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ALTERNATIVE DISPUTE RESOLUTION

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Editor's Note

We are pleased to launch another issue of the *Alternative Dispute Resolution (ADR) Journal*, Volume 13, No. 3.

The ADR Journal is a publication by the Chartered Institute of Arbitrators (CIArb), Kenya that spearheads intellectual discourse on pertinent and germane issues in Alternative Dispute Resolution and other related fields of knowledge.

It offers a platform where scholars, ADR practitioners, judicial officers, law lecturers and students can share knowledge, ideas, emerging jurisprudence and reflects on the practice of ADR. The Journal is aimed towards advancing the growth of ADR as a viable tool for the management of disputes in Kenya and across the globe.

The role of ADR in access to justice has gained recognition in the recent past. In Kenya, the Constitution advocates for the promotion of ADR mechanisms towards achieving access to justice. The Journal addresses some of the current concerns and challenges facing ADR mechanisms and proposes recommendations towards enhancing the suitability of ADR mechanisms in the quest towards Access to Justice.

The ADR Journal is devoted to the highest quality academic standards. It is peer reviewed and refereed in order to achieve this goal.

This volume contains papers and case reviews on salient themes in ADR including: *No Longer Alternative?: Reconceptualizing ADR in the African Context for Development; Integrating Traditional Dispute Resolution Mechanisms into Formal Legal Systems in African Jurisdictions: Opportunities and Challenges; Decolonizing Dispute Resolution: Revitalizing Indigenous Appropriate Justice Systems (AJS) For Greater Access to Justice in Kenya; Arbitrator Disclosure: Analysis of the Applicable Tests for Arbitrator Bias in Kenya; ESG, Sustainability and Investment Arbitration: A Reflection; Medical Arbitration and the Right to Responsive Framework for Timely Health Justice: A Human Rights Perspective from Kenya; Resolving Intellectual Property Disputes in The Digital Era: The Role of Online Arbitration in Kenya; Arbitrating Carbon Disputes for*

Green Growth and Sustainability; and Dispute Boards in construction contracts: The challenges and opportunities of the new norm in public-sector contracts in Kenya.

The Journal continues to shape the landscape of ADR practice in Kenya and beyond. It is one of the most widely cited and referenced publications in ADR. The Editorial Team welcomes feedback and suggestions from our readers across the globe to enable us to continue improving the Journal.

I wish to thank the contributing authors, Editorial team, reviewers and everyone who has made this publication possible.

The Journal is committed towards equality and non-discrimination in academia and offers a platform where everyone can share his/her ideas and thoughts on key issues in ADR. To this end, the Editorial Board welcomes and encourages the submission of papers, book reviews and case summaries on emerging and pertinent issues in ADR to be considered for publication in subsequent issues of the Journal. The Editorial Board receives and considers each article but does not guarantee publication. Submissions should be sent to the editor through editor@ciarbkenya.org and adrjournal@ciarbkenya.org and copied to admin@kmco.co.ke.

The Journal is available online at <https://ciarbkenya.org/journals/>

Prof. Kariuki Muigua Ph. D, FCI Arb, Ch. Arb, OGW.

Editor, Nairobi,

August, 2025.

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No Longer Alternative?: Reconceptualizing ADR in the African Context for Development

By: *Hon. Prof. Kariuki Muigua**

Abstract

This paper discusses the need to reconceptualize Alternative Dispute Resolution (ADR) in the African context. The paper argues that ADR in the African context is an ‘appropriate’ and not ‘alternative’ tool in the administration of justice. The paper notes that ADR has been practiced in Africa for many centuries. Further, it posits that ADR fits well within the concept of justice in Africa. Consequently, the paper argues that ADR is a suitable tool towards justice, peace and development in Africa. Despite its advantages, the paper notes that ADR is often misconceptualized and considered alternative to litigation in Africa. The paper critically examines some of the key challenges undermining the growth and use of ADR as an appropriate process in Africa. In light of these challenges, the paper discusses how ADR can be reconceptualized in Africa for justice and development.

1.0 Introduction

Alternative Dispute Resolution (ADR) is a term that includes all dispute resolution methods other than court proceedings¹. It has been argued that ADR encompasses a wide range of dispute management techniques that function outside formal

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¹ Alternative Dispute Resolution (ADR), Available at [https://uk.practicallaw.thomsonreuters.com/0-107-6391?transitionType=Default&contextData=\(sc.Default\)&firstPage=true](https://uk.practicallaw.thomsonreuters.com/0-107-6391?transitionType=Default&contextData=(sc.Default)&firstPage=true) (Accessed on 01/08/2025)

court processes² According to the United Nations, ADR comprises various approaches and techniques for resolving disputes in a non-confrontational way³. It has been observed that ADR covers a wide range of techniques and approaches ranging from party-to-party engagement through *negotiation* as the most direct way to reach a mutually accepted resolution, to *arbitration* and *adjudication* where an external party imposes a solution upon the parties⁴. Further, it has been noted that somewhere along the axis of ADR approaches between these two extremes lies *mediation* which is a process by which a third party aids the disputants to reach a mutually agreed solution (Emphasis added)⁵. ADR mechanisms may be linked to but function outside formal court litigation processes⁶.

ADR has emerged as a preferred approach towards managing disputes at all levels. At the global level the *Charter of the United Nations* encourages a peaceful approach to management of conflicts amongst states⁷. The Charter provides that parties to a dispute shall first of all seek a solution by *negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means* of their own choice⁸ (Emphasis added). Further, at a national level, the *Constitution of Kenya*⁹ mandates courts and tribunals

² Uwazie. E., 'Alternative Dispute Resolution in Africa: Preventing Conflict and Enhancing Stability.' *Africa Security Brief*, No. 16 of 2011

³ United Nations., 'Alternative Dispute Resolution Approaches and their Application in Water Management: A Focus on Negotiation, Mediation and Consensus Building' Available at https://www.un.org/waterforlifedecade/water_cooperation_2013/pdf/adr_background_paper.pdf (Accessed on 01/08/2025)

⁴ Ibid

⁵ Ibid

⁶ Uwazie. E., 'Alternative Dispute Resolution in Africa: Preventing Conflict and Enhancing Stability.' Op Cit

⁷ United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI

⁸ Ibid, article 33 (1)

⁹ Constitution of Kenya., 2010., Government Printer, Nairobi

to promote ADR mechanisms including reconciliation, mediation, arbitration and Traditional Dispute Resolution Mechanisms (TDRMs)¹⁰.

The growth of ADR globally is linked to the advantages it provides in the administration of justice. ADR mechanisms contain key attributes including informality, privacy, confidentiality, flexibility and the ability to promote expeditious and cost-effective management of disputes which makes them a viable tool in enhancing access to justice¹¹. ADR provides numerous advantages in the administration of justice including a system with procedural flexibility, a broad range of remedial options, and a focus on individualized justice¹². It has been argued that with the exception of binding arbitration, the goal of ADR is to provide a forum for disputing parties to work toward a voluntary, consensual agreement, as opposed to having a judge or other authority impose an outcome upon them¹³. Further, ADR provides a platform for parties in dispute to resolve their differences prior to or during the use of formal administrative procedures and litigation which are often very costly and time-consuming¹⁴. In addition, ADR allows for more

¹⁰ Ibid, article 159 (2) (c)

¹¹ Muigua. K., 'Alternative Dispute Resolution and Access to Justice in Kenya.' Glenwood Publishers Limited, 2015

¹² Main. T., 'ADR: The New Equity.' Available at https://www.researchgate.net/profile/ThomasMain/publication/228182886_ADR_The_new_equity/links/53d00e470cf2fd75bc5c57a5/ADR-The-newequity.pdf (Accessed 01/08/2025)

¹³ Alternative Dispute Resolution., Available at <https://www.dol.gov/general/topic/labor-relations/adr#:~:text=Types%20of%20ADR%20include%20arbitration,%2C%20neutral%20factfinding%2C%20and%20minitrials.> (Accessed on 01/08/2025)

¹⁴ Alternative Dispute Resolution Handbook., Available at <https://www.opm.gov/policy-data-oversight/employee-relations/employee-rights-appeals/alternative-dispute-resolution/handbook.pdf> (Accessed on 01/08/2025)

creative and collaborative solutions than that those available in traditional litigation¹⁵.

Due to their key attributes and benefits, it has been argued that ADR mechanisms should be considered as *'appropriate'* and not *'alternative'* in the quest towards justice¹⁶. It has been argued that the term *'alternative'* is a misnomer since it may be understood to imply that ADR mechanisms are second-best to litigation which is not the case¹⁷. Access to justice through formal court processes is hindered by several challenges including costs, bureaucracy, complex legal procedures, illiteracy, corruption, distance from formal courts, backlog of cases in courts and lack of legal knowhow¹⁸. ADR has thus emerged as an appropriate tool towards addressing these challenges and enhancing flexibility, efficiency, informality, party autonomy, cost-effectiveness and expeditiousness in managing disputes¹⁹. It is therefore necessary to reconceptualize ADR in order to bolster its role in access to justice and development.

This paper discusses the need to reconceptualize ADR in the African context. The paper argues that ADR in the African context is an *'appropriate'* and not *'alternative'* tool in the administration of justice. The paper notes that ADR has been practiced in Africa for many centuries. Further, it posits that ADR fits well within the

¹⁵ JAMS ADR, 'What is ADR' Available at <https://www.jamsadr.com/adr-spectrum/> (Accessed on 01/08/2025)

¹⁶ Muigua. K., 'Reframing Conflict Management in the East African Community: Moving from Alternative to 'Appropriate' Dispute Resolution' Available at <https://kmco.co.ke/wp-content/uploads/2023/06/Reframing-Conflict-Management-in-the-East-African-Community-Moving-from-Alternative-to-Appropriate-Dispute-Resolution-1.pdf> (Accessed on 01/08/2025)

¹⁷ P. Fenn, "Introduction to Civil and Commercial Mediation", in Chartered Institute of Arbitrators, *Workbook on Mediation*, (CIArb, London, 2002), pp. 50-52

¹⁸ Ojwang. J.B , "The Role of the Judiciary in Promoting Environmental Compliance and Sustainable Development," 1 *Kenya Law Review Journal* 19 (2007), pp. 19-29: 29

¹⁹ Muigua. K., 'Alternative Dispute Resolution and Access to Justice in Kenya.' Op Cit

concept of justice in Africa. Consequently, the paper argues that ADR is a suitable tool towards justice, peace and development in Africa. Despite its advantages, the paper notes that ADR is often misconceptualized and considered alternative to litigation in Africa. The paper critically examines some of the key challenges undermining the growth and use of ADR as an appropriate process in Africa. In light of these challenges, the paper discusses how ADR can be reconceptualized in Africa for justice and development.

2.0 ADR in Africa: Promises and Pitfalls

ADR is not an alien concept in Africa. It has been observed that ADR mechanisms have been practiced in Africa for many centuries²⁰. Therefore the introduction of some terms, laws, rules and/or terminologies in the current landscape of ADR in the continent does not make it foreign²¹. Before colonialism, most African societies, if not all, were living communally and were organized along clan, village, tribal or ethnic lines²². Conflicts were therefore a common phenomenon in African societies. Conflicts were a common occurrence in this set up due to various issues including land, chieftaincy, personal relationship issues, family property, murder, and matrimonial fall-outs among others²³. It has been observed that African societies have throughout history upheld norms and values geared towards

²⁰ Muigua. K., 'Resolving Conflicts through Mediation in Kenya.' Glenwood Publishers Limited, 2nd Edition, 2017

²¹ Elachi. A.J., 'African Lawyers and Alternative Dispute Resolution' Available at <https://lawyersofafrica.org/wp-content/uploads/2019/08/African-Lawyers-and-Alternative-Dispute-Resolution.pdf> (Accessed on 02/08/2025)

²² Kariuki. F., 'Conflict Resolution by Elders in Africa: Successes, Challenges and Opportunities.' Available at <http://kmco.co.ke/wp-content/uploads/2018/08/Conflict-Resolution-by-Elders-successes-challenges-and-opportunities-1.pdf> (Accessed on 02/08/2025)

²³ Ademowo. A., 'Conflict Management in Traditional African Society.' Available at https://www.researchgate.net/publication/281749510_Conflict_management_in_Traditional_African_Society (Accessed on 02/08/2025)

promoting social cohesion and smooth running of the community²⁴. These values include respect and honor for elders, unity, cooperation, forgiveness, harmony, truth, honesty, *Ubuntu/Utu*, and peaceful co-existence²⁵. Conflicts were therefore seen as a threat to the social fabric that holds the community together²⁶.

Due to the negative impacts of conflicts on the entire community, African societies have frameworks in place for the resolution of conflicts and for preventing their escalation into violence, in order to avoid threatening the social fabric that holds these communities together²⁷. The process of conflict management in African societies is well-entrenched in the traditions, customs, norms and taboos of the people²⁸. It takes the form of informal negotiation, mediation, reconciliation and arbitration among other techniques²⁹. These mechanisms are considered 'appropriate' and not 'alternative' in management of disputes since they are able to safeguard values that are inherent in African societies and foster peace and social cohesion³⁰. ADR is considered appropriate since it fits well within the concepts of justice in Africa and its core values of peace, truth, harmony and reconciliation³¹.

ADR cannot therefore be considered as alternative in Africa. For many years, African societies have had institutional mechanisms including the Council of

²⁴ Awoniyi. S., 'African Cultural Values: The Past, Present and Future' *Journal of Sustainable Development in Africa*, Volume 17, No.1, 2015

²⁵ Ibid

²⁶ Ibid

²⁷ Kariuki. F., 'Conflict Resolution by Elders in Africa: Successes, Challenges and Opportunities.' Op Cit

²⁸ Ademowo. A., 'Conflict Management in Traditional African Society.' Op Cit

²⁹ Kariuki. F., 'Conflict Resolution by Elders in Africa: Successes, Challenges and Opportunities.' Op Cit

³⁰ Adeyinka. A., & Lateef. B., 'Methods of Conflict Resolution in African Traditional Society' *An International Multidisciplinary Journal*, Ethiopia Vol. 8 (2).

³¹ Uwazie. E., 'Alternative Dispute Resolution in Africa: Preventing Conflict and Enhancing Stability.' Op Cit

Elders as well as cultural and spiritual sources to uphold the values of peace, tolerance, solidarity and respect for, and of, one another³². These structures are responsible for peace education, confidence-building, peacemaking, peacebuilding, conflict monitoring, conflict prevention, conflict management, and conflict resolution³³. When conflicts occurred, these structures and systems ensure that they are effectively managed through dialogue, negotiation and mediation among other traditional conflict management techniques³⁴. It has been argued that the mechanisms adopted towards conflict prevention, management and resolution in African are largely effective and respected, and their decisions are binding on all parties, since the identity of an individual is linked to that of the community³⁵. Consequently, there is an impetus for individuals to comply with decisions for the well-being of the community³⁶. In addition, social ties, values, norms and beliefs and the threat of excommunication from the society provide institutions such as the Council of Elders with legitimacy and sanctions to ensure their decisions are complied with³⁷.

From the foregoing, it is evident that ADR has a long and rich history in Africa. As a result, it has been argued that ADR should be embraced as '*African Dispute Resolution*' and not Alternative Dispute Resolution³⁸. Throughout its history in the continent, ADR has focused greatly on principles of reconciliation and maintaining social cohesion as opposed to punitive justice which is the case in

³² ACCORD., 'Traditional Methods of Conflict Resolution.' Available at <https://www.accord.org.za/conflict-trends/traditional-methods-of-conflict-resolution/> (Accessed on 02/08/2025)

³³ Ibid

³⁴ Ibid

³⁵ Ademowo. A., 'Conflict Management in Traditional African Society.' Op Cit

³⁶ Ibid

³⁷ Kariuki. F., 'Conflict Resolution by Elders in Africa: Successes, Challenges and Opportunities.' Op Cit

³⁸ Elachi. A.J., 'African Lawyers and Alternative Dispute Resolution' Op Cit

modern dispute resolution processes³⁹. ADR has been described as an age long cultural phenomenon in most African Countries⁴⁰. It has been argued that ADR is an African concept and is on its face, a natural dispute resolution process for the continent⁴¹.

Despite its suitability and appropriateness in the continent, it has been observed that most African countries have adopted a form of ADR based on Western notions⁴². As African countries became colonized, the colonial governments controlled dispute resolution mechanisms and replaced the old customary law systems of dispute resolution with court processes⁴³. It has been observed that some of the traditional dispute resolution mechanisms survived only as informal systems and as lower courts in the judicial hierarchy⁴⁴. The traditional dispute resolution processes which promoted ADR in the African context were therefore disregarded following the introduction of formal dispute resolution processes in the continent. It has been argued that the indigenous practices and institutions on conflict management were largely weakened and even destroyed in many African societies, since the colonial powers introduced formal justice processes such as law courts, which came to pronounce judgments rather than resolve conflicts according to the African concepts of justice⁴⁵. This has significantly impacted the growth of ADR in the continent.

³⁹ Ibid

⁴⁰ Phillips. F.P., 'ADR in Africa' Available at <https://www.businessconflictmanagement.com/blog/2012/06/adr-in-africa/#:~:text=Alternative%20Dispute%20resolution%20is%20an,the%20indigenous%20system%20of%20governance>. (Accessed on 02/08/2025)

⁴¹ Elachi. A.J., 'African Lawyers and Alternative Dispute Resolution' Op Cit

⁴² Price. C., 'Alternative Dispute Resolution in Africa: Is ADR the Bridge Between Traditional and Modern Dispute Resolution?', 18 *Pepp. Disp. Resol. L.J.* 393 (2018)

⁴³ Phillips. F.P., 'ADR in Africa' Op Cit

⁴⁴ Ibid

⁴⁵ Adeyinka. A., & Lateef. B., 'Methods of Conflict Resolution in African Traditional Society' Op Cit

Further, it has been argued that the current practice of ADR as we know it today originated and developed within specific cultural, ideological and political contexts inherent in the West and therefore, its application in non-Western societies especially Africa may turn out to be counter-productive since the latter exhibit markedly different social, cultural, historical and political conditions⁴⁶. Most of the ADR mechanisms being practiced in Africa including arbitration, mediation and adjudication are largely influenced by the Western conceptions of justice where they are seen as '*alternative*' as opposed to '*appropriate*' in the African context⁴⁷.

In light of the foregoing challenges, it is imperative to reconceptualize ADR in the African context for justice and development.

3.0 Reconceptualizing ADR in the African Context for Development

It is imperative to reconceptualize ADR in the African context. ADR has been part and parcel of conflict management in Africa since time immemorial. It is an appropriate and effective tool in managing conflicts and disputes for peace and development⁴⁸. Despite its suitability in Africa, the current practice of ADR in the continent is heavily westernized and fails to fully capture African cultural values and conflict management practices and principles⁴⁹. On this basis, it has been

⁴⁶ Ogbaharya. D., 'Alternative Dispute Resolution (ADR) in Sub-Saharan Africa: The Role of Customary Systems of Conflict Resolution (CSCR).' Available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1612865 (Accessed on 02/08/2025)

⁴⁷ Muigua. K., 'Reframing Conflict Management in the East African Community: Moving from Alternative to 'Appropriate' Dispute Resolution.' Op Cit

⁴⁸ Ogbaharya. D., 'Alternative Dispute Resolution (ADR) in Sub-Saharan Africa: The Role of Customary Systems of Conflict Resolution (CSCR).' Op Cit

⁴⁹ Ghebretkle. T., & Rammala. M., 'Traditional African Conflict Resolution: The Case of South Africa and Ethiopia' available at <https://www.ajol.info/index.php/mlr/article/view/186176> (Accessed on 02/08/2025)

argued that there is need to Africanize conflict management processes in order to fully capture the spirit of conflict management inherent in African societies⁵⁰.

