of Nairobi

**SUPERVISOR.DR. NANCY BARAZA**

**SIGNATURE**



**DATE**

28/3/2023

## **DEDICATION**

To the deaf community in Kenya who are in search of Justice

## **ACKNOWLEDGMENT**

I am extremely thankful to my supervisor Dr. Nancy Baraza, I am grateful for your tutorship, valuable suggestions, and motivating guidance. This research work would not be possible without hit stimulation inspiration and cooperation.

My family deserves endless gratitude. To my family, I give everything, including this.

## TABLE OF CASES

1. Cradle – Children Foundation (suing through the Trustee Geoffrey Maganya) v Nation Media Group Limited ex parte Cradle – Children Foundation (suing through Geoffrey Maganya) [2012]
2. Deaf Volleyball Association of Kenya v Kenya Sports Federation of the Deaf & 2 others [2018] eKLR Case 7 of 2018
3. Dry Associates Limited v Capital Markets Authority &anor Nairobi Petition No 358 of 2011 (Unreported)
4. Elridge -vs- British Columbia 1998 ILRC
5. Paul Pkiach Anupa & Another V Attorney General & Another [2012]
6. Pett v Greyhound Racing Association (1968) 2 All E.R 545, at 549

## **TABLE OF STATUTES**

### **Kenya Constitution and Statutes**

- 1) Civil Procedure Act (Cap. 21 Laws of Kenya).
- 2) Constitution of Kenya 2010
- 3) Criminal Procedure Code Cap 75 of the Laws of Kenya
- 4) Fair Administrative Action Act No. 4 Of 2015
- 5) Legal Aid Act, 2016
- 6) Persons with Disabilities Act 2003

### **South Africa constitution and statutes**

1. Constitution of the Republic of South Africa 1996
2. Equality and Prohibition of Unfair Discrimination Act 4 of 2000 (Equality Act)
3. Pan South African Language Board Act Of 1995
4. South African Schools Act of 1996

## **TABLE OF INTERNATIONAL INSTRUMENTS**

- 1) Convention for the Protection of Human Rights and Fundamental Freedoms
- 2) International Covenant on Civil and Political Rights 1976
- 3) Convention on the Rights of Persons with Disabilities
- 4) Universal Declaration of Human Rights (UDHR)
- 5) United Nations Convention on the Rights of Persons with Disabilities

## **ABSTRACT**

*Access to justice is a fundamental right, as well as a prerequisite for the protection of all other human rights. Access to justice is a broad concept, encompassing people's effective access to the formal and informal systems, procedures, information, and locations used in the administration of justice. Persons with disabilities often find themselves marginalized by society and by our justice systems. The study seeks to improve access to justice for persons living with disabilities in particular the deaf. The Deaf must not only be knowledgeable concerning relevant laws and regulations, but they must be able to interact effectively on a personal and professional level with persons who can make use of the vocal-auditory channel for communication.*

*The study examines how Kenya's sign language as an official language in Kenya can be used to support the right to access to justice and to provide suggestions regarding additional ways in which Kenya's sign language could be employed in our judicial system. The lack of information and communication on a country's normative framework or national laws makes it difficult for deaf peoples to access meaningful justice. This study appraises the legal and policy landscape concerning access to justice for the deaf in Kenya and especially the role of numerous individuals that participate in the justice system.*

**KEYWORDS:** *deaf, disability non-discrimination; access to justice; Kenya sign language, human rights, legal representation.*



## Table of Contents

DECLARATION .....	i
DEDICATION .....	ii
ACKNOWLEDGEMENT .....	iii
TABLE OF CASES .....	iv
CHAPTER ONE .....	1
<b>GENERAL INTRODUCTION.....</b>	<b>1</b>
1.0 Background.....	1
1.1 Statement of the Problem.....	4
1.2 Research Questions.....	5
1.3 The study objectives .....	5
<b>1.3.1 Main Objective .....</b>	<b>5</b>
<b>1.3.2 Specific Objectives .....</b>	<b>5</b>
1.4 Hypothesis.....	6
1.5 Theoretical framework.....	6
1.6 Literature review .....	9
<b>1.6.1 Overview .....</b>	<b>9</b>
<b>1.6.2 Literature on the definition of deaf and status of the deaf in the society .....</b>	<b>10</b>
<b>1.6.3 Literature on status of Kenya sign language .....</b>	<b>11</b>
<b>1.6.4 Access to Justice and language .....</b>	<b>13</b>
1.8 Methodology .....	18
<b>1.10 Limitations of the study. ....</b>	<b>19</b>
<b>1.10.1 Mitigating the Limitations.....</b>	<b>19</b>
CHAPTER TWO .....	21
THE CONCEPTUAL AND THEORETICAL UNDERPINNINGS OF ACCESS TO JUSTICE FOR PERSONS WITH DISABILITY .....	21
2.1 Introduction.....	21
<b>2.2 THEORETICAL UNDERPINNINGS .....</b>	<b>22</b>
<b>2.2.1 Access and the Social Construction Theory of Disability .....</b>	<b>22</b>
<b>2.2.2 Rawls' Theory of Justice .....</b>	<b>23</b>
<b>2.2.3 Utilitarianism.....</b>	<b>24</b>
<b>2.2.4 The egalitarian theory .....</b>	<b>26</b>
2.3 THE CONCEPTS OF ACCESS TO JUSTICE AND PERSONS WITH DISABILITIES .....	27
<b>2.3.1 Access to Justice paradox.....</b>	<b>27</b>

<b>2.3.2 The general exclusion of Persons with Disabilities</b> .....	<b>41</b>
2.5 Deaf community stigmatization and deaf culture .....	46
<b>2.5.1 Deaf culture and practices</b> .....	<b>48</b>
<b>2.5.2 Deaf challenges on access to Justice</b> .....	<b>49</b>
2.6 CONCLUSION.....	51
CHAPTER THREE .....	52
LEGAL AND INSTITUTIONAL FRAMEWORK OF ACCESS TO JUSTICE AND ITS INTERFACE WITH PERSONS WITH DISABILITIES IN KENYA.....	52
3.1 Introduction.....	52
3.2 DOMESTIC LAWS AND POLICIES.....	52
<b>3.2.1 The Constitutional Underpinning of the Right to Access to Justice in Kenya</b> .....	<b>52</b>
<b>3.2.2 Access to justice encapsulated under the Constitution of Kenya 2010</b> .....	<b>53</b>
3.3 CONCEPT OF ACCESS TO JUSTICE ENCAPSULATED IN OTHER STATUTORY PROVISIONS	56
<b>3.3.1 The Legal Aid Act, 2016</b> .....	<b>56</b>
<b>3.3.2 The Fair Administrative Action Act No. 4 Of 2015</b> .....	<b>56</b>
<b>3.3.3 The Civil Procedure Act (Cap. 21 Laws of Kenya)</b> .....	<b>57</b>
<b>3.3.4 Criminal Procedure Code Cap 75 of the Laws of Kenya</b> .....	<b>57</b>
<b>3.3.5 The Persons with Disabilities Act 2003</b> .....	<b>58</b>
<b>3.3.6 National Council for Persons with Disabilities (NCPWD) Strategic Plan 2018 - 2022</b> .....	<b>59</b>
3.4 ACCESS TO JUSTICE UNDER REGIONAL AND INTERNATIONAL CONVENTIONS .....	60
<b>3.4.1 Basic principles on Access to justice</b> .....	<b>60</b>
<b>3.4.2 The Universal Declaration of Human Rights (UDHR)</b> .....	<b>61</b>
<b>3.4.3 International Covenant on Civil and Political Rights 1976</b> .....	<b>61</b>
<b>3.4.4 The Convention on the Rights of Persons with Disabilities</b> .....	<b>62</b>
<b>3.4.5 Regional Instruments</b> .....	<b>64</b>
3.5 CONCLUSION.....	66
CHAPTER FOUR.....	67
4.0 BEST PRACTICES OF THE USE SIGN LANGUAGE AND ACCESS TO JUSTICE SOUTH AFRICAN AND AMERICAN LEGAL SYSTEMS .....	67
4.1 Introduction.....	67
4.2 Legal recognition of Deaf Peoples’ Rights and the use of Sign Language as an Official in South Africa	68
4.3 Legal recognition of deaf peoples’ rights and the use of American Sign Language (ASL) .....	73
4.4 CONCLUSION.....	76

CHAPTER FIVE .....	77
SUMMARY OF THE FINDINGS, RECOMMENDATIONS, AND CONCLUSIONS .....	77
5.1 Introduction.....	77
5.2 Summary Findings.....	77
5.3 RECOMMENDATIONS.....	80
<b>5.3.1 Recommendations to the Parliament .....</b>	<b>80</b>
<b>5.3.2 Recommendations to the Executive.....</b>	<b>80</b>
<b>5.3.3 Recommendation to Ministry of Education.....</b>	<b>81</b>
<b>5.3.4Recommendation to the Judiciary.....</b>	<b>82</b>
5.4 CONCLUSION.....	83
BIBLIOGRAPHY .....	85

## **CHAPTER ONE**

### **GENERAL INTRODUCTION**

#### **1.0 Background**

People with disabilities statistics have never been reliable, especially in developing nations, resulting in a strong reliance on estimations, resulting in a wide range of values being recorded. The World Health Organization (WHO) and the World Bank (WB) estimate that one billion or more people worldwide live with a disability (physical, mental, or any other type), emphasizing that this number is growing.<sup>1</sup>

About 4.6% of the Kenyan population has some form of disability. Person living with disability (PWDs) with hearing (51%), speech (55%), mental (54%) and self-care (55%) impairments were male. On the other hand, more females than males had visual (55%) and other (55%) forms of impairments.<sup>2</sup>

According to the World Health Organization (WHO), approximately 5% of the world's population suffers from hearing loss. Although 5% may appear to be a little percentage, it represents approximately 360 million people around the world.<sup>3</sup> According to the KNBS census report, around 14.1 percent of Kenya's population is deaf.<sup>4</sup>

---

<sup>1</sup> The World Health Organization, 'World report on disability' WHO/NMH/VIP/11.01 (World Health Organization 2011) <[https://www.who.int/disabilities/world\\_report/2011/report/en/](https://www.who.int/disabilities/world_report/2011/report/en/)> accessed on 13 November 2019

<sup>2</sup> National Coordinating Agency for Population and Development, 'Kenya National survey report on person with Disability Report' March 2008 <[D:\MYDOCU~1\NCAPD\PWDSUR~1\KNSP \(afri-can.org\)](D:\MYDOCU~1\NCAPD\PWDSUR~1\KNSP (afri-can.org))> accessed 16 June 2020

<sup>3</sup>Elena McPhillips , 'World Wide Hearing Loss: Stats from Around the World' <https://www.audicus.com/world-wide-hearing-loss-stats-from-around-the-world/> accessed 13 November 2019

<sup>4</sup> Stanley Wambua, 'Approaches Used To Measure Disability Through Censuses: Kenyan Experience'. PowerPoint Presentation (un.org) accessed 14 November 2019

The deaf community is perceived as the minority in society who cannot make use of the vocal-auditory channel for communication. Sign Language thus offers the deaf a communication alternative to the vocal-auditory channel that is inaccessible to them.<sup>5</sup>

For decades, deaf people in Kenya and the world at large have encountered considerable obstacles in terms of access to justice. This challenge is due to discrimination, information and communication barriers, lack of judicial officers training, lack of civic education, corruption, impunity, and poverty

Access to information by the deaf is through sign language, which is not a universal language because different countries have their national sign language. Thus we can talk of national sign languages such as Kenyan Sign Language (KSL). Language to the deaf has become an important topic internationally in recent years, and this has been especially true concerning human rights.<sup>6</sup>

The United Nations Convention on Rights of Persons with Disabilities (CRPD) provision on persons living with a disability has access to information through the provision of alternative means of communication including Braille, sign language, and plain language among others.<sup>7</sup>

Kenya ratified CRPD on 19<sup>th</sup> May 2008 and it subsequently becomes part of Kenya law under article 2(6)Kenya constitution.<sup>8</sup>

To promote inclusivity and the right to access to justice in society, The Kenya Constitution 2010 safeguards the rights of citizens with disabilities in Article 54 the Constitution is couched in broad

---

<sup>5</sup> George Jefwa Mweri, 'The Acquisition of Kenyan Sign Language (KSL) and Its Significance as a Mother Tongue and Medium of Instruction in Schools for the Deaf in Kenya' 16. The University of Nairobi Journal of Language and Linguistics, Vol. 5 (2016) <<https://kerd.ku.ac.ke/handle/123456789/1715>> accessed 26 November 2019

<sup>6</sup> Ibid

<sup>7</sup> UN General Assembly, 'Convention on the Rights of Persons with Disabilities : resolution / adopted by the General Assembly' 24 January 2007, A/RES/61/106 < <https://www.refworld.org/docid/45f973632.html> > accessed 20 November 2021

<sup>8</sup> The Constitution of Kenya 2010, Article 2(6)

terms as it is titled 'Persons with disabilities". Additionally, on National, official and other languages Article 7 (3b) of the Kenya Constitution provides that the State shall promote the development and use of indigenous languages, the Kenyan Sign Language, Braille, and other communication formats accessible to people with disabilities. Kenyan Sign Language (KSL) is now recognized and elevated to the status of English and Kiswahili as an official and national language in Kenya as a medium of communication for the deaf in society.<sup>9</sup>

The rights of deaf people in regards to access to justice have been protected in Kenya through various legal documents including but not limited to the Persons with Disabilities Act 2003, Persons with Disabilities (Amendment) Bill 2019, the Kenya sign language Bill 2019, and the Constitution of Kenya 2010.

Despite the recognition of Keya sign language and the right to equality, most deaf people in the community have never been to school and are thus more or less illiterate. It has frequently been observed that sign language is repressed in many countries and its use is not permitted in education. The consequence is that Deaf people are not aware of the rights they have and live as a highly marginalized group. Little is known about their lives because without information and communication the right to access justice, their cognitive development is severely delayed and they have little means to communicate.<sup>10</sup>

---

<sup>9</sup> The Constitution of Kenya 2010, Article 7(3b)

<sup>10</sup> Mweri (n 5).

## **1.1 Statement of the Problem**

Although Kenya Sign Language is an official language in Kenya there are no Kenya Sign Language interpreters in Courts and Police stations which Hinders access to justice to the deaf accused person and deaf litigants. This raises a serious question on the efficacy of the legislative framework and legal principles that protect deaf litigants whose main aid of communication is Kenya sign Language.

Kenya is a multilingual society with most Kenyans speaking at least 3 languages, Mother tongue (, English and Kiswahili.<sup>11</sup> It is important to note at this point that Kenya sign Language like any other Sing Language is a fully blown lan-guage in its right, complete with its own rules of grammar. More importantly, no signlanguage is based on any spoken language.<sup>12</sup> There is a lack of clarity that Kenya sign language is not linked to any speken language by court officers of the court, the prosecutors, and the police hinders acces to justice to the deaf community since their medium of communication is Kenya sign language which is recognized as one of the official languages by the constitution. Many are the times deaf will face challenges in finding sign language interpreters in court who understand both the law and Kenya's sign language. The study, therefore, investigates the extent to which the legislative framework and legal principles protect

---

<sup>11</sup> Mweri, Jefwa. (2014). Diversity in education: Kenyan sign language as a medium of instruction in schools for the deaf in Kenya. Multilingual Education. [https://www.researchgate.net/publication/270665414\\_Diversity\\_in\\_education\\_Kenyan\\_sign\\_language\\_as\\_a\\_medium\\_of\\_instruction\\_in\\_schools\\_for\\_the\\_deaf\\_in\\_Kenya](https://www.researchgate.net/publication/270665414_Diversity_in_education_Kenyan_sign_language_as_a_medium_of_instruction_in_schools_for_the_deaf_in_Kenya)

<sup>12</sup> ibid

the rights of deaf communities as the constitution of Kenya 2010 emphasizes the right to access to justice for all persons, including persons living with disabilities.

### **1.2 Research Questions.**

To achieve the objective of the study, the study responds to the following questions:

1. What are the conceptual, theoretical underpinnings for access to justice for persons living with a disability?
2. What are the Policy, Legislative and institutional frameworks for access to justice for persons with disabilities and the deaf communities in Kenya?
3. What are the best practices of Sign language and access Justice?
4. What are the appropriate legislative, policy, and administrative measures to be employed by the Judiciary to alleviate the problem of access to justice for the deaf communities in Kenya?

### **1.3 The study objectives**

The overall and specific objectives of this study are as follows:

#### **1.3.1 Main Objective**

The main objective of this study is to examine the role of sign language in the realisation of access to justice for deaf communities in Kenya.

#### **1.3.2 Specific Objectives**

The study:

1. To examine and enhance the general understanding of the conceptual, theoretical underpinnings of access to justice for persons with disabilities in an ideal judicial system



2. To discuss a legislative and institutional framework for access to justice for persons with disabilities in Kenya and the deaf community
3. To evaluate best practices of Sign language and access Justice
4. To offer reforms and recommendations on the access to justice to the deaf communities in Kenya.

#### **1.4 Hypothesis**

The study will be based on the following hypothesis;

- a) Despite the constitutional, statutory, and administrative mechanisms to the use of Kenya sign language as an official language, most of the court users are not acquaintance with the basics of Kenya sign language.
- b) The legislative and administrative measures to address the problem of the use of Kenya sign language are premised on a system of equality, economy, proportionality, expedition, and stakeholders' inclusivity which are fundamental to the realization of the right to access justice.

#### **1.5 Theoretical framework**

The plight of disabled people has already raised several legal issues that need to be investigated. As a result, a great deal of scholarly research has arisen, which has sparked policy development as well as public debate. Political philosopher's and theorists' work stands out in the literature. Many people believe that persons with disabilities should be treated equally. The theoretical framework examines both procedural and substantive legal tenets of access to justice in this paper.

The study Mainly relies on **John Rawls" theory of procedural justice.**

The study applies John Rawls' theory of procedural justice.<sup>13</sup> The theory is relevant to this study as it discusses the concepts of fairness, equal opportunities, and liberties. Procedural technicalities are amongst several factors that hinder access to justice in formal courts. According to Rawls, justice is the first value of social institutions, as truth is of systems of thought.<sup>14</sup>

Rawls defines Equal Rights as each person is to be granted an equal right to the most extensive basic liberty compatible with a similar liberty for everyone else.<sup>15</sup>

Rawls argues that formal justice is a kind of minimal justice that is secured whenever like cases are treated alike. Since it requires only this, it results whenever rules or procedures are consistently followed and impartially applied. The idea of *pure Procedural Justice* also involves the idea that, in some cases, following rules or procedures renders an outcome just. However, He thinks it clear that the two ideas are supposed to be distinct.<sup>16</sup>

Procedural technicalities are amongst several factors that hinder access to justice in formal courts. This may, for example, occur when an advocate exploits the deaf because of a lack of sign language interpreters in court hence enrich his or her selfish interests. The question of procedural fairness is a natural justice precept that is integral in the administration of justice. It, therefore, includes, inter alia, the right to legal representation, absence of procedural technicalities, due process, impartiality in decision-making, the right of being heard, and giving reasons for a decision. Court procedures are often complex to understand for the deaf. Yet, they are expected to participate in the proceedings. This leads to unfair decisions as the procedure fails to address the concerns of the deaf participants in the dispute resolution process. Based on procedural justice theory, this study

---

<sup>13</sup> John Rawls, *A Theory of Justice* (Rev edn, Harvard University Press, 1971)

<sup>14</sup> *ibid*

<sup>15</sup> Rawls (n11)

<sup>16</sup> Nelson, W, 'The Very Idea of Pure Procedural Justice. Ethics' (1980) Vol. 90, No. 4 The University of Chicago Press <[www.jstor.org/stable/2380450](http://www.jstor.org/stable/2380450)> accessed 25 November 2020

argues that procedural fairness can only be ensured if the deaf people are well represented by advocates who can understand sign language and the law, court proceedings, and presentation of law and fact to effectively articulate their issues.