It has been observed that many African countries are still struggling to establish functional, timely, and trusted judicial systems⁵¹. Consequently, it has been argued that many African citizens have lost faith in the ability of their nations' courts to provide timely or just closure to their grievances⁵². In post-conflict and fragile contexts, where societal tensions are already high and justice systems typically do not function as in the case of some African countries, the need for prompt resolution of disputes is particularly vital⁵³. ADR has thus developed as an ideal and popular channel outside formal procedures to resolve disputes in timely manner, while restoring the parties' sense of justice⁵⁴.

Further, ADR can play a key role in peacebuilding in Africa. ADR mechanisms such as mediation, conciliation and negotiation are not only vital in addressing internal conflicts but also doing so in ways that enhance sustainable peace rather than dividing people further as would be the case with adversarial court processes⁵⁵. For many decades, several African countries have been characterized by internal conflicts, intra and inter-state wars, and political instability threatening

⁵⁰ Muigua. K., 'Reframing Conflict Management in the East African Community: Moving from Alternative to 'Appropriate' Dispute Resolution.' Op Cit

⁵¹ Uwazie. E., 'Alternative Dispute Resolution in Africa: Preventing Conflict and Enhancing Stability.' Op Cit

⁵² Ibid

⁵³ Ibid

⁵⁴ Price. C., 'Alternative Dispute Resolution in Africa: Is ADR the Bridge Between Traditional and Modern Dispute Resolution?.' Op Cit

⁵⁵ Muigua. K., 'Towards Effective Peacebuilding and Conflict Management in Kenya.' Available at <https://kmco.co.ke/wp-content/uploads/2021/05/Towards-Peacebuilding-and-Conflict-Managementin-Kenya.docx-Kariuiki-Muigua-MAY-2021x.pdf> (Accessed on 02/08/2025)

peace, security and development⁵⁶. As a result of these conflicts, it has become more challenging to secure lasting peace in Africa, with protracted and recurring conflict more difficult to prevent or resolve, often because their underlying causes are not well understood or addressed⁵⁷. Utilising ADR processes including mediation, negotiation and conciliation can foster lasting peace in Africa by addressing the root causes of conflict thus resulting in mutually satisfying and long- lasting outcomes while also eliminating the likelihood of conflicts reemerging in future⁵⁸.

Embracing ADR in Africa is therefore key for development. ADR can enhance access to justice by strengthening dispute management systems and bridging the gap between formal legal systems and traditional modes of African justice⁵⁹. Further, ADR has high value in stabilization, peacebuilding and state building efforts when judicial institutions are weak and social tensions are high⁶⁰. In order to achieve these goals, it is imperative to reconceptualize ADR in the African context. There is need to consider and embrace ADR mechanisms in Africa as ‘appropriate’ and not ‘*alternative*’ in the quest towards access to justice⁶¹. Further, ADR mechanisms should be widely embraced in Africa including through putting in place appropriate legal, policy, and institutional frameworks in order to

⁵⁶ Olaosebikan. A., ‘Conflicts in Africa: Meaning, Causes, Impact and Solution.’ *African Research Review.*, Volume 4, No. 4 (2010)

⁵⁷ United Nations., ‘Promotion of Durable Peace and Sustainable Development in Africa.’ Available at https://www.un.org/osaa/sites/www.un.org.osaa/files/docs/2109875_osaa_sg_report_web_new.pdf (Accessed on 02/08/2025)

⁵⁸ Muigua. K., ‘Resolving Conflicts through Mediation in Kenya.’ Op Cit

⁵⁹ Uwazie. E., ‘Alternative Dispute Resolution in Africa: Preventing Conflict and Enhancing Stability.’ Op Cit

⁶⁰ Ibid

⁶¹ Muigua. K., ‘Reframing Conflict Management in the East African Community: Moving from Alternative to ‘Appropriate’ Dispute Resolution.’ Op Cit

encourage their uptake⁶². Governments should support the growth of ADR in the continent including through initiating and financing ADR projects, fostering public awareness on ADR and putting in place effective ADR frameworks⁶³.

There is also need to reform the current practice of ADR in Africa in order to capture the spirit of conflict management inherent in African societies. It has been observed that most African countries have adopted a form of ADR based on Western notions⁶⁴. However, since the African culture and spirit of conflict management is quite different than Western culture, modifications are necessary in order to effectively embrace ADR in Africa⁶⁵. In particular, indigenous and customary systems of conflict management in Africa should be recognised and strengthened in order to capture and reflect ADR in the African context⁶⁶.

4.0 Conclusion

ADR holds a special place in Africa. It has been part and parcel of conflict management in the continent since time immemorial⁶⁷. ADR in the African context is considered '*appropriate*' and not '*alternative*'. It fits well within the concepts of justice in Africa and its core values of peace, truth, harmony and reconciliation⁶⁸. Reconceptualizing ADR in the African context is therefore necessary for justice, peace and development.

⁶² Muigua. K., 'Effective Justice for Kenyans: Is ADR Really Alternative?' Available at <https://kmco.co.ke/wp-content/uploads/2018/08/Alternative-Dispute-Resolution-or-Appropriate-Dispute-Resolution.pdf> (Accessed on 02/08/2025)

⁶³ Ibid

⁶⁴ Price. C., 'Alternative Dispute Resolution in Africa: Is ADR the Bridge Between Traditional and Modern Dispute Resolution?.' Op Cit

⁶⁵ Ibid

⁶⁶ Ibid

⁶⁷ Muigua. K., 'Resolving Conflicts through Mediation in Kenya.' Op Cit

⁶⁸ Uwazie. E., 'Alternative Dispute Resolution in Africa: Preventing Conflict and Enhancing Stability.' Op Cit

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Integrating Traditional Dispute Resolution Mechanisms into Formal Legal Systems in African Jurisdictions: Opportunities and Challenges

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Abstract

Traditional Dispute Resolution Mechanisms can be defined as a conventional way of resolving disputes based on a particular society's culture, norms, values, and customs. In Africa, even before the colonialists came, societies had structures and mechanisms to reconcile people in case of a dispute. The objective of the traditional dispute resolution mechanism was to restore harmony in the community and deter the occurrence of similar conflicts in the future. During colonialism in Africa, modern structures to administer justice were established, and as a result, traditional mechanisms were undermined. After their independence, most African countries retained the colonial structures of their legal systems. However, with time, some countries have recognised and used the Traditional Dispute Resolution Mechanism to settle some conflicts. This Article examines the benefits and shortcomings of the Traditional Dispute Resolution Mechanisms. The Article proposes how African countries can continue to use traditional means of settling disputes. It suggests that good practices of the traditional mechanism can be incorporated into the formal legal system. Also, proper institutions can be established to run the traditional dispute Resolution Mechanisms.

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Introduction

Traditional Dispute Resolution Mechanisms (TDRM), also known as Indigenous or Customary Dispute Resolution Mechanisms, are community-based systems for resolving conflicts. Rooted in specific communities' customs, norms, and cultural practices, these mechanisms are typically facilitated by respected local figures such as elders, chiefs, or spiritual leaders.⁶⁹ The primary objectives of TDRM are to restore social harmony, promote reconciliation, and maintain communal relationships, often prioritising consensus and restorative justice over punitive measures.⁷⁰ In the traditional dispute settlement mechanism, parties were expected to end their differences at the end of the process.⁷¹ For example, once the dispute was settled, the offender was expected to provide a goat or fowl for the community members to share. This encouraged reconciliation of the parties because, having eaten together, they were considered to have buried the hatchet.⁷² Before colonisation, African societies primarily relied on traditional dispute resolution methods.⁷³ These mechanisms prioritised mediation, reconciliation, and social harmony rather than formal legal processes. Although there were no written

⁶⁹ Zekarias Milkias, Ketema Wakijira and Misikir Milkias, The role of customary dispute resolution in prompting peacebuilding in Ethiopian federation: The case of dubusha institution of the Gamo People published in *International Journal of Peace and Development Studies*, Vol.15(1), pp. 1-15, July-December 2024

⁷⁰ Ibid

⁷¹ Assefa, Getachew and Alula Pankhurst 2008. Facing the challenges of customary dispute resolution: Conclusions and recommendations. In: *Pankhurst, Alula and Getachew Assefa eds. Grass-roots justice in Ethiopia: The contribution of customary dispute resolution*. Addis Ababa, Centre Francais d'Études Éthiopiennes. pp. 257-273.

⁷² Adenike AiyedunI, and Ada OrdorII, Integrating the traditional with the contemporary in dispute resolution in Africa (https://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S2077-49072016000100009)

⁷³Wikipedia contributors. "Law in Africa." Wikipedia, Wikimedia Foundation, last modified#. https://en.wikipedia.org/wiki/Law_in_Africa

. Ibid

rules in the TDRM, stakeholders should observe certain principles. These principles included the parties having faith in the Tribunal, which would determine the dispute.⁷⁴ Typically, the Tribunal would be composed of elders, traditional religious leaders, chiefs, or other recognised prominent people in that period.⁷⁵

TDRM's main aim was to restore harmony and maintain social cohesion within the community.⁷⁶ The process focused on healing relationships, preserving community bonds, and promoting peace rather than solely seeking damages and punishment for wrongdoers. Although traditional society had no formal legislation, it was governed by community norms, values, cultures, beliefs, and customary law that had developed from generation to generation.⁷⁷

The effect of colonialism and its aftermath on the TDRM

Colonialism greatly impacted African traditional mechanisms for resolving disputes among and between society members.⁷⁸ The impact was caused by Africa's integration into global systems, including those related to dispute

⁷⁴ Ajayi, Adeyinka Theresa and Buhari, Lateef Oluwafemi, *Methods of Conflict Resolution in African Traditional Society*, *African Research Review*, Vol. 8 (2), Serial No. 33, April: 2014:138-157

⁷⁵ Ibid

⁷⁶ Gebretsadik HG (2022). *Indigenous Conflict Resolution: Social Institutions and their Role in Peacebuilding in Ethiopia's Gamo Community*. *International Journal of Research and Innovation in Social Science* 6(4):1-14.

⁷⁷ Jude Nsom Waandim, *Traditional methods of conflict resolution: The Kom experience*, *Conflict Trends* (Issue 2018/4), published by the African Centre for the Constructive Resolution of Disputes (ACCORD).

⁷⁸ Tsegai Berhane Ghebretkle & Macdonald Rammala (2019) - *Traditional African Conflict Resolution: The Case of South Africa and Ethiopia* Published in the *Mizan Law Review* (Vol. 12, Issue 2, pp. 325-350)

resolution.⁷⁹ Western culture undermined traditional African cultures, which enshrined a dispute resolution philosophy to bring peace and harmony to society.⁸⁰ The traditional African approach to settling disputes was significantly affected. At the same time, some of the dispute resolution methods were displaced or transformed considerably by the countervailing imperatives of Western civilisation and its accompaniments of complex liberalism and cultural secularisation.⁸¹ Colonial administrations imposed formal legislations and systems of law enforcement.⁸² Colonialism impacted the social, cultural, political and economic life of Africans in a very significant and radical manner, and the dispute resolution landscape could not escape these effects.^{83*} It is important to note that the new system introduced by colonial rule did not completely wipe out the traditional dispute resolution mechanism.⁸⁴ The traditional system was undermined and ran together with the Western-introduced system, resulting in dual, and sometimes multiple, normative orders existing side by side.⁸⁵ However, the new system was superior for all intents and purposes. For example, customary

⁷⁹ Olabisi D. Akinkugbe, *Dispute Settlement under the African Continental Free Trade Area Agreement: A Preliminary Assessment*, published in the African Journal of International and Comparative Law

⁸⁰ Okechukwu, O. *A comparative analysis of restorative justice practices in Africa*. Globalex. New York University School of Law. Retrieved from https://www.nyulawglobal.org/globalex/restorative_justice_africa1.html

⁸¹ Almond, G. A. & B. Powell (1966), *Comparative Politics: Developmental Approach*, Boston, MA: Little, Brown.

⁸² Code & Justice. *Legal systems in Africa: An overview of frameworks and practices*. Code & Justice.

⁸³ Ullah, Farhat. *Colonial Policing and Police Administration in Erstwhile Northwest Frontier Province and Tribal Areas of British India*, *Cogent Social Sciences* 10 (1): 2326179. <https://doi.org/10.1080/23311886.2024.2326179>

⁸⁴ Omotayo, A. I. 2021. "Reintegrating African Traditional Dispute Resolution Mechanisms in Conflict Resolution." *International Journal of Advanced Academic Research* 7 (12): 91–104. <https://www.ijaar.org/articles/v7n12/ijaar71209.pdf>

⁸⁵ Brin ZLegal Pluralism across the Global South: Colonial Origins and Contemporary Consequences

laws were accepted only when not repugnant to colonial legislations and Western morality.⁸⁶

Despite independence, many African countries retained colonial legal structures, often marginalising TDRM. The dominance of formal courts and statutory laws limited the scope and authority of traditional mechanisms.⁸⁷ The formal court system, emphasising statutory law and judicial processes, often overshadows the role and authority of TDRM, which relies on community-based solutions and customary practices.⁸⁸ However, there have been some debates in some African jurisdictions about using traditional methods of resolving disputes in society. Those pro-traditional methods of resolving conflicts have several reasons to support their position. One of the main reasons for supporting TDRM is to reduce the case backlog in courts.⁸⁹ Several factors contribute to the backlog of cases, including the insufficient budget for the judiciary, a small number of judicial officers, and poor court infrastructure. Also, in some places, a small number of lawyers to assist disputants is attributed to the case backlog.⁹⁰

Some countries in Africa have enacted laws recognising TDRM. For example, in Kenya, the Constitution of 2010 under Article 159, which deals with judicial authority and the legal system, persuades courts and tribunals to be guided by the

⁸⁶ See section 9 of The Judicature and Application of Laws Ordinance (JALO), Cap. 358 [R.E. 2002] [Tanzania]

⁸⁷ Ochich, G. O.. The withering province of customary law in Kenya: A case of design or indifference. In J. Fenrich et al. (Eds.), *The future of African customary law* (pp. x-y). [Publisher].

⁸⁸ Kariuki Muigua, Francis Kariuki and Humphrey Sipalla, *Traditional Natural Resource Conflict Resolution: A Case Study of Kenya*, *African Journal on Conflict Resolution*

⁸⁹ Metekia, T. S. ,Customary courts in East Africa – more than a means to lighten caseloads

⁹⁰ David McQuoid-Mason, *Could traditional dispute resolution mechanisms be the solution in post-colonial developing countries, particularly in Africa?*
<https://opo.iisj.net/index.php/osls/article/view/1174>

TDRM, among other principles, when exercising their judicial authority.⁹¹ Probably, the most famous country in Africa to use TDRM in resolving social disputes is Rwanda, after the 1994 genocide. Although criminal machinery was put into motion to prosecute those who were involved in the genocide, several Alternative Dispute Resolution (ADR) mechanisms were deployed to achieve the purpose of reconciling people in the society who were affected by the killings. ADR was seen as one of the best ways to resolve the dispute because it would prevent future occurrences of such merciless killings. The need to have an alternative means of resolving the conflict was based on the fact that normal courts, after the genocide, were not able to try all those cases emanating from the genocide.⁹² Against this background, community courts known as Gacaca were established. Gacaca refers to the public place where neighbourhood male elders used to meet to resolve local problems.⁹³ In traditional Gacaca, elderly men of the community comprised the judge's panel, with the impartial implementation of justice as the goal.⁹⁴ The court's scope dealt with property feuds and any other domestic dispute plaguing the community.⁹⁵ A large part of traditional Gacaca rested in reconciliation and the restoration of balance back in the community, including reintegrating the perpetrator into community life.⁹⁶ The Gacaca system

⁹¹ Article 159(2)(c) of the Kenyan Constitution

⁹² Gaparayi, I. T. . Justice and social reconstruction in the aftermath of genocide in Rwanda: An evaluation of the possible role of the gacaca tribunals. *African Human Rights Law Journal*, 1(1), 78-106

⁹³Samuel TUYISENGE, GACACA COURTS AS AN ALTERNATIVE DISPUTE RESOLUTION MECHANISM IN RWANDA,

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4002506&download=yes

⁹⁴ Transitional Justice in Rwanda: The Legacy of Gacaca. (University of Malaya Law Review. Retrieved from <https://www.umlawreview.com/lex-in-breve/transitional-justice-to-rwanda-the-legacy-of-gacaca>

⁹⁵ Ibid

⁹⁶ Bert, "Inside Rwanda's/Gacaca/Courts: seeking justice after genocide, University of Wisconsin,"2016.P.3.

was established by Organic Law No. 16/2004 of 19/6/2004. The law gave Gacaca courts jurisdiction to try the crimes of genocide and other crimes against humanity committed between October 1, 1990, and December 31, 1994. When the Rwandan government established these courts, it aimed to respond to the immense judicial challenges following the 1994 genocide.

Many other African countries have enacted laws allowing TDRM to resolve disputes. TDRM has many advantages, so some African countries are eager to apply it as a dispute resolution mechanism.

Advantages of TDRM

One of the advantages of TDRM is its spirit of restoring relationships between and among members of society.⁹⁷ This spirit aims at social healing as opposed to strict legal justice, which, while it may resolve the dispute, may leave parties not reconciled. In TDRM, reconciliation of parties is very essential, and most TDRMS are designed in a way that the dispute will be settled peacefully and there is avoidance of violence. In most African societies, after the settlement or during the dispute resolution meeting, people who are present will eat and drink together to signify their brotherhood. Elders, chiefs and religious leaders are mediators who will mediate and reconcile the disputants rather than judges who will punish the offenders. In effect, this builds a strong community bond.⁹⁸

⁹⁷ Nadjia Hashim González, A. . Efficacy of Traditional Dispute Resolution Mechanisms in Facilitating Peacebuilding Between Herdsmen and Farmers in the West Mamprusi Municipal of Ghana.

⁹⁸ Okechukwu , O. (n.d.). A Comparative Analysis of Restorative Justice Practices in Africa. Globalex. New York University School of Law. Retrieved from [Globalex link] https://www.nyulawglobal.org/globalex/restorative_justice_africa1.html

Another vital advantage of TDRM in contemporary times is reducing the backlog of court cases. For example, the Gacaca Court tried more than 100,000 genocide suspects who overfilled the country's prisons. The judicial system in Rwanda would have taken many years to try cases involving all these suspects.⁹⁹ In a normal judicial system, procedures are lengthy and involve many technicalities, unlike in Gacaca courts, where procedures were simplified, and hence, there was speed in determining those cases. In Kenya, for example, using TDRM has helped greatly reduce the case backlog by using alternative dispute resolution, including TDRM.

*"Customary law dispute resolution mechanisms can play a valuable role in reducing litigation in both criminal and civil cases. Such mechanisms involve negotiation, mediation, conciliation, adjudication and reconciliation (Otieno 2016, pp. 19–20). The first three are common to Western notions of alternative dispute resolution used to reduce litigation. The informal and flexible processes of traditional courts and arbitration mechanisms with their emphasis on reconciliation and re-integration are not."*¹⁰⁰

The use of TDRM is likely more cost-effective than litigation in courts of law.* In TDRM, parties are not represented by counsel, so there are no legal fees for prosecuting or defending a matter in a traditional dispute resolution process.* Also, the reconciliation meeting is typically held within the community, with no travelling costs. The costs involved in most cases are for buying foods and drinks, which usually becomes the burden of the losing party.

In TDRM, technicalities cannot overrule substantial justice. Although some procedures might be developed over time by usage, such as the role of specific

⁹⁹ the Human Rights Watch (HRW) report Justice Compromised: The Legacy of Rwanda's Community-Based Gacaca Courts

¹⁰⁰ <https://opo.iisj.net/index.php/osls/article/view/1174/1329>

individuals, and the order of speaking, there are no strict procedural technicalities in resolving the dispute in African tradition. What is common in most African societies is that conflicts are resolved in an open meeting where community members gather together to discuss.¹⁰¹ The wisdom of elders is relied upon in resolving the dispute. Technicalities cannot be entertained in the African tradition of solving disputes because the focus is always on reconciliation and restoration of harmony. Also, it aims to prevent similar conflicts in future.

Shortcomings of TDRM

Despite its benefits, TDRM has some criticisms and shortcomings. One of the main criticisms is that the system has an undue process. In TDRM, there are no well-established rules of procedure. The process will depend mainly on the wisdom of the “tribunal,” which has no training in justice dispensation. Therefore, fundamental rules to protect the natural justice of the parties may be ignored. For example, in a patriarchal society, women are likely to be given fewer opportunities to participate in dispute resolution.¹⁰² Also, in the Gacaca court, many allegations of procedural flaws have impacted the substantive determination of the cases.¹⁰³ The weakness in the procedures violated the right to a fair trial and limitations on accused persons’ ability to defend themselves effectively; flawed decision-making (often caused by judges’ ties to the parties in a case or pre-conceived views of what happened during the genocide) leading to allegations of miscarriages of justice; cases based on what appeared to be trumped-up charges, linked, in some cases, to the government’s wish to silence critics (journalists, human rights activists, and

¹⁰¹ Ibid

¹⁰² Joseph Serгон and Dr Scholastica Omondi, *An Analysis of the Weaknesses of Traditional Dispute Resolution Mechanisms (TDRMS) As an Avenue of Dispute Resolution in Kenya*, IOSR Journal Of Humanities And Social Science (IOSR-JHSS) Volume 24, Issue 9, Series. 9 (September 2019) 01-07

¹⁰³Justice Compromised The Legacy of Rwanda’s Community-Based Gacaca Courts

public officials) or to disputes between neighbours and even relatives; judges' or officials' intimidation of defense witnesses; corruption of judges to obtain the desired verdict; and other serious procedural irregularities.¹⁰⁴

Bias in TDRM is also noted as another weakness of the process. In this context, biases are suspected to be based on age, gender, social status, and kinship. In many traditional African societies, older people are perceived to have more authority than younger people in dispute resolution and other social matters.¹⁰⁵ Young people and women are discriminated against in most traditional African societies.¹⁰⁶ As noted earlier, the "neutrals" in TDRM come from a special class, such as elders, chiefs, and religious leaders.* In a dispute involving persons from two different socioeconomic statuses in society, the issue of power dynamics within the community may influence the determination of the dispute.

Regarding gender discrimination, women may not be allowed to participate in the dispute resolution meetings. At present, alternative dispute resolution reflects the gendered discrimination in society and does not benefit everyone equally.¹⁰⁷ Arguably, local justice institutions do not protect and serve women's interests well. Rather than balancing interests, they reinforce existing social norms and power relations. Divorced as they are from local authority structures, women's interests are often expendable; there is limited social or political return in protecting them. This is both caused by and reflected in women's lack of

¹⁰⁴ Justice Compromised The Legacy of Rwanda's Community-Based Gacaca Courts (<https://www.hrw.org/report/2011/05/31/justice-compromised/legacy-rwandas-community-based-gacaca-courts>)

¹⁰⁵ Dr. Francis Kariuki, *Conflict Resolution by Elders in Africa: Successes, Challenges and Opportunities*

¹⁰⁶ *Ibid*

¹⁰⁷ SEMINAR REPORT GENDER RESPONSIVE ALTERNATIVE DISPUTE RESOLUTION (DILI, 4-5 DECEMBER 2017)

representation in local dispute resolution mechanisms and a paradigm of the objectification of women's rights. Consequently, many women's legal issues are either ignored or not taken seriously,¹⁰⁸

Another weakness of the TDRM is that the mechanism may be complex and challenging to apply in a society with different ethnicities that coexist. People with different ethnicities may have different values, cultures, beliefs, and structures for resolving disputes. It should be noted that the essence of TDRM is people's culture and customs. What is wrong with one ethnicity may not necessarily be mistaken for another ethnicity. TDRM, in most cases, cannot effectively address the disputes in a complex society where people with different customs and norms live together.

Probably one of the most challenging aspects of TDRM in the modern world is how it can be used to determine the rights of parties that are protected by specific legislation, such as those related to land and other properties, those of a criminal nature, and matrimonial disputes. The decision makers in TDRM are, in most cases, without formal legal training. Hence, it may become difficult for them to determine conflicts requiring a clear understanding of a particular law that creates rights or obligations to the disputants. One criticism of Gacaca courts is that these courts could hear and determine criminal cases using lay persons. In Gacaca courts, judges were appointed by the community from the community without legal knowledge. Yet, these judges had to hear evidence, evaluate it and enter a judgment on the suspect. In disputes involving rights which are protected under the law, it is vital for those who are entrusted with the determination of the dispute to have at least a minimum knowledge of the law, which will enable them to apply

¹⁰⁸ Janine Ubink, Editor

Thomas McNerney and Series (Editors), *Customary Justice: Perspectives on Legal Empowerment*, LEGAL AND GOVERNANCE REFORM: LESSONS LEARNED. No. 3 /2011

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legal principles, interpret laws, and ensure fairness and consistency in dispute resolution.

How to proceed with TDRM in the current legal system

As we have seen, TDRM has many advantages and shortcomings. It is not wise to completely abandon TDRM because of the weaknesses that can be identified in the system. It is also improper to ignore TDRM's shortcomings and continue as if all is well. Some of these shortcomings harm substantive justice. Therefore, there is a need to look for a middle ground to tap into the system's advantages and avoid the disadvantages. In any event, society is not static. The culture is constantly changing. Because of these changes, societal conflict resolution must also change. African societies today are pretty different from the societies before colonialism. Although some disputes, such as land disputes, matrimonial disputes, and other disputes, appear to be the same in pre-colonial and post-colonial societies, the way of handling them may require different mechanisms because of the complexity of contemporary society. Changes are needed to ensure that these systems can adequately handle the complexities of modern conflicts and incorporate the needs of contemporary society in the way they are perceived by modern society, such as how human rights are interpreted today, issues of the environment, and social structures and economic needs in real time.

The best way to preserve TDRM's values is to extract the good parts of the mechanism and integrate them with modern dispute resolution systems, including court systems. Our laws should be crafted to enshrine African values of dispute settlement. Particularly, the laws should maintain the spirit of TDRM, which is to reconcile and restore societal harmony. Procedures should be the handmaidens of justice and not be used to abort justice.

Incorporating traditional mechanisms into the formal system will help ensure adherence to legal standards and due process, which are lacking in most TDRMS. Formal courts can borrow a lot from TDRM, particularly ensuring that the dispute resolution process is meaningful if the result is harmony. Society's participation in resolving the dispute can be one of the practices to be taken from TDRM and incorporated into the formal dispute settlement mechanism. For example, court-annexed mediation can be designed in a manner that, in some instances, elders or religious leaders are invited as mediators.

The dispute resolution system can also be designed so that TDRM is run in parallel with the formal system, but subject to modifications. The existence of multiple legal systems in one jurisdiction is known as legal pluralism. For this to function correctly, formal rules/legislation must be established to determine the types of disputes that can be resolved under TDRM and give the outcome of such a process the force of law. The law can recognise TDRM as a formal type of Alternative Dispute Resolution, or, like Gacaca, can be used as a community court. However, when TDRM is used as a community court, there must be minimum rules of procedure, and those who are given the authority to preside over these "courts" should get basic training on how to determine the dispute and be familiarised with the basic principles of human rights. In Ethiopia, for example, there are what are known as Traditional dispute resolution institutions (TDRIs). These institutions operate based on community values, norms and beliefs.¹⁰⁹ TDRM must be institutionalised for it to function properly. Where there is an issue of legal pluralism, the law should explicitly provide what will happen when there is a conflict between the different legal systems within the same jurisdiction. The existence of properly established institutes of TDRM alongside formal legal

¹⁰⁹ The interplay between traditional dispute resolution institutions and the formal justice system in Ethiopia: The case of the Jaarsa Biyyaa. (<https://www.accord.org.za/ajcr-issues/the-interplay-between-traditional-dispute-resolution-institutions-and-the-formal-justice-system-in-ethiopia-the-case-of-the-jaarsa-biyyaa/>)

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systems is possible, just like international laws coexist with domestic law in one jurisdiction.

Suppose TDRM is recognised as a proper institution for resolving disputes in the community. In that case, courts will be reduced with the burden of cases, just like how Gacaca courts helped the Rwandan judiciary after the Rwandan genocide 1994. This would also mean more access to justice for many people, particularly those from rural areas.

Conclusion

In conclusion, TDRM has a lot of advantages in the administration of justice. However, because of the changing society, TDRM should also change how it operates. These changes can be brought about by either taking good practices from TDRM and integrating them in the formal legal system. Alternatively, proper institutions can be established to dispense justice through TDRM, and these institutions can run along with the Court system and other types of Alternative Dispute resolution.

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*Decolonizing Dispute Resolution: Revitalizing
Indigenous Appropriate Justice Systems (AJS)
For Greater Access to Justice in Kenya:
Murithi Antony*

(2025)13(3) Alternative Dispute Resolution

Decolonizing Dispute Resolution: Revitalizing Indigenous Appropriate Justice Systems (AJS) For Greater Access to Justice in Kenya

*By: Murithi Antony**

Abstract

The pursuit of access to justice remains a critical challenge in Kenya, significantly hampered by the enduring legacy of colonial legal structures that often marginalize majority of the population. This paper interrogates the shortcomings of the formal, state-centric judicial system, characterized by its procedural complexities, high cost, geographical inaccessibility, and cultural alienation for many Kenyans. The writer argues that enhancing access to justice lies in the decolonization of conflict resolution mechanisms through the conscious revitalization and integration of Indigenous Appropriate Justice Systems (AJS). These systems are rooted in the various cultural and normative systems within Kenya's communities, producing culturally relevant, accessible, affordable, and often restorative mechanisms for dispute resolution. Drawing upon historical inquiry, legal anthropology, socio-legal studies, and constitutional interpretation, it explores the philosophical underpinnings, operational modalities, and inherent potentials of AJS. In addition, it offers a critical assessment of the challenges facing their revitalization, including potential human rights conflicts, among others. The author espouses an innovative, nuanced approach to revitalization that balances respect for indigenous epistemologies and constitutional imperatives, particularly in upholding human rights. The paper proposes practical strategies for documentation, capacity building, forging synergistic relationships with the formal system, and leveraging on technology. Ultimately, this paper asserts that the revitalizing AJS is not only an alternative dispute resolution strategy, but also a fundamental act of legal decolonization, critical for realizing substantive justice and fostering a more inclusive and equitable legal framework in Kenya.

Key Words: Decolonization, Access to Justice, Human Rights, Restorative Justice

1. Introduction

The architecture of Kenya's contemporary legal system is heavily shaped by its colonial past.¹ The imposition of British common law, legislative frameworks, and adversarial court procedures during the colonial era systematically marginalized and suppressed the pre-existing indigenous systems of governance and dispute resolution.² The colonial system was not merely administrative but deeply epistemic, predicated on the assumption that the European legal system was superior, and the corresponding denigration of African normative systems as primitive or illegitimate.³ As a result, even after independence, Kenya has retained a formal legal system that continues to hinder effective access to justice.⁴ While there have been noticeable efforts for reform, the formal legal system continues to grapple with serious systemic challenges, including geographical inaccessibility of courts, exorbitantly high fees for legal representation, complicated and lengthy procedures, language barriers, and a fundamental disconnect from the socio-cultural contexts within which disputes emerge.⁵ This, irrefutably, results in significant "access to justice gap," where people either forego justice altogether, endure lengthy delays, or resort to extralegal means in pursuit of justice.⁶

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¹ Shadle, Brett L. "Changing Traditions to Meet Current Altering Conditions': Customary Law, African Courts and the Rejection of Codification in Kenya, 1930–60." *The Journal of African History* 40, no. 3 (1999): 411-431.

² Merry, Sally Engle. "Law and colonialism." *Law & Society Review* 25, no. 4 (1991): 889-922.

³ *Ibid.*

⁴ Joireman, Sandra Fullerton. "Inherited legal systems and effective rule of law: Africa and the colonial legacy." *The Journal of Modern African Studies* 39, no. 4 (2001): 571-596.

⁵ Bhattacharya, Arindam. *The Socio-Economic Impact of Judicial Verdicts: A Comparative Analysis*. Opus Publica, 2024.

⁶ *Ibid.*

This article proceeds from the premise that the realization of substantive access to justice in Kenya necessitates a proper analysis of the colonial legacy and a move beyond mere reform of the existing formal institutions.⁷ It advocates for a process of “decolonizing dispute resolution,” understood here as the conscious effort to dismantle colonial legal hegemonies and redirect Indigenous knowledge systems and practices in the administration of justice.⁸ The central argument is that the revitalization and strategic integration of Indigenous Appropriate Justice Systems (AJS) offers a potent avenue for bridging the access to justice gap.⁹ These systems, often characterized by principles of restorative justice, communal participation, accessibility, and cultural relevance, hold immense potential if approached holistically and critically.¹⁰ This study endeavors to investigate the aspects of such revitalization, examining the nature of Alternative Justice Systems (AJS) in Kenya, the constitutional imperative under Article 159(2)(c), the inherent advantages and challenges, and innovative solutions towards their efficient and rights-compliant integration. The objective is not a romanticized retreat to a static past, but a dynamic re-imagining of justice delivery that embraces legal pluralism and empowers communities under a constitutional order.¹¹ This essay shall begin by exploring the historical imposition of formal legal system and the marginalization

⁷ Helbling, Jürg, Walter Kälin, and Prosper Nobirabo. "Access to justice, impunity and legal pluralism in Kenya." *The Journal of Legal Pluralism and Unofficial Law* 47, no. 2 (2015): 347-367.

⁸ Walker, Polly O. "Decolonizing conflict resolution: Addressing the ontological violence of westernization." *American Indian Quarterly* (2004): 527-549.

⁹ Osi, Carlo. "Understanding indigenous dispute resolution processes and Western alternative dispute resolution, cultivating culturally appropriate methods in lieu of litigation." *Cardozo J. Conflict Resol.* 10 (2008)

¹⁰ *Ibid.*

¹¹ Ndimba, Dial Dayana. "Re-imagining and Re-interpreting African Jurisprudence Under the South African Constitution." PhD diss., University of South Africa, 2013. <<https://www.google.com/url?sa=t&source=web&rct=j&opi=89978449&url=https://www.grafiati.com/en/literature-selections/common-law-of-sale-in-south-africa/dissertation/>> Accessed on 10th April 2025.

of indigenous systems, then examine the nature and diversity of AJS, analyze the limitations of the formal system, explore the constitutional space for AJS, present the case for revitalization, critically analyze the challenges therein, and finally propose innovative way forward.

2. Historical Marginalization of Indigenous Justice Systems

Understanding the relevance of AJS today requires a historical excavation of the colonial encounter and its impact on Indigenous legal and institutional orders in Kenya.¹² Prior to colonial rule, different communities in Kenya had their own unique systems for maintaining social harmony, regulating conduct, and resolving disputes.¹³ These systems, while unique and different from one community to another, often shared common principles emphasizing reconciliation, compensation, community involvement, and the restoration of social and communal harmony.¹⁴ These systems were intrinsically linked to community customs, religious beliefs, governance structures, and were president over by elders or recognized figures in the society, thereby forming an integral part of the social fabric.¹⁵ The arrival of colonial masters, however, ushered in a period of systemic legal disruption and subordination.¹⁶ Driven by the quest for

¹² Gemoh, Ferdinand. "A Philosophical Justification Of Indigenous Rights In Postcolonial Africa: A Case Study Of The Republic Of Kenya." PhD diss. University of Saskatchewan, 2018. <<https://www.google.com/url?sa=t&source=web&rct=j&opi=89978449&url=https://harvest.usask.ca/bitstream/10388/8586/1/GEMOH-THESIS-2018.pdf>> Accessed on 9th April 2025.

¹³ Kinyanjui, Sarah. "Restorative Justice in Traditional Pre-Colonial Criminal Justice Systems' in Kenya." *Tribal Law Journal* 10, no. 1 (2009)

¹⁴ Ogot, Veronica M., Samuel A. Nyanchoga, and Francis M. Muchoki. "Conflict and Conflict Mechanism in the Colonial Period, 1895 to 1963 Between Turkana and Pokot Communities in Kenya." <<https://arjess.org/conflict-and-conflict-mechanism-in-the-colonial-period1895-to-1963-between-turkana-and-pokot-communities-in-kenya/>> Accessed on 9th April 2025.

¹⁵ Shils, Edward. *The constitution of society*. University of Chicago Press, 1982.

¹⁶ *Ibid.*

administrative convenience, economic benefit, and racist ideologies that viewed African societies as lacking in 'genuine' legal systems, the colonial administration imposed their own legal frameworks, such as English common law, principles of equity, and statutes of general application.¹⁷

This imposition was effected through various means.¹⁸ First, a formal court system was established, which was manned by colonial officials and subsequently by African appointees trained in English law, supplanting traditional forums as the primary avenues for resolving disputes.¹⁹ Secondly, although colonial law sometimes permitted the partial application of native law and custom, such applications were always subject to several limitations.²⁰ Notably, traditional legal systems were only recognized if they were not considered repugnant to justice and morality or did not conflict with written colonial laws, a standard judged entirely through a European perspective.²¹ This "repugnancy clause" became a tool for invalidating customs relating to marriage, land tenure, and social obligations which were against colonial interests.²² Thirdly, even where Native Tribunals were

¹⁷ Daniels, Ronald J., Michael J. Trebilcock, and Lindsey D. Carson. "The Legacy of Empire: The common law inheritance and commitments to legality in former British colonies." *The American Journal of Comparative Law* 59, no. 1 (2011): 111-178.

¹⁸ Adeyeye, Adewale Adekunle. "Administrative Convenience or Deliberate Reform? The Impacts of the Colonial Judicial Legacy of the Pre-Colonial Justice System in South-Western Nigeria." (2023) <<https://www.google.com/url?sa=t&source=web&rct=j&opi=89978449&url=https://yorkspace.library.yorku.ca/items/a0d8e7b2-42a9-4068-b84b-a9e3e4df222f>> Accessed on 10th April 2025.

¹⁹ *Ibid.*

²⁰ Moore, Sally Falk. "Treating law as knowledge: Telling colonial officers what to say to Africans about running "their own" native courts." *Law & Society Review* 26, no. 1 (1992): 11-46.

²¹ Ocran, Modibo. "The clash of legal cultures: The treatment of indigenous law in colonial and post-colonial Africa." *Akron L. Rev.* 39 (2006): 465.

²² *Ibid.*

established, they were often restructured, their procedures formalized along British lines, and their jurisdiction curtailed.²³ They derived their powers not from indigenous legitimacy but from the colonial state, and their decisions were subject to review by colonial administrators, further weakening their autonomy.²⁴ This process resulted in distortion of customary law, often recorded and enforced rigidly, detached from its social context.²⁵ The overarching effect was the creation of a dual legal system with state law paramount and customary law, if at all acknowledged, consigned to an inferior, often folkloric, status, dealing primarily with issues of interpersonal relations and minor disputes within specific ethnic confines.²⁶ This historical marginalization gave foundation to the challenges facing access to justice today, creating a deep-rooted distrust or unfamiliarity with the formal legal system within most communities, while simultaneously weakening the structure and legitimacy of traditional mechanisms.²⁷

3. The Nature and Diversity of Indigenous Appropriate Justice Systems (AJS) in Kenya

Indigenous Justice Systems in Kenya are not uniform; they represent a diverse array of practices reflecting the cultural, social, and ecological diversity of nation's numerous ethnic communities.²⁸ Despite this variation, however, certain

²³ Gocking, Roger. "British Justice and the Native Tribunals of the Southern Gold Coast Colony1." *The Journal of African History* 34, no. 1 (1993): 93-113.