This study also employs the egalitarian theory by John Rawls that states social and economic inequalities are to be arranged so that those who are attached to offices must be open to all under principles of fair equality of opportunity. Equality in its prescriptive usage has a close connection with morality and justice in general and distributive justice in particular.<sup>17</sup>

Throughout history, people and emancipatory movements use the language of justice to pillory certain inequalities. But what exactly is the connection between equality and justice, i.e., what kind of role does equality play in a theory of justice? Egalitarianism theory argues that people should get the same or be treated as equals and relate to equals. Egalitarians explain that all humans and persons are equal in fundamental worth or status.<sup>18</sup> Egalitarian doctrines tend to rest on a background idea that all human persons are equal in fundamental worth or moral status.

The Lockean rights approach is so named because an early prominent exponent of the doctrine was John Locke (Locke 1690). The Lockean view is that every person has equal basic moral rights. He argues that all persons have an equal right to use resources taking turns if there is crowding.<sup>19</sup>

Karl Marx on Equal Rights supports the egalitarian theory, by urging the elimination of inequalities established by the capitalist market economy. Marx argues that in the first phase of communist

---

<sup>17</sup> *ibid*

<sup>18</sup> Pojman, Louis, 'Theories of Equality: A Critical Analysis' (1995) Volume 23, No. 2 Behavior and Philosophy <[www.jstor.org/stable/27759323](http://www.jstor.org/stable/27759323)> accessed 29 November 2020

<sup>19</sup> Stanford Encyclopedia of Philosophy, 'Egalitarianism' <<https://plato.stanford.edu/entries/egalitarianism/>> accessed 29 November 2020

society, there will be a distribution of goods according to the norm of each according to his need. This norm is regarded as defining equal rights.<sup>20</sup>

The two theories are relevant to the current study to the extent that access to justice is not only a fundamental right captured under article 48 of the Constitution of Kenya 2010 but also a principle in the dispensation of justice.<sup>21</sup> The Constitution of Kenya 2010 in article 27 extensively provides for the right of equality and freedom from discrimination. It states explicitly that every person is equal before the law and has the right to equal benefits of the law. Persons living with disabilities are appreciated in article 54 of the Constitution and they should be treated with dignity and respect and be addressed and referred to in a manner that is not demeaning.<sup>22</sup>

## **1.6 Literature review**

### **1.6.1 Overview**

The literature review examines the available literature on the status of the deaf population and their access to justice globally and more specifically in Kenya. It looks at what other researchers have established in regards to providing sign language during the arrest, prosecution of deaf cases, or any other proceeding in court, the effectiveness, and sustainability of sign language interpreters as well as what other research has been identified that needs to be considered. An analysis of the information gathered reveals the gaps that need attention and shows how the existing literature ties in with the objectives of the study.

---

<sup>20</sup> Gerald Allan Cohen, *'Karl Marx's Theory of History: A Defence'* (Clarendon Press, 2000)

<sup>21</sup> The Constitution of Kenya 2010, Article 159

<sup>22</sup> The Constitution of Kenya 2010, Article 159

## **1.6.2 Literature on the definition of deaf and status of the deaf in the society**

Deaf means we're unable to hear, either completely or partly.<sup>23</sup> There are different types of deafness distinguished by different communication abilities. Congenital deafness is a loss of hearing present at birth or loss that may develop later but is due to genetic causes or other influences that affected the foetus while it was in the womb.<sup>24</sup> This hearing loss can be caused by hereditary and non-hereditary genetic factors or by certain complications during pregnancy and childbirth, including maternal rubella, syphilis, or certain other infections during pregnancy, low birth weight, or birth asphyxia (a lack of oxygen at the time of birth).<sup>25</sup>

Acquired deafness may or may not be genetic. For example, it may be a manifestation of a delayed-onset form of genetic deafness. On the other hand, acquired deafness may be due to damage to the ear from noise.<sup>26</sup> Deaf people as people with hearing loss who do not benefit from any linguistic information that is transmitted through sound and can only use sign language as their primary method of communication. Sign Language is also used for communication by hearing people who have learned it. Interactions between the hearing and the deaf communities rarely run smoothly. There is a good deal of mutual distrust between the two groups making it difficult for even well-meaning hearing persons to successfully penetrate the deaf community as agents of positive change.<sup>27</sup>

---

<sup>23</sup> Cambridge dictionary, 'deaf' < <https://dictionary.cambridge.org/dictionary/english/deaf> > accessed on 26 November 2019

<sup>24</sup> Medicinenet, 'Medical Definition of Congenital deafness' < <https://www.medicinenet.com/script/main/art.asp?articlekey=10766> > accessed on 26/11/2019

<sup>25</sup> World health organization, 'Deafness and hearing loss' < <https://www.who.int/news-room/factsheets/detail/deafness-and-hearing-loss> > accessed on 26 November 2019

<sup>26</sup> Ibid

<sup>27</sup> Viehmann, Krystel, 'Deaf Culture in Mombasa and HIV/AIDS Education' (2005) *Independent Study Project (ISP) Collection* 486 < [https://digitalcollections.sit.edu/isp\\_collection/486](https://digitalcollections.sit.edu/isp_collection/486) > accessed 26 November 2019

**Jefwa Mweri** in his paper discusses deaf culture. The deaf also constitutes a co-culture within the dominant culture of the hearing and like all co-cultures, they form a community (within their respective nations) partly by exclusion (from the hearing culture) and partly by congregating together.<sup>28</sup>

### **1.6.3 Literature on the status of Kenya's sign language**

Sign language is any of various formal languages employing a system of hand gestures and their placement relative to the upper body, facial expressions, body postures, and fingerspelling, especially for communication by and with deaf people.<sup>29</sup>

**Jefwa Mweri** also argues sign language is not universal since each country has its own. Thus we can talk of national sign languages such as Kenyan Sign Language (KSL), British Sign Language (BSL), Ugandan Sign Language (USL), etc. The existence of national sign languages is because deaf people within a country share more or less the same experiences and thus the process of abstraction (i.e. giving meanings to signs) among them tends to be similar.<sup>30</sup>

**Joyce Ngugi** a Kenyan scholar showed interest in sign language. She contends that Sign language rights awareness is missing. Sign language is the first and often the only language of the deaf, yet it is not widespread in the hearing community; with the Deaf population often sparsely distributed in any population. Socially, sign language is shrouded in taboo in most African societies, with four

---

<sup>28</sup> George Jefwa Mweri, 'The acquisition of Kenyan sign language (Ksl) and its significance as a mother tongue and medium of instruction in schools for the deaf in Kenya' (2016) <[http://erepository.uonbi.ac.ke/bitstream/handle/11295/96019/Mweri\\_The%20acquisition](http://erepository.uonbi.ac.ke/bitstream/handle/11295/96019/Mweri_The%20acquisition)> accessed 26 November 2019

<sup>29</sup> Merriam Webster, 'Sign language' <<https://www.merriam-webster.com/dictionary/sign%20language>> accessed 26 November 2019

<sup>30</sup> Ibid 4

stigma factors of the Social Impact Scale arising as related to language barriers, namely: social rejection, financial insecurity, internalized shame, and social isolation.<sup>31</sup>

The Kenyan Deaf community consists of individuals who come from ALL the 42 tribes of Kenya and are united by a common language KSL, a shared culture, tradition, and history; KSL is fundamental to their self-esteem and social wellbeing. Deaf Kenyans regardless of tribe, gender, or religion use KSL as a medium of communication and for the official transaction of business, school, religious activities, and social interactions.

The Constitution of Kenya 2010 in Article 7 recognizes K.S.L as the National language. It provides that the official languages of the Republic are Kiswahili and English. It further provides the State shall respect, promote, and protect the diversity of language of the people of Kenya. The State shall promote the development and use of Kenyan Sign Language (KSL), Braille, and other appropriate modes of communication for persons with disabilities. KSL is recognized as the official language of parliament in Article 120. The Constitution states that every person is equal before the law and must enjoy equal protection before the law.<sup>32</sup>

Despite the Constitution recognizing K.S.L as a national official language communication barrier that exists between the deaf and the hearing helps to separate this unique population from the majority. This has unfortunately meant that the majority of the deaf population missed the wealth of communications over and has led to discrimination hence hindering access to justice.

---

<sup>31</sup> Joyce W. Ngugi, 'Barriers to Mental Health Access of Deaf Adults in Kenya: A Review' (2018) Vol. 01, Issue 03 African Journal of Clinical Psychology

<<https://www.daystar.ac.ke/ajcp/downloads/articles/Ngugi%20and%20Mwiti.pdf>> accessed on 4 December 2019

<sup>32</sup> Ibid 25

#### **1.6.4 Access to Justice and language**

Communication is arguably the most important factor that may hinder deaf persons to obtain adequate, timely, and justice. The concept of access to justice invokes two inseparable elements concept of access and the concept of justice. The first emphasizes the “access” half of the equation and focuses on the availability of resources to help individuals resolve disputes. The second steam emphasizes “justice” and argues that the justice we seek consists of more than exposure to dispute resolution services.<sup>33</sup>

The call for “access to justice” invokes notions of equality, equity, fairness, universality, and justice.<sup>34</sup> In the absence of access to justice, people are unable to have their voices heard, exercise their rights, challenge discrimination, or hold decision-makers accountable.

The UN and rule of Law suggest that access to justice is a basic principle of the rule of law and delivery of justice should be impartial and non-discriminatory. In the Declaration of the High-Level Meeting on the Rule of Law, Member States highlighted the independence of the judicial system, together with its impartiality and integrity, as an essential prerequisite for upholding the rule of law and ensuring that there is no discrimination in the administration of justice.<sup>35</sup>

---

<sup>33</sup> Roderick Macdonald, ‘Justice Is a Noun, But Access Isn’t a Verb’ in ‘Expanding Horizons: Rethinking Access to Justice in Canada’ [http://www.justice.gc.ca/eng/rp-pr/csj-sjc/jsp-sjp/op00\\_2-po00\\_2/b4.html#sec15](http://www.justice.gc.ca/eng/rp-pr/csj-sjc/jsp-sjp/op00_2-po00_2/b4.html#sec15) accessed 29 November 2019

<sup>34</sup> Jerry McHale, ‘What does access to justice mean?’ (Uvic 2016) <<http://www.uvicace.com/blog/2016/2/2/what-does-access-to-justice-mean>> accessed 29 November 2011

<sup>35</sup> UN and the Rule of Law, ‘Access to justice’ < <https://www.un.org/ruleoflaw/thematic-areas/access-to-justice-and-rule-of-law-institutions/access-to-justice/> > accessed 29 November 2011



The UN through United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems establishes minimum standards for the right to legal aid in criminal justice systems and provides practical guidance on how to ensure access to effective criminal legal aid services.<sup>36</sup>

Under the CRPD the States Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others. This includes through the provision of procedural and age-appropriate accommodations, to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages.<sup>37</sup> To ensure effective justice, these international instruments obliged states to measures that ensure access to justice for all without discrimination.

The CRPD at article 2 defines communication to include language (including sign language), display of text, Braille, tactile communication, large print, accessible multimedia as well as written, audio, plain language, human-reader and augmentative and alternative modes, means, and formats of communication, including accessible information and communication technology. Other communicational supports include assistive devices for hard of hearing people an active and patient listening style to converse with people with psychosocial disabilities<sup>38</sup>

The courts function acceptably only when judges, witnesses, parties, and other people in the courtroom understand each other. When participants have limited proficiency in English, courts may need to provide interpreters, translate documents, and offer other language assistance.<sup>39</sup>

---

<sup>36</sup> United Nations Office on Drugs and Crime, 'United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems' <https://www.justiceinitiative.org/publications/un-guidelines-and-principles-access-legal-aid-criminal-justice-systems> accessed 29 November 2011

<sup>37</sup> UN General Assembly, *Convention on the Rights of Persons with Disabilities : resolution / adopted by the General Assembly*, 24 January 2007, A/RES/61/106 , <https://www.refworld.org/docid/45f973632.html> > accessed 10 November 2020

<sup>38</sup> *ibid*

<sup>39</sup> The national center for access to justice <https://ncforaj.org/language-access-project/> accessed on 29 November 2019

Although barrier-free communication is a basic human right, sign language interpreters are often inadequate and expensive, with this communication support perceived as cumbersome and inconvenient rather than a fundamental necessity.

**Jill Cottrell Ghai** argues that no one may be discriminated against based on their language. Language is used for communication. If a person encounters a public office and chooses to speak in Croatian or Aramaic but no one can or chooses to respond, is that person able to use that language? The problem is enhanced by the constitutional obligation on the part of the state not only to respect but also to promote fulfill rights, and by the strict limits on the possibility of restricting rights contained in Article 24.<sup>40</sup>

**Luiz** contends that the deaf have a right to an interpreter, appointed for the proceeding itself. In the case of an indigent party, they have a right to have a "qualified interpreter/translator" appointed and paid for "to assist in communication with counsel in all phases of the preparation and presentation of the case."<sup>41</sup>

**Kristi Bleyer** confirms that our judicial systems place the greatest weight on the exact words the witness speaks. Thus some have questioned the accuracy of sign language interpreters.<sup>42</sup>

The authors argue that access to justice is based on the interaction between these pillars and with collective rights, such as the right to access to justice; the right to recognition; the right to

---

<sup>40</sup> Jill Cottrell Ghai, 'Pluralism, Language and the Constitution' (2017) Katiba Institute <<http://www.katibainstitute.org/wp-content/uploads/2017/09/Language-and-the-Constitution.pdf>> accessed 4 December 2019

<sup>41</sup> Luz M Molina, 'Language Access to Louisiana Courts: A Failure to Provide Fundamental Access to Justice' (2008) Louisiana Bar Journal Vol. 61, No. 6, 10

<sup>42</sup> Kristi Bleyer, Kathryn Shane McCarty and Erica Wood, 'Access to Jury Service for Persons with Disabilities' (1995) Mental & Physical Disability Law Reporter Vol.19 No. 2, 249

development; the right to participation; the right to non-discrimination, and substantive equality; and the right to information.

Besides, **Miller, Katrina** argues lack of sign language interpreters during the arrest procedures and in the courtrooms, the suspects are deemed not being able to be accommodated and later deemed incompetent by the court. He explains further that due to varying education levels and linguistic diversity in the deaf population, spoken language, note writing, and efforts of well-meaning family members, police signers do not satisfy the deaf individual requirement. This is interesting as cases are appealed the courts frequently explore if the suspect could understand “well enough”.<sup>43</sup> **Joyce W. Ngugi** further explains that a lack of trained professionals often leads to poor access to services for the deaf. For example when Doctors do not understand sign language inadvertently leads to misdiagnosis, inaccurate treatment, hospitalization, and aftercare.<sup>44</sup>

According to the authors, deaf people have frequently resorted to various services, but, despite affirming their petitions, many States have blatantly refused to include sign language. This has also been the trend with decisions pronounced by regional human rights institutions, including the African Commission on Human and Peoples’ Rights. A notable example is the case of *Elridge - vs- British Columbia 1998 ILRC* wherein it was held that the failure to provide sign language where it is necessary for effective communication constitutes a prima facie violation.<sup>45</sup>

A Kenyan court in *Cradle – Children Foundation (suing through the Trustee Geoffrey Maganya) v Nation Media Group Limited ex parte Cradle – Children Foundation (suing through Geoffrey Maganya) [eKLR2012]* the court held that the Respondent to provide a sign

---

<sup>43</sup> Miller, Katrina R ‘Access to Sign Language Interpreters in the Criminal Justice System’ (2001) American Annals of the Deaf Volume 146, No. 4, 328 <http://www.jstor.org/stable/44390112> accessed 19 February 2020

<sup>44</sup> Ibid 24

<sup>45</sup> *Elridge v British Columbia* (1998) ILRC

language inset or sub-titles in all its newscasts, educational and all programmers of national importance.<sup>46</sup>

### **1.7 Justification of the study**

Persons with a disability face challenges with access to justice. Further, the lack of meaningful representation and participation makes it very difficult for deaf people to advocate for their cause and determine their future. Ordinarily, where a party is unrepresented in adjudication, approximate injustice is likely to be manifested in the place of justice.<sup>47</sup> The study addressed the issue of not just the inclusion of the Kenya sign language as an aid of access to justice but significant inclusion that brings about access to justice for the deaf community.

This research prompted the need to keenly look into why Kenyan courts have not yet adopted the KSL interpretation of programs as required by law. The fact is that most both virtual and physical courts do not have sign language interpreters and are still operating normally during court proceedings involving the deaf. There are very few interpreters of sign language and this has resulted in a huge backlog of cases involving the deaf hence infringing upon their right to speedy justice.

Thus, where the deaf are unrepresented in court or in instances that would require the services of an advocate who understands Kenya sign Language, the basic principles upon which the theory is based are negated. The net effect is that approximate injustice is manifested in the place of justice as reiterated by *Lord Justice Denning, in Pett v Greyhound Racing Association, he says;*

---

<sup>46</sup> Judicial Review Miscellaneous Application 217 of 2011

<sup>47</sup> Bear, Leroy Little, *The Quest for Justice: Aboriginal Peoples and Aboriginal Rights* (Menno Boldt and J. Anthony Long (eds) (University of Toronto Press, 1985)

“It is not every man who can defend himself on his own. He cannot bring out the points in his favor or the weakness in the other side. He may be tongue-tied, nervous, confused, or wanting in intelligence. He cannot examine or cross-examine witnesses. We see it every day. A magistrate says to a man: “you can ask any questions you like”; whereupon the man immediately starts to make a speech. If justice is to be done, he ought to have the help of someone to speak for him; and who better than a lawyer who has been trained for the task?”<sup>48</sup>

The findings herein are expected to assist in the development of a legal framework on how to handle cases involving infringements of the rights of deaf people. Further, it is hoped that the findings generated in this study will contribute additional knowledge for academic and research institutions working on the right to legal representation of the deaf communities in Kenya. It may also provide useful information to policymakers who are keen on enhancing access to justice through legal representation of the deaf community in Kenya, particularly those tasked with setting the legislative agenda for the implementation of the Constitution on matters related to access to justice for persons living with a disability.

## **1.8 Methodology**

The study is based on a desktop review of various legal instruments and literature materials on one hand and a qualitative data collection method on the other hand. The various legal instrument includes the constitution, relevant instrument legal instruments touching on access to justice for persons with disability regional and international legal instruments having a bearing on the right to access justice. The legal instrument and literature materials shall be sourced from law reports

---

<sup>48</sup> *Pett v Greyhound Racing Association* [1968] 2 All E.R 545, at 549.

and major academic research and publication on access to justice. The study concludes by posing recommendations for the law in action in full realization of Kenya Sign Language as an official language in the realization of the Constitution of Kenya 2010.

### **1.10 Limitations of the study.**

Certain limitations were encountered during the research period including;

- a) Because the Kenya sign language is not well-versed by most court users, it was difficult to quickly get accurate data on the number of deaf cases filed or handled by our courts in Kenya
- b) Lack of co-operation and/or hostile reception from the interviewees posed another challenge as well as the receipt of abstract answers.
- c) Due to COVID-19 Pandemic, access to the Milimani law court, Court users, and deaf people were difficult hence limited data was collected.

#### **1.10.1 Mitigating the Limitations.**

Measures used to mitigate the limitations were;

- a) Request for an official letter from the University authorizing the research. This enabled me to get an official appointment with the intended respondents.
- b) Working as per the scheduled timetable to avoid delays.
- c) Booking of appointments to all interviewees i.e court users and deaf to ensure enough data is collected and to comply with Covid-19 MOH measures.

## **1.11 Chapter outline**

The study is divided into five chapters.

**Chapter one** provides an overview of the study, which includes the background, problem statement, objectives of the study, theoretical framework, and justification.

**Chapter two** provides an in-depth review of literature, identifying the Historical, philosophical, conceptual, and theoretical underpinnings on Access to Justice for persons with disabilities and identifying the gaps. This also includes the stigmatization and challenges facing the deaf Communities in Kenya

**Chapter three** discusses the legal framework and institutional framework on access to justice for persons with disabilities with a major focus on the deaf community in Kenya.

**Chapter four** discusses countries with best practice sign language in their legal system in South Africa in comparison with Kenya.

**Chapter Five** provides a summary of the study, study findings, conclusion, and recommendations.

## **CHAPTER TWO**

### **THE CONCEPTUAL AND THEORETICAL UNDERPINNINGS OF ACCESS TO JUSTICE FOR PERSONS WITH DISABILITY**

#### **2.1 Introduction**

Chapter one reveals that the status of persons living with disabilities in particular the deaf raises legal questions and concerns both locally and internationally. On a case-by-case basis, this chapter provides an analysis of the concept of persons with disabilities, with a particular emphasis on the deaf community in Kenya, while highlighting various theories that are fundamentally based on their recognition and, more importantly, enforcement of their rights.

Furthermore, it rationalizes the relevance and significance of Kenya's sign language and its role in access to justice for the deaf community in the aforementioned context. This chapter also includes a literature review to capture various scholarly perspectives on access to justice and the overall exclusion of people with disabilities. The Persons with Disabilities Narrative, as it will be formed, demonstrates a wide range of concerns that impact Kenyan deaf people, prompting legal action. Despite the well-publicized decisions in numerous cases, enforcement has shown genuine and apparent problems that will be discussed.

People with impairments, such as the deaf, blind, and mentally ill, have been involved in cases that have spanned geographical, national, and international legal authorities. To discover this, the courts, as well as many advocates, legal experts, and practitioners, found themselves delving into the traditional practice of advocacy and scrutinizing applicable laws and facts in this familiar yet strange territory. A synopsis of the deaf case reveals that the deaf volleyball association of Kenya



sought to be to join the Kenya Sports Federation of the Deaf they were denied even though they were part of the deaf community.<sup>49</sup> Accordingly, they sought legal redress in the Kenyan courts. such cases led to intervention by the Kenya Human right commission to promote the full realization of all human rights and fundamental freedoms for persons with disabilities, without discrimination of any kind based on disability. This is within the legal purview, relating to the recognition and protection of deaf community rights which is viewed as a big **win**.

## **2.2 THEORETICAL UNDERPINNINGS**

### **2.2.1 Access and the Social Construction Theory of Disability**

The social approach, or the social construction approach, that is dominant among disability studies scholars and disability rights advocates, offers an alternative vision that views disabled people as equal members of society and disability as a product of social construction and social interaction.<sup>50</sup> This view is often associated with the early “social model” of disability, that was originated in the United Kingdom but has since developed and become more sophisticated.<sup>51</sup> The social construction approach rejects the view of disability as an inherent difference but rather views disability as a contextual and relational phenomenon resulting from the interaction between the person and the environment.<sup>52</sup>

At the same time, it explores the embodied experience of disability, of life in a body that constantly challenges social expectations as well as its limitations.<sup>53</sup> This way, lack of access becomes a matter of social exclusion and social responsibility a form of social disablement. Therefore, society should acknowledge its part in the historical exclusion of disabled people and should act to fix that

---

<sup>49</sup> Deaf Volleyball Association of Kenya v Kenya Sports Federation of the Deaf & 2 others [2018] eKLR

<sup>50</sup> Sagit Mor, ‘ With Access And Justice For All’ (2010, Cardozo Law Review)

<http://cardozolawreview.com/wpcontent/uploads/2018/08/MOR.39.2.pdf> accessed 17 September 2021

<sup>51</sup> *ibid*

<sup>52</sup> *ibid*

<sup>53</sup> *ibid*

injustice by restructuring its institutions and redesigning the public sphere. A social construction approach also mandates a positive understanding of disability through the prism of human diversity or human variation.<sup>54</sup>

### **2.2.2 Rawls' Theory of Justice**

Rawls' theory is oriented toward liberalism and forms the basis for what law enforcement, and the criminal justice system, should strive for in a pluralistic and liberal society. Borrowing from some concepts of social contract theory, Rawls envisions a society in which the principles of justice are founded in a social contract.<sup>55</sup> However, Rawls identifies problems with the social contract that do not allow fairness and equality to exist among members of society and therefore proposes a social contract that is negotiated behind a "veil of ignorance." Here the negotiating participants have no idea what their race, gender, education, health, sexual orientation, and other characteristics are so that the social contract is fair.<sup>56</sup> Ultimately, Rawls argues that the primary concern of justice is fairness, and within this paradigm, Rawls identifies two principles:<sup>57</sup>

#### ***First Principle***

- a) Each person is to have an equal right to the most extensive total system of equal basic liberties compatible with a similar system of liberty for all.

#### ***Second Principle***

- a) Social and economic inequalities are to be arranged so that they are both:

---

<sup>54</sup> Ibid

<sup>55</sup> Steve McCartney and Rick Parent, 'Ethics In Law Enforcement' <https://opentextbc.ca/ethicsinlawenforcement/chapter/rawls-theory-of-justice/> accessed on 20 September 2021

<sup>56</sup> Ibid

<sup>57</sup> Dan W. Brock, 'The Theory of Justice' 1971 Vol 40 Harvard University Press. Cambridge <https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=3767&context=uclrev> accessed on 20 September 2021

- i. to the greatest benefit of the least advantaged, consistent with the just savings principle, and
- ii. attached to offices and positions open to all under conditions of fair equality of opportunity.

The theory of justice may be divided into two main parts: (1) an interpretation of the initial situation and a formulation of the various principles available for choice there, and (2) an argument establishing which of these principles would be adopted.<sup>58</sup>

These principles should be adhered to, according to Rawls, to ensure that disadvantages are neutralized and everyone receives the same benefits of justice.<sup>59</sup>

These principles are taken as defining an ideally just and social order and a well-ordered society where everyone is presumed to act justly and to do his part in upholding institutions.<sup>60</sup>

Based on theory, fairness can only be ensured if the persons with a disability are well represented and treated equally without any discrimination.

### **2.2.3 Utilitarianism**

From the utilitarian perspective, since everyone counts as one and no one as more than one (Bentham), the interests of all should be treated equally without consideration of contents of interest or an individual's material situation. For utilitarianism, this means that all enlightened personal interests have to be fairly aggregated.

---

<sup>58</sup> *ibid*

<sup>59</sup> *ibid*

<sup>60</sup> Singer, Marcus G, 'Justice, Theory, and a Theory of Justice' (1977, *Philosophy of Science* Vol 44, no. 4) < <http://www.jstor.org/stable/186941> > accessed 15 November 2020

The utilitarian approach to social justice is the idea that the benefit of a great number of people is more important than the benefit of an individual. Jeremy Bentham, one of the first theorists of utilitarianism, designed a calculation for determining the value of pleasure versus pain; he posited that pleasure minus pain equal utility. Bentham also noted the importance of the number of people who benefit from an act versus those who consequently suffer. John Stuart Mill continued to develop the work of Jeremy Bentham; he faced much criticism for stating that happiness was the only desire of most people. Mill believed there should be less of a division among owners and workers. He believed that all people have the right to basic needs as well as social welfare. Critics of utilitarianism point out that it conflicts with common-sense approaches to morality. The common-sense approach to morality maintains that the suffering of all individuals is equally important, regardless of how many people may benefit from the sacrifice of one. Karl Marx criticized Bentham's version of utilitarianism by pointing out that different people desire different things from life.<sup>61</sup>

Dworkin criticised Bentham as inadequate and the hoped-for moral equality is flawed because all desires are taken up by the utilitarian calculation, including "selfish" and "external" preferences that are meant to all have equal weight, even when they diminish.<sup>62</sup>

According to John Rawls, Equal treatment has to consist of everyone being able to claim a fair portion, and not in all interests having the same weight in disposal over my portion. Utilitarians cannot admit any restrictions on interests based on morals or justice.<sup>63</sup> As long as utilitarian theory

---

<sup>61</sup> Sheskin, M., & Baumard, N, 'Switching away from utilitarianism: The limited role of utility calculations in moral judgment' (2016, *PLoS One*, 11 (8), 1) < Switching Away from Utilitarianism: The Limited Role of Utility Calculations in Moral Judgment (semanticscholar.org)> accessed 21 September 2021

<sup>62</sup> Stanford Encyclopedia of Philosophy, 'Equality' <https://plato.stanford.edu/entries/equality/#Util>> accessed 21 September 2021

<sup>63</sup> *ibid*

lacks a concept of justice and fair allocation, it fails in its goal of treating everyone as equals. As Rawls also famously argues, utilitarianism that involves neglecting the separateness of persons does not contain a proper interpretation of moral equality as equal respect for each individual.<sup>64</sup>

#### **2.2.4 The egalitarian theory**

The egalitarian approach to social justice holds that all people are equal and, therefore, deserve the same opportunities. Egalitarianism is the idea that no group of people is dominant or treated differently in ability or opportunity. Egalitarianism encompasses the causes of all specific groups who have fought for social justice; a true egalitarian will be supportive of equal rights for all rather than for some.<sup>65</sup>

An egalitarian favors equality of some sort, People should get the same, or be treated the same, or be treated as equals, in some respect. An alternative view expands on this last-mentioned option, People should be treated as equals, should treat one another as equals, should relate as equals, or enjoy equality of social status of some sort. Egalitarian doctrines tend to rest on a background idea that all human persons are equal in fundamental worth or moral status.<sup>66</sup>

One potential issue with this approach to social justice is that the focus is too dispersed, with the lack of focus leading to no progress toward equality. Criticisms of classic egalitarianism have branched off and relabeled themselves as more specific forms. New egalitarianism is an emerging view that raises the question of how different groups of people will be able to live together in the

---

<sup>64</sup> ibid

<sup>65</sup> ibid

<sup>66</sup> Stanford Encyclopedia of Philosophy, 'Equality' [https://plato.stanford.edu/entries/equality/ Util](https://plato.stanford.edu/entries/equality/Util) accessed 21 September 2021

same community. Luck egalitarianism points out that luck cannot be eliminated from the equation of behavior versus consequence.<sup>67</sup>

## **2.3 THE CONCEPTS OF ACCESS TO JUSTICE AND PERSONS WITH DISABILITIES**

### 2.3.1 Access to Justice paradox

Distributive justice or economic justice, which is concerned with fairness in sharing; procedural justice, which involves the notion of fairness in a sense of fair play; restorative justice (corrective justice), or retributive justice, according to Muigua and Kariuki. As a result, justice is a broad idea. Access to justice is a difficult idea to grasp. It could relate to a condition in which people in need of assistance find effective answers from justice systems that are cost-efficient, accessible, and would administer justice fairly, quickly, and without fear or favor.<sup>68</sup>

Access to justice is a vital component of any system of governance based on the rule of law because it ensures that everyone with a genuine legal claim, including the poor, the weak, and the disadvantaged in society, has access to justice.<sup>69</sup> This definition of access to justice is broader than the traditional one, which emphasizes everyone's right to access the courts and implies that this right is automatically protected as long as authorities do not interfere.<sup>70</sup> Since the 1970s, a larger understanding of access to justice has emerged, emphasizing its effectiveness. It asserts that authorities have a positive obligation to take steps to remove legal and factual barriers that prevent

---

<sup>67</sup> Otteson, J. R, 'The misuse of egalitarianism in society' (2017) Vol 22 Number 1, The Independent Review < The Misuse of Egalitarianism in Society: The Independent Review: The Independent Institute> accessed 24 November 2020

<sup>68</sup> Kariuki Muigua, 'Access to Justice: Promoting Court and Alternative Dispute Resolution Strategies' <<http://kmco.co.ke/wp-content/uploads/2018/08/Access-to-Justice.pdf>> accessed 6 May 2020

<sup>69</sup> Jürg Helbling, Walter Kälin & Prosper Nobirabo, 'Access to justice, impunity and legal pluralism in Kenya' (2015) DOI: 10.1080/07329113.2015.1080430, The Journal of Legal Pluralism and Unofficial Law <<http://dx.doi.org/10.1080/07329113.2015.1080430>> accessed on 6 May 2020

<sup>70</sup> Ibid

certain groups of people from accessing justice, such as people with disabilities.<sup>71</sup> Justice can thus mean different things for different people.

What then does the term access to justice mean? Access to justice as a concept is not easy to define. It may refer to a situation where people in need of help, find effective solutions available from justice systems that are accessible, affordable, comprehensible to ordinary people, and dispense justice fairly, speedily and without discrimination, fear, or favor and offer a greater role for alternative dispute resolution.<sup>72</sup> It could also refer to judicial and administrative remedies and procedures available to a person (natural or juristic) aggrieved or likely to be aggrieved by an issue. Further, it refers to a fair and equitable legal framework that protects human rights and ensures the delivery of justice.<sup>73</sup>

In the case of *Dry Associates Limited v Capital Markets Authority & Anor*, the court was of the view that access to justice includes the enshrinement of rights in the law; awareness of and understanding of the law; access to information; equality in the protection of rights; access to justice systems particularly the formal adjudicatory processes; availability of physical legal infrastructure; affordability of legal services; provision of a conducive environment within the judicial system; expeditious disposal of cases and enforcement of judicial decisions without delay.<sup>74</sup>

In Toolkit's study on effective access to justice for people with disabilities, there are several pillars that should work together to help the most vulnerable people secure their rights.<sup>75</sup> These pillars

---

<sup>71</sup> Ibid

<sup>72</sup> Ibid15

<sup>73</sup> Ibid

<sup>74</sup> *Dry Associates Limited V Capital Markets Authority & Another Interested Party Crown Berger (K) LTD* [2012] eKLR < Petition 328 of 2011 - Kenya Law > accessed 23 November 2020

<sup>75</sup> United Nations, 'Toolkit on disability for Africa' < mod\_3.indd (un.org)> accessed 23 November 2020

ensure that people with disabilities have equal access to justice as everyone else, including by providing specific accommodations to let them play a more effective role as direct and indirect participants.<sup>76</sup> It further prescribes positive measures to be taken for the fulfillment of the rights of persons with disabilities concerning justice.<sup>77</sup>

Even though persons with disabilities are recognized by the legal system on both a national and international level, access to justice remains elusive. Kenya ratified the UN Convention on the Rights of Persons with Disabilities (CRPD) on May 19, 2008, and it became legislation through Article 2(6) of Kenya's 2010 Constitution.<sup>78</sup> The State agreed to ensure and promote the full enjoyment of all human rights and fundamental freedoms for people with disabilities, without discrimination of any sort based on disability, as a result of this ratification.<sup>79</sup> However, Persons with disabilities continue to face a lot of challenges when seeking justice with key obstacles being inaccessibility and exercise of legal capacity.<sup>80</sup>

Despite improvements in legislative rights and social status for people with disabilities, there are still numerous places where services and accessibility fall short. According to the KNHCR, police officers have not received training on equality and diversity, including disability awareness, leaving them with limited capacities to respond more effectively to people with disabilities, particularly those with mental illnesses and intellectual disabilities.<sup>81</sup> During police investigations and interviews, it was noted that there are no relevant services to aid communication between the

---

<sup>76</sup> *ibid*

<sup>77</sup> *ibid*

<sup>78</sup> Kenya National Commission On Human Rights, *'From norm to practice a status report on implementation of the rights of persons with disabilities in Kenya'* (KNCHR, 2014) <[https://www.knchr.org/Portals/0/EcosocReports/From%20Norm%20to%20Practice\\_Status%20Report%20on%20the%20Implementation%20of%20the%20Rights%20of%20PWDs%20in%20Kenya.pdf?ver=2018-06-06-182335-003](https://www.knchr.org/Portals/0/EcosocReports/From%20Norm%20to%20Practice_Status%20Report%20on%20the%20Implementation%20of%20the%20Rights%20of%20PWDs%20in%20Kenya.pdf?ver=2018-06-06-182335-003)> accessed on 6 May 2020

<sup>79</sup> *ibid*

<sup>80</sup> *ibid*

<sup>81</sup> *ibid*



police and disabled adults with intellectual disabilities, hearing impairments, and mental health disorders.<sup>82</sup> The paper adds to the current research by focusing on Kenya's government's shortcomings, the issue of access to justice, and the constitutional acknowledgment of disabled people's rights. The focus of this study, however, is on deaf people and Kenya's sign language as a crucial tool for gaining access to justice.

When people with disabilities in Kenya and Africa have had their rights violated, they have regularly gone to court, but despite the fact that courts have upheld their petitions, several states have shamelessly failed to enforce the verdicts. A notable example is the Supreme Court of Canada in *Eldridge -vs- British Columbia 1998 ILRC*<sup>83</sup> wherein it was held that the failure to provide sign language where it is necessary for effective communication constitutes a *prima facie* violation. According to the respondent, the issue that arises in a case such as this is how the courts should approach a conflict between the rights of private citizens.

In Kenya, in the case of *Paul Pkiach Anupa & Another V Attorney General & Another [2012] Eklr*<sup>84</sup> the petitioner Anupa was employed as a Police Constable on 3<sup>rd</sup> March 2001 and assigned official duties at the Anti-Stock Theft Unit in Isiolo and later Gilgil. On the 22<sup>nd</sup> March 2003 while on official duty in Isiolo District, whilst traveling along the Isiolo-Marsabit road, he was involved in an accident. He sustained a spinal cord injury resulting in paralysis of his lower limbs. After the accident, he was sent for early retirement. Anupa testified that he was wrongly, unfairly, and illegally retired from his employment in the Police Force. He stated that he had the good mental ability as his upper body was normal and that he could do police work and light duties including

---

<sup>82</sup> *ibid*

<sup>83</sup> *Eldridge v British Columbia (Attorney General)*, [1997] 3 SCR 624 < *Eldridge v British Columbia (Attorney General)* | Case Brief Wiki | Fandom > accessed 13 March 2020

<sup>84</sup> *Paul Pkiach Anupa & Another V Attorney General & Another[2012]eKLR* < *Petition 93 of 2011 - Kenya Law* > accessed 13 March 2020

working with computers. He contended that there were other officers with disabilities serving in the police force and that he was improperly retired. It was held that the Commissioner's decision was not objective and reasonable. The court further observed that the 1<sup>st</sup> petitioner's rights protected under the *Persons with Disabilities Act* were infringed when he was retired before attainment of the statutory retirement age.<sup>85</sup>

Besides the high court in *Nation Media Group Limited v Cradle - The Children's Foundation Suing Through Geoffrey Maganya*<sup>86</sup> the respondent applied to compel the appellants to provide sign language provide a sign language inset or sub-titles in all newscasts, educational programs, and in all programs covering events of national significance under *section 39* of the Act by Legal Notice No. 182 of 2009. Despite the foregoing and a request from the respondent to comply with the same, the appellant failed to do so without reasonable cause. As a result, the appellant's actions not only violated the right of persons with hearing disabilities to equality and freedom from discrimination.

These cases contribute significantly to the current research, particularly in terms of the Kenyan government's shortcomings, the issue of access to justice, and the constitutional acknowledgment of disabled people's rights. As a result, the focus of this research is on Kenya's sign language as an official language and a tool for deaf people to access justice.