²⁴ *Ibid.*

²⁵ Perreau-Saussine, Amanda, and James B. Murphy, eds. *The nature of customary law: legal, historical and philosophical perspectives*. Cambridge university press,2007.<<https://www.google.com/url?sa=t&source=web&rct=j&opi=89978449&url=https://www.cambridge.org/core/books/nature-of-customary-law/8CA087B79EC2B295681B62368B019CD2>> Accessed on 10th April 2025.

²⁶ Toomey, Leigh T. "A Delicate Balance: Building complementary customary and state legal systems." *The Law and Development Review* 3, no. 1 (2010): 156-207.

²⁷ *Ibid.*

²⁸ Kamau, Francis Kariuki. *Traditional justice systems as sui generis frameworks for the protection of traditional ecological knowledge in Kenya*. University of the Witwatersrand,

underlying principles and characteristics often distinguish AJS from the formal, adversarial justice system.²⁹ Fundamentally, many Alternative Justice Systems are principally founded upon a restorative justice philosophy.³⁰ Their primary goal is not punitive retribution against an offender but the restoration of social harmony, the repair of harm caused to victims and society, and reintegrating parties into society.³¹ This approach is contra-distinguishable with the retributive focus, which is founded on guilt determination and punishment, and premised on the common law tradition.³² Processes within AJS typically emphasize dialogue, mediation, negotiation, and consensus-building, facilitated by community elders, whose authority is derived from social standing, wisdom, and knowledge of custom, not from formal legal training.³³

Another feature is accessibility. AJS forums are typically geographically proximate, conducted in local languages, and involve procedures that are known and comprehensible to community members.³⁴ The costs associated are minimal or symbolic relative to the high financial cost of formal litigation which includes

Johannesburg (South Africa),
2019.<<https://www.google.com/url?sa=t&source=web&rct=j&opi=89978449&url=https://wiredspace.wits.ac.za/bitstreams/86367bfe-c47d-44da-a7aa-1418cdac82d1/download>.> Accessed on 10th April 2025.

²⁹ *Ibid.*

³⁰ Braithwaite, John. "Principles of restorative justice." *Restorative justice and criminal justice: Competing or reconcilable paradigms* 360 (2003): 1-20.

³¹ Szablowinski, Zenon. "Punitive justice and restorative justice as social reconciliation." *The Heythrop Journal* 49, no. 3 (2008): 405-422.

³² *Ibid.*

³³ Abdulkabir, Ibrahim, and Samson Joseph. "The Role of Traditional Conflict Resolution Mechanisms in Promoting Peace in Nigeria." *WAUU Journal of International Affairs and Contemporary Studies (WJIACS)* 3, no. 1 (2023).

³⁴ Cappelletti, Mauro. "Alternative dispute resolution processes within the framework of the world-wide access-to-justice movement." *The Modern Law Review* 56, no. 3 (1993): 282-296.

legal representation fees, court fees, and transport costs.³⁵ Further, AJS operates within the shared community's cultural and normative context. They draw on local customs, values, and traditions, making their processes and solutions become more legitimate and suitable for the parties.³⁶ Resolutions often involve apologies, in kind or monetary compensation, reconciliation rituals, or other culturally specific remedies that are designed to solve the underlying causes of the conflict and mend relationships.³⁷ Examples range from mediation at the family level by lineage elders in domestic disputes, to clan or community councils addressing disputes over land, theft, or inter-personal assaults, to specialized bodies dealing with specific problems of resource management such as water or grazing rights.³⁸ Notably, however, AJS vary in their formality, scope, and adherence to principles of fairness, and their historical forms may reflect patriarchal power structures or practices that clash with modern human rights norms, issues that must be addressed in any revitalization effort.³⁹ Understanding this diversity and the underlying philosophies is essential for appreciating their potential contribution to a more pluralistic framework for greater access to justice.⁴⁰

The notable variation in AJS's structure and focus often correlates with the socio-economic organization of respective communities.⁴¹ For instance, in more highly

³⁵ George, James P. "Access to justice, costs, and legal aid." *Am. J. Comp. L.* 54 (2006): 293.

³⁶ Dzur, Albert W., and Susan M. Olson. "The Value of Community Participation in Restorative Justice." *Journal of social philosophy* 35, no. 1 (2004).

³⁷ *Ibid.*

³⁸ Kariuki, Francis. "Community, Customary and Traditional Justice Systems in Kenya: Reflecting on and Exploring the Appropriate Terminology." *Alternative Dispute Resolution* 6, no. 2 (2007): 163.

³⁹ Sultan, Mian Sajid, and Samza Fatima. "Access to Justice; Informal Justice System and Principles of Human Rights." *Pakistan Journal of Criminal Justice* 4, no. 1 (2024): 180-194.

⁴⁰ *Ibid.*

⁴¹ Lacey, Nicola, and Lucia Zedner. "Discourses of community in criminal justice." *Journal of Law and Society* 22, no. 3 (1995): 301-325.

centralized farming communities such as the Kikuyu or Meru, traditional governance structures typically comprised of more formalized councils, such as the *Kiama* and *Njuri Ncheke*, respectively, with defined jurisdictions procedures for the settlement of disputes involving issues such as land boundaries, inheritance, interpersonal disputes, and breaches of communal rules.⁴² Contrastively, among semi-nomadic pastoralist societies like the Maasai, Samburu, and Turkana, conflict resolution mechanisms were more fluid, often organized around age-sets and councils of elders whose authority was critical in settling conflicts related to livestock theft, grazing rights, access to water, and inter-family disputes.⁴³

Similarly, coastal communities such as the Mijikenda historically relied on the wisdom of elders operating within the framework of the *Kaya* system, addressing spiritual, social, and resource related conflicts.⁴⁴ In Western Kenya, among communities such as the Luo or Luhya, lineage elders and special councils played important roles in resolving marital conflicts, property disputes, and breaches of

⁴² Mutema, Angela N. "The interface between customary laws of succession in the traditional justice system and the formal justice system in." (2020). <<https://www.google.com/url?sa=t&source=web&rct=j&opi=89978449&url=https://uwcscholar.uwc.ac.za/items/db93aa4a-4235-4ff2-bd5d-ed3495722062>.> Accessed on 10th April 2025.

⁴³ Melil, Kwonyike Moses. "Understanding Cattle Rustling And The Role Of Indigenous Conflict Resolution Mechanisms Among The Tugen, Ilchamus and Pokot of Baringo County, 2000-2015." PhD diss., University of Nairobi, 2018. <<https://www.google.com/url?sa=t&source=web&rct=j&opi=89978449&url=https://erepository.uonbi.ac.ke/handle/11295/104722>.> Accessed on 10th April 2025.

⁴⁴ Bresnahan, David P. "Sacred spaces, political authority, and the dynamics of tradition in Mijikenda history." Master's thesis, Ohio University, 2010. <https://www.google.com/url?sa=t&source=web&rct=j&opi=89978449&url=https://etd.ohiolink.edu/acprod/odb_etd/ws/send_file/send%3Faccession%3Dohiou1275430896%26disposition%3Dinline&ved=2ahUKEwiY3_qMws2MAxUuA9sEHWkjPKYQFnoECBgQAQ&usq=AOvVaw1iBRFw1rfOEP8v1hRmXAlE.> Accessed om 8th April 2025.

social norms, often incorporating distinctive rituals and oratorical traditions.⁴⁵ These variations underscore that that AJS are not static artifacts, but dynamic systems inextricably linked with the distinctive historical contexts, social structures, and means of livelihoods of the diverse groups of people in Kenya.⁴⁶

Furthermore, the operational logic underpinning many AJS extends beyond simple mediation to encompass holistic approaches to truth-seeking, accountability, and social healing.⁴⁷ Fact-finding procedures, albeit less formalized as compared to court procedures, often involve meticulous community-based inquiries, gathering testimonies from disputing parties and witnesses within a context where social reputation and relationships are paramount.⁴⁸ In certain cultures, ritual ceremonies or oaths are employed as mechanisms believed to ensure truthful testimony, founded on shared cosmological beliefs.⁴⁹ Remedies employed often seek to not only provide material restitution but also to acknowledge wrongdoing, restoring victim's dignity, and reconstruct damaged

⁴⁵ Akoth, Stephen Ouma. "Human Rights Modernities: Practices of Luo Councils of Elders in Contemporary Western Kenya." PhD diss., University of the Western Cape, 2013. <<https://www.google.com/url?sa=t&source=web&rct=j&opi=89978449&url=https://uwcscholar.uwc.ac.za/items/733fc4c2-2fbe-4873-b83c-8037d08a45a1>> Accessed on 8th April 2025.

⁴⁶ Emmanuel Olawale, Fasuan, Khoo Ying Hooi, and K. S. Balakrishnan. "The Dynamics of African traditional justice systems: Perspectives and prospective." *African Security Review* 33, no. 3 (2024): 229-244.

⁴⁷ AJS POLICY, August 2020

⁴⁸ Gillett, Matthew. "Fact-Finding Without Rules: Habermas's Communicative Rationality as a Framework for Judicial Assessments of Digital Open-Source Information." *Mich. J. Int'l L.* 44 (2023): 301.

⁴⁹ Muigai, K. "Institutionalising traditional dispute resolution mechanisms and other community justice systems." *Research Methods Africa Center for Technology Studies* (2017). <<https://www.google.com/url?sa=t&source=web&rct=j&opi=89978449&url=http://ouci.dntb.gov.ua/en/works/ldogox6Y/>> Accessed on 8th April 2025

social relationships.⁵⁰ Ritual elements, such as cleansing ceremonies or shared meals following reconciliation, play significant symbolic roles, marking the end of the conflict, reaffirming communal bonds, and indicating the restoration of harmony between individuals, families, and, in some instances, the divine or spiritual realm.⁵¹ The often public or semi-public character of AJS proceedings also serves a pedagogical role, reaffirming community values and standards for all participants and observers, thus contributing to social regulation and preventing conflict beyond the specific case under determination.⁵²

4. The Formal Justice System: Barriers to Access and the Persistence of the Justice Gap

Despite constitutional mandates and various reform initiatives aimed at enhancing the efficiency and reach of the formal judicial system, significant barriers continue to impede access to justice for a large segment of the Kenyan population.⁵³ These obstacles are multi-faceted, encompassing economic,

⁵⁰ McConkie Jr, Daniel S. "Promoting and Reforming Kenya's Customary Justice Systems in Criminal Cases." *Emory Int'l L. Rev.* 38 (2024): 343.

⁵¹ *Ibid.*

⁵² Paul, Gregory D., and Ian M. Borton. *Creating restorative justice: A communication perspective of justice, restoration, and community.* Rowman & Littlefield, 2021. <<https://www.google.com/url?sa=t&source=web&rct=j&opi=89978449&url=https://rowman.com/ISBN/9781498576451/Creating-Restorative-Justice-A-Communication-Perspective-of-Justice-Restoration-and-Community>.> Accessed on 8th April 2025.

⁵³ Mbacho, Lydia W. "Achieving Access to Justice Through Alternative Dispute Resolutions: a Critical Analysis on Kenyan Legal Framework." PhD diss., University of Nairobi, 2021. <<https://www.google.com/url?sa=t&source=web&rct=j&opi=89978449&url=https://erepository.uonbi.ac.ke/handle/11295/160426>.> Accessed on 8th April 2025.

geographical, procedural, and socio-cultural dimensions that cumulatively contribute to a persistent justice gap.⁵⁴

To begin with, the economic cost of pursuing justice through formal courts remains prohibitive for many.⁵⁵ This includes not only direct costs like court fees for filing and the expense of hiring legal representatives, which is important to navigate the adversarial and complex court processes, but also indirect costs such as transportation to courts given that most courts are located in the urban or areas, and accommodation costs, and also lost wages due to time spent attending court hearings.⁵⁶ Legal aid services, where they do exist, are usually under-resourced and unable to meet the overwhelming demand, leaving marginalized and vulnerable populations without effective representation.⁵⁷ The importance of legal representation in an adversarial formal system cannot be overemphasized. In the words of Lord Denning:

"It is not every man who has the ability to defend himself on his own. He cannot bring out the points in his own 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

⁵⁴ Akpuokwe¹, Chidiogo Uzoamaka, Adekunle Oyeyemi Adeniyi, Seun Solomon Bakare, and Nkechi Emmanuella Eneh⁴. "The impact of judicial reforms on legal systems: a review in African countries."

(2024).<https://www.google.com/url?sa=t&source=web&rct=j&opi=89978449&url=http://www.researchgate.net/publication/379041614_The_Impact_Of_Judicial_Reforms_On_Legal_Systems_A_Review_In_African_Countries.> Accessed on 8th April 2025.

⁵⁵ Posner, Richard A. "An economic approach to legal procedure and judicial administration." *The Journal of Legal Studies* 2, no. 2 (1973): 399-458.

⁵⁶ *Ibid.*

⁵⁷ Buck, Alexy, and Liz Curran. "Delivery of advice to marginalised and vulnerable groups: the need for innovative approaches." *Pub. Space: JL & Soc. Just.* 3 (2009).

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?"⁵⁸

Secondly, geographical barriers have a greater negative impact in accessing justice in courts, especially in rural, remote, and marginalized regions, such as the Arid and Semi-Arid Lands (ASALs).⁵⁹ The nearest courthouse could be quite distant, involving long and sometimes costly travel.⁶⁰ While there have been innovations for mobile courts in a few places, their prevalence and availability are generally low.⁶¹ This geographical exclusion severely hinders justice for individuals who are unable to travel, thereby perpetuating spatial disparities.⁶² While Kenya has made commendable strides in adopting virtual courts and online dispute resolution mechanisms, a significant digital divide persists, leaving many marginalized areas disconnected due to lack of reliable network infrastructure.⁶³ Even where connectivity exists, individuals in these regions often face substantial barriers in comprehending the formal legal processes involved, particularly without access

⁵⁸ *Pett v. Greyhound Racing Association Ltd* [1968] 2 W.L.R. 1471.

⁵⁹ Melil, Kwonyike Moses. "Understanding Cattle Rustling And The Role Of Indigenous Conflict Resolution Mechanisms Among The Tugen, Ilchamus And Pokot Of Baringo County, 2000-2015." PhD diss., University of Nairobi, 2018. <<https://www.google.com/url?sa=t&source=web&rct=j&opi=89978449&url=https://erepository.uonbi.ac.ke/handle/11295/104722>> Accessed on 9th April 2025.

⁶⁰ *Ibid.*

⁶¹ Sourdin, Tania, Bin Li, and Donna Marie McNamara. "Court innovations and access to justice in times of crisis." *Health policy and technology* 9, no. 4 (2020): 447-453.

⁶² *Ibid.*

⁶³ Kariuki, James Ngotho. "Embracing online dispute resolution as an avenue to Justice in Kenya." (2017). <<https://www.google.com/url?sa=t&source=web&rct=j&opi=89978449&url=http://su-plus.strathmore.edu/server/api/core/bitstreams/fdc9c126-0daa-44ca-a9e3-b31e8c992fa9/content>> Accessed on 9th April 2025.

to legal representation, thus hindering the equitable realization of justice through these digital platforms.⁶⁴

In addition, the procedural complexity associated with the formal legal system, rooted in the adversarial common law system, constitutes a major obstacle.⁶⁵ Rules of evidence, pleading requirements, and courtroom etiquette are often intimidating and incomprehensible to laypersons, especially those with limited formal education.⁶⁶ The reliance on English and Kiswahili, while official languages, excludes citizens who are only fluent in their mother tongues, necessitating interpreters who may not always be available or fully effective, potentially leading to misunderstandings and injustices.⁶⁷

Moreover, and perhaps most fundamentally, there exists a socio-cultural disconnect.⁶⁸ The procedure, principles, and philosophy of formal systems may be alienating to those used to community-oriented, restorative methods.⁶⁹ The adversarial nature of litigation leads to a *'winner takes all'* outcome, which may exacerbate conflicts rather than mend relationships, unlike the AJS which primarily focuses on a *'win-win'* outcome.⁷⁰ Equally, the formality, perceived by lack of empathy from judicial officers, and the focus on legal technicalities rather

⁶⁴ *Ibid.*

⁶⁵ Menkel-Meadow, Carrie. "The trouble with the adversary system in a postmodern, multicultural world." In *Mediation*, pp. 633-672. Routledge, 2018.

⁶⁶ Dingake, Oagile Bethuel Key. *Lawyers: Professional Ethics and Court Etiquette*. Notion Press, 2020.

⁶⁷ *Ibid.*

⁶⁸ Ferrell, Rick R., and Robert D. Hanser. "The Somalia phenomenon: peacemaking theory, asymmetric policy, restorative justice, and paradigm paralysis when combating lawlessness in a fragmented nation." *Pakistan Journal of Criminology* 3 (2011).

⁶⁹ *Ibid.*

⁷⁰ Porto, João Gomes. *The Role of Conflict Analysis in Conflict Resolution: Reflections on International Mediation. the Case of Angola*. University of Kent (United Kingdom), 2002.

than underlying social issues can lead to dissatisfaction and the feeling that justice has not truly been realized, even though a legal decision has been made.⁷¹ This cultural alienation fosters distrust and reluctance to engage with the judicial apparatus, prompting people to seek the informal or traditional channels, or sometimes, unfortunately, to self-help means or abandonment of their claims.⁷² These cumulative barriers underscore the insufficiency of a dependence on the formal system and accentuate the need for affordable, culturally responsive alternatives such as AJS.⁷³

5. The Constitutional Gateway: Article 159 and the Space for Legal Pluralism

The Constitution of Kenya 2010 marked a potentially transformative moment for the recognition and integration of various dispute resolution mechanism.⁷⁴ It explicitly moves away from the colonial-era skepticism of non-state judicial systems and establishes a constitutional basis for embracing legal pluralism.⁷⁵ The cornerstone in this respect is Article 159, which sets out the principles informing the exercise of judicial power.⁷⁶ Fundamentally, Article 159(2)(c) mandates that in the exercise of judicial authority, courts and tribunals shall be guided by the principle of promoting “*alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms*” (emphasis added).⁷⁷ This provision is further reinforced by Article 159(3), which stipulates that these traditional mechanisms shall not be used in a way that contravenes the

⁷¹ Tyler, Tom R. "Citizen discontent with legal procedures: A social science perspective on civil procedure reform." *Am. J. Comp. L.* 45 (1997): 871.

⁷² MacDowell, Elizabeth L. "Reimagining access to justice in the poor people's courts." *Geo. J. on Poverty L. & Pol'y* 22 (2014): 473.

⁷³ *Ibid.*

⁷⁴ Okalo, Agnetta S. "Mainstreaming Alternative Justice Systems for Improved Access to Justice: lessons for Kenya." PhD diss., University of Nairobi, 2019.

⁷⁵ *Ibid*

⁷⁶ Constitution of Kenya, Article 159

⁷⁷ *Ibid*, Article 159 (2) (c)

Bill of Rights, is repugnant to justice and morality, or is inconsistent with the constitution or any other written law.⁷⁸ The repugnancy clause under this article, notably, is a potentially problematic echo of the colonial clause, requiring careful and holistic interpretation in a decolonized context.⁷⁹

Article 159(2)(c) marks a significant departure, constitutionally validating Alternative Justice Systems as legitimate components of the broader access to justice framework, rather than merely tolerated relics.⁸⁰ It directs the judiciary, and by extension the state, not just to permit but to actively promote these mechanisms, implying a positive obligation on the state to create an enabling environment for AJS to function effectively.⁸¹

Furthermore, Article 10 enshrines national values and principles of governance, including participation of the people, inclusivity, equality, and social justice, which resonate strongly with the communitarian and accessible nature of many AJS.⁸² The Constitution's emphasis on devolved governance under Chapter 11 also potentially creates space for county-level initiatives that support community-based justice systems tailored to align with local realities.⁸³ These constitutional provisions clearly indicate that the people of Kenya have expressed their desire to resolve disputes in fair and efficient ways, reflecting the nation's norms and aspirations. As Odunga J notes:

⁷⁸ *Ibid*, Article 2(5).