Concerning challenges, Larson argues that Persons with disabilities often find themselves marginalized by society and by our justice systems. According to Larson's countries around the world have different views regarding the need to protect individual rights, it is not surprising to

---

<sup>85</sup> Eklr Paul Pkiach Anupa & Another V Attorney General & Another[2012]eKLR < Petition 93 of 2011 - Kenya Law > accessed 13 March 2020

<sup>86</sup> Nation Media Group Limited v Cradle - The Children's Foundation Suing Through Geoffrey Maganya [2016] eKLR

see varying levels of protection for persons with disabilities as one moves around the globe.<sup>87</sup> Despite the fact that facilities and services are becoming more accessible to people with disabilities in general, substantial obstacles remain. To provide services to people with disabilities, qualified personnel and specialists are required. Without a strong advocate, certain services may never be available, and governments can occasionally function as those advocates.<sup>88</sup>

Also, disability law has not been consistently kept pace with technological advances. But there are exceptions in the USA. The Federal Communications Commission oversees the services that allow persons with speech and hearing disabilities to use telephones, for example, such as the 711 service and video relay services. These services allow persons with disabilities to contact people with or without disabilities. The telecommunications relay service.<sup>89</sup> It must be noted, however, that United States federal agencies are committed to making their services accessible.<sup>90</sup>

One of the arguments dominating Larson's paper is that the Lack of technology leads to inaccessibility to justice. Given the speed with which our lives are moving online, one cannot be integrated into modern society without the ability to access websites and perform tasks in that environment.<sup>91</sup> In his view, Online Dispute Resolution (ODR) holds great promise for increasing access to justice for persons with disabilities. Alternative Dispute Resolution (ADR) is a term used to describe dispute resolution processes that can be used to settle disputes instead of relying on litigation, such as negotiation, mediation, and arbitration.<sup>92</sup> ODR is a technology-facilitated form of ADR. Although the term ODR did not even come into existence until the mid-1990s, there now

---

<sup>87</sup> David Allen Larson, 'Access to Justice for Persons with Disabilities: An Emerging Strategy' (2014) *Laws*, Vol. 3.<[https://www.researchgate.net/publication/262690323\\_Access\\_to\\_Justice\\_for\\_Persons\\_with\\_Disabilities\\_An\\_Emerging\\_Strategy](https://www.researchgate.net/publication/262690323_Access_to_Justice_for_Persons_with_Disabilities_An_Emerging_Strategy) > accessed on 5 October 2020

<sup>88</sup> *ibid* 236

<sup>89</sup> *ibid*

<sup>90</sup> *ibid*

<sup>91</sup> *ibid* 226

<sup>92</sup> *ibid*

are numerous online dispute resolution platforms that include Modria, Smart Settle, The Mediation Room, and Cyber Settlement.<sup>93</sup> ODR providers promise to resolve disputes quickly and inexpensively. It may be possible to participate asynchronously, which would allow persons with motor or cognitive impairments the time they may need to participate effectively. But at this early stage in the evolution of ODR, it is not apparent that disability access is a priority.<sup>94</sup>

Accordingly, in bridging the gap, he recommends law schools offer opportunities related to disability law that provide representation and resources to persons with disabilities, advocate for policy change, and train advocates to represent persons with disabilities.<sup>95</sup> It is important not only to teach advocates about the regulatory context and unique problems that may be faced by persons with disabilities, but it also is important to guide how to interact effectively with persons with disabilities.<sup>96</sup>

The report by J Beqiraj, L McNamara, and V Wicks, examines the Overarching barriers and drawbacks concerning cases involving persons with disabilities.<sup>97</sup> According to them, persons with disabilities are repeatedly and erroneously portrayed as inherently ‘wicked’, ‘abnormal’ or ‘deviant’.<sup>98</sup> This stigmatization is then used to justify mockery, harassment, social isolation, or violence against them.<sup>99</sup> For instance, police or legal counsel may act on prejudice or ignorance when interacting with persons with disabilities, effectively deterring them from pursuing a legitimate claim.<sup>100</sup>

---

<sup>93</sup> ibid

<sup>94</sup> ibid

<sup>95</sup> ibid 229

<sup>96</sup> ibid

<sup>97</sup> J Beqiraj, L McNamara and V Wicks, ‘Access to justice for persons with disabilities: From international principles to practice’ (2017) International Bar Association  
<[https://www.biicl.org/documents/1771\\_access\\_to\\_justice\\_persons\\_with\\_disabilities\\_report\\_october\\_2017.pdf](https://www.biicl.org/documents/1771_access_to_justice_persons_with_disabilities_report_october_2017.pdf)>  
accessed on 5 October 2020

<sup>98</sup> ibid 20

<sup>99</sup> ibid

<sup>100</sup> ibid 21

Despite the fact that the CRPD was passed over a decade ago, certain jurisdictions still maintain legislation that overtly discriminates against individuals with disabilities. Legal exclusion from social, economic, and political participation sends the message that persons with disabilities should not try to exploit state institutions for their benefit, including the court system. Thus, the author argues that the general problem of legal poverty comprises many subsidiary challenges. Legal awareness is the foundation for fighting injustice. Yet, many persons with disabilities (and those who support them) still do not have a clear understanding of relevant legal information. Lack of accessible communications and/or documents that will enable them to make informed decisions on what rights one is constitutionally entitled to; not knowing what to do to vindicate their rights; and the inability to understand the legal language and procedures.<sup>101</sup>

They argue that to promote equality and eliminate discrimination, States Parties should take all necessary steps to ensure that reasonable accommodations are provided by ensuring that people with disabilities have access to all human rights and fundamental freedoms on an equal basis with others.<sup>102</sup>

The authors believe that the pre-trial stage in criminal and civil cases before the trial court is a critical step in the criminal procedure that often greatly influences and may even determine the outcome of the entire judicial proceedings. It is consequently critical that the personnel involved at this level, such as police officers, lawyers, judges, social workers, and health experts, are appropriately prepared to recognize and accommodate non-obvious types of disability.<sup>103</sup> For instance, some people with visual or auditory disabilities who do not wear glasses or hearing aids may not be disabled. There is, however, no reason to assume that a witness who has a learning

---

<sup>101</sup> *ibid* 23

<sup>102</sup> *ibid* 27

<sup>103</sup> *ibid*30

disability or mental health condition is not competent to give evidence. It is necessary to be aware of and accommodate these differences, to ensure that persons with disabilities can participate equally and effectively in testifying during a trial.<sup>104</sup> The concept of trial or just decisions is an important tenet of effective access to justice. It comprises standards against which a hearing is to be assessed in terms of fairness.<sup>105</sup>

According to Torkadi and. Monjurul Kabir on the Convention on the Rights of Persons with Disabilities (CRPD) provides a unique normative framework and an effective legal tool for States to end this discrimination and violation of the rights of persons with disabilities.<sup>106</sup> The convention, as one of international human rights laws, pursues the goal of safeguarding the integrity and dignity of the PWDs by establishing legal obligations on states to protect the rights of all Persons with Disability under their jurisdiction.<sup>107</sup> The Authors view CRPD as legally binding and by ratifying it states must, among other things, modify or abolish existing discriminatory laws, customs, and practices; take all appropriate measures to eliminate discrimination based on disability by any person, organization, or private enterprise; adopt legislative, administrative, policy, programmatic and other measures to implement the rights of PWDs.<sup>108</sup> This donates that states both internationally and locally should promote human dignity, human rights, social protection, and justice.

Further government's efforts to provide access to justice to persons with disabilities are obvious and real, but what is real and substantial is the institutional barriers and inefficiency of legal

---

<sup>104</sup> ibid31

<sup>105</sup> ibid 17-21

<sup>106</sup> Arkadi Toritsyn, and A. H. Monjurul Kabir, 'Promoting The Human Rights of Persons with Disabilities in Europe and the Commonwealth of Independent States: Guide' (UNDP, 2013) <<https://reliefweb.int/sites/reliefweb.int/files/resources/BRC%20PWD%20Report.pdf> > accessed 18 May 2020

<sup>107</sup> ibid 13

<sup>108</sup> ibid

counsel and legal representation which hinders access to justice.<sup>109</sup> The authors argue the right to access to justice for persons living with a disability requires special attention in securing their rights. In the absence of adequate financial resources, professional competence, independence, and facilities in the judicial system, access to justice may not be successful.<sup>110</sup> According to the authors to actively promote access to justice, a legal plan was necessary to address the needs of persons with Disabilities which includes; identifying and addressing physical and communication barriers that PWDs face in accessing justice, Support the relevant ministries and agencies in consulting PWDs on access to justice matters conduct targeted awareness-raising interventions to train and educate the judiciary about the rights of PWD and support PWDs who chose the legal profession to grow professionally to assume positions of significance in the justice system.<sup>111</sup> This would enable them to seek access to justice whenever a matter of community or public interest arises.

There are no scholars who openly contest the issue of access to justice for people with disabilities around the world. In their work *Access to Justice & Legal Needs*, 'A project to identify legal needs, pathways, and barriers for disadvantaged people in NSW,' Louis Schetzer et al argue that the law and justice foundation's overall goals are to contribute to the development of a fair and equitable justice system that addresses community legal needs and to improve community access to justice (in particular, by economically and socially disadvantaged people). To them, legal aid as a feature of access to justice works primarily through a credible process to establish a declaration of such

---

<sup>109</sup> *ibid* 42

<sup>110</sup> *ibid*44

<sup>111</sup> *ibid*

groups' needs to guide decisions made by government, non-government, and community institutions when dealing with them.<sup>112</sup>

According to Kariuki Muigwa, the Kenyan Constitution of 2010 is a progressive text that strives to fix the country's broken justice system. Apart from Article 48, which guarantees equal access to judicial and other administrative institutions and mechanisms for the protection of rights, all other provisions, in his opinion, are geared toward ensuring that adjudication of claims is fair, impartial, expeditious, and effective and that those who are in violation are treated humanely and given a reasonable chance to right their wrongs.<sup>113</sup>

All of the problems of the poor and vulnerable in society should be addressed in-laws, strategies, policies, programs, conceptualization, and design from the beginning so that they do not fall through the cracks of justice reform, according to the Kariuki Muigwa. It is necessary to comprehend how the justice system and institutions work, as well as people's perceptions of justice, the hurdles they experience in accessing justice, and how to overcome such barriers. We risk expanding existing gaps in access to justice if justice programming does not yield results for the most vulnerable.<sup>114</sup>

Toolkit report examines access to justice for persons with disabilities in Africa. Toolkit describes access to justice as a wide notion that includes people's effective access to both formal and informal judicial systems, procedures, information, and locations.<sup>115</sup> The report illustrates how citizens can

---

<sup>112</sup> Access to Justice Advisory Committee, *Access to justice: an action plan* (AGPS, 1994) < Access to justice : an action plan / Access to Justice Advisory Committee | National Library of Australia (nla.gov.au) > accessed 5 June 2020

<sup>113</sup> Kariuki Muigwa, 'A-Paper-on-Improving-Access-to-Justice-2.Pdf' <http://kmco.co.ke/wp-content/uploads/2018/08/A-Paper-on-Improving-Access-to-Justice-2.pdf> accessed 4 May 2020.

<sup>114</sup> *ibid*

<sup>115</sup> United Nations, 'Toolkit on disability for Africa: Access to Justice For Persons with Disabilities' <https://www.un.org/esa/socdev/documents/disability/Toolkit/Access-to-justice.pdf> accessed on 5 May 2020



participate in the justice system in a variety of ways, including as witnesses, jurors, lawyers, prosecutors, judges, arbitrators, or by taking on additional duties such as police or prison employees, in addition to seeking legal protections or remedies.<sup>116</sup>

While the report focus is on the challenges of persons living with different disabilities, this study is centered on the language barrier as a barrier to access to justice for the deaf community in Kenya. The study however explains the question of Kenya sign language as an official language in the context of participation of the deaf community, which is the cornerstone of Toolkit's report.

As noted in the toolkit report, many Africa countries' police officers lack awareness of disability or of working with victims with disabilities and, indeed, often endorse general stereotypes of persons with disabilities as vulnerable and lacking the capacity to be competent and credible reports of crime and therefore poor witnesses.<sup>117</sup> In its view, the first point of contact with the criminal justice system is the police play a very significant role in shaping how alleged offenses are handled, and whether cases proceed to trial.<sup>118</sup> Given their role as gatekeepers to the justice system, the attitudes and dispositions of the police towards persons with disabilities who are victims of crime have a significant bearing on those victims' experiences of seeking legal redress. Police perceptions of people with disabilities, not least their capacity to be reliable reporters and witnesses of crime, are key to understanding how incidents of abuse or harassment are handled.<sup>119</sup> Rather than fostering a pluralistic society founded on variety and equality before the law, the police have exacerbated contending forces of regression among Africa's various groups. This is the context in which people with disabilities in Africa are now living. Although the Convention on the Rights of Persons with Disabilities advocates for the right to access to justice in the context of

---

<sup>116</sup> *ibid*

<sup>117</sup> *ibid* (n9)

<sup>118</sup> *ibid* (n9)

<sup>119</sup> *ibid*

disability, specifically Article 13 which directs States parties to ensure effective access to justice for persons with disabilities on an equal basis, the current experience reveals increased vulnerability, according to the Toolkit report. Constitutional and policy recognition of persons living with disability remains a paper issue that has not yielded positive developments in reality.

Despite the protection afforded under international human rights law, particularly the CRPD, persons with disabilities often continue to face considerable obstacles in terms of access to justice. Barriers and impediments often involve combined forms of inaccessibility and other forms of discrimination.<sup>120</sup> Toolkit argues that barriers are encountered with a country's normative framework where they do not adequately give effect to the rights of persons with disabilities. Persons with disabilities, in particular, in a given country, have no say in the design and implementation of public policy and are not represented by people from the same social, economic, or cultural class.<sup>121</sup>

For example, Brent C Elder, and Michael A Schwartz, in examining the extent to which the deaf participate in access to justice in the United Kingdom, Brent argues that many people with disabilities around the world are excluded from accessing justice simply because of the presence of a disability. If a deaf person cannot communicate effectively with his or her solicitor, the person cannot obtain effective access to justice.<sup>122</sup>

Brent C Elder, and Michael A Schwartz, present how the deaf community is always discriminated against when it comes to access to justice. The report focused on Northern Ireland, where if a deaf

---

<sup>120</sup> *ibid*

<sup>121</sup> *ibid*

<sup>122</sup> Brent C Elder, Michael A Schwartz, 'Effective Deaf Access to Justice' (2018) Volume 23 Issue 4 The Journal of Deaf Studies and Deaf Education < <https://doi.org/10.1093/deafed/eny023> > accessed 7 May 2020

person qualifies for “legal aid,” that’s, if he or she meets the income eligibility requirement for public legal assistance, the state will pay for a sign language interpreter, hereby relieving the solicitor representing the deaf person of the obligation to cover the cost out of pocket. If, however, the deaf person does not qualify for legal aid, the duty to provide effective communication access devolves on the solicitor, who, in the narratives of our participants, insists that a pen and paper suffice as a reasonable adjustment. To them, providing an interpreter is not a reasonable adjustment because the cost is not reasonable.<sup>123</sup>

Several governments and states have frequently adopted policies with limited success in putting them into practice. This is the fundamental issue that has hampered the realization of the Constitution's rights. Kenya has also ratified a number of international agreements concerning the rights of people with disabilities, including the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD), which reaffirms that all people with disabilities, regardless of their type, are entitled to all human rights and fundamental freedoms, and the Universal Declaration of Human Rights (1948), which guarantees that all citizens are entitled to social security.<sup>124</sup>

Kabare asserts Kenya's Vision 2030, a national long-term development framework, acknowledges the importance of social protection and its role in ensuring that all Kenyans can enjoy a good quality of life by 2030.<sup>125</sup> Persons with disabilities have the right to be treated with dignity and respect, not to be referred to in a demeaning manner, to access educational institutions and facilities, to reasonable access to all places, public transportation, and information, to use sign

---

<sup>123</sup> *ibid* (n4)

<sup>124</sup> Krystle Kabare, ‘Social Protection and Disability in Kenya’ (2018) <https://www.developmentpathways.co.uk/wp-content/uploads/2018/10/Disability-Report-Kenya.pdf> accessed on 19 May 2020

<sup>125</sup> *ibid* (n15)

language, Braille, or other appropriate means of communication, and to access materials and devices, according to Article 54 of the Constitution.<sup>126</sup> The same article further states that the state must ensure the progressive implementation of a quota system in which persons with disabilities make up at least 5% of the public in elected and appointive bodies.<sup>127</sup> The Constitution is also clear on non-discrimination and representation of persons with disabilities.<sup>128</sup> This study, on the other hand, highlights deaf people and their lack of awareness of Kenya sign language as an official language in the legal system as one of the biggest barriers to deaf communities' access to justice. The study emphasizes the distinction between disabled people and the deaf community.

### **2.3.2 The general exclusion of Persons with Disabilities**

There are no scholars who openly contest the issue of access to justice for people with disabilities around the world. In their work *Access to Justice & Legal Needs*, 'A project to identify legal needs, pathways, and barriers for disadvantaged people in NSW,' Louis Schetzer et al argue that the law and justice foundation's overall goals are to contribute to the development of a fair and equitable justice system that addresses community legal needs and to improve community access to justice (in particular, by economically and socially disadvantaged people). To them, Legal aid as a facet of access to justice operates principally through a credible process, to develop a statement of the needs of such groups of persons to inform decisions of government, non-government, and community agencies when engaging with them.<sup>129</sup>

---

<sup>126</sup> The Constitution of Kenya 2010, article 54

<sup>127</sup> *ibid*

<sup>128</sup> The Constitution of Kenya 2010, article 27

<sup>129</sup> Access to Justice Advisory Committee, *Access to justice: an action plan* (AGPS, 1994)

[https://parlinfo.aph.gov.au/parlInfo/download/library/prspub/DVQ20/upload\\_binary/DVQ20.pdf;fileType=application%2Fpdf#search=%22library/prspub/DVQ20%22](https://parlinfo.aph.gov.au/parlInfo/download/library/prspub/DVQ20/upload_binary/DVQ20.pdf;fileType=application%2Fpdf#search=%22library/prspub/DVQ20%22) accessed on June 15, 2021

According to Kariuki Muigua, the Kenyan Constitution of 2010 is a progressive text that strives to fix the country's broken justice system. Apart from Article 48, which guarantees equal access to judicial and other administrative institutions and mechanisms for the protection of rights, all other provisions, in his opinion, are geared toward ensuring that adjudication of claims is fair, impartial, expeditious, and effective and that those who are in violation are treated humanely and given a reasonable chance to right their wrongs.<sup>130</sup>

All of the problems of the poor and vulnerable in society should be addressed in-laws, strategies, policies, programs, conceptualization, and design from the beginning so that they do not fall through the cracks of justice reform, according to the Kariuki Muigua. It is necessary to comprehend how the justice system and institutions work, as well as people's perceptions of justice, the hurdles they experience in accessing justice, and how to overcome such barriers. We risk expanding existing gaps in access to justice if justice programming does not yield results for the most vulnerable.<sup>131</sup>

Toolkit report examines access to justice for persons with disabilities in Africa. Toolkit defines access to justice as a broad concept, encompassing people's effective access to the formal and informal systems, procedures, information, and locations used in the administration of justice.<sup>132</sup> The report explains how access to justice goes beyond seeking legal protections or remedies, which includes numerous ways in which individuals can participate in the justice system, such as

---

<sup>130</sup> Kariuki Muigua Improving Access to Justice: Legislative and Administrative Reforms under the Constitution <http://kmco.co.ke/wp-content/uploads/2018/08/A-Paper-on-Improving-Access-to-Justice-2.pdf> accessed on 5th May 2020

<sup>131</sup> ibid

<sup>132</sup> United Nations, 'Toolkit on disability for Africa: Access to Justice For Persons with Disabilities' < <https://www.un.org/esa/socdev/documents/disability/Toolkit/Access-to-justice.pdf> > accessed on 5 May 2020

witnesses, jurors, lawyers, prosecutors, judges, arbitrators, or by taking on other roles such as police or prison staff.<sup>133</sup>

While the report focus is on the challenges of persons living with different disabilities, this study is centered on the language barrier as a barrier to access to justice for the deaf community in Kenya. The study however explains the question of Kenya's sign language as an official language in the context of participation of the deaf community, which is the cornerstone of Toolkit's report.