⁷⁹ Lyman, Abra, and Darren Kew. "An African Dilemma: Resolving Indigenous Conflicts in Kenya." *Georgetown Journal of International Affairs*, vol. 11, no. 1, 2010, pp. 37–46. JSTOR, <http://www.jstor.org/stable/43133798>. Accessed on 9th April 2025.

⁸⁰ Constitution of Kenya (2010), Article 159(2)(c)

⁸¹ *Ibid*.

⁸² Constitution of Kenya (2010), Article 10

⁸³ Constitution of Kenya, Article 186

“Our Constitution embodies the values of the Kenyan Society, as well as the aspirations, dreams and fears of our nation as espoused in Article 10. It is not focused on presenting an organization of Government but rather is a value system itself hence not concerned only with defining human rights and duties of individuals and state organs but goes further to find values and goals in the Constitution and to transform them into reality.”⁸⁴

However, the constitutional recognition is not a blank cheque.⁸⁵ The limitations imposed in Article 159(3), particularly on the requirement of consistency with the Bill of Rights, are critical safeguards.⁸⁶ This creates a necessary tension, on how to encourage culturally grounded Alternative Justice Systems (AJS) while also guaranteeing respect for fundamental rights and freedoms, such as gender equality⁸⁷, children's rights⁸⁸, and fair administrative action.⁸⁹ Interpreting the "*repugnancy to justice and morality*" clause through the lens of the Constitution's own values, rather than imported colonial sensibilities, becomes paramount.⁹⁰ The constitutional framework, therefore, does not simply endorse AJS wholesale; it invites a nuanced process of engagement, adaptation, and integration where these systems are supported and revitalized in ways that align with the transformative vision of the 2010 Constitution.⁹¹ This demands diligent policy formulation,

⁸⁴ *Pharmaceutical Society of Kenya v National Assembly & 3 others* [2017] eKLR, Constitutional Petition 557 of 2015 at para 96.

⁸⁵ Muigua, K. (2017). Institutionalising Traditional Dispute Resolution Mechanisms and other Community Justice Systems. *Alternative Dispute Resolution*, 1-80.

⁸⁶ Constitution of Kenya (2010), Article 159(3).

⁸⁷ *Ibid*, Article 27.

⁸⁸ *Ibid*, Article 53.

⁸⁹ *Ibid*, Article 47.

⁹⁰ Lyman, Abra, and Darren Kew. "An African Dilemma: Resolving Indigenous Conflicts in Kenya." *Georgetown Journal of International Affairs*, vol. 11, no. 1, 2010, pp. 37-46. JSTOR, <http://www.jstor.org/stable/43133798>.

⁹¹ Muigua, K. (2017). Institutionalising Traditional Dispute Resolution Mechanisms and other Community Justice Systems. *Alternative Dispute Resolution*, 1-80.

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legislative action such as refining or implementing frameworks like the stalled Traditional Dispute Resolution Mechanisms Bill, and judicial interpretation that balances the quest for Alternative Justice Systems (AJS) with uncompromising defense of fundamental rights.⁹²

6. The Need for Revitalization: Advantages of Adopting AJS

The case for the revival of Indigenous Appropriate Justice Systems in Kenya rests on their potential to enhance access to justice, promote social cohesion, and support the broader quest for legal decolonization.⁹³ The benefits of AJS accrue directly from their very nature and their contrast with the shortcomings of formal judicial system, as discussed in the ensuing paragraphs.⁹⁴

First, increased accessibility is, perhaps, the most compelling advantage.⁹⁵ AJS are usually incorporated within communities, which results in geographical proximity and removal of distance barriers.⁹⁶ They operate using local languages and familiar customs, thus reducing the problems of communication, and

⁹² Murithi Antony, "Towards Enhanced Access to Justice: Leveraging the Role of Kenyan Law Schools in Promoting ADR" ((2023) 11(3) Alternative Dispute Resolution)) Page 123-141.

⁹³ Barasa, Nancy N. "Evaluating the Place of Alternative Justice Mechanisms as a Form of Restorative Justice in Kenya: Interrogating Best Practices From the South Africa's Criminal Justice System." PhD diss., University of Nairobi, 2021. <https://www.google.com/url?sa=t&source=web&rct=j&opi=89978449&url=https://erepository.uonbi.ac.ke/bitstream/handle/11295/161000/Barasa_Evaluating%20the%20Place%20of%20Alternative%20Justice%20Mechanisms%20as%20a%20Form%20of%20Restorative%20Justice%20in%20Kenya.pdf%3Fsequence%3D3>

> Accessed on 10th April 2025.

⁹⁴ Cane, Peter. "Judicial review and merits review: comparing administrative adjudication by courts and tribunals." *Comparative Administrative Law* (2010): 426-448.

⁹⁵ Rhode, Deborah L. "Access to justice: Connecting principles to practice." *Geo. J. Legal Ethics* 17 (2003): 369.

⁹⁶ *Ibid.*

understanding that confront the formal court litigation.⁹⁷ The costs are usually minimal or non-financial, thus removing the financial barriers to access by the poor and marginalized in the formal system.⁹⁸ This inherent accessibility enables AJS to cover a substantial number of disputes that may otherwise go unaddressed, thereby considerably increasing the range of administration of justice.⁹⁹

In addition, AJS provide cultural legitimacy and relevance.¹⁰⁰ Since they are based on the community's common norms, values, and beliefs, their processes and results tend to resonate more with disputing parties.¹⁰¹ Resolutions achieved through AJS are more likely to be viewed as just and sustainable since they align with local perceptions of justice and social order.¹⁰² This generates more community ownership of the justice process and potentially more durable resolutions as compared to decisions imposed by an external, cultural distance formal system.¹⁰³

⁹⁷ McDonald, Hugh. "Assessing Access to Justice: How Much "Legal" Do People Need and How Can We Know?." *UC Irvine L. Rev.* 11 (2020): 693.

⁹⁸ Conteh, Felix Marco, Yakama Manty Jones, Sonkita Conteh, Henry Mbawa, and Aisha Fofana Ibrahim. "Costs and benefits of community-based justice in Sierra Leone." (2022). (https://www.researchgate.net/publication/361100072_The_Costs_and_Benefits_of_Community-based_Justice_in_Sierra_Leone.) Accessed on 10th April 2025.

⁹⁹ *Ibid.*

¹⁰⁰ Bottoms, Anthony, and Justice Tankebe. "Beyond procedural justice: A dialogic approach to legitimacy in criminal justice." *J. Crim. I. & Criminology* 102 (2012): 119.

¹⁰¹ Braithwaite, John. "Building legitimacy through restorative justice." *Legitimacy and criminal justice: International perspectives* (2007): 146-162.

¹⁰² Creutzfeldt, Naomi, and Ben Bradford. "Dispute resolution outside of courts: procedural justice and decision acceptance among users of ombuds services in the UK." *Law & Society Review* 50, no. 4 (2016): 985-1016.

¹⁰³ *Ibid.*

Further, the predominantly restorative and reconciliatory focus of most AJS is a key benefit.¹⁰⁴ By placing emphasis on restoring relationships, repairing harm, and reintegrating parties into the community, AJS has the potential to help maintain community cohesion and prevent the escalation of conflicts, which is different and better as compared to the adversarial litigation which tends to escalate tensions.¹⁰⁵ Where communal harmony is particularly valued, this restorative approach is especially suited to the effective resolution of interpersonal, domestic, and minor community disputes.¹⁰⁶

Moreover, AJS is more efficient and offers solutions in a timely manner.¹⁰⁷ Unencumbered by the time-consuming processes, strict rules of evidence, and large case backlogs that plague the formal courts, AJS offer a quicker dispute resolution process.¹⁰⁸ This timely resolution is valuable not only for the parties involved but also for preventing disputes from festering and potentially escalating into more serious conflicts.¹⁰⁹

¹⁰⁴ Gal, Tali. "The conflict is ours': community involvement in restorative justice." *Contemporary justice review* 19, no. 3 (2016): 289-306.

¹⁰⁵ Akintayo, Obafemi D., Chinazo Nneka Ifeanyi, and Okeoma Onunka. "Enhancing domestic peace through effective community-based ADR programs." *Global Journal of Advanced Research and Reviews* 2, no. 02 (2024): 001-015.

¹⁰⁶ *Ibid.*

¹⁰⁷ Ali, Muhammad, and Naimul Razzaque. "The Key Problems Facing Civil Justice Today Are Cost, Delay & Complexity: A Critical Review." *Sch Int J Law Crime Justice* 6, no. 8 (2023): 438-446.

¹⁰⁸ *Ibid.*

¹⁰⁹ Neubauer, David W. *Managing the Pace of Justice: An Evaluation of LEAA's Court Delay-reduction Programs: Executive Summary*. US Department of Justice, National Institute of Justice, 1981. <<https://www.ojp.gov/ncjrs/virtual-library/abstracts/managing-pace-justice-evaluation-leaas-court-delay-reduction>> Accessed on 10th April 2025.

Finally, revitalizing AJS is intrinsically tied to decolonization.¹¹⁰ It represents a move away from the reliance on exclusive formal judicial system and imported legislative frameworks, and an acknowledgement of local knowledge systems and governance practices.¹¹¹ By recognizing and empowering AJS, the state also acknowledges the value of legal pluralism and makes a concrete step towards dismantling the epistemic hierarchy established during colonialism.¹¹² This can foster greater national identity, empower local communities, and contribute to the building of a justice system founded on the unique realities of different Kenyan communities.¹¹³ These benefits collectively present a case for paradigm shift, envisioning AJS not an inferior alternative but rather as complementary components of a multi-layered, pluralistic justice system.¹¹⁴

7. Navigating the Complexities: Challenges to Revitalization and Integration

While the potential benefits of revitalizing AJS are substantial, the process is fraught with significant challenges that must be acknowledged and carefully navigated to ensure that revitalization leads to greater justice rather than perpetuating inequalities that offend human rights.¹¹⁵

¹¹⁰ Tella, Adeyinka, and Bolaji David Oladokun. "Assessing the Role of Indigenous African Traditional Practices in Facilitating Cultural and Intellectual Revitalization and Decolonization." In *Evaluating Indigenous African Tradition for Cultural Reconstruction and Mind Decolonization*, pp. 99-111. IGI Global, 2024.

¹¹¹ *Ibid.*

¹¹² Divetia, Manas, and Arjun Chaudhary. "Legal Pluralism: Re-Engaging the Narrative to Solve Global Problems." *Indian J. Integrated Rsch. L.* 3 (2023): 1.

¹¹³ *Ibid.*

¹¹⁴ Sovacool, Benjamin K., Shannon Elizabeth Bell, Cara Daggett, Christine Labuski, Myles Lennon, Lindsay Naylor, Julie Klinger, Kelsey Leonard, and Jeremy Firestone. "Pluralizing energy justice: Incorporating feminist, anti-racist, Indigenous, and postcolonial perspectives." *Energy Research & Social Science* 97 (2023): 102996.

¹¹⁵ McCabe, Katherine. "The Environment on our Doorsteps: Community Restorative Justice and the Roots of Sustainability." PhD diss.,

A primary concern revolves around potential conflicts with constitutional rights, specifically those enshrined in the Bill of Rights.¹¹⁶ Historically, certain customary rules and practices inherent in Alternative Justice Systems (AJS) have potentially discriminated against women, such as in matters of inheritance, property, or involvement in decision-making.¹¹⁷ These customs, notably, oppressed younger members of society or employed for procedures that conflict with the principles of fair administrative action, discrimination, or degrading treatment.¹¹⁸ Therefore, it is necessary to ensure that the revitalized AJS operates in full alignment with constitutional guarantees of equality, non-discrimination, and due process and requires robust oversight and calibration mechanisms, as stipulated in Article 159(3).¹¹⁹

Another significant challenge is managing internal power dynamics and potential biases within communities.¹²⁰ Elders or traditional leaders who preside over AJS are not always neutral, as they can be influenced by kinship affiliation, social status, gender dynamics, or economic interests.¹²¹ Vulnerable members in the community may lack voice or influence to secure a fair hearing or decision within

2009.<<https://uwaterloo.ca/grebel/publications/conrad-grebel-review/past-issues/cgr-vol-32-no-3-fall-2014>.> Accessed on 8th April 2025.

¹¹⁶ Maina, Grace Njoki, Nyasha Samuel Chikowero, and Laurene Manaa Abdallah. "Gender Dynamics in African Land Redistribution and Alternative Justice Systems: Insights from Kenya and Zimbabwe." In *Mobility, Identity and Conflict Resolution in Africa: Resources Belong to the People*, pp. 213-229. Cham: Springer Nature Switzerland, 2024.

¹¹⁷ *Ibid.*

¹¹⁸ *Ibid.*

¹¹⁹ Constitution Of Kenya (2010), Article 159(3)

¹²⁰ Wallerstein, Nina, Michael Muhammad, Shannon Sanchez-Youngman, Patricia Rodriguez Espinosa, Magdalena Avila, Elizabeth A. Baker, Steven Barnett et al. "Power dynamics in community-based participatory research: A multiple-case study analysis of partnering contexts, histories, and practices." *Health Education & Behavior* 46, no. 1_suppl (2019): 19S-32S.

¹²¹ *Ibid.*

such traditional structures.¹²² Revitalization efforts must therefore incorporate mechanisms that guarantee fairness, provide opportunities for appeals or review especially by connecting to the formal system, and, importantly, allow underrepresented groups such as minorities, youth, and women, to contribute meaningfully and safely.¹²³

Further, the issue of standardization versus pluralism presents another critical dilemma.¹²⁴ Kenya's AJS are extremely diverse, mirroring the traditions of various communities.¹²⁵ Attempting to impose a one-size-fits-all model or over-formalize AJS threatens to kill their distinctive character and local legitimacy.¹²⁶ Nevertheless, some degree of procedural guidelines and minimum standards, especially regarding human rights compliance, is indispensable.¹²⁷ Striking the right balance between respecting cultural diversity and insistence on compliance with constitutional fundamental; principles of justice is a delicate task that demands tailored solutions instead of general solutions.¹²⁸

¹²² Andress, Lauri, Tristen Hall, Sheila Davis, Judith Levine, Kimberly Cripps, and Dominique Guinn. "Addressing power dynamics in community-engaged research partnerships." *Journal of Patient-Reported Outcomes* 4 (2020): 1-8.

¹²³ *Ibid.*

¹²⁴ Muango, Ettah A. "Cultural pluralism as a source of political instability in Kenya: a critical analysis." PhD diss., University of Nairobi, 2013. <<https://erepository.uonbi.ac.ke/11295/60079>> Accessed on 10th April 2025.

¹²⁵ Kariuki, Francis. "Community, Customary and Traditional Justice Systems in Kenya: Reflecting on and Exploring the Appropriate Terminology." *Alternative Dispute Resolution* 6, no. 2 (2007): 163.

¹²⁶ *Ibid.*

¹²⁷ Deveaux, Monique. *Cultural pluralism and dilemmas of justice*. Cornell University Press, 2000. (<https://www.cornellpress.cornell.edu/book/9780801436826/cultural-pluralism-and-dilemmas-of-justice/>.) Accessed on 8th April 2025.

¹²⁸ Kumm, Mattias. "Constitutional rights as principles: on the structure and domain of constitutional justice." *Int'l J. Const. L.* 2 (2004): 574.

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Resource constraints and capacity building also pose fundamental challenges.¹²⁹ Irrefutably, effective revitalization of AJS hinges on the investment and documentation of its practices, training of facilitators including human rights concepts and basic record-keeping abilities, logistical support where required, and coherent frameworks for their operation and interface with the formal system.¹³⁰ Without adequate resources and sustained capacity-building efforts, revitalization attempts may remain superficial and ineffective.¹³¹

Ultimately, resistance actors within formal judicial systems such as judges and lawyers, who may view AJS with suspicion or as competitors, and potential co-option by political actors seeking to manipulate traditional structures for their own ends, are further hurdles that need to be anticipated and managed through clear policy frameworks and inter-institutional dialogue.¹³² Addressing these challenges proactively and collaboratively is crucial for the successful and ethical revitalization of AJS.¹³³

8. Recommendations to overcome the Challenges: Strategies for Rights-Compliant Revitalization and Synergy

Going beyond mere recognition towards effective revitalization of AJS needs innovative, context-sensitive strategies that harness the strengths of AJS while

¹²⁹ Cappelletti, Mauro. "Alternative dispute resolution processes within the framework of the world-wide access-to-justice movement." *The Modern Law Review* 56, no. 3 (1993): 282-296.

¹³⁰ Tomas, Amparo. "Reforms that benefit poor people—practical solutions and dilemmas of rights-based approaches to legal and justice reform." *Reinventing Development* (2005): 171-184.

¹³¹ *Ibid.*

¹³² Desmet, Ellen. "Interaction between customary legal systems and the formal legal system of Peru." (2011): 151-167.

¹³³ *Ibid.*

mitigating their potential weaknesses and ensuring constitutional compliance.¹³⁴ These call for a multi-faceted strategy aimed at documentation, capacity building, integrating human rights, developing clear linkage mechanisms with the formal system, leveraging technology.¹³⁵

To start with, there is a crucial need for systemic documentation and research.¹³⁶ Given that numerous AJS traditions, their principles, procedures, and precedents in various communities are passed from one generation to another orally, there is urgent need for documentation.¹³⁷ This must be done in partnership with the community members themselves, in respecting Indigenous knowledge ownership, and moving beyond simplistic codification towards the ethnographic understanding.¹³⁸ Such research can inform policy, development of training materials, and determination of best practices and areas that require improvement.¹³⁹

Second, there is a need for targeted capacity building.¹⁴⁰ In this case, AJS facilitators such as community elders and leaders must be trained, not only in

¹³⁴ Helbling, Jürg, Walter Kälin, and Prosper Nobirabo. "Access to justice, impunity and legal pluralism in Kenya." *The Journal of Legal Pluralism and Unofficial Law* 47, no. 2 (2015): 347-367.

¹³⁵ Muigua, Kariuki, and Kariuki Francis. "Alternative Dispute resolution, access to Justice and Development in Kenya." *Strathmore LJ* 1 (2015): 1.

¹³⁶ Borrows, John. "Listening for a change: The courts and oral tradition." *Osgoode Hall LJ* 39 (2001): 1.

¹³⁷ *Ibid.*

¹³⁸ Law, Robin. "How truly traditional is our traditional history? The case of Samuel Johnson and the recording of Yoruba oral tradition." *History in Africa* 11 (1984): 195-221.