As noted in the toolkit report, many Africa countries' police officers lack awareness of disability or of working with victims with disabilities and, indeed, often endorse general stereotypes of persons with disabilities as vulnerable and lacking the capacity to be competent and credible reports of crime and therefore poor witnesses.<sup>134</sup> In its view, the first point of contact with the criminal justice system is the police play a very significant role in shaping how alleged offenses are handled, and whether cases proceed to trial.<sup>135</sup> Given their role as gatekeepers to the justice system, the attitudes and dispositions of the police towards persons with disabilities who are victims of crime have a significant bearing on those victims' experiences of seeking legal redress. Police perceptions of people with disabilities, not least their capacity to be reliable reporters and witnesses of crime, are key to understanding how incidents of abuse or harassment are handled.<sup>136</sup> Instead of building a pluralistic society based on diversity and equality before the law, the police have caused conflicting forces of regression between Africa's diverse groups. This is the setting that animates the present state of persons living with disabilities in Africa. The Toolkit report argues that, although the Convention on the Rights of Persons with Disabilities advocates the right to access to justice in the context of disability, Article 13 to be specific the directs State parties to

---

<sup>133</sup> *ibid*

<sup>134</sup> *ibid* (n9)

<sup>135</sup> *ibid* (n9)

<sup>136</sup> *ibid*

ensure effective access to justice for persons with disabilities on an equal basis, the prevailing experience illuminates increased vulnerability. Constitutional and policy recognition of persons living with disability remains a paper issue that has not yielded positive developments in reality. Despite the protections provided by international human rights law, particularly the CRPD, persons with disabilities frequently encounter significant barriers to accessing justice. Barriers and obstructions frequently include a combination of inaccessibility and discrimination. According to Toolkit, impediments arise when a country's normative framework fails to appropriately give effect to the rights of people with disabilities.<sup>137</sup> Persons with disabilities, in particular, in a given country, have no say in the development and implementation of public policy and are not represented by people from their own social, economic, or cultural class.<sup>138</sup>

For example, Brent C Elder, and Michael A Schwartz, in examining the extent to which the deaf participate in access to justice in the United Kingdom, Brent argues that many people with disabilities around the world are excluded from accessing justice simply because of the presence of a disability. If a deaf person cannot communicate effectively with his or her solicitor, the person cannot obtain effective access to justice.<sup>139</sup>

Brent C Elder, and Michael A Schwartz, presents how the deaf community is always discriminated against when it comes to access to justice. The report focused on Northern Ireland, where if a deaf person qualifies for “legal aid,” that’s, if he or she meets the income eligibility requirement for public legal assistance, the state will pay for a sign language interpreter, hereby relieving the solicitor representing the deaf person of the obligation to cover the cost out of pocket. If, however,

---

<sup>137</sup> *ibid*

<sup>138</sup> *ibid*

<sup>139</sup> Brent C Elder, Michael A Schwartz, ‘Effective Deaf Access to Justice’ (2018) Volume 23 Issue 4 The Journal of Deaf Studies and Deaf Education < <https://doi.org/10.1093/deafed/eny023> > accessed 7 May 2020

the deaf person does not qualify for legal aid, the duty to provide effective communication access devolves on the solicitor, who, in the narratives of our participants, insists that a pen and paper suffice as a reasonable adjustment. To them, providing an interpreter is not a reasonable adjustment because the cost is not reasonable.<sup>140</sup>

Several governments and states have frequently adopted policies with limited success in putting them into practice. This is the fundamental issue that has hampered the realization of the Constitution's rights. Kenya has also ratified several international agreements concerning the rights of people with disabilities, including the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD), which reaffirms that all people with disabilities, regardless of their type, are entitled to all human rights and fundamental freedoms, and the Universal Declaration of Human Rights (1948), which guarantees that all citizens are entitled to social security.<sup>141</sup>

Kabare asserts Kenya's Vision 2030, a national long-term development framework, acknowledges the importance of social protection and its role in ensuring that all Kenyans can enjoy a good quality of life by 2030.<sup>142</sup> Persons with disabilities have the right to be treated with dignity and respect, not to be referred to in a demeaning manner, to access educational institutions and facilities, to reasonable access to all places, public transportation, and information, to use sign language, Braille, or other appropriate means of communication, and to access materials and devices, according to Article 54 of the Constitution.<sup>143</sup> The same article also provides that the State shall ensure the progressive implementation of a quota system where at least five percent of the

---

<sup>140</sup> *ibid* (n4)

<sup>141</sup> Krystle Kabare, 'Social Protection and Disability in Kenya' (2018) <<https://www.developmentpathways.co.uk/wp-content/uploads/2018/10/Disability-Report-Kenya.pdf>> accessed on 19 May 2020

<sup>142</sup> *ibid* (n15)

<sup>143</sup> The Constitution of Kenya 2010, article 54



members of the public in elective and appointive bodies are persons with disabilities.<sup>144</sup> The Constitution is also clear on non-discrimination and representation of persons with disabilities.<sup>145</sup> This study however emphasizes the deaf people and their lack of knowledge of Kenya's sign language as an official language in the justice system as one of the main obstacles to access to justice by deaf communities. The study underscores the distinction between persons with disabilities and the deaf community.

## **2.5 Deaf community stigmatization and deaf culture**

As one of the minority groups in Kenya, the deaf boast a population of 200,000 people.<sup>146</sup> This is according to the Kenya National survey for persons with disabilities done in 2008.<sup>147</sup>

Across the world stereotypes, prejudice, and stigma contribute to the discrimination and exclusion experienced by people with disabilities and their families in all aspects of their lives.<sup>148</sup> In Kenya, many people view deafness as a curse. Parents are often ashamed to have a deaf child or believe it is a punishment from God. As a result, deaf children are frequently kept at home without access to vital education, play, and social interaction.<sup>149</sup>

Misconceptions about the nature and abilities of people with disabilities, including that they are unable to contribute financially; that they are not able to have a normal relationship; that they will

---

<sup>144</sup> *ibid*

<sup>145</sup> The Constitution of Kenya 2010, article 27

<sup>146</sup> Mweri, J.G, 'Diversity in education: Kenyan sign language as a medium of instruction in schools for the deaf in Kenya' (2014) *Multiling.Ed. Volume 4* <https://doi.org/10.1186/s13616-014-0014> - accessed 20 September 2021

<sup>147</sup> *Ibid*

<sup>148</sup> Brigitte Rohwerder, 'Disability stigma in developing countries' (2018)

[https://assets.publishing.service.gov.uk/media/5b18fe3240f0b634aec30791/Disability\\_stigma\\_in\\_developing\\_countries.pdf](https://assets.publishing.service.gov.uk/media/5b18fe3240f0b634aec30791/Disability_stigma_in_developing_countries.pdf) accessed on 22/09/2021 > accessed 21 September 2021

<sup>149</sup> Amber Mezbouria, 'Fighting discrimination against deaf children in Kenya'

<https://www.volunteers.org/blogs/fighting-discrimination-against-deaf-children-kenya> >accessed on 21 September 2021

be unable to report sexual abuse; that their disability is contagious or they bring bad luck; that their bodies have magical powers; or that they are witches, also contribute to the stigma, discrimination, and abuses they experience.<sup>150</sup>

The stigma associated with the birth of children with disabilities also leads to fathers abandoning the family, with the mother left with the sole responsibility for care thus leading to a lack of registration of people with disabilities in the national census or official statistics as it often attributed to the stigma around disability.<sup>151</sup> Such negative beliefs and the stigma associated with disability contribute to children with disabilities being seen as unworthy and means they face a greater risk of violence than their non-disabled peers.<sup>152</sup>

Lack of understanding and awareness regarding the causes of disabilities and their resulting characteristics is a key factor in the stigma. Such an adverse attitude toward deaf children means that their linguistics needs are not attended to early and their education onset is delayed.<sup>153</sup>

In a country where disability is often seen as a curse, Deaf children are frequently denied access to education and social opportunities, and hidden away by their families. The situation is aggravated by the fact that the deaf is examined alongside their hearing peers in the Kenya Certificate of Primary Education (KCPE).<sup>154</sup>

The wording and phrasing used in questions work to their disadvantage as they do not understand the vocabulary and grammar used especially in English Subjects, which do not better their chances of passing. As a result, the few who take KCPE do not perform comparably with their hearing peers as they may score as low as 100 marks out of 500 marks. In such a case, Many schools for

---

<sup>150</sup> *ibid*

<sup>151</sup> *ibid*

<sup>152</sup> *ibid*

<sup>153</sup> *ibid*

<sup>154</sup> Norah N. Mose, 'Societal Impingement on Linguistic Human Rights of the Kenyan Deaf People: Pitfalls in Integrating the Deaf in National Development' (2019) Vol. 7, No. 2 International Journal of Linguistics and Communication <[http://ijlcnnet.com/journals/ijlc/Vol\\_7\\_No\\_2\\_December\\_2019/7.pdf](http://ijlcnnet.com/journals/ijlc/Vol_7_No_2_December_2019/7.pdf)> accessed 21 September 2021

the deaf have, therefore, opted to enroll their students for vocational or technical exams at primary school.<sup>155</sup>

### **2.5.1 Deaf culture and practices**

Cultural diversity is a fact of life. This cultural diversity entails diversity in language use.<sup>156</sup>

Language is a system of symbols that people use for purposes of encoding and decoding information. Because sign language is a language minority, there is a need to protect and preserve their cultural and linguistic identity.<sup>157</sup> Kenya is a multilingual society with most Kenyans speaking at least three languages, Mother tongue, English, and Kiswahili. This generalization is always passed as the true linguistic situation in Kenya.<sup>158</sup> However, on closer examination, we note that it excludes the use of Kenyan Sign Language (KSL). Secondly, most of the deaf are monolingual in the sense that they can only use KSL in most communicative situations.<sup>159</sup>

These sign languages are as different as English is to Kiswahili which is why Sign Language is normally given the name of the country it belongs to. Thus Kenyan Sign Language (KSL), British Sign Language (BSL), etc. A deaf Kenyan therefore cannot communicate with a deaf person from a different country who uses a different sign Language without the use of an interpreter.<sup>160</sup>

Deaf Kenyans, like their hearing counterparts, need to be able to have access to the larger society. This access is linked to language which opens the doors to the world.<sup>161</sup> They need to be in a position to use their language in an atmosphere that guarantees them access to information and services like anybody else as well as guaranteeing them all the freedoms enshrined in the

---

<sup>155</sup> *ibid*

<sup>156</sup> *ibid* (n147)

<sup>157</sup> *ibid*

<sup>158</sup> *ibid*

<sup>159</sup> *ibid*

<sup>160</sup> *Ibid* (n3)

<sup>161</sup> *ibid*

constitution.<sup>162</sup> They do not require being in an atmosphere where they suffer from being a language minority in a system that still insists that they communicate using speech.

### **2.5.2 Deaf challenges on access to Justice**

Deaf persons are too often disregarded by our society in some areas, even though they have unique communication needs that must be met. Imagine living in a world where no one speaks your native tongue and you have to rely on translators and other special services to connect with people.<sup>163</sup> In a world where everyone is deaf and you are the only one who can hear, you are categorized as an "other" because of your "hearing" impairment. The Deaf community is a dynamic and welcoming community that has sadly been ignored by mainstream hearing culture. Deaf people live with the scars of discrimination and injustice daily.<sup>164</sup> Hearing people's paternalistic stance in knowing what is "best" for the Deaf community and adopting regulations for the Deaf community without their input has often strained the connection between the hearing and the Deaf communities.<sup>165</sup> Anti-discrimination legislation and international agreements protect the deaf community, unlike people who cannot speak or read the official language of their place of residence. Despite such Acts, the acceptance of sign language, and the availability of assistive technology, persons who are deaf still do not have equitable access to a range of services, such as education, medical, and employment.<sup>166</sup> Many countries have not enforced the law protecting the deaf, occasionally deaf people have successfully won their claims based on discrimination and have been awarded compensation.<sup>167</sup> In the most recent lawsuits reported in the USA and the UK, medical

---

<sup>162</sup> *ibid*

<sup>163</sup> West Resendes & Angie Martell, 'Understanding the Injustices Faced by the Deaf Community' (July, 2016) <<http://iglesiamartell.com/understanding-the-injustices-faced-by-the-deaf-community/>> accessed 18 May 2020

<sup>164</sup> *ibid*

<sup>165</sup> *ibid*

<sup>166</sup> Audrey Laur, 'Healthcare access for deaf patients – The legal and ethical perspectives' (2017) Volume 86 Issue 1 *Medico-Legal Journal* <<https://journals.sagepub.com/doi/pdf/10.1177/0025817217743416>> accessed on 18 May 2020

<sup>167</sup> *ibid* (n38)

practitioners and hospitals have been found liable for refusing to provide a sign language interpreter on financial grounds or because they believed it was the patient's duty to book and pay for an interpreter.<sup>168</sup> Further in Scotland, a deaf patient made a complaint to the Ombudsman Reporting Scotland's Health Service after being left for 12 days without any sign language interpreter and was unable to communicate with medical staff and doctors following her appendicitis surgery. The Ombudsman found that the NHS medical center failed to comply with their Informed Consent Policy and their legal duty under the Equality Act (section 20).<sup>169</sup>

Indeed, deaf people experience serious barriers when it comes to access to justice in any judicial system. For a deaf pers, injustices can occur at every step of the legal process, begging of arrest and throughout the sequence of interrogation, courtroom hearings, trials, acquittals, probation, incarceration, and parole.<sup>170</sup> These injustices are a result of o lack of information, lack of legal counsel, and legal interpretation, and lack of sign language interpreters.<sup>171</sup>

Consequently, by using deaf people as a case study, this study provides a more practical rationale of how language and access to information can hinder access to justice. The study underscores the importance of Kenya sign language as an aid to access to justice for the deaf people

---

<sup>168</sup> *ibid*

<sup>169</sup> *ibid*

<sup>170</sup> Vernon, McCay, and Katrina Miller, 'Obstacles Faced by Deaf People in the Criminal Justice System' (2005) *American Annals of the Deaf* Volume 150 Number 3 < [https:// www.jstor.org/stable/2623473](https://www.jstor.org/stable/2623473) > accessed 18 May 2020

<sup>171</sup> *ibid*

## **2.6 CONCLUSION**

The facts of this analysis confirm that persons with disabilities still experience barriers to accessing justice. At the same time, they are systematically being denied the right to be heard or fair representation in the judicial system as tools to secure their rights. These are concerns of immense magnitude on how to continue to improve relevant legislation and treaties. Consequently, it is essential to train advocates who not only understand the regulatory environment but who also can interact effectively and comfortably with persons with disabilities. The study presents the specific legal needs, rights awareness, and access to justice experience of the deaf community as well as feasible bottom-up strategies for social governance innovation at the grassroots level, including how to currently assess legal needs of persons with disabilities, influence rights awareness, provide support for the key for the disabled.

The belief that people with disabilities, particularly the deaf community, lack capacity not only further marginalizes them, but also stops them from effectively collaborating with other communities and acquiring the capital necessary to impact change in our communities. To accept a meaningful judicial system and interact with other communities, they require a greater level of legal awareness than is currently available. As a result, knowing Kenya's sign language will go a long way toward reducing the deaf community's unreasonable barriers to justice. The rights that are being violated cannot be suspended to wait for a convenient time when advocates and judicial officers will understand Kenyan sign language.

## **CHAPTER THREE**

### **LEGAL AND INSTITUTIONAL FRAMEWORK OF ACCESS TO JUSTICE AND ITS INTERFACE WITH PERSONS WITH DISABILITIES IN KENYA**

#### **3.1 Introduction**

This chapter examines the domestic and international legal foundations that directly or indirectly support access to justice and its relevance to people with disabilities, with a particular focus on Kenya's deaf populations. Fundamental provisions that highlight Kenya's opportunities and problems based on current and applicable law pertinent to increasing access to justice for the deaf community will be debited. This is despite the fact that Article 48 of the Constitution of Kenya 2010 states that the state must ensure access to justice for all people, and that any fee imposed must be reasonable and not obstruct access to justice, and that Article 27(4) prohibits direct or indirect discrimination on any grounds, including ethnic or social origin, belief, culture, language, or race. The inference is that the state has a constitutional obligation to take legislative and other measures, including affirmative action programs and policies, to address any disadvantages faced by people with disabilities and the deaf community.

#### **3.2 DOMESTIC LAWS AND POLICIES**

##### **3.2.1 The Constitutional Underpinning of the Right to Access to Justice in Kenya**

The government is required by the 2010 Constitution to promote access to justice for all citizens, as it is a crucial component of poverty reduction and sustainable development.<sup>172</sup>

---

<sup>172</sup> International Development Law Organization, 'IDLO In Kenya: Access To Justice' <<https://www.idlo.int/idlo-kenya-access-justice>> accessed on 21 May 2020

Since the enactment of the Constitution of Kenya 2010; access to justice is now one of the fundamental rights guaranteed therein.<sup>173</sup> Article 48 of the Constitution requires the state to ensure that all people have access to justice and, if a fee is required, that it is reasonable and does not obstruct access to justice. Article 48 aims to improve access to justice for all Kenyans, particularly the impoverished and marginalized populations.<sup>174</sup>

### **3.2.2 Access to justice encapsulated under the Constitution of Kenya 2010**

Apart from Article 48 providing for the right to access to justice for all, other provisions are geared towards enhancing equal access to judicial and other administrative institutions and mechanisms for the protection of rights, that adjudication of claims is fair, impartial, expeditious and effective and that those who are in violation are treated humanely and are given a reasonable chance to right their wrongs.<sup>175</sup>

Article 22 provides that 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.<sup>176</sup> Thus Article 22 (3) is geared towards ensuring that there are no factors that will impede access to justice when enforcing the Bill of Rights by ensuring that no fees are charged for commencing proceedings; removing the strict legal requirement of proving locus standi; minimizing procedural formalities, entertaining the commencement of proceedings based on informal documentation and allowing experts to appear as friends of the court where necessary.<sup>177</sup>

---

<sup>173</sup> Kariuki Muigwa Improving Access to Justice: Legislative and Administrative Reforms under the Constitution <<http://kmco.co.ke/wp-content/uploads/2018/08/A-Paper-on-Improving-Access-to-Justice-2.pdf> > accessed in 21May 2022

<sup>174</sup> ibid

<sup>175</sup> ibid (n2)

<sup>176</sup> The Constitution of Kenya 2010, article 22

<sup>177</sup> The Constitution of Kenya 2010, article 22(3)



Article 35 grants every citizen the right of access to information held by the State and information held by another person and required for the exercise or protection of any right or fundamental freedom. It also entitles the citizen the right to the correction or deletion of untrue or misleading information that affects the person and also obligates the State to publish and publicize any important information affecting the nation.<sup>178</sup> The right to access information of information supported by Article 7(3) which provides that the State shall promote the development and use of indigenous languages, Kenyan Sign language, Braille, and other communication formats and technologies accessible to persons with disabilities.<sup>179</sup>

Besides Article 54 on the rights of persons with disabilities states that all persons with disabilities shall be entitled to reasonable access to all places, public transport, and information as well as the use of sign language, Braille, and other appropriate means of communication. It is therefore the responsibility of all public and private institutions to ensure that they make accessible their products and services to persons with disabilities on an equal basis as any other Kenyan citizen.

180

Article 47 guarantees every person the right to fair administrative action that is expeditious, efficient, lawful, reasonable, and procedurally fair. It requires the giving of written reasons where a right or fundamental freedom of a person has been or is likely to be adversely affected by an administrative action.