¹³⁹ *Ibid.*

¹⁴⁰ Ntaganda, F. "Investigating the contribution of land tenure regularization on land dispute resolution: the case of polygamy and land rights in Rwanda's northern province." Master's thesis, University of Twente, 2014.<
<https://essay.utwente.nl/view/year/2014.html>.> Accessed on 10TH April 2025.

traditional practices but critically on constitutionalism, human rights, gender equality, children's rights, principles of fair hearing, elementary recording, and appropriate mediation/facilitation skills for the context of contemporary disputes.¹⁴¹ Such training needs to be participatory, culturally sensitive, and continuous.¹⁴² Simultaneously, actors in the formal justice system need to be sensitized and training on the nature, value, and constitutional standing of AJS to facilitate mutual respect and effective collaboration.¹⁴³

Third, integrating human rights safeguards needs to be central, not peripheral.¹⁴⁴ This should be more than just prohibiting abuse of rights but encompassing active rights-affirming AJS practices.¹⁴⁵ This could involve creating community-specific codes of conduct for AJS facilitators, ensuring representation of women and youth within decision-making circles, having clear guidelines on admissible sanctions, and having an accessible internal mechanism of grievance or referral/appeal pathway to the formal system, especially where serious crimes have been committed, or where the case conflicts with constitutional order.¹⁴⁶ The goal is transformation from within, enabling AJS to develop in line with constitutional norms.¹⁴⁷

¹⁴¹ *Ibid.*

¹⁴² Bottoms, Anthony, and Justice Tankebe. "Beyond procedural justice: A dialogic approach to legitimacy in criminal justice." *J. Crim. I. & Criminology* 102 (2012): 119.

¹⁴³ *Ibid.*

¹⁴⁴ Ubink, Janine M., and Thomas McInerney. "Customary justice: perspectives on legal empowerment." (2011)

¹⁴⁵ *Ibid.*

¹⁴⁶ Powell, Derek. "The Role of Constitution Making and Institution Building in Furthering Peace, Justice and Development: South Africa's Democratic Transition." *International Journal of Transitional Justice* 4, no. 2 (2010): 230-250.

¹⁴⁷ *Ibid.*

Fourth, it is important to establish clear and synergistic linkage mechanisms between AJS and the formal judicial system, not as subordination but as collaboration.¹⁴⁸ Models could include formal referral mechanisms whereby courts can refer certain types of cases, like family or land disputes, to AJS, mechanisms for registering or recognizing AJS agreements to give them legal effect, clear regulations appeal or review of AJS decisions by courts on specific grounds such as violation of fundamental rights, procedural unfairness or illegitimacy, and creation of platforms for regular dialogue between judicial officers and AJS practitioners at local levels.¹⁴⁹ The Judiciary's Court Annexed Mediation program offers potential lessons, but linkages to AJS require separate, culturally appropriate designs.¹⁵⁰

Finally, exploring the appropriate use of technology could offer huge support.¹⁵¹ Mobile technology could be utilized in simple case monitoring, but cautiously to uphold the right to privacy of disputing parties, to spread information on rights, or to provide distance training modules to facilitators.¹⁵² Technology adoption needs to be situation-specific, affordable, and should not impose inapplicable formality.¹⁵³ These strategies, implemented collaboratively and adaptively, have

¹⁴⁸ Aasoglenang, Thaddeus Arkum, Samuel Ziem Bonye, and Gordon Yenglier Yiridomoh. "Framework for building synergies of the traditional and formal political adjudicatory institutions in conflict resolution in north-western Ghana." *Cogent Social Sciences* 9, no. 2 (2023): 2268974.

¹⁴⁹ Galanter, Marc. "Justice in many rooms: Courts, private ordering, and indigenous law." *The Journal of Legal Pluralism and Unofficial Law* 13, no. 19 (1981): 1-47.

¹⁵⁰ Welsh, Nancy A. "The place of court-connected mediation in a democratic justice system." *No. 2 Cardozo J. Conflict Resol.* 5 (2004): 117.

¹⁵¹ Rainey, Daniel, Mohamed S. Abdel Abdel Wahab, and Ethan Katsh. "Online Dispute Resolution-Theory and Practice: A Treatise on Technology and Dispute Resolution." (2021): 1-740.

¹⁵² *Ibid.*

¹⁵³ Rainey, Daniel. "Integrating technology into your dispute resolution practice: making friends with the fourth party." (2022): 1-118.

the potential to make AJS a reality as vibrant, rights-oriented component of a decolonized and accessible justice system in Kenya.¹⁵⁴

9. Conclusion

The quest for achieving access to justice in Kenya cannot be fully attained through an exclusive emphasis on reforming the inherited colonial state apparatus.¹⁵⁵ Although the formal justice system has a constitutional role, it is largely inaccessible to the majority, thereby perpetuating a legacy of exclusion.¹⁵⁶ This article has argued that one of the necessary avenues toward more accessible, meaningful, and culturally relevant justice is the intentional decolonization of dispute resolution through the revitalizing Indigenous Appropriate Justice Systems (AJS).¹⁵⁷ These systems, based on the various normative orders of Kenyan societies, offer inherent benefits in terms of accessibility, cultural legitimacy, restorative potential, and efficiency.¹⁵⁸ The Constitution of Kenya 2010, under Article 159(2)(c), entrenches a clear mandate to not only adopt but actively promote these mechanisms as foundational pillars of Kenya's justice system.¹⁵⁹

However, revitalizing these mechanisms is not so much a simple task of returning to old practices as it demands a responsible and innovative engagement with

¹⁵⁴ *Ibid.*

¹⁵⁵ Helbling, Jürg, Walter Kälin, and Prosper Nobirabo. "Access to justice, impunity and legal pluralism in Kenya." *The Journal of Legal Pluralism and Unofficial Law* 47, no. 2 (2015): 347-367.

¹⁵⁶ Hughes, Patricia. "Advancing access to justice through generic solutions: The risk of perpetuating exclusion." *Windsor YB Access Just.* 31 (2013): 1.

¹⁵⁷ *Ibid.*

¹⁵⁸ Bwire, Buluma. "Integration of African customary legal concepts into modern law: restorative justice: a Kenyan example." *Societies* 9, no. 1 (2019): 17.

¹⁵⁹ Constitution Of Kenya (2010), Article 159 (2)(c)

current realities.¹⁶⁰ It requires confronting the challenges posed by potential disputes related to human rights, internal power imbalances, the conflict between pluralism and essential standards, resource constraints, and institutional resistance.¹⁶¹ To counter these challenges, there is need to take various strategies including comprehensive research and documentation of AJS methods, targeted capacity building focused on human rights integration, developing synergistic connections with the formal system, and strategic use of technology.¹⁶² These solutions, cumulatively, provide a blueprint for coping successfully with these intricate challenges.¹⁶³ The ultimate aim should be to foster a dynamic legal pluralism in which AJS are enabled to operate effectively and to develop in ways that are both culturally authentic and consistent with the transformative aspirations of the Constitution, and especially its robust Bill of Rights.¹⁶⁴

Revitalizing AJS is, therefore, not only an alternative dispute resolution strategy but also an essential act of legal decolonization.¹⁶⁵ It challenges the epistemic violence of colonialism that excluded indigenous legal orders and seeks to re-center community-based knowledge and practice in the quest for justice.¹⁶⁶ Through a thoughtful and critical adoption of AJS, Kenya can move towards

¹⁶⁰ Divetia, Manas, and Arjun Chaudhary. "Legal Pluralism: Re-Engaging the Narrative to Solve Global Problems." *Indian J. Integrated Rsch. L.* 3 (2023): 1.

¹⁶¹ *Ibid.*

¹⁶² Ubink, Janine M., and Thomas McInerney. "Customary justice: perspectives on legal empowerment." (2011).<
<https://www.idlo.int/sites/default/files/Customary%20Justice%20%20-%20Perspectives%20on%20Legal%20Empowerment.pdf>> Accessed on 10th April 2025.

¹⁶³ *Ibid.*

¹⁶⁴ Klare, Karl E. "Legal culture and transformative constitutionalism." *South African Journal on Human Rights* 14, no. 1 (1998): 146-188.

¹⁶⁵ Kariuki, Francis, and Enyinna Sodiemye Nwauche. "Reflections on the "Autonomous Alternative Justice System Institutions" in Kenya's Alternative Justice Systems Policy Frameworks." *RiA Recht in Afrika | Law in Africa | Droit en Afrique* 26, no. 1 (2023): 70-83.

¹⁶⁶ *Ibid.*

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realizing a justice system that is not only more accessible and efficient but also more inclusive, equitable, and reflective of the nation's rich social and cultural diversity.¹⁶⁷ Further research, particularly empirical studies on the functioning of revitalized AJS, how they interact with the formal system, and how they impact users' experiences of justice, will be crucial in guiding ongoing policy formulation and implementation in this critical area.¹⁶⁸ The journey towards a truly decolonized and fair legal system demands sustained commitment, innovative thinking, and a willingness to genuinely value and integrate the diverse ways in which Kenyans understand and practice justice.¹⁶⁹

¹⁶⁷ Kariuki, Francis, and Enyinna Sodiénye Nwauche. "Reflections on the "Autonomous Alternative Justice System Institutions" in Kenya's Alternative Justice Systems Policy Frameworks." *RiA Recht in Afrika | Law in Africa | Droit en Afrique* 26, no. 1 (2023): 70-83.

¹⁶⁸ *Ibid.*

¹⁶⁹ Mbacho, Lydia W. "Achieving Access to Justice Through Alternative Dispute Resolutions: a Critical Analysis on Kenyan Legal Framework." PhD diss., University of Nairobi, 2021. <<https://erepository.uonbi.ac.ke/handle/11295/160426>.> Accessed on 8th April 2025.

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Arbitrator Disclosure: Analysis of the Applicable Tests for Arbitrator Bias in Kenya

*By: Austine Ouma**

Abstract

The essence of effective arbitration is contingent on the impenetrable cloak of trust in the independence and impartiality of the tribunal. Under Section 13(3) of the Arbitration Act 1995 (the Act hereafter), an arbitrator may be challenged 'only if circumstances exist that give rise to justifiable doubts as to his impartiality and independence.' The independence and impartiality of arbitrators are validated through pre-appointment disclosures. Nevertheless, ambiguity surrounds what constitutes 'circumstances that give rise to justifiable doubt' under the Act and the nature of information requiring disclosure. The lack of exposition under this clause presents an arduous task for individual arbitrators to determine the appropriate information to disclose, and has also spawned inconsistent tests that courts employ in assessing an arbitrator's potential bias and disclosure duty. This article critically evaluates emerging jurisprudence from Kenyan courts on the applicable test for assessing arbitrators' bias and the duty of disclosure. The paper furthermore analyses the relevant threshold for evaluating arbitrator bias and duty of disclosure in the UK and the IBA Guidelines on conflict of interest to highlight some key lessons for Kenya. It recommends the real possibility test as the most appropriate test for assessing an arbitrator's bias and offers other insights regarding the independence and impartiality of arbitrators.

Keywords: Arbitrator's independence, Reasonable apprehension, Real danger test, IBA Guidelines on Conflict of Interest.

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1. Introduction

The rule against bias forms the cornerstone of the justice dispensation system, ensuring its legitimacy and efficacy.¹ The justice system acknowledges that decisions impacting individuals' rights and obligations, whether issued by quasi-judicial administrative bodies or judges, lack ethical validity if they violate the principles of natural justice.² In light of arbitration's increasing popularity as an alternative to litigation, upholding the rule against bias within arbitration proceedings becomes imperative to preserve its credibility.³

Arbitration is an alternative dispute resolution method predicated on the consensual agreement between disputing parties to ostensibly provide a neutral, private, and efficient forum for resolving their disputes.⁴ Arbitrators' "cardinal duty" is to exercise their judicial or quasi-judicial prerogatives in independence and impartiality, rendering their function akin to that of a judge.⁵ The doctrine of Independence and impartiality is one facet of the pillars of natural justice applicable to arbitration. Though distinct, the concepts of impartiality and independence are harmonious and complement each other as constructs.⁶ The duty of independence on the arbitrator entails resisting pressure from any party, including third parties linked to the dispute. On the other hand, impartiality

¹ Emma Garrett, "Independence and impartiality: Australia's arbitrator bias test," *Oxford University Arbitration International*, 2024, XX, 1-21,

² Austin I. Pullé, "Securing Natural Justice in Arbitration Proceedings" (2012) 20(1) *Asia Pacific Law Review* 63.

³ Rom KL Chung, "The Rules of Natural Justice in Arbitration" (2011) 77(2) *Arbitration: The International Journal of Arbitration, Mediation and Dispute Management*.

⁴ Ronan Feebily, "Neutrality, Independence and Impartiality in International Commercial Arbitration, A Fine Balance in the Quest for Arbitral Justice" (2019) 7 *Penn St. JL & Int'l Aff.* 88.

⁵ N. Giraldo-Carrillo, "The 'Repeat Arbitrators' Issue: A subjective concept" (2011) *International law* (19) 75-105.

⁶ Nathalie M-P Potin and Tunde Ogunseitan, "Exploring the Parameters of Conflicts of Interest" in Carlos A. Matheus López (ed), *The Cambridge Handbook of Judicial Control of Arbitral Awards* (Cambridge University Press, 2020)

mandates the arbitrator to put aside personal biases and interests by employing objective reasoning throughout the decision-making process.⁷

Demonstrating independence is easier because it ordinarily refers to typical objective indicators of proximity, such as personal ties, professional relationships, or any other relationship of an arbitrator to one of the parties or the group. However, impartiality is more abstract and relates to a state of mind, requiring the arbitrator to make decisions without demonstrating a preference for one party over another.⁸ The pivotal criterion for an arbitrator is impartiality, and an arbitrator could be qualified if impartial but not wholly independent; however, an independent arbitrator lacking impartiality must face disqualification.⁹

Parties often opt for arbitration to resolve their dispute because it allows them to choose a commercial arbitrator with expertise in the specific market or technical issue, potentially offering a more informed perspective than a judge in a conventional court proceeding.¹⁰ The arbitrators are all-powerful as their decisions are final and binding and are not subject to appeal on merit. This implies that unless there is a breach of section 35 or a mutual agreement between the parties permitting appeals on legal grounds under section 39, the arbitral tribunal's determination seals the parties' fate.¹¹ All arbitral tribunals must therefore act fairly and impartially between the parties while conducting arbitration

⁷ *ibid.*

⁸ Andrew Tetley, "Judicial Control of Arbitral Awards in the United Kingdom" in *The Cambridge Handbook of Judicial Control of Arbitral Awards* (Cambridge University Press, 2020).

⁹ Doak Bishop & Lucy Reed, *Practical Guidelines for Interviewing, Selecting and Challenging Party Appointed Arbitrators in International Commercial Arbitration*, 14 *Arbitration International* 345 (1998)

¹⁰ Dr Kariuki Muigua, *Settling Disputes Through Arbitration in Kenya* (4th edn, 2022) Glenwood Publishers Ltd.

¹¹ *Ibid* n 6

proceedings and exercising their powers.¹² When allegations of a lack of independence or impartiality arise against arbitrators, the court employs different designed tests to evaluate these claims.¹³

Against this backdrop, this article seeks to resolve the underlying uncertainty under section 13(3) of the Act, and by doing so, it evaluates the High Court jurisprudence on the applicable test for evaluating arbitrator bias in Kenya, highlighting inconsistency. The article begins with this brief introduction to the definition of terminology. The next section analyses the legislative and constitutional framework for evaluating the arbitrator's bias. The paper then proceeds to the analysis of the competing test on assessing arbitrator bias and duty of disclosure. The paper in the comparative analysis explores the leading precedent in the UK for determining apparent arbitrators' bias and salient provisions under the International Bar Association, Guidelines on Conflicts of Interest in International Arbitration, 2024 (IBAG)¹⁴ to determine which threshold for assessing bias should be adopted in Kenya. The paper finally makes recommendations and draws a conclusive summary.

2.0 The Legal Framework Governing the Arbitrator's Duty of Disclosure

2.1 Arbitration Act, 1995

Section 12(9) of the Act mandates the High Court, when appointing an arbitrator, to take any necessary considerations to ensure the appointment of an independent

¹² Hong-Lin Yu and Laurence Shore, "Independence, impartiality, and immunity of arbitrators – US and English perspectives" (2003) 52(4) *International & Comparative Law Quarterly* 935.

¹³ Leela Kumar, "The Independence and Impartiality of Arbitrators in International Commercial Arbitration" (2014) Available at SSRN 2428632.

¹⁴ International Bar Association, Guidelines on Conflicts of Interest in International Arbitration (2024) <https://www.ibanet.org/document?id=Guidelines-on-Conflicts-of-Interest-in-International-Arbitration-2024> (visited on 30/3/2025)

and impartial arbitrator. Similarly, the Act provides that the prospective arbitrator must disclose any facts that would give rise to justified doubts about his impartiality or independence.¹⁵ One ground for challenging an arbitrator under the Act is pertinent to justifiable doubts regarding their impartiality or independence. However, should such grounds emerge after the arbitrator's appointment, it becomes incumbent upon the arbitrator to promptly disclose such circumstances to the involved parties unless the arbitrator has already informed them of these circumstances.¹⁶

The arbitrator's duty of disclosure is also contained in the institutional rules and codes of conduct, which serve as complementary sources to the Act. For instance, the Chartered Institute of Arbitrators (Kenya Branch) Rules, 2020 mandates prospective arbitrators to disclose any circumstances likely to give rise to justifiable doubts as to his or her impartiality and independence to the Chairperson of the Chartered Institute of Arbitrators (Kenya Branch) Rules before appointment.¹⁷ Upon acceptance of the appointment, the arbitrator must sign and provide each party with a copy of the statement of independence and impartiality. The Nairobi Centre for International Arbitration ('NCIA') Arbitration Rules, 2015 ('NCIA Rules') stipulate that any arbitrator conducting any arbitration under the said Rules should not act as an advocate for any party and should not also advise any party on the merits or outcome of the dispute, whether before or after the appointment. The NCIA Rules furthermore provide that arbitrators must sign a declaration affirming their impartiality and disclose any potential conflicts other than the circumstances disclosed in the arbitrator's declaration.¹⁸

¹⁵ Arbitration 1995 s 13(2).

¹⁶ *ibid*, s 13(2).

¹⁷ Chartered Institute of Arbitrators (Kenya Branch) Rules, 2020, Rule 14

¹⁸ Nairobi Centre for International Arbitration, Arbitration Rules, 2015, Rule 8.

2.2) The United Nations Commission on Trade Law (UNCITRAL) Model Law

The Model Law became an integral part of Kenya's legal framework in 1995. It was incorporated into the Arbitration Act of the same year and subsequently amended in 2009.¹⁹ The Kenyan Arbitration Act provisions align *pari materia* with those provided in the Model Law's guidelines. The Model law obligates the tribunal to maintain both impartiality and independence and imposes the arbitrator's duty to disclose 'any circumstances likely to give rise to justifiable doubts as to this impartiality or independence.'²⁰ The tribunal is therefore obligated to maintain both impartiality and independence. The Model Law's stipulated objective is to foster the liberalisation of international arbitration, underscoring the significance of party autonomy and providing parties with the prerogative to select the mechanisms for resolving their disputes.²¹ Furthermore, the Model aims to limit court intervention in arbitration proceedings. An exceptional attribute of the Model Law (formerly reflected in the UNCITRAL Rules) is the lack of a dichotomy between a party-nominated arbitrator and the third arbitrator.²²

2.3) The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958)

The New York Convention does not directly address the issue at hand. However, under Article V (2), enforcing an award tainted by bias could be rooted in public policy objections or on the grounds asserting non-conformity with the parties' agreement or the applicable law of the arbitration venue. The court may cite the grounds set out in Article V (2) on its own initiative *sua sponte*. The public policy exception is thus a reserve power to refuse enforcement when it is convenient for the court. The New York Convention's Article V(2)(b) contains both substantive

¹⁹ Evelyn Mbula, 'Critical Analysis of Section 6 of Kenya's Arbitration Act: A Case for Reform' (2018) 6(1) *Alternative Dispute Resolution*, pg.70.

²⁰ Article 12 (1), UNCITRAL Model Law.

²¹ Sujoy Chatterjee, 'Judicial Import of the Model Law: How far is too far' (2015) 4(1) *Indian Journal of Arbitration Law*, 20.

²² *ibid*

and procedural aspects of public policy. It covers instances where a party has been deprived of procedural fairness by the tribunal, and accordingly, it grants national courts the authority to refuse the enforcement of arbitral awards if it is evident that one or more arbitrators on the tribunal displayed bias, whether real or apparent, during the decision-making process.

To invoke protection under Article V(2)(b), a respondent must demonstrate that the arbitrator failed to meet the necessary standards of impartiality and independence following procedural public policy. In the post-award phase, bias can be raised as a compositional irregularity enabling member states to decline award enforcement if the arbitral authority's composition does not align with the law of the arbitration country²³ or based on public policy considerations of the enforcing state.²⁴ Having ratified the New York Convention in 1989, Kenya is consequently bound to uphold the obligations delineated in the Convention as discussed above. However, Kenya acceded to the New York Convention on 10 February 1989 with a reservation on reciprocity.²⁵

2.4) The Constitution of Kenya 2010

The independence and impartiality of arbitrators have a broader resonance in the comprehensive constitutional concepts and legal systems. Although this concept is not explicitly delineated in constitutional provisions, the overarching principles, such as the rule of law, fair administrative action, and access to justice, serve as its backdrop. The Constitution upholds the inviolability of natural justice principles, acknowledging their paramount importance. The constitution guarantees the right to a fair and public hearing, emphasising independent and impartial decision-

²³ New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards art V(1)(d) (1958).

²⁴ *Ibid* art V(2)(b).

²⁵ Muigai, Githu (ed.), *Arbitration law and practice in Kenya* Law Africa Publishers (African Books Collective, 2011).

making.²⁶ The Constitution furthermore provides for the right to fair administrative action; however, referring to public bodies, it signals a commitment to fairness.²⁷

Arbitration plays a vital role in facilitating access to justice in Kenya by providing an alternative and efficient mechanism for dispute resolution.²⁸ The Constitution enjoins the court to promote arbitration,²⁹ and in doing so, it should foster confidence in the arbitral process, dismiss misplaced allegations and spurious attacks on arbitrators, and uphold the independence and impartiality of arbitrators. However, dismissal based on impartiality should be done through a balanced approach that addresses concerns about potential bias while demonstrating a commitment to the realisation of the right to fair and impartial arbitration.

3. The Competing Tests for Evaluation of Apparent Bias in Arbitration

The tests for assessing apparent bias on the part of arbitrators under most common law jurisdictions can be grouped into three major categories: the reasonable apprehension test, the real danger test, and the real possibility test, each comprising two limbs.³⁰ The first limb establishes the perspective from which the allegations will be evaluated, either from the court's perspective or that of a reasonable person, while the second limb sets the threshold that must be satisfied for the allegation to be substantiated.

²⁶ Constitution of Kenya 2010, Article 50 (1).

²⁷ *ibid*, Article.47

²⁸ *ibid*, Article. 159(3).

²⁹ *ibid*, Article 159(2)(c).

³⁰ Aradhana Cherupara Vadakkethil, Ashleigh Barnes, Gauri Pillai, Gayathree Devi KT, 'Determining Bias: A survey of the law in the United Kingdom' (Oxford Pro Bono Publico, January 2020)

The reasonable apprehension test was established in the landmark case of *R v Sussex Justices*³¹ in which the High Court examined bias in a conviction appeal. The applicant in this case alleged bias because the clerk retired with the justices and worked for the opposing solicitors. The court highlighted the significance of the appearance of bias and elaborated that the case law required that ‘justice should not only be done but should manifestly and undoubtedly be seen to be done’.³² The court noted that even though the clerk was not involved in the decision, his retirement with the justices created an ‘appearance of bias.’ The court quashed the decision, and as a result, the test for evaluating bias was formulated to determine “whether a reasonable person with knowledge of the material facts would have reasonably apprehended that the decision-maker was biased.”

The stance in the reasonable apprehension test was informed by an endeavour to protect the integrity of the administration of justice and preserve the confidence of the general public in the judicial system, ‘by not letting bias distort the law.’ The test was premised on Lord Denning’s sentiment that: ‘Justice must be rooted in confidence: and confidence is destroyed when right-minded people go away thinking: “The judge was biased.”’³³ The test in *Sussex Justices* lowered the standard for establishing bias on the parties; however, it expected a higher standard for decision-makers to avoid bias. Reasonable apprehension implies a low threshold where decisions can be overturned based on a ‘reasonable appearance,’ and not a “real” risk of bias. This test was argued to be incompatible with the fundamental principles of arbitration, prompting the proposition of a distinct standard for arbitrators.

The real danger test traces its ancestral pedigree from the case of landmark precedent of *R v Gough*³⁴ and it requires the court to consider whether, “in view of

³¹ [1924] 1 KB 256

³² *ibid* 259 (Lord Hewart CJ).

³³ *R v Metropolitan Properties Co (FGC) v Lannon* [1969] 1 QB 577, 599 (Lord Denning)

³⁴ [1993] AC 646 at 670.

the circumstances, there exists a real danger of bias on the part of the relevant tribunal member, implying potential unjust favouritism or prejudice toward a party's case.³⁵ When employing this test, the court has to proceed on its derived impression of the circumstances relating to the case to determine whether they give rise to a real likelihood of arbitrators' bias.³⁶ The opinion of the court in *Gough* was that a stricter criterion, such as in *Sussex Justices*, was unnecessary and central to the real danger test is that there is no probability that a decision will be quashed if the appearance of bias does not create a real danger of injustice.³⁷ Had the court employed the *Gough test* in *Sussex Justices*, then there would have been chances that the decision would not have been overturned since 'appearance did not amount to the real danger of injustice.' Lord Goff of Chievely, in this case, stated that "the court should look at the matter through the eyes of a reasonable man because the court in cases such as these personifies the reasonable man." The House of Lords argued that the test would ensure that justice is manifestly seen to be done. However, due to the stringent nature of the test, it did not gain universal acceptance across the Commonwealth jurisdictions.³⁸

The House of Lords, in *Re Medicaments and Related Classes of Goods*,³⁹ subjected the *Gough test* to 'modest adjustment' and held that in assessing bias the court must consider the circumstances which bear on whether there was bias and consider if this would cause a 'fair-minded and informed observer to conclude that there was a real possibility, or a real danger' of bias." The court's analysis posited that a real possibility was just the same as a real danger. However, the House of Lords in *the Porter case* went to great lengths in eschewing the language 'real danger,' opting

³⁵ibid n 37.

³⁶ Lionel Leo and Siyuan Chen, 'Reasonable Suspicion or Real Likelihood: A Question of Semantics?' (2008) *Singapore Journal of Legal Studies* 446-454.

³⁷ ibid, Paras 673 (Lord Woolf).

³⁸ Sumeet Kachwaha, 'The Rule Against Bias and the Jurisprudence of Arbitrator's Independence and Impartiality', *Asian International Arbitration Journal* 17(2) (2021).

³⁹ [2001] UKHL 67

instead for a 'real possibility in line with Strasbourg's jurisprudence.'⁴⁰ The test has been felt more in harmony with the European Court of Human Rights jurisprudence.

The difference between the Gough and reasonable apprehension on the first limb is the observer's perspective, assessing bias. In the reasonable apprehension test and real possibility, bias assessment relies on the perspective of the hypothetical observer (a fair-minded and informed observer). In the real danger test, the court itself assumes the role of an observer and directly evaluates whether a real danger of bias exists, implying a more subjective assessment within the judicial context.⁴¹ The second difference lies in the second limb, which determines the degree of proof required; whereas the real danger test requires a "real likelihood" of bias, the test in *Porter* requires a "real possibility" of bias. The Gough test set a more stringent standard that exceeds the reasonable suspicion or apprehension threshold but remains below the probability of bias.⁴²

4. Jurisprudence from Kenyan Courts on the Applicable Test For Arbitrator Bias

In the case of *Zadock Furniture Limited and Another v Central Bank of Kenya*,⁴³ the applicant, Central Bank of Kenya, applied to the court to have Hon. Mr Justice Torgbor removed from his position as the sole arbitrator. The grounds cited by the applicant were that the arbitrator departed from the agreed procedure, exhibited unfair and partisan behaviour, failed to treat parties equally, and eroded trust stemming from recording and publishing off-record discussions. The application furthermore invoked an incident of intense interrogation of a stenographer and interference during cross-examination. In determining whether the issues raised

⁴⁰ Smith, Murray. L. "The New Real Danger' Test for Arbitrator Bias in British Colombia." *British Columbia Law Review* Vol.77 part 61(2019): 1.

⁴¹ *ibid*, n 37

⁴² *ibid* n pg.112

⁴³ [2015] eKLR.

by the applicant amount to bias, the court established an interpretation of the objective of section 13 (3) of the Act as follows:⁴⁴

“ ..., The grounds for removal of the arbitrator are set out in section 13(3) of the Arbitration Act, but the one which is relevant to this application is...only if circumstances exist that give rise to justifiable doubts as to his impartiality and independence... The words “only if” and “justifiable doubts” are important in a decision under section 13(3) of the Arbitration Act. And the arbitrator recognised that fact. The words suggest the test is stringent and objective in two respects: a) the Court must find that circumstances exist, and those circumstances are not merely believed to exist, and b) those circumstances are justifiable; this goes beyond saying that a party has lost confidence in the arbitrator’s impartiality into more cogent proof of actual bias or prejudice.”

In determining the applicable test for arbitrator bias, the court stated in its rationale that:

“The test for bias or prejudice must be that there is a real danger that the arbitrator is biased, and in deciding whether bias has been established, the Court personifies the reasonable man and considers all the material before it to determine whether any reasonable person looking at what the arbitrator has done, will have the impression in the circumstances of the case, that there was a real likelihood of bias.”

The court added that justifiable doubts regarding the arbitrator's impartiality and independence must be based on substantial reasons, not peripheral, imagined, fanciful issues, or merely the applicant's belief. It can be discerned from the ratio that the court employed the real danger test and that the impression of the likelihood of bias was drawn by the court based on its assessment of material facts before it.

⁴⁴ *ibid*, Para 30

From the *Zadocks case*, the applicants should demonstrate that there was a 'real danger of bias' when the decisions were made against them.⁴⁵ It was the court's position that the appropriate test is that the bias "must be a manifest" as opposed to "mere possibility"- "almost certain" when circumstances of the case are considered."⁴⁶ The court dismissed the application and suggested that the challenge against the arbitrator was based on the counsel's suspicion that the arbitrator could be biased. The court found that the applicant's allegations must satisfy the court that there existed apparent bias to such a degree that there was a real danger of bias toward the arbitrator. The learned justice employed this stringent test to accommodate arbitration within the Kenyan legal framework adequately and also to deter meritless claims, thereby saving time and costs associated with resolving such claims.

In *West Park Limited v Villa Care Limited and another*,⁴⁷ the applicant, West Park, filed a motion on February 27, 2020, requesting the arbitrator, Dr Kenneth Wyne Mutuma, to recuse himself from their dispute with Villa Care. The applicant contended that there existed justifiable doubts for a conflict of interest between the arbitrator and the 1st respondent and that they had lost faith in the arbitrator's impartiality due to his failure to disclose a change in material circumstances that would result in a conflict of interest. The applicant's position was grounded on the allegation that the arbitrator had accepted the role of arbitrator in another reference between Villa Care and Waiyaki Way Developers, where the same counsel represented Villa Care. In the interpretation of the mischief of section 13(3), the court reiterated the rationale established by learned Justice Gikonyo in *the Zadock case*. The learned Justice Majanja further added that:

⁴⁵ S. R. Luttrell, 'Go Back to Gough: The Need for the 'Real Danger' Test for Arbitrator Bias in the Common Law Seats of the Asia Pacific' (2008) 16(2) *Asia Pacific Law Review* 157-176.

⁴⁶ *ibid n 38 Paras 37*

⁴⁷ [2020] eKLR

“... the test adopted by the Act is stringent. It is intended to weed out frivolous allegations not founded on facts. The application must be based on the circumstances that exist, and those circumstances must be justifiable. This test is in consonance with the prevailing legal formulation for the test for recusal of judicial officers emerging from our superior court, where the courts have held that the test is not subjective based on the feelings or belief of the parties aggrieved but of a reasonable person with knowledge of the facts in issue.”⁴⁸

However, the learned justice Majanja, in this case, did not adopt the real danger test as in *Zadock's case* but referred to the superior court decisions regarding the test for recusal of judicial officers. In applying the test to the facts, the court held that the relationship between the arbitrator and the Villa Care advocate, which resulted from the subsequent appointment, could not reasonably cast doubt on his impartiality and independence.⁴⁹ Learned Majanja contended that the ‘duty to disclose depends on whether the circumstance sought to be disclosed gives rise to justifiable doubts about the arbitrator’s impartiality and independence.’ The court found out further that there was no rule deterring an arbitrator from handling references involving the same parties or their advocates because this is similar to how judges may preside over cases with the same advocates on a daily basis, and therefore disclosing such information was just a matter of courtesy and the arbitrator was not under any obligation to do so. The court emphasised that, however, disclosing the facts would have been good practice to allay fears; the test for establishing the arbitrator's bias is premised on an objective consideration of the facts, not the party's subjective view.

However, in the case of *Brian Martin Francis & 5 others v Samuel Thenya Maina & Martin Munyu*,⁵⁰ the court underscored that the test for arbitrator bias centres on ‘whether a reasonable, objective, and informed person would, on the correct facts,

⁴⁸ *ibid* Para 32

⁴⁹ *ibid* Paras 34

⁵⁰ [2021] eKLR at para 72.

reasonably apprehend that the decision maker has not or will not bring an impartial mind to bear on the adjudication of the case, that is, a mind open to persuasion by the evidence and submissions of counsel.’

However, a different standard was taken by the court in the case of *Chania Garden Ltd v Gilbi Construction Company Ltd & Another*⁵¹ in which the court stated:

“Perception of bias, as is the case here, without proof, will not amount to misconduct for purposes of removal of the arbitrator. The comments complained of were not made without basis. The parties made elaborate submissions and submitted documents on the issues which he addressed in the ruling, including the matters of the Quantity Surveyor. ... The facts presented do not meet the ultimate test as per the literary work by Steve Gatembu on page 54 of Arbitration Law and Practice in Kenya; “The test whether a person is in position to act judicially and without any bias has been suggested to be: - “do there exist grounds from which a reasonable person would think that there was a real likelihood that the arbitrator could not or would not fairly determine.... (the dispute)on the basis of the evidence and arguments to be adduced before him”.

The jurisprudence emerging from the Kenyan courts seems not to have shown consistency in the applicable test for determining arbitrator bias. The jurisprudence emerging from the High Court has utilised a nuanced approach incorporating the three tests for arbitrator bias in deciding whether the arbitrator was biased. Sometimes, the court utilises a reasonable apprehension test, a real possibility test, or a real danger test. The real danger standard has been abandoned and is no longer applicable in most common law jurisdictions.⁵² The effect of the lack of a consistent threshold for determining bias or arbitrator duty of disclosure

⁵¹ [2015] eKLR at para 32

⁵² Applicable in British Columbia “real danger” test applies in the case of international arbitration (Section 12 of the British Columbia International Commercial Arbitration Act) and Australia ‘The Gough Amendment’

is that it undermines the predictability and fairness of arbitration proceedings, which are always centred on impartiality and neutrality. Furthermore, a lack of consistency can erode Kenya's credibility as a seat for international arbitration, as parties to arbitration may perceive a lack of clarity and consistency in the standards applied by courts when assessing bias.

5. Halliburton's case on Standards for Arbitrator's Impartiality and Disclosure Duty

The Supreme Court of the UK in the *Halliburton case*⁵³ confirmed that the relevant threshold for arbitrator bias was a real possibility test. The *Halliburton case* centres on the participation of arbitrator Kenneth Rokison QC in three arbitrations stemming from the Deepwater Horizon disaster in the Gulf of Mexico. The High Court was not persuaded by Halliburton's application to remove Rokison, a judgment which the Court of Appeal upheld. The crux of the dispute hinges on Rokison's failure to disclose his proposed appointment by Chubb in one arbitration with Halliburton. The matter came before the Supreme Court in 2019, and the two main issues which the court addressed were the arbitrator's duty of impartiality and the duty of disclosure.

The Supreme Court found that the English court employs an objective standard to determine whether there is an appearance of bias that the arbitrator should be removed. This standard assesses 'whether an informed, fair-minded observer would conclude that there is a real possibility of bias', and it applies to judges and arbitrators.⁵⁴ The hypothetical informed and impartial observer will consider the context and may consider the unique features of international arbitration, such as the debate surrounding the role of party-appointed arbitrators (although English law does not distinguish between the impartiality obligations of a co-arbitrator and a chairperson); the reputation or experience of **an arbitrator (with the**

⁵³ *Halliburton Company v Chubb Bermuda Insurance Ltd* [2020] UKSC 48.

⁵⁴ *ibid* Para 55

understanding that parties' knowledge of an arbitrator's reputation or experience will vary depending on the circumstances); and the potential for tactical challenges.⁵⁵ In certain circumstances, accepting appointments in several references on the same or overlapping subjects with only one common party could justifiably lead an impartial observer to conclude a real possibility of bias.⁵⁶ However, this conclusion hinges on the specific facts of the case, as well as the norms and practices within the relevant arbitration field.

On the disclosure, the Supreme Court found that arbitrators, in the absence of party agreement, have a legal duty to disclose “facts or circumstances which would or might lead the fair-minded and informed observer, having considered the facts, to conclude that there was a real possibility that the arbitrator was biased.”⁵⁷ This duty stems from the arbitrator’s statutory duties under Section 33 of the Arbitration Act 1996, which ensure an implied term in the arbitrator's contract to act impartially and ensure compliance with Section 24 for removal.⁵⁸ The arbitrator’s obligations of confidentiality and privacy apply to the disclosure. In cases when these obligations are applicable, disclosure cannot occur without the parties' express or implied consent. Such consent may be given expressly, but it may be inferred from the arbitration agreement itself, given the customs and practices of the pertinent arbitration field.⁵⁹

The hypothetical assessment of arbitrator bias will be made on the hearing date to remove the arbitrator, taking into account the facts and circumstances both as of and from the date the duty arose. In the opinion of the Supreme Court, failure to disclose “may in certain circumstances amount to apparent bias.”⁶⁰ The court

⁵⁵ *ibid* Para 67

⁵⁶ *ibid* Para 118

⁵⁷ *ibid* Para 72

⁵⁸ *ibid* Para 76

⁵⁹ *ibid* Para 88-91

⁶⁰ *ibid* Para 117

dismissed the appeal, stating that the “existence of possibly overlapping arbitrations with only one common party would not necessarily cause the fair-minded and informed arbitrator to conclude that there was a real possibility of bias” when assessed at the appointment date. On the duty of disclosure, the court found that Mr Rokison “was under a legal duty to disclose his appointment” to *Halliburton*, and his failure to disclose “was a breach of his legal duty of disclosure.”⁶¹ The Supreme Court rejected inferring unconscious bias from the oversight, stating the fair-minded observer would not conclude a real possibility of bias. At the removal hearing, Mr. Rokison had explained his failure to disclose the appointments (an oversight), and Halliburton did not challenge his explanation.

6. Analysis of the Applicable Test for Arbitrator Bias in Kenya and the UK

Hulliborton's case is the leading English precedent in evaluating the arbitrator's impartiality. The Supreme Court, in this case, elucidated a stringent criterion for the removal of the arbitrator on the grounds of bias. In the case of *H1 & Anor v. W & Ors*,⁶² the English Commercial Court removed a sole arbitrator under section 24 of the Arbitration Act 1996 due to justifiable doubts about his impartiality and a real possibility of bias, offering further guidance on the disqualification of arbitrators.⁶³ The court reiterated the important considerations for the evaluation of arbitrator bias and emphasised the need for full and frank disclosure due to the confidential setting of arbitration.⁶⁴ The court, in underscoring the significance of impartiality in arbitral proceedings, noted that arbitrators are not subject to the same degree of scrutiny on factual or legal issues as judges. The court also highlighted that the arbitrators' financial interests in getting income for their appointments as arbitrators could taint their impartiality. Furthermore, the court

⁶¹ *ibid* Para 147

⁶² [2024] EWHC 382 (Comm)

⁶³ *ibid* Paras 58-62

⁶⁴ *ibid* Para 63

also opined that the arbitrator's experience and professional reputation were vital considerations in assessing allegations of apparent bias.