Article 49 (1) (c) provides that an arrested person has the right “to communicate with an advocate and other persons whose assistance is necessary.”<sup>181</sup> While Article 50 (7) stipulates that in the

---

<sup>178</sup> The Constitution of Kenya 2010, article 35

<sup>179</sup> The Constitution of Kenya 2010, article 7(3)

<sup>180</sup> The Constitution of Kenya 2010, article 54

<sup>181</sup> The Constitution of Kenya 2010, Article 49 (1)(C )

interest a court may allow an intermediary to assist a complainant or an accused person to communicate with the court. Likewise, Article 50 (1) provides for the right of every person 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.<sup>182</sup> Article 50 (1) aims at ensuring expediency, the fairness of the process, equality in accessing legal services, and effective dispute resolution mechanisms. This is vital in enhancing access to justice in Kenya.<sup>183</sup>

Article 159 echoes the right of all persons to have access to justice as guaranteed by Article 48 of the constitution.<sup>184</sup> It also mirrors the spirit of Article 27(1) which provides that “every person is equal before the law and has the right to equal protection and equal benefit of the law”. To ensure that justice is done to all the concerns of the poor and vulnerable in society need to be included in the legislation, strategies, policies, programs, conception, and design from the outset so that they do not fall through the cracks of justice reform. The working of the justice system and institutions, people’s perceptions of justice, the barriers they face in accessing justice, and the ways to overcome those barriers have to be understood.<sup>185</sup>

Article 159 of the Constitution further enumerates the principles which shall guide Kenyan courts in exercising their judicial authority. These include: that justice shall be done to all irrespective of status, that justice shall not be delayed, that the courts shall promote alternative forms of dispute

---

<sup>182</sup> The Constitution of Kenya 2010, Article 50 (1)

<sup>183</sup> *ibid* (n2)

<sup>184</sup> *Ibid*171

<sup>185</sup> *ibid*

resolution including reconciliation, mediation, arbitration, and traditional dispute resolutions, and that justice shall be administered without undue regard to procedural technicalities.<sup>186</sup>

### **3.3 CONCEPT OF ACCESS TO JUSTICE ENCAPSULATED IN OTHER STATUTORY PROVISIONS**

#### **3.3.1 The Legal Aid Act, 2016**

Legal Aid was enacted in 2016 as part of the efforts to promote access to justice in Kenya through the provision of legal aid. The Act has several provisions that directly affect the law clinics of various law schools in Kenya. The preamble to the Legal Aid Act notes that one of the reasons for its enactment is to give effect to Article 48 of the Constitution. It further broadly defines legal aid inter alia, including legal advice, legal representation, creating awareness through the provision of legal information and law-related information and recommending law reform, and undertaking advocacy work on behalf of the community.<sup>187</sup>

#### **3.3.2 The Fair Administrative Action Act No. 4 Of 2015**

The right to Fair Administration Action is recognized in Article 47 of the Constitution of Kenya, 2010. The right entitles every citizen to administrative action that is expeditious, efficient, lawful, reasonable, and procedurally fair.<sup>188</sup> It obliges public officers to adhere to these principles when taking administrative action. In addition to the constitutional provisions on fair administrative action, a Fair Administrative Action Act was enacted in 2015.<sup>189</sup> The Fair Administrative Action Act applies to all state and non-state application agencies.<sup>190</sup> It also includes any person exercising

---

<sup>186</sup> The Constitution of Kenya 2010, article 159

<sup>187</sup> The Legal Aid Act, 2016

<sup>188</sup> The Constitution of Kenya, 2010, article 47

<sup>189</sup> The Fair Administrative Action Act No. 4 of 2015

<sup>190</sup> Doris Matu, 'Improving Access to Justice in Kenya through Horizontal Application of the Bill of Rights and Judicial Review' (2017) Volume 2 Strathmore Law Review

administrative authority; performing a judicial or quasi-judicial function under the Constitution or any written law; or whose action, omission, or decision affects the legal rights or interests of any person to whom such action, omission, or decision relates.<sup>191</sup>

### **3.3.3 The Civil Procedure Act (Cap. 21 Laws of Kenya).**

Section 1A(1) of Cap. 21 sets out the overriding objective of the Act and the Rules made thereunder, namely: to facilitate the just, expeditious, proportionate, and affordable resolution of civil disputes. Section 1B of Cap. 21 imposes a duty on the court to conduct judicial proceedings expeditiously and cost-effectively. Similarly, section 3A(1) of the Appellate Jurisdiction Act (Cap. 9 Laws of Kenya) sets out the overriding objectives of the Act and the Rules made thereunder, namely: to facilitate the just, expeditious, proportionate, and affordable resolution of appeals. Section 3B of the Act imposes a duty on the court to ensure expedition and cost-effectiveness in the determination of appeals.

### **3.3.4 Criminal Procedure Code Cap 75 of the Laws of Kenya**

The Constitution of Kenya 2010 provides for the rights of the arrested.<sup>192</sup> The Criminal Justice process commences with the arrest of an accused person either with or without a warrant of arrest.<sup>193</sup> The CPC also gives powers not only to the Police but also to private persons and Magistrates to arrest suspects.<sup>194</sup> The Courts have persistently through case law, reinforced the constitutional requirement that an arrested person be presented to Court for trial within the required time, that is 24 hours. Or if the twenty-four hours ends outside ordinary court hours, or on a day

---

<[http://www.press.strathmore.edu/uploads/journals/strathmore-law-review/SLR2/2SLR1\\_Article\\_4.pdf](http://www.press.strathmore.edu/uploads/journals/strathmore-law-review/SLR2/2SLR1_Article_4.pdf) accessed on 22/5/2020 > accessed 6 June 2020

<sup>191</sup> *ibid*

<sup>192</sup> The Constitution of Kenya, 2010, article 49

<sup>193</sup> The Criminal Procedure Code Cap 75 of Laws of Kenya, Section 29

<sup>194</sup> The Criminal procedure Code Cap 75 of Laws of Kenya, Section 34 and Section 39

that is not an ordinary court day, the end of the next court day.<sup>195</sup> However, in some instances, this obligation has been regarded as costly especially when handling criminal cases involving a deaf person. This is demonstrable under Article 49(1) (c) of the Constitution of Kenya 2010, where, an arrested person has the right to communicate with an advocate and other persons whose assistance is necessary. Likewise, Article 50 (2) (h) provides an accused person with the right to be assigned an advocate by the state where there might be substantial injustice.<sup>196</sup> Further, Article 50(7) provides for the court's responsibility to provide an interpreter to assist a complainant or an accused person to communicate with the court.<sup>197</sup> This is essentially guaranteeing Kenya's sign language is aid of Access to justice for deaf people in criminal matters.

### **3.3.5 The Persons with Disabilities Act 2003**

The act placed a strong emphasis on physical accessibility and employment opportunities for people with impairments.<sup>198</sup> The Act has had some success in improving structures that deliver services to people with disabilities, but the actual implementation of rights remains a problem. The Act emphasizes physical accessibility and gives the National Council for Persons with Disabilities (NCPWD) the authority to issue adjustment orders and penalties.<sup>199</sup> However, accessibility in practice remains the biggest challenge that persons with physical disabilities face. The provisions remain unrealistic and untenable given the capacity of the Council. The NCPWD relies heavily on information and advocacy to enforce compliance, although it is ultimately up to organizations and institutions to adopt recommendations.<sup>200</sup> This lead to the review of the Act with the Persons with

---

<sup>195</sup> The Constitution of Kenya, 2010, article 49(f)

<sup>196</sup> The Constitution of Kenya, 2010, article 50(2)

<sup>197</sup> The Constitution of Kenya, 2010, article 50(7)

<sup>198</sup> The Persons with Disabilities Act 2003

<sup>199</sup> Persons with Disabilities Act 2003, Section 3

<sup>200</sup> Helen Mudora, 'Review of Kenya persons with disabilities act overdue'

<<http://globaldisability.org/2016/04/01/review-kenya-persons-disabilities-act-2003-overdue>> accessed on 30 May 2020

Disabilities Bill, 2015. The review of the Persons with Disabilities Act of 2003 takes place against the backdrop of a slew of new opportunities and rights contained in Kenya's 2010 Constitution.<sup>201</sup>

### **3.3.6 National Council for Persons with Disabilities (NCPWD) Strategic Plan 2018 - 2022**

The National Council for Persons With Disabilities (NCPWDs) is committed to the realization of a barrier-free society for persons living with Disabilities.<sup>202</sup> The NCPWD envisions “A barrier-free Society for Persons with Disabilities.” Its mission is “To promote and protect equalization of opportunities and realization of human rights for PWDs to live decent livelihoods” The driving core values: Inclusivity, Human Dignity, Equality and Equity, Integrity, and being results-oriented.<sup>203</sup>

The Strategic Plan of the NCPWD was developed in appreciation of the Constitution of Kenya and other legal and policy documents, Kenya's development blueprint Vision 2030, the third Medium Term Plan (MTP III) which lays a strong foundation for the “Big Four Agenda”.<sup>204</sup>

This strategic plan will build on the foundations and achievements of the First MTP (Medium-Term Plan) (2008– 2012) and Second MTP (2013–2017). The plan will coincide with the third MTP (2018-2022), which lays a strong foundation for “Equity in Access, Control and Participation in Resource Distribution for Improved Livelihood of Women, Youth and Vulnerable Groups.”<sup>205</sup>

The key priority areas in the plan have put into consideration the “Big Four” Government Agenda. Specifically, under universal health care, the Council prioritizes advocating the operationalization

---

<sup>201</sup> ibid

<sup>202</sup> National Council for Persons with Disabilities, ‘About NCPWD’  
<<http://ncpwd.go.ke/>> accessed on 9 July 2020

<sup>203</sup> ibid

<sup>204</sup> National Council for Persons with Disabilities (NCPWD) , ‘Strategic Plan 2018 – 2022’  
<<https://www.socialprotection.go.ke/wp-content/uploads/2019/06/NCPWD-SP-FINAL.pdf>> accessed on 9 July 2020

<sup>205</sup> ibid

of the PWDs Act, 2003.<sup>206</sup> Besides, prioritizing the promotion of accessibility for services and on built areas. Under housing, the plan strategizes to lobby for reservation of at least 5% of suitable and affordable housing for PWDs. Small and Medium Enterprises (SMEs) run by PWDs are banking on zero-rating or direct support in the acquisition of SMEs tool kits.<sup>207</sup>

### **3.4 ACCESS TO JUSTICE UNDER REGIONAL AND INTERNATIONAL CONVENTIONS**

#### **3.4.1 Basic principles on Access to justice**

The right to seek justice is a fundamental element of the rule of law. People are unable to have their voices heard, exercise their rights, fight prejudice, or hold decision-makers responsible without access to justice.<sup>208</sup> In strengthening access to justice, the UN system works with national partners to develop national strategic plans and programs for justice reform and service delivery. UN entities support the Member States in strengthening justice in areas including monitoring and evaluation; empowering the poor and marginalized to seek responses and remedies for injustice; improving legal protection, legal awareness, and legal aid; civil society and parliamentary oversight; addressing challenges in the justice sector such as police brutality, inhumane prison conditions, lengthy pre-trial detention, and impunity for perpetrators of sexual and gender-based violence and other serious conflict-related crimes; and strengthening linkages between formal and informal structures.<sup>209</sup>

---

<sup>206</sup> ibid (n13)

<sup>207</sup> ibid (n15)

<sup>208</sup> United Nation and the Rule of Law, 'Access to Justice <https://www.un.org/ruleoflaw/thematic-areas/access-to-justice-and-rule-of-law-institutions/access-to-justice/#:~:text=access%20to%20justice,-.The%20Declaration%20of%20the%20High%2Dlevel%20Meeting%20on%20the%20Rule,12%20and%2014%5D>.

**31** May 2020

<sup>209</sup> ibid

### **3.4.2 The Universal Declaration of Human Rights (UDHR)**

Adopted in 1948, the Universal Declaration of Human Rights (UDHR) is a constitutional foundation of international human rights.<sup>210</sup> The UDHR establishes a framework for economic, social, civic, cultural, and political rights, notwithstanding its non-binding nature. The rights to equal treatment before the law and to equal protection of the law without discrimination are among the rights established therein.<sup>211</sup> This right is also reflected in Article 27 of the constitution of Kenya 2010.<sup>212</sup>

Article 8 of the Declaration states that “*Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.*”<sup>213</sup> Subsequently, Article 10 thereof provides that, *every person is entitled to full equality to a fair trial and public hearing by an independent and impartial court or tribunal, in the determination of his rights and obligations and of any criminal charge against him.*<sup>214</sup> This right is reflected in Article 50(1) of the Constitution of Kenya, 2010.<sup>215</sup>

### **3.4.3 International Covenant on Civil and Political Rights 1976**

The principle of access to justice for all under international law was further strengthened on March 23, 1976, when the International Covenant on Civil and Political Rights come into force.<sup>216</sup> Article

---

<sup>210</sup> UN General Assembly, ‘*Universal Declaration of Human Rights*’ 10 December 1948, 217 A (III) <<https://www.refworld.org/docid/3ae6b3712c.html>> accessed 21 November 2021

<sup>211</sup> Universal Declaration of Human Rights, article 7

<sup>212</sup> The Constitution of Kenya, article 27

<sup>213</sup> Universal Declaration of Human Rights, article 8

<sup>214</sup> Universal Declaration of Human Rights, article 10

<sup>215</sup> The Constitution of Kenya, 2010, article 50 (1)

<sup>216</sup> UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171 <<https://www.refworld.org/docid/3ae6b3aa0.html>> accessed 21 November 2021



2 of the Covenant states that each party to it will “ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy.” The Covenant also includes the obligation to “ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State.”<sup>217</sup>

Kenya is a party to the International Convention on Civil and Political Rights (ICCPR),<sup>218</sup> which envisages fair trial, non-discrimination, and equality before the law as the basic strata of access to justice. In particular, under Article 14 (1) of the ICCPR, all persons are equal before the courts and tribunals.<sup>219</sup> This provision sets out a general guarantee regardless of the nature of proceedings before a tribunal or court. Although this provision is silent on the right of an interpreter in deaf cases, it is instructive to note that the right to a fair trial may include the right to access an interpreter if one is deaf.

#### **3.4.4 The Convention on the Rights of Persons with Disabilities**

The Convention on the Rights of Persons with Disabilities was adopted on 13 December 2006 and entered into force on 3 May 2008.<sup>220</sup> It came into existence through a forceful call from persons with disabilities around the world to have their human rights respected, protected, and fulfilled on an equal basis with others.<sup>221</sup> The Convention celebrates human diversity and human dignity. Its main message is that persons with disabilities are entitled to the full spectrum of human rights and

---

<sup>217</sup> International Covenant on Civil and Political Rights, article 2

<sup>218</sup> United Nations, ‘United nation Treaty collection Chapter IV’

<[https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-4&chapter=4&clang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&clang=en)> accessed on 31 May 2020

<sup>219</sup> International Covenant on Civil and Political Rights, article 14

<sup>220</sup> UN General Assembly, *Convention on the Rights of Persons with Disabilities : resolution / adopted by the General Assembly*, 24 January 2007, A/RES/61/106 <<https://www.refworld.org/docid/45f973632.html>> accessed 21 November 2021

<sup>221</sup> *ibid*

fundamental freedoms without discrimination. This is reflected in the Convention's preamble and throughout its articles.<sup>222</sup>

Article 13 of the convention provides that States Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages.<sup>223</sup> It further prescribes positive measures to be taken for the fulfillment of the rights of persons with disabilities concerning justice. For example, State parties are to promote appropriate training for those working in the field of administration of justice, including police and prison staff.<sup>224</sup>

Although all provisions of the CRPD are relevant to access to justice, several, beyond Article 13 for instance Article 5 on Equality and Non-Discrimination, requires State parties to recognize that all persons with disabilities are equal before and under the law, and are entitled without any discrimination to equal protection from and equal benefit of the law.<sup>225</sup> State parties are to further prohibit all discrimination based on disability and guarantee persons with disabilities equal and effective legal protection against discrimination on all grounds.<sup>226</sup>

Article 12 on Equal Recognition before the Law, requires State parties to recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life, and to take

---

<sup>222</sup> *ibid*

<sup>223</sup> The convention on the Rights of Persons with Disabilities, article 13

<sup>224</sup> *ibid*

<sup>225</sup> The convention on the Rights of Persons with Disabilities, article 5

<sup>226</sup> *ibid*

appropriate measures to provide access by persons with disabilities to the support that they may require in exercising their legal capacity.<sup>227</sup>

Kenya is a party to the Convention on the Rights of Persons with Disabilities which advocates for the right to access justice for persons with disabilities. Conversely, it offers the best hope for sign language policy notwithstanding its disability framing. The CRPD requires states to recognize sign languages and to support sign bilingual education, where appropriate.<sup>228</sup>

### **3.4.5 Regional Instruments**

In terms of legal reform, Kenya takes a lot of cues from other countries. In this regard, the study may need to take into account a few legal rules or practices on legal representation or help. The European Convention on Human Rights, Article 6<sup>229</sup> is part material to Article 50(2) of the Kenyan Constitution on fair trial in criminal cases. Article 6 means that persons with Disabilities should have effective access to tribunals or courts.<sup>230</sup> This can be accomplished, for example, by providing a deaf advocate or an interpreter in cases involving the deaf to streamline court procedures so that the deaf person does not have to look for an advocate in order for the trial to be considered fair. This judgment confirms states' obligations to provide deaf individuals with interpreters as a method of guaranteeing effective access to justice.

In Africa, Article 10(2) of the Protocol to the African Charter on Human and Peoples' Rights, 1998 provides that "free legal representation may be provided where the interests of justice so

---

<sup>227</sup> The convention on the Rights of Persons with Disabilities, article 12

<sup>228</sup> Batterbury, S.C.E., 'Language justice for Sign Language Peoples: the UN Convention on the Rights of Persons with Disabilities' (2012) Lang Policy 11 <https://doi.org/10.1007/s10993-012-9245-8> accessed 21 April 2020

<sup>229</sup> Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, ETS 5 <<https://www.refworld.org/docid/3ae6b3b04.htm>> accessed 21 November 2021

<sup>230</sup> Convention for the Protection of Human Rights and Fundamental Freedoms, article 6

require”.<sup>231</sup> While this provision applies to the African Court on Human and Peoples’ Rights, the thesis behind its inclusion in the Protocol was to assist those individuals who cannot access a legal representative of their choice, for instance, because of lack of interpreters. As a Party to the Protocol, Kenya has some lessons to learn from how the African Court operates with regard to access to justice.

Article 23 of the Protocol to the African Charter on Human and Peoples' Rights on The Rights Of Women In Africa provides that every person is equal before the law and is entitled to equal protection for women with a disability before the law.<sup>232</sup> Equality, in this case, counters any discriminatory acts, either from the Government or the lawyers, against persons with disabilities.

Providing free legal aid to indigent people is an important aspect of equal access to justice as envisioned in the AU Charter, which stipulates that freedom, equality, justice, and dignity are essential objectives for the achievement of the legitimate aspirations of the African peoples.

The African Charter on Human and Peoples’ Rights provides that every person is equal before the law and is entitled to equal protection of the law.<sup>233</sup> Equality in this case counters any discriminatory acts, either from the Government or the lawyers, against indigenous communities.<sup>234</sup>

---

<sup>231</sup> Organization of African Unity (OAU), *Protocol to the African Charter on Human and People's Rights on the Establishment of an African Court on Human and People's Rights*, 10 June 1998 <https://www.refworld.org/docid/3f4b19c14.html> accessed 21 November 2021

<sup>232</sup> *ibid*

<sup>233</sup> *ibid*

<sup>234</sup> *ibid*

### **3.5 CONCLUSION**

Based on the foregoing discussion, it can be concluded that Kenya has not adopted any special institutional or legislative mechanisms to protect the rights of persons living with disabilities, particularly deaf communities, other than the Constitution's recognition of their culture, customs, and minority status. This explains why the implementation of the Kenya sign language in the Kenya Judiciary has had challenges. The Constitution provides for Article 7(3)(b) of the Constitution 2010 on the promotion and development of the use of Kenya Sign language; to give effect to Article 54(1)(d); to provide for the inclusion of sign language in education curriculum; to provide the use of sign language in legal proceedings and for connected purpose. The Constitution envisions the enactment of a legal framework to give effect to Article 7(3) (b)but the Government has been reluctant in complying with the same within the four-year timeline set out under the 5th Schedule.

## **CHAPTER FOUR**

### **4.0 BEST PRACTICES OF THE USE OF SIGN LANGUAGE AND ACCESS TO JUSTICE SOUTH AFRICAN AND AMERICAN LEGAL SYSTEMS**

#### **4.1 Introduction**

As previously stated in chapter two, the theoretical and conceptual underpinnings of Persons with Disabilities contexts are complex and vary by jurisdiction. The legal and institutional mechanisms used to address access to justice become relatively applicable. It should be noted that Sign Language is not universal. Thus, in Kenya, we have Kenyan Sign Language (KSL), in the United Kingdom, we have British Sign Language (BSL), in South Africa, we have South African Sign Language (SASL), and in the United States, we have American Sign Language (ASL), and so on. Additionally, Sign Languages are natural languages in their own right, systematic and rule-based, with distinct vocabularies and grammatical structures and just as complex as spoken languages and independent. While the Constitution of Kenya generally recognizes the rights of persons living with disabilities<sup>235</sup> and Kenya Sign Language as an official language. The existing legal framework when it comes to Kenya's sign language as an official language is ineffective and inadequate when compared with South Africa and America. This chapter discusses the access to justice framework for the Deaf community in the two jurisdictions to provide best practices for the improvement of Kenya's access to justice with the aid of Sign language.

---

<sup>235</sup> The Constitution of Kenya 2010, article 54

#### **4.2 Legal recognition of Deaf Peoples' Rights and the use of Sign Language as an Official in South Africa**

The World Federation of the Deaf (WFD) of which South Africa is one of the ordinary members encourages the national federations of the Deaf to work towards official recognition of Sign Languages for communication accessibility for Deaf people.<sup>236</sup>

Many countries, particularly in Europe, have gone a long way toward accepting, recognising, and protecting their Sign Languages. After the European Parliament passed a resolution based on the European Charter for Regional and Minority Languages requiring member states to recognize their Sign Languages, European countries began to prioritize official recognition of their Sign Languages.<sup>237</sup>

South Africa ratified the United Nations Convention on the Rights of Persons with Disabilities and its Optional Protocol without reservation in 2007. The Convention requires States Parties to take specific measures to promote the rights of persons with disabilities, including the right to equal access to information and communication, as well as the right to freedom of expression and opinion, by allowing them to seek, receive, and impart information and ideas on an equal footing with others, and through any form of communication that they choose.<sup>238</sup> Such measures include the provision of a professional sign language interpreter.<sup>239</sup>

---

<sup>236</sup> Deaf Federation Of South Africa, 'Memorandum Towards Recognition Of South African Sign Language As The 12<sup>th</sup> Official Language' <https://static.pmg.org.za/docs/2007/070216memorandum.htm> > accessed 8 September 2021

<sup>237</sup> *ibid*

<sup>238</sup> South African Government, 'The right of deaf South Africans to access to information and communication' < [The right of deaf South Africans to access to information and communication | South African Government \(www.gov.za\)](http://www.gov.za) > accessed 12 July 2020

<sup>239</sup> United Nations Convention on the Rights of Persons with Disabilities, article 9

South Africa has South African Sign Language (SASL), which is the first language of nearly 5% of Deaf people and some hearing people who grew up with Deaf family members. People who became deaf later in life or who are hard of hearing usually speak as their first or preferred language. Most people, on the other hand, prefer to learn sign language in order to communicate more effectively. The above-mentioned percentage figure is significant for a country with a population of 55 million people.<sup>240</sup>

The recognition of South African Sign Language in section 6(5)(a)(iii) of the Constitution was a significant step toward potentially achieving linguistic equality, as well as a significant step toward ensuring human rights and dignity, as well as active participation in the life of the Deaf community.<sup>241</sup> These provisions generally recognise the basic rights of the deaf community who form part of the minority groups in South Africa. This provision in the constitution also provides a viable platform upon which the deaf people may find recourse development of the Deaf community and the strength and health of the language.<sup>242</sup>

Like the Kenyan Constitution, the South African Constitution requires the state to establish a law that recognizes sign Language to address past inequalities and the Language barrier. The Pan South African Language Board (PanSALB) was foreshadowed in Section 6(5) of the Constitution of the Republic of South Africa, 1996 (Act No. 108 of 1996), the Constitution, and established through the Pan South African Language Board Act 59 of 1995.<sup>243</sup> The Pan South African Language Board Act of 1995 was passed by the South African Parliament, recognizing that South African Sign

---

<sup>240</sup>South African National Deaf Association, 'Submission to The Constitutional Review Committee in Terms of Section 45(1)(C) of The Constitution Of The Republic Of South Africa, (Act 108, 1996) – Recommended Review of Section 6(1)' <<https://www.sanda.org.za/assets/files/constitution.pdf> > accessed on 8 September 2021

<sup>241</sup> ibid

<sup>242</sup> ibid

<sup>243</sup>Pan South African Language Board Act Of 1995



Language (SASL) is the primary language of Deaf people in South Africa and must be respected as a language of choice to be used in all interactions. It is a South African indigenous language that is an important part of the country's linguistic and cultural heritage.<sup>244</sup> The Act Take steps aimed at ensuring that South African Sign Language (SASL) is advanced, promoted, maintained, and regularly used in all aspects of life in South Africa. Within this framework, deaf communities in South Africa have been able to enjoy their rights, as enshrined in the constitution, and improve their quality of life by employing equal education opportunities.

The South African Constitution's matrix of sign language protection includes the rights to equality, language, culture, and education. The anti-discrimination section 26 of the Constitution was the most significant gain made by the disability community during the democratic era, and it would prove to be an impetus for policy and legislation to address the unequal treatment of persons with disabilities, to the extent that persons with disabilities are a designated group for employment equity and affirmative action.

The Equality and Prohibition of Unfair Discrimination Act 4 of 2000 (Equality Act) was enacted in South Africa to comply with the constitutional requirement for national legislation to prevent or prohibit unfair discrimination.<sup>245</sup> According to the Equality Act, unfair discrimination based on disability includes denying or removing any supporting or enabling facility necessary for a person with a disability's functioning in society; and failing to eliminate obstacles that unfairly limit or restrict persons with disabilities from enjoying equal opportunities, or failing to take steps to reasonably accommodate such persons' needs, is failing to provide reasonable accommodation.<sup>246</sup>

---

<sup>244</sup> Pan South African Language Board Act Of 1995, section1

<sup>245</sup> Equality and Prohibition of Unfair Discrimination Act 4 of 2000

<sup>246</sup> Willene Holness, 'The development and use of Sign Language in South African schools: The denial of inclusive education' (2016) SAFLII < <http://www.saflii.org/za/journals/ADRY/2016/8.html> > accessed 22 September2021

A significant amount of South African legislation confirms an individual's right to speak and be spoken to in the language they fully understand, particularly during court proceedings. This right is even enshrined in the Constitution's Section 35(3)(k), which grants the right to a fair trial.<sup>247</sup> Courts are also obliged, during criminal proceedings, to provide a competent interpreter if the accused does not understand the language in which court proceedings are conducted.

Section 6 of the South Africa Constitution states that the nine official African languages must be promoted and elevated to ensure parity of esteem alongside English and Afrikaans.<sup>248</sup> For this to happen in South African courts, the Department of Justice and Constitutional Development's language policy should be amended to give clear directives for how African languages and South African Sign Language can be implemented incrementally in courts and be used as languages of record.<sup>249</sup>

In the education setting in South Africa, the legislative framework consists primarily of *the South African Schools Act of 1996* (SASA) and the *National Education Policy Act 27 of 1996 (Policy Act)*, whilst the policy framework includes the Language in Education Policy, the Norms, and Standards regarding Languages and the White Paper 6 on Special Needs Education (White Paper 6).

South African Schools Act of 1996 (SASA) particularly refers to South African Sign Language (SASL) in the provision relating to language policy in government schools and explicitly acknowledges that 'a recognised sign language has the status of an official language for purposes of learning at a public school'. South African Schools Act 1996 (SASA) supports the notion of

---

<sup>247</sup> Constitution of the Republic of South Africa 1996, section 35(3)i

<sup>248</sup> Constitution of the Republic of South Africa 1996, section 6

<sup>249</sup> Jabulani Sikhakhane, 'Why using just one language in South Africa's courts is a problem' (*The Conversation*, 2020) <<https://theconversation.com/why-using-just-one-language-in-south-africas-courts-is-a-problem-134911>> accessed 22 September 2021

inclusion as integration, insofar as it stipulates that education for learners with disabilities should be provided in ordinary public schools, with the necessary support provided to these learners in such mainstream schools.<sup>250</sup>

The South Africa Policy Act of 1996 guarantees the right to be instructed in the language of choice. The Policy Act includes in its aims three imperatives: supporting the teaching and learning of South African Sign Language (SASL), as well as alternative and augmentative communication; countering the disadvantages arising from disparities between home language and languages of learning and teaching, and developing programs to redress the historical injustices visited upon ‘previously disadvantaged languages’. However, the policy stipulates that the language of learning and teaching in public schools must be an official language. Fortunately, the recognition of South African Sign Language (SASL) as an official language means that it is not excluded from languages of learning and teaching.<sup>251</sup>

In South Africa there have been positive changes in the education of the deaf, therefore, can only be expanded upon if the deaf community continues to ensure that its ‘voice’ be heard through processes that strategise and implement education policies. This process has been so far effective, it provides a forum through which deaf communities have an opportunity to engage the Government directly. This is distinct from Kenya, where deaf communities can only air their views through civil society organisations, which are voluntary in nature. In other words, there is no specific state-funded institution that deals exclusively with deaf community issues in Kenya.

---

<sup>250</sup> *ibid* (n247)

<sup>251</sup> *ibid*

### **4.3 Legal recognition of deaf peoples' rights and the use of American Sign Language (ASL)**

American Sign Language (ASL) is a visual language used by many Deaf and Hard Hearing people to communicate. ASL is a complete and complex language with unique linguistic elements that are composed of specific body movements, handshapes, and facial expressions.<sup>252</sup>

With regard to access to justice, America guarantees every person, including deaf people, equal protection of the law and the right to have a fair hearing before an independent and impartial court, tribunal, or forum.

Individuals with disabilities, including deaf people, who participate in court activities, such as litigants, witnesses, jurors, spectators, traffic violators, conservators, victims, and attorneys, are protected under the Americans with Disabilities Act (ADA).<sup>253</sup> Civil, criminal, traffic, small claims, domestic relations, probate, bankruptcy, juvenile, and other specialized courts are all covered by the law. It also applies to other activities carried out by court systems, such as interactions with court personnel, educational activities, and marriage ceremonies conducted by court personnel or magistrates.<sup>254</sup> This law also protects deaf parents of minor children who are being prosecuted in court. Even if the parents are not parties or witnesses, parents of a minor who is the subject of a juvenile proceeding are clearly "participants" in the proceeding. During the

---

<sup>252</sup> New Mexico Judiciary, 'Working with the Deaf and Hard of Hearing' <<https://www.nmcenterforlanguageaccess.org/cms/en/courts-agencies/judges-portal/working-with-the-deaf-and-hard-of-hearing>> accessed 14 September 2021

<sup>253</sup> National Association of the Deaf, 'Communication Access in State and Local Courts' (NAD, 2008) <<https://www.nad.org/resources/justice/courts/communication-access-in-state-and-local-courts/>> accessed on 14 September 2021

<sup>254</sup> *ibid*

proceeding, they are entitled to auxiliary aids and services to ensure effective communication, such as qualified interpreter services.<sup>255</sup>

The US Department of Justice contends that knowing sign language alone does not qualify one as a qualified interpreter. A qualified interpreter, on the other hand, is someone "who can interpret effectively, accurately, and impartially, both receptively and expressively, using any necessary specialized vocabulary." Knowledge of highly specialized vocabulary is required in the legal setting. Interpreters who work in court should have some form of national certification in addition to formal legal interpreter training. While not conclusive, such certification and training do serve as indicators of competence.<sup>256</sup>

Current best practices in the United States suggest that Deaf interpreters are, and should consistently be, working in the courts alongside their hearing counterparts.<sup>257</sup> Deaf interpreters function as gatekeepers, ensuring that Deaf Interpretation clients are comfortable and aware of the process and have access to contextualized information.<sup>258</sup>

In contrast, Kenya has only recognised the rights of deaf communities and Persons living with disabilities in article 54 of the Constitution of Kenya 2010, but there are no other mechanisms especially institutions to aid in implementing and fostering the abovementioned. This is despite the fact that deaf people are among those groups that have suffered access to justice. In Kenya Courts also appear to have rigid perceptions of the status of Kenya Sign Language use, which limits their access to justice. In the United States, for example, state and local courts may not

---

<sup>255</sup> *ibid* (n215)

<sup>256</sup> *ibid* (n215)

<sup>257</sup> Christopher Tester, 'How American Sign Language-English Interpreters Who Can Hear Determine Need for a Deaf Interpreter for Court Proceedings' (2018) Volume 26 Issue

<<https://digitalcommons.unf.edu/cgi/viewcontent.cgi?article=1081&context=jo>> accessed on 14 September 2021

<sup>258</sup> *ibid*

charge a deaf person for using a court sign language interpreter. According to the Americans with Disabilities Act (ADA) regulation, deaf litigants, attorneys, defendants, spectators, or any other person involved in the proceedings may not be charged for any auxiliary aid or service provided by a state or local court.<sup>259</sup>

The Department of Justice recognized that imposition of the cost of courtroom interpreter services is impermissible.<sup>260</sup> Accordingly, recouping the costs of interpreter services by assessing them as part of court costs would also be prohibited.

In America for example, there has been a series of legal reforms and institutional mechanisms particularly on deaf litigants which enhance access to justice. The Department of Justice in America has played a significant role in the reform process and other issues concerning the recognition of the rights of deaf communities. For example, each court must designate a specific office or individual(s) to act as an access coordinator, from whom participants in court proceedings may request auxiliary aids or sign language interpreter services. To ensure that the policy is properly implemented, the access coordinator must be familiar with the judiciary's policy of providing reasonable accommodations to people with communication disabilities.<sup>261</sup> Kenya lacks such a body.

---

<sup>259</sup> *ibid* (n215)

<sup>260</sup> The Rehabilitation Act of 1973, section 504

<sup>261</sup> National association for the Deaf, 'Communication Access in Federal Courts' (*NAD*, 2008)

<<https://www.nad.org/resources/justice/courts/communication-access-in-federal-courts/>> accessed 14 September 2021

#### **4.4 CONCLUSION**

Kenya has a lot to do to ensure Kenya sign language is adapted in our legal systems and courts to aid access to justice for the deaf communities is effective. While South Africa and America have a long history of recognition of Sign language guarantee access to justice deaf communities, Kenya has still not Enacted the Kenya sign Language Bill,2019 to law and it may take time for it to have an impact in achieving access to justice for the deaf people.

## **CHAPTER FIVE**

### **SUMMARY OF THE FINDINGS, RECOMMENDATIONS, AND CONCLUSIONS**

#### **5.1 Introduction**

This chapter constitutes a summary of the study's findings, recommendations, and conclusion.

#### **5.2 Summary Findings**

According to an analysis of Kenya's framework for persons with disabilities and access to justice, Kenya has not adopted any special mechanisms to protect the rights of persons with disabilities, particularly the deaf community, other than the simple recognition of their culture, customs, and minority status under Article 54 of the Constitution. In addition, the deaf community lacks a structural and institutional platform or organization to assist them in achieving access to justice through the use of Kenya's sign language, as envisaged in the constitution. Under the CRPD, all countries are required to promote legal recognition of their national sign languages. Unlike America and South Africa, Kenya has not enacted any law on Kenya's sign language that exclusively protects the rights and use of sign language. Kenya, despite being a signatory to several international and regional human rights treaties, has failed to enforce and protect the emotive nature of the deaf community and the use of Kenya Sign Language.

The global deaf community has historically faced and continues to face discrimination in the use of their national sign languages. This includes natural language access barriers as well as frequently confronting situations in which they do not have equal and real-time access to information and communication in their daily lives. This is particularly acute in educational



settings that teach Kenya Sign Language and the COVID-19 pandemic has illustrated, there are inadequate Kenya sign language interpreters in court-rooms now that most courts are virtual and often not deaf-friendly. It could be argued that the Government's reluctance to implement the Kenya sign Language Bill is clear evidence of the absence of an institution that specifically deals with the deaf community and the lack of recognition of Kenya's sign language as an official language.

Furthermore, Article 7(3) of the Constitution recognizes the diversity of languages and encourages the development and use of indigenous languages, including Kenyan Sign language. Article 44. (1) also recognizes that everyone has the right to use the language of their choice and to participate in the cultural life of their choice. Similarly, Article 54 mandates that people with disabilities be treated with dignity and respect and that they have access to educational institutions and facilities for people with disabilities that are integrated into society to the extent compatible with their person's interests.

This law essentially makes it a right for members of the Kenyan deaf community to have their handicap facilitated by service institutions such as the broadcasting media.

According to the findings, sign language plays an important role in the deaf community's access to justice. As various scholars point out in Chapter 2, a person living with a disability faces many challenges, including a lack of political participation, discrimination, and inadequate protection of their right to access to justice under Article 48 of Kenya's 2010 Constitution. For decades, their institutions have been suppressed by the repugnancy test, leaving them to contend with dominant formal justice systems in which they have limited or no representation. As a result, the deaf community, in particular, continues to feel marginalized by the mainstream hearing community.

In light of this, this study identifies a reason why it is critical to establish pragmatic mechanisms to protect the deaf community and improve the use of Kenya Sign Language as a means of facilitating their access to justice.

These findings are consistent with Rawls' procedural justice theory, which is based on the concepts of fairness, equality, and liberty. Because the government has failed to provide a framework for the deaf community to access justice through Kenya Sign Language, these communities may not be able to articulate their issues successively in the formal justice system, which is often characterized by procedural technicalities and partiality. Deaf people are left with the option of contacting non-profit organizations or non-advocates for interpretation due to the subordination of their language barrier. Whether their rights in the client-advocate relationship are abused by the Interpreters is an issue. The most important thing is to access legal services for them to vindicate their rights in court. The *Nation Media Group Limited v Cradle - The Children's Foundation Suing Through Geoffrey Maganya*<sup>262</sup> case discussed in chapter two indicates the legal battle that the deaf community has to go through to protect their rights and access to justice with the aid of Kenya Sign Language. This is inimical to Rawls' concept of equal opportunities and liberties.

The findings are also consistent with the study's hypothesis that although Kenya's sign Language is an official language, most of the court users are not acquaintance and There exists an inadequate legal framework and institutional implementation of Kenya sign language as an official language. This explains why the Kenya Sign Language Bill,2021 Should be enacted to Law will be very significant in promoting access to justice for the deaf community.

---

<sup>262</sup> Nation Media Group Limited v Cradle - The Children's Foundation Suing Through Geoffrey Maganya [2016] eKLR < Civil Appeal 149 of 2013 - Kenya Law > accessed 4 October 2020

### **5.3 RECOMMENDATIONS**

In light of the foregoing findings, the study makes the following recommendations.

#### **5.3.1 Recommendations to the Parliament**

First, the adoption of the 2010 Constitution is a positive step that will improve access to justice for people with disabilities. Although Kenya Sign language has been recognized as an official language, some cases involving the deaf community continue to face difficulties, resulting in a backlog of cases. As a result, it is recommended that Parliament pass legislation that recognizes Kenya's sign language through leadership and governance structures, with a focus on procedural issues. The Kenya Sign Language Bill was enacted in accordance with Article 7 of the Constitution, despite the fact that there is no provision for legislation in this regard. The legislation should also include procedures for selecting and training Sign language interpreters, including those who will represent the deaf community in court, as well as training for court user committees.

#### **5.3.2 Recommendations to the Executive**

To begin, the study recommends that the government support the establishment of deaf-specific institutions due to the nature of the challenges that people with disabilities face in Kenya. The organization should collaborate with the National Council for Persons with Disabilities and the Kenya National Commission on Human Rights, both of which have broad responsibilities. The establishment of this institution will reduce the workload of the Human Rights Commission, making it easier for it to carry out its mandates effectively. It is important to note that the institution will be tasked with dealing with reform programs in collaboration with the government.

The National Council For Persons With Disabilities membership should also have representatives from each deaf community as the Government may prescribe.

Upon the enactment of the Kenya Sign Language law, the Government should provide enough funds for Kenya sign Language training as this is a constitutionally protected aspect, particularly under Article 7(3) (b)(2) of the Constitution.

The government cannot be left out in Deaf Education since it has an obligation through its policymakers to establish realistic policies as far as Deaf Education and Kenya sign language is concerned. The constitution offers the right platform for the formulation of a language policy that embraces equality and impartiality to all the ethnic backgrounds that call Kenya home. Perhaps the implementation of Kenya's sign language policy can be managed at three levels of governance, namely, the national level where the ministry of education is charged with the responsibility, at the provincial level, where the provincial administrators are required to manage their respective language matters, and finally, the local government level where counties are charged with the management of language policies while taking into consideration the relevant provincial policy and the language preference and usage patterns of their resident.

### **5.3.3 Recommendation to Ministry of Education**

It is important to note at this point that KSL like any other Language is a full-blown language in its right, complete with its own rules of grammar. More importantly, no sign language is based on any spoken language. While spoken language makes use of sounds and letters for communication, Sign language uses gestures (manual) and Nonmanual signs. Each country has its own sign language. These sign languages are as different as English is to Kiswahili which is why SL is normally given the name of the country it belongs to. Thus Kenyan Sign Language (KSL).

An important step in rectifying or addressing this anomaly as far as deaf children are concerned is the introduction of signed bilingualism - this is the type of bilingualism that recognizes the use of

two languages in different modalities; that is, signed and spoken languages. Through this, Deaf Education will open up and enable the deaf to compete effectively with their hearing counterparts.

The Ministry of Education must be prepared to fund Deaf Education fully on the understanding that its previous policies have impoverished the deaf population and thus a majority of parents cannot afford to pay for their deaf children. Thus, a form of affirmative action for the deaf in terms of education would be in order.

Kenyan government has recently embarked on a wholesale review of its basic education curriculum. The education ministry should work with civil society groups and NGOs including Deaf Child Worldwide to make sure the review would include a special focus on adapting the new curriculum to meet the needs of students with disabilities.

The government to put up adequate structures for the deaf, from national integration and development. Consequently, the transition rate of the deaf to secondary school to learn the same subjects as their hearing counterparts or to tertiary institutions and universities is low.

Also Teaching sign language to all hearing as well as deaf children at school is a remarkable leap forward, especially as the government only recognised Kenya sign Language ten years ago. As Lack of knowledge of sign language by non-deaf people results in an attitudinal barrier starting from home environment, religion, health, and justice systems.

#### **5.3.4 Recommendation to the Judiciary**

The Kenyan Constitution of 2010 recognizes KSL as a national language. However, Deaf individuals do not have access to qualified KSL interpreters, creating barriers to education, employment, and public information, and more so in the justice system. There is a lack of

accessibility to the justice system, including physical access, legal aid and sign language interpreters in courtrooms, and procedural accommodation. The State should implement physical, informational, and communicational accessibility, such as the provision of professional sign language interpreters, Braille, and other procedural accommodation, and ensure the training of court staff, judges, police officers, and prison staff to uphold the rights of persons with disabilities, including the right to a fair trial.

#### **5.4 CONCLUSION**

Kenya's legal system has undergone progressive reforms since its independence. These reforms have had a significant impact on people with disabilities and resented opportunities that, if properly explored, could significantly reduce the human rights challenges that deaf people face. With the adoption of the 2010 Constitution, the door was opened for the recognition and protection of people with disabilities, including the deaf community. Kenya is a signatory to a number of international and regional human rights treaties that articulate the rights to equality, inherent human dignity, equality before the law, and equal protection of the law before an impartial tribunal or court, as well as non-discrimination on a variety of grounds, including race, social origin, and ethnicity. Kenya is a signatory to the International Covenant on Civil and Political Rights (ICCPR), which envisions fair trials, non-discrimination, and equality before the law as the fundamental pillars of access to justice. Kenya has also ratified the Convention on the Rights of Persons with Disabilities, which advocates for the right of people with disabilities to access justice. In contrast, despite its disability framing, it represents the best hope for a sign language policy. The Convention on the Rights of the Child requires states to recognize sign languages and to support sign bilingual education.

This means that the two crucial instruments are inapplicable in Kenya. The other instruments that Kenya has ratified or acceded to, on the other hand, apply domestically under Articles 2(5) and 2(6) of the Constitution. Kenya is required by Article 21(4) to ensure that international human rights instruments to which it is a party are implemented. While Kenya's Sign Language is recognized as an official language in the Kenyan Constitution, no effective legal mechanisms have been established to enforce and ensure Sign Language is effectively used in various forums to protect the deaf community from oppression and discrimination and to promote access to justice. Kenya lags in terms of laws and institutions on sign language and assistance for the indigent, as well as the protection of disability laws and governance structures.

Thus, a lack of knowledge of Kenya's sign language means a poor understanding of the law or a lack of legal representation for the deaf community in Kenya, giving them little chance of success in Kenya's formal justice institutions. In light of this, the study recommends, among other things, that the government enact a law under Article 54 of the Constitution that exclusively deals with the unique nature of life and rights of deaf community peoples and other marginalized groups; that the government enacts legislation that recognizes Kenya Sign Language as an official language; and that the government establishes institutions that promote the use of Kenya sign language.

## **BIBLIOGRAPHY**

### **BOOKS**

1. Bear, Leroy Little, *The Quest for Justice: Aboriginal Peoples and Aboriginal Rights* (Menno Boldt and J. Anthony Long (eds) (University of Toronto Press, 1985)
2. Gerald Allan Cohen, *'Karl Marx's Theory of History: A Defence'* (Clarendon Press, 2000)
3. John Rawls, *A Theory of Justice* (Rev edn, Harvard University Press, 1971)

### **REPORTS/PAPERS**

1. Batterbury, S.C.E., 'Language justice for Sign Language Peoples: the UN Convention on the Rights of Persons with Disabilities' (2012) Lang Policy 11 <https://doi.org/10.1007/s10993-012-9245-8> accessed 21 May 2021
2. David Allen Larson, 'Access to Justice for Persons with Disabilities: An Emerging Strategy' (2014) Laws, Vol. 3. No. 2 [https://www.researchgate.net/publication/262690323\\_Access\\_to\\_Justice\\_for\\_Persons\\_with\\_Disabilities\\_An\\_Emerging\\_Strategy](https://www.researchgate.net/publication/262690323_Access_to_Justice_for_Persons_with_Disabilities_An_Emerging_Strategy) > accessed 5<sup>th</sup> May 2020
3. Deaf Federation of South Africa, 'Memorandum towards Recognition Of South African Sign Language As The 12<sup>th</sup> Official Language' <https://static.pmg.org.za/docs/2007/070216memorandum.htm> accessed on 21 May 2021
4. Equality and Prohibition of Unfair Discrimination Act 4 of 2000
5. George Jefwa Mweri, 'The acquisition of Kenyan sign language (Ksl) and its significance as a mother tongue and medium of instruction in schools for the deaf in Kenya' (2016) <[http://erepository.uonbi.ac.ke/bitstream/handle/11295/96019/Mweri\\_The%20acquisition%20](http://erepository.uonbi.ac.ke/bitstream/handle/11295/96019/Mweri_The%20acquisition%20)> accessed 6<sup>th</sup> September 2019
6. Helen Mudora, 'Review of Kenya persons with disabilities act overdue' <<http://globaldisability.org/2016/04/01/review-kenya-persons-disabilities-act-2003-overdue>> accessed 6<sup>th</sup> September, 2019
7. Jill Cottrell Ghai, 'Pluralism, Language and the Constitution' (2017) Katiba Institute <<http://www.katibainstitute.org/wp-content/uploads/2017/09/Language-and-the-Constitution.pdf>> accessed 6<sup>th</sup> September, 2019
8. Kariuki Muigua, 'Access to Justice: Promoting Court and Alternative Dispute Resolution Strategies' <<http://kmco.co.ke/wp-content/uploads/2018/08/Access-to-Justice.pdf>> accessed 20 September 2019



9. Kenya National Commission On Human Rights, *'From norm to practice a status report on implementation of the rights of persons with disabilities in Kenya'* (KNCHR, 2014) <[https://www.knchr.org/Portals/0/EcosocReports/From%20Norm%20to%20Practice\\_Statu%20Report%20on%20the%20Implementation%20of%20the%20Rights%20of%20PW%20Ds%20in%20Kenya.pdf?ver=2018-06-06-182335-003](https://www.knchr.org/Portals/0/EcosocReports/From%20Norm%20to%20Practice_Statu%20Report%20on%20the%20Implementation%20of%20the%20Rights%20of%20PW%20Ds%20in%20Kenya.pdf?ver=2018-06-06-182335-003)> accessed on 1<sup>st</sup> October 2022
10. Kristi Bleyer, Kathryn Shane McCarty and Erica Wood, 'Access to Jury Service for Persons with Disabilities' (1995) *Mental & Physical Disability Law Reporter* Vol.19 No. 2, 249
11. Krystle Kabare, 'Social Protection and Disability in Kenya' (2018) <<https://www.developmentpathways.co.uk/wp-content/uploads/2018/10/Disability-Report-Kenya.pdf>> 6 September 2019
12. National Council for Persons with Disabilities (NCPWD), 'Strategic Plan 2018 – 2022' <<https://www.socialprotection.go.ke/wp-content/uploads/2019/06/NCPWD-SP-FINAL.pdf>> 6 september 2020
13. National Coordinating Agency for Population and Development, 'Kenya National survey report on person with Disability Report' March 2008 D: MYDOCU~1\NCAPD\PWDSUR~1\KNSP (afri-can.org)
14. Organization of African Unity (OAU), *Protocol to the African Charter on Human and People's Rights on the Establishment of an African Court on Human and People's Rights*, 10 June 1998 <<https://www.refworld.org/docid/3f4b19c14.html>>
15. Roderick Macdonald, 'Justice Is a Noun, But Access Isn't a Verb' in 'Expanding Horizons: Rethinking Access to Justice in Canada' [http://www.justice.gc.ca/eng/rp-pr/csj-sjc/jsp-sjp/op00\\_2-po00\\_2/b4.html#sec15](http://www.justice.gc.ca/eng/rp-pr/csj-sjc/jsp-sjp/op00_2-po00_2/b4.html#sec15)
16. Sheskin, M., & Baumard, N, 'Switching away from utilitarianism: The limited role of utility calculations in moral judgment' (2016, *PLoS One*, 11 (8), 1) < Switching Away from Utilitarianism: The Limited Role of Utility Calculations in Moral Judgment (semanticscholar.org)>
17. South African National Deaf Association, 'Submission to The Constitutional Review Committee in Terms of Section 45(1)(C) of The Constitution Of The Republic Of South Africa, (Act 108, 1996) – Recommended Review of Section 6(1)' <<https://www.sanda.org.za/assets/files/constitution.pdf>> accessed 21 September 2021
18. The Judiciary, Republic of Kenya, 'Sustaining Judiciary Transformation (SJT) A Service Delivery Agenda, 2017-2021' (Judiciary, 2017) *Strategic\_BluePrint.pdf* (kenyalaw.org) >
19. The World Health Organization, 'World report on disability' WHO/NMH/VIP/11.01 (World Health Organization 2011)

<[https://www.who.int/disabilities/world\\_report/2011/report/en/](https://www.who.int/disabilities/world_report/2011/report/en/) > accessed on 21 May 2021

20. UN and the Rule of Law, 'Access to justice <<https://www.un.org/ruleoflaw/thematic-areas/access-to-justice-and-rule-of-law-institutions/access-to-justice/> > accessed on 6 June 2020
21. UN General Assembly, *Convention on the Rights of Persons with Disabilities: resolution / adopted by the General Assembly, 24 January 2007, A/RES/61/106* <https://www.refworld.org/docid/45f973632.html> accessed on 20 May 2021
22. United Nations Office on Drugs and Crime, 'United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems' (United Nations, 2013) United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems (unodc.org)
23. United Nations and the Rule of Law, 'Access to Justice' <https://www.un.org/ruleoflaw/thematic-areas/access-to-justice-and-rule-of-law-institutions/access-to-justice/> > accessed on 6 June 2020
24. UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171 <https://www.refworld.org/docid/3ae6b3aa0.html> accessed on 6 June 2020
25. United Nations, 'Toolkit on disability for Africa: Access to Justice For Persons with Disabilities' <<https://www.un.org/esa/socdev/documents/disability/Toolkit/Access-to-justice.pdf> > accessed on 15 September 2020
26. United Nations, 'United Nations Treaty collection Chapter IV' [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-4&chapter=4&clang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&clang=en)
27. UN General Assembly, '*Universal Declaration of Human Rights*' 10 December 1948, 217 A (III) <https://www.refworld.org/docid/3ae6b3712c.html>
28. Viehmann, Krystel, 'Deaf Culture in Mombasa and HIV/AIDS Education' (2005) *Independent Study Project (ISP) Collection* 486 [https://digitalcollections.sit.edu/isp\\_collection/486](https://digitalcollections.sit.edu/isp_collection/486)

## **ARTICLES, JOURNALS**

1. Arkadi Toritsyn, and A. H. Monjurul Kabir, 'Promoting The Human Rights of Persons with Disabilities in Europe and the Commonwealth of Independent States: Guide' (UNDP, 2013) <https://reliefweb.int/sites/reliefweb.int/files/resources/BRC%20PWD%20Report.pdf> accessed 18 May 2020

2. Audrey Laur, 'Healthcare access for deaf patients – The legal and ethical perspectives' (2017) Volume 86 Issue 1 *Medico-Legal Journal* <https://journals.sagepub.com/doi/pdf/10.1177/0025817217743416> accessed on 18 May 2020
3. Brent C Elder, Michael A Schwartz, 'Effective Deaf Access to Justice' (2018) Volume 23 Issue 4 *The Journal of Deaf Studies and Deaf Education* <https://doi.org/10.1093/deafed/eny023>
4. Christopher Tester, 'How American Sign Language-English Interpreters Who Can Hear Determine Need for a Deaf Interpreter for Court Proceedings' (2018) Volume 26 Issue 1 <https://digitalcommons.unf.edu/cgi/viewcontent.cgi?article=1081&context=joi>
5. Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, ETS5 <https://www.refworld.org/docid/3ae6b3b04.html> accessed
6. Dan W. Brock, 'The Theory of Justice' 1971 Vol 40 Harvard University Press. Cambridge <https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=3767&context=uclev>
7. Doris Matu, 'Improving Access to Justice in Kenya through Horizontal Application of the Bill of Rights and Judicial Review' (2017) Volume 2 *Strathmore Law Review* <[http://www.press.strathmore.edu/uploads/journals/strathmore-law-review/SLR2/2SLR1\\_Article\\_4.pdf](http://www.press.strathmore.edu/uploads/journals/strathmore-law-review/SLR2/2SLR1_Article_4.pdf) accessed on 22/5/2020 >
8. J Beqiraj, L McNamara and V Wicks, 'Access to justice for persons with disabilities: From international principles to practice' (2017) *International Bar Association* [https://www.biicl.org/documents/1771\\_access\\_to\\_justice\\_persons\\_with\\_disabilities\\_report\\_october\\_2017.pdf](https://www.biicl.org/documents/1771_access_to_justice_persons_with_disabilities_report_october_2017.pdf)
9. Joyce W. Ngugi, 'Barriers to Mental Health Access of Deaf Adults in Kenya: A Review' (2018) Vol. 01, Issue 03 *African Journal of Clinical Psychology* <https://www.daystar.ac.ke/ajcp/downloads/articles/Ngugi%20and%20Mwiti.pdf>
10. Jürg Helbling, Walter Kälin & Prosper Nobirabo, 'Access to justice, impunity and legal pluralism in Kenya' (2015) DOI: 10.1080/07329113.2015.1080430, *The Journal of Legal Pluralism and Unofficial Law* <http://dx.doi.org/10.1080/07329113.2015.1080430>
11. Luz M Molina, 'Language Access to Louisiana Courts: A Failure to Provide Fundamental Access to Justice' (2008) *Louisiana Bar Journal* Vol. 61, No. 6, 10
12. Miller, Katrina R 'Access to Sign Language Interpreters in the Criminal Justice System' (2001) *American Annals of the Deaf* Volume 146, No. 4, 328 [www.jstor.org/stable/44390112](http://www.jstor.org/stable/44390112)

13. Mweri, J.G, 'Diversity in education: Kenyan sign language as a medium of instruction in schools for the deaf in Kenya' (2014) *Multiling.Ed. Volume 4* <[https://doi.org/10.1186/s13616-014-0014->](https://doi.org/10.1186/s13616-014-0014-)
14. Nelson, W, 'The Very Idea of Pure Procedural Justice. Ethics' (1980) Vol. 90, No. 4 The University of Chicago Press [www.jstor.org/stable/2380450](http://www.jstor.org/stable/2380450)
15. Norah N. Mose, 'Societal Impingement on Linguistic Human Rights of the Kenyan Deaf People: Pitfalls in Integrating the Deaf in National Development' (2019) Vol. 7, No. 2 *International Journal of Linguistics and Communication* [http://ijlcnnet.com/journals/ijlc/Vol\\_7\\_No\\_2\\_December\\_2019/7.pdf](http://ijlcnnet.com/journals/ijlc/Vol_7_No_2_December_2019/7.pdf)
16. Otteson, J. R, 'The misuse of egalitarianism in society' (2017) Vol 22 Number 1, *The Independent Review* The Misuse of Egalitarianism in Society: The Independent Review: The Independent Institute
17. Pojman, Louis, 'Theories of Equality: A Critical Analysis' (1995) Volume 23, No. 2 *Behavior and Philosophy* [www.jstor.org/stable/27759323](http://www.jstor.org/stable/27759323) accessed on 9 September 2020
18. Sagit Mor, 'With Access And Justice For All' (2010, *Cardozo Law Review*) <http://cardozolawreview.com/wpcontent/uploads/2018/08/MOR.39.2.pdf> accessed 5 may 202
19. Singer, Marcus G, 'Justice, Theory, and a Theory of Justice' (1977) *Philosophy of Science* Vol 44, no. 4 <http://www.jstor.org/stable/186941> accessed on June 15, 2020
20. Willene Holness, 'The development and use of Sign Language in South African schools: The denial of inclusive education' (2016) *SAFLII* <http://www.saflii.org/za/journals/ADRY/2016/8.html>

### **ELECTRONIC/ INTERNET MATERIALS**

1. Access to Justice Advisory Committee, *Access to justice: an action plan* (AGPS, 1994) Access to [justice](http://www.nla.gov.au/justice): an action plan / Access to Justice Advisory Committee | National Library of Australia (nla.gov.au) >
2. Amber Mezbouria, 'Fighting discrimination against deaf children in Kenya' <<https://www.volunteeries.org/blogs/fighting-discrimination-against-deaf-children-kenya>> accessed 16 may 2020
3. Brigitte Rohwerder, 'Disability stigma in developing countries' (2018) <[https://assets.publishing.service.gov.uk/media/5b18fe3240f0b634aec30791/Disability\\_stigma\\_in\\_developing\\_countries.pdf](https://assets.publishing.service.gov.uk/media/5b18fe3240f0b634aec30791/Disability_stigma_in_developing_countries.pdf)> accessed on 22/09/2021 > accessed 16 may 2020

4. Elena McPhillips , ‘World Wide Hearing Loss: Stats from Around the World’ <<https://www.audicus.com/world-wide-hearing-loss-stats-from-around-the-world/> > accessed 16 August 2020
5. International Development Law Organization, ‘IDLO In Kenya: Access To Justice’ <<https://www.idlo.int/idlo-kenya-access-justice> > accessed 16 september 202a
6. Jabulani Sikhakhane, ‘Why using just one language in South Africa’s courts is a problem’ (*The Conversation*, 2020) <https://theconversation.com/why-using-just-one-language-in-south-africas-courts-is-a-problem-134911>
7. Medicinenet, ‘Medical Definition of Congenital deafness’ <<https://www.medicinenet.com/script/main/art.asp?articlekey=10766> > accessed on 16 October 2020
8. Merriam Webster, ‘Sign language’ <https://www.merriam-webster.com/dictionary/sign%20language> accessed on 19 November 2019
9. National Association of the Deaf, ‘Communication Access in State and Local Courts’ (*NAD*, 2008) <<https://www.nad.org/resources/justice/courts/communication-access-in-state-and-local-courts/>> accessed on 16 September 2020
10. National Council for Persons with Disabilities, ‘About NCPWD <<http://ncpwd.go.ke/> >
11. New Mexico Judiciary, ‘Working with the Deaf and Hard of Hearing’ <https://www.nmcenterforlanguageaccess.org/cms/en/courts-agencies/judges-portal/working-with-the-deaf-and-hard-of-hearing>
12. South African Government, ‘The right of deaf South Africans to access to information and communication’[The right of deaf South Africans to access to information and communication | South African Government \(www.gov.za\)](https://www.gov.za/the-right-of-deaf-south-africans-to-access-to-information-and-communication)
13. Stanford Encyclopedia of Philosophy, ‘Equality’ <https://plato.stanford.edu/entries/equality/#Util>
14. Stanley Wambua, 'Approaches Used To Measure Disability Through Censuses: Kenyan Experience' .PowerPoint Presentation (un.org)
15. Steve McCartney and Rick Parent, ‘Ethics In Law Enforcement’ <https://opentextbc.ca/ethicsinlawenforcement/chapter/rawls-theory-of-justice/>
16. The national center for access to justice <https://ncforaj.org/language-access-project/> accessed on 16 September 2020

17. West Resendes & Angie Martell, 'Understanding the Injustices Faced by the Deaf Community' (July, 2016) <http://iglesiamartell.com/understanding-the-injustices-faced-by-the-deaf-community/>> accessed on 6 October 2021
18. World health organization, 'Deafness and hearing loss' <https://www.who.int/news-room/fact-sheets/detail/deafness-and-hearing-loss> accessed on 26 November 2019