In this case, the court removed the sole arbitrator from proceedings due to apparent bias shown by his remarks that insured expert witnesses were "exceptional people in their fields" and that he knew "them all personally extremely well."⁶⁵ The statements, among others, illustrated his close personal relationships with the insured's witness experts, a predisposition to believe their evidence, and his lack of professional acquaintance with the insurer's expert. Mr Justice Calver concluded that the arbitrator's professional acquaintance with the insured's experts did not pose impartiality. However, the arbitrator's declaration that he would believe the insured experts' evidence without question and accept it at face value raised bias based on an objective assessment, finding a real possibility of bias on the part of the sole arbitrator.

In Kenya, the jurisprudence emerging from the High Court suggests no single test for evaluating arbitrator bias. For instance, the court in *Kenya Pipeline Company Limited v Kenya Oil Company Limited & another*,⁶⁶ cited the interpretation of section 13(3) of the Act and real danger test as employed in the *Zadocks case* and, nevertheless, concluded that the circumstances which constitute justifiable doubt as to the impartiality of the arbitrator need not necessarily relate to the substantive dispute at hand, but they should be of such nature as to impeach the integrity of the arbitrator or would create real apprehension in the eyes of a reasonable person that justice will not be done by the arbitrator in the dispute at hand. The court further stated that it is imperative to consider whether there exists a reasonable basis to infer the possibility of bias and whether it is liable to create in the minds of the public a reasonable doubt regarding the fairness of justice administration. It seems that the court employed a nuanced approach or did not see any material

⁶⁵ *ibid* Para 42

⁶⁶ (2015) eKLR para 20 pg. 10

difference between the reasonable apprehension and the real danger test.⁶⁷ However, the Kenyan courts have employed an objective perspective, focusing on whether a reasonable person aware of the circumstances would question the arbitrator's impartiality.

The courts in the UK jurisdiction centre on the impartiality of arbitrators, and in this context, the Supreme Court in the *Halliburton* case affirmed that the relevant test for assessing arbitrator bias is a real possibility.⁶⁸ The UK rejected the real danger test since it was not in line with international best practices.⁶⁹ The real possibility test strikes a balance between the reasonable apprehension and the real danger test and therefore is the most suitable for arbitrator bias since it combines the strengths of both tests. The rule against bias is essential for preserving public confidence and ensuring impartiality in decisions; however, different jurisdictions use different tests to assess arbitrator bias, taking into account factors such as time and costs.⁷⁰

6. IBA Guidelines on Conflicts of Interest in International Arbitration, 2024.

The guidelines are divided into two parts: the first part outlines the General Standards relating to arbitrator impartiality and independence, and the second part, called the 'Application Lists,' has four colour-coded lists for specific situations and has been termed 'the revolutionary Pinnacle' of the Guidelines' ambition. The Application List outlines the circumstances pertinent to the disclosures and disqualifications, which are categorized into the 'Non-waivable Red List', 'Waivable Red List', 'Orange List', and 'Green List.'

⁶⁷ *ibid* p.9 para 20

⁶⁸ Paffey, Joshua, et al., "UK Supreme Court decision in *Halliburton v Chubb*: clarity or missed opportunity?," *Const. L. Int'l* 16 (2021) 23.

⁶⁹ *ibid*

⁷⁰ *ibid*

The guidelines in both parts reflect the IBA Arbitration Committee's insight into the 'best current international practices.'⁷¹ In any circumstance an arbitrator harbours self-doubt about impartiality or independence, he/she must resolve it by refusing the appointment or recusing (if already appointed).⁷² Conflict of interest is assessed from the perspective of a reasonable third person with knowledge of the relevant facts. Furthermore, justifiable doubts arise if a reasonable third person, informed of the relevant facts, concludes that there is a likelihood of the arbitrator being influenced by factors beyond the merits of the case. The focal point of General Standards 3 is the arbitrator's duty of disclosure. It requires arbitrators to disclose facts that may raise doubts about their impartiality or independence in the parties' perception (eyes of the parties), providing a broader disclosure than the Model Law standard. The Guideline clarifies that the disclosure does not automatically presume a conflict of interest.⁷³ Furthermore, any pre-existing party declaration or waiver regarding a possible conflict of interest doesn't exempt the arbitrator from fulfilling the disclosure duty.⁷⁴

Part 2 of the IBA guidelines introduces the non-waivable red list, encompassing situations where conflicts of interest lead to disqualification. The Non-Waivable Red List is not solely for disclosure but serves as an absolute disqualification list for conflicts of interest, incapable of waiver by parties. This includes scenarios such as an identity between a party and the arbitrator, the arbitrator's significant financial or personal interest in a party, and a regular advisory relationship between the arbitrator or their firm and the party, yielding substantial financial income. The waivable red list is subject to the parties' agreement and the appointing institution's acknowledgment and includes scenarios like an arbitrator

⁷¹ IBA Guidelines, Introduction to the Guidelines, para. 4.

⁷² IBA Guidelines Part I: General Standards Regarding Impartiality, Independence and Disclosure, General Standards Regarding Impartiality, Independence and Disclosure, para. 2 (a).

⁷³ *ibid* Part I Explanation to General Standard 3, Clause (c).

⁷⁴*ibid* para. 3 (b)

giving legal advice or an expert opinion on the dispute to a party or its affiliate. However, none of the four lists is exhaustive. The IBA Guidelines, however, are Soft Law and merely the equivalent of papers published in legal journals. They are not a Convention nor rules of an arbitral institute; however, they can be used as persuasive yardsticks.⁷⁵ These guidelines do not override any applicable national law or arbitral rules chosen by the parties; however, appointing authorities can disseminate the ABA code for uniform standards among arbitrators.⁷⁶

7. Recommendations

In light of the above discussions, the author makes the following proposals on how to deal with issues that concern the arbitrator's impartiality and disclosure requirements.

Firstly, the court should assess arbitrator bias through the reasonable apprehension of bias test in light of Porter's 'real possibility' or 'real likelihood'. In this instance, the court's role should not be to replace the reasonable man but to ascertain the perspective of the public using fair-minded and well-informed observers with relevant knowledge and facts pertinent to the case. The *UK Halliburton case* should serve as a precedent for Kenyan courts on assessing arbitrator bias. The case underscored the necessity of utilizing a rigorous test for assessing bias.⁷⁷ In assessing the arbitrator's bias and the duty of disclosure:

"The fair-minded and informed observer should assess whether there is a real possibility that an arbitrator was biased by reference to the facts and circumstances known at the date of the hearing to remove the arbitrator while taking into consideration the custom and practice in arbitrations in that particular field." ⁷⁸

⁷⁵*ibid* Para. 4, 8 Introduction.

⁷⁶ General Standards Regarding Impartiality, Independence and Disclosure.

⁷⁷*ibid*

⁷⁸ Faith Wanjiku & Ian Otenyo, 'The legal test applied to the duty of disclosure, the assessment of possible bias of an arbitrator and the consideration on the interplay of the

Since arbitration is a private dispute resolution and consensual process, it should not take mountains to remove arbitrators by proving real danger bias on the part of the arbitrator but the applicant should just raise a 'possibility of bias.'⁷⁹ This contention is grounded on the presumption of impartiality and integrity of the arbitrator. The arbitrator need not take oath; however, they have a legal and ethical duty to disclose any circumstances giving rise to their independence and impartiality. Arbitration is therefore deeply rooted in confidence, independent and impartial decision-makers chosen by the parties, unlike courts where the parties have no choice for the decision-maker. This means remote connections with the parties to dispute can trigger an arbitrator's disqualification. The court should therefore proceed on the reasonable suspicion or apprehension of bias.⁸⁰ Secondly, the Act emphasizes timely disclosure for independence and impartiality, however, the Act does not differentiate between standards for arbitrator removal and setting aside award. Applying a uniform standard based on 'justifiable ground' without considering other factors may lead to disproportionate and unfair consequences.⁸¹ The author advocates for legal reasoning that recognizes that apparent bias, unlike actual bias, need not always invalidate an award. Furthermore, careful formulation of disclosure requirements prompts a consideration of the consequences of non-disclosure. The core consideration is whether non-disclosure entails a legal sanction and if it can independently lead to arbitrator removal or the imposition of costs. *Halliburton's*,⁸² perspective emphasizes that non-disclosure, particularly when close to the margin, can serve as grounds for arbitrator removal. Furthermore, even in less

duties of privacy and confidentiality in arbitration' (27 January 2021) Kenya Law Blog <http://kenyalaw.org/kenyalawblog/the-legal-test-applied-of-possible-bias-of-an-arbitrator/> (visited 25/3/2025)

⁷⁹*ibid*

⁸⁰*ibid* n 59

⁸¹ *ibid* n 25 sec 13(1)

⁸²*ibid* n 80

clear situations, serious non-disclosure might result in costs being imposed on the challenging party.⁸³

Finally, the author calls upon the appointing authorities such as the Chartered Institute of Arbitrators - Kenya Branch, Law Society of Kenya, and the Nairobi Centre for International Arbitration to adopt the IBA Guidelines on conflict of interest in international arbitration, 2024, applying them both in domestic and international arbitration.⁸⁴ The utilization of these Guidelines in appointment procedures and in addressing complaints against arbitrators should be without due regard to the court's jurisdiction under section 35 of the Arbitration Act.

8. Conclusion

In Kenya, the applicable test for determining arbitrator bias seems unresolved. The specific test applied to arbitrator bias in Kenya is unpredictable and can vary depending on the circumstances of the case and the court's interpretation. While the three competing tests for arbitrator bias are the real danger, reasonable apprehension and real possibility tests, their application at judicial discretion may create uncertainty for the parties to determine the applicable test and the overall outcome of a decision. However, the UK, after *Porter's case*, as confirmed by the *Halliburton case*, has consistently applied the real possibility test, a norm in most Commonwealth jurisdictions and under the IBA guidelines. However, it can be noted that both Kenya and the UK jurisdictions have been reluctant to remove arbitrators on grounds of bias. Therefore, this paper proposes that the Kenyan courts should apply a uniform and predictable real possibility test for evaluating arbitrator bias and duty of disclosure, as it aligns with the best current international practices. Furthermore, this paper recommends that the section 13(1) of the Arbitration Act, 1995, should be amended to expressly mention the "real possibility" test for challenging an arbitrator. The test, therefore, should be

⁸³ *ibid* n 51

⁸⁴ *ibid* n 2

whether an informed, fair-minded observer would conclude that there is a real possibility of bias. This article concludes in the words of Professor Martin Hunter:

*“Indeed, when I am representing a client in an arbitration, what I am really looking for in a party-nominated arbitrator is someone with the maximum predisposition towards my client, but with the minimum appearance of bias.”*⁸⁵

⁸⁵ Hunter, Martin, "Ethics of the International Arbitrator," *The Journal of the Chartered Institute of Arbitrators* (1987) 219.

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ESG, Sustainability and Investment Arbitration: A Reflection

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Abstract

This paper discusses how sustainability can be integrated in investment arbitration. The paper argues that incorporating sustainability into investment arbitration is key towards enhancing access to Environmental Justice while also minimising the negative impacts of investment activities on the environment and society. The paper posits that Environmental, Social, and Governance (ESG) provides a framework through which sustainability can be effectively incorporated into investment arbitration and other dispute resolution processes. It examines ways through which ESG can foster sustainability in investment arbitration. In addition, the paper suggests interventions towards integrating ESG in investment arbitration for sustainability.

1.0 Introduction

Achieving sustainability is a vital global ideal. It has been argued that sustainability entails the integration of environmental health, social equity and economic vitality in order to create thriving, healthy, diverse and resilient communities and ecosystems now and in the future¹. Sustainability entails creating and maintaining the conditions under which humanity and nature can exist in productive harmony to support present and future generations².

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¹ What is Sustainability?., Available at <https://www.sustain.ucla.edu/what-is-sustainability/> (Accessed on 17/07/2025)

² United States Environmental Protection Agency., 'What is Sustainability.' Available at <https://www.epa.gov/sustainability/learn-about-sustainability> (Accessed on 17/07/2025)

Achieving sustainability has become an urgent priority globally in light of mounting environmental, social, and economic challenges facing the planet³. These challenges include poverty, inequalities, unemployment, conflicts, and global health threats⁴. Further, environmental threats facing the planet including depletion of natural resources, environmental degradation, desertification, drought, freshwater scarcity, loss of biodiversity, and climate change call for urgent and transformative approaches towards achieving sustainability in order to ensure harmony with nature⁵.

At the global level, the concept of Sustainable Development has been embraced as a pathway towards sustainability. Sustainable Development refers to development that meets the needs of the present generations without compromising the ability of future generations to meet their own needs⁶. It has been argued that Sustainable Development provides the means for achieving sustainability⁷. Sustainable Development aims to achieve the ideal of sustainability

³ United Nations Environment Programme., 'The Triple Planetary Crisis: Forging a New Relationship Between People and the Earth' Available at https://www.unep.org/news-and-stories/speech/triple-planetary-crisis-forging-new-relationship-between-people-and-earth?gad_source=1&gclid=EA1aIQobChMI5If4zjXihwMVR6KDBx2jcx22EAAYASAAEglqsfd_BwE (Accessed on 17/07/2025)

⁴ United Nations General Assembly., 'Transforming Our World: the 2030 Agenda for Sustainable Development.' 21 October 2015, A/RES/70/1., Available at <https://sustainabledevelopment.un.org/content/documents/21252030%20Agenda%20for%20Sustainable%20Development%20web.pdf> (Accessed on 17/07/2025)

⁵ Ibid

⁶ World Commission on Environment and Development., 'Our Common Future.' Oxford, (Oxford University Press, 1987)

⁷ Giovannoni. E., & Fabietti. G., 'What Is Sustainability? A Review of the Concept and Its Applications.' In: Busco, C., Frigo, M., Riccaboni, A., Quattrone, P. (eds) Integrated Reporting. Springer, Cham. Available at https://doi.org/10.1007/978-3-319-02168-3_2 (Accessed on 17/07/2025)

by promoting environmental protection and conservation, economic development and social progress⁸.

The United Nations *2030 Agenda for Sustainable Development* sets out the global vision for sustainability⁹. The Agenda envisions attainment of the environmental, economic, and social facets of sustainability through 17 Sustainable Development Goals (SDGs)¹⁰. Achieving sustainability is also a key priority for Africa. African Union's *Agenda 2063*¹¹ sets out a strategic framework for inclusive growth and sustainable Development in Africa towards sustainability¹².

It has been argued that sustainability is a cross-cutting theme that permeates all fields including dispute resolution¹³. Sustainability is a pertinent ideal in dispute resolution in order to ensure that conflicts and disputes are resolved in a manner that is environmentally and socially responsible, as well as economically viable especially in the corporate world, where many disputes are related to environmental issues such as pollution, climate change, resource depletion, and deforestation¹⁴. Sustainability is vital in dispute resolution in order to ensure that conflicts and disputes are managed in a manner that is environmentally and socially responsible, as well as economically viable while also ensuring that

⁸ Fitzmaurice. M., 'The Principle of Sustainable Development in International Development Law.' *International Sustainable Development Law.*, Vol 1

⁹ United Nations General Assembly., 'Transforming Our World: the 2030 Agenda for Sustainable Development.' 21 October 2015, A/RES/70/1., Op Cit

¹⁰ Ibid

¹¹ Africa Union., 'Agenda 2063: The Africa we Want' Available at https://au.int/sites/default/files/documents/33126-doc-framework_document_book.pdf (Accessed on 17/07/2025)

¹² Ibid

¹³ Gupta. A., & Bajpai. A., 'Green Dispute Resolution: A Sustainable way of Resolving Disputes' Available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4855128 (Accessed on 17/07/2025)

¹⁴ Ibid

dispute resolution processes minimise negative impact on the environment and society¹⁵.

This paper discusses how sustainability can be integrated into investment arbitration. The paper argues that incorporating sustainability into investment arbitration is key towards enhancing access to Environmental Justice while also minimising the negative impacts of investment activities on the environment and society. The paper posits that Environmental, Social, and Governance (ESG) provides a framework through which sustainability can be effectively incorporated into investment arbitration and other dispute resolution processes. It examines ways through which ESG can foster sustainability in investment arbitration. In addition, the paper suggests interventions towards integrating ESG in investment arbitration for sustainability.

2.0 The Need for Sustainability in Investment Arbitration

Arbitration is among the key Alternative Dispute Resolution (ADR) processes. Arbitration is a private and consensual process where parties in dispute agree to present their grievances to a third party for resolution¹⁶. It has also been defined as a dispute management mechanism where parties through an agreement submit their dispute to one or more neutral third parties who make a binding decision on the dispute¹⁷. Arbitration and other ADR processes have been embraced both globally and at national levels. At the global level, ADR mechanisms including arbitration are recognized under the *Charter of the United Nations*¹⁸. The Charter provides that parties to a dispute shall first of all seek a solution by negotiation, enquiry, mediation, conciliation, *arbitration*, judicial settlement, resort to regional

¹⁵ Ibid

¹⁶ Muigua, K., 'Settling Disputes through Arbitration in Kenya.' Glenwood Publishers, 4th Edition, 2022

¹⁷ World Intellectual Property Organization., 'What is Arbitration' Available at <https://www.wipo.int/amc/en/arbitration/what-is-arb.html> (Accessed on 18/07/2025)

¹⁸ United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI

agencies or arrangements, or other peaceful means of their own choice¹⁹ (Emphasis added). At a national level, the Constitution of Kenya mandates courts and tribunals to promote ADR mechanisms including reconciliation, mediation, *arbitration* and Traditional Dispute Resolution Mechanisms (TDRMs)²⁰ (Emphasis added).

Arbitration can be classified into various forms including domestic and international arbitration²¹. It has been observed that international arbitration is being practiced through various forms including interstate arbitration, investor-state/investment arbitration, and international commercial arbitration²². Investment arbitration is an evolutionary innovation in international dispute settlement²³. It creates a system for the settlement of disputes between investors and host governments through a neutral forum that offers the possibility of a fair hearing before a tribunal unencumbered by domestic political considerations²⁴.

It has been argued that investment arbitration is a procedure to resolve disputes between foreign investors and host States (also called Investor-State Dispute Settlement (ISDS))²⁵. The possibility for a foreign investor to sue a host State is a guarantee for the foreign investor that, in the case of a dispute, it will have access to independent, impartial and qualified arbitrators who will resolve the dispute

¹⁹ Ibid, article 33 (1)

²⁰ Constitution of Kenya., 2010., article 159 (2) (c)

²¹ Muigua. K., 'Settling Disputes through Arbitration in Kenya.' Op Cit

²² Shonk. K., 'International Arbitration: What it is and How it Works' Available at <https://www.pon.harvard.edu/daily/international-negotiation-daily/international-arbitration-what-it-is-and-how-it-works/> (Accessed on 18/07/2025)

²³ Ibid

²⁴ United Nations Conference on Trade and Development., 'Investor-State Dispute Settlement' Available at https://unctad.org/system/files/official-document/diaeia2013d2_en.pdf (Accessed on 18/07/2025)

²⁵ Introduction to Investment Arbitration., Available at <https://www.international-arbitration-attorney.com/investment-arbitration/> (Accessed on 18/07/2025)

and render an enforceable award²⁶. Investment arbitration allows foreign investor to bypass national jurisdictions that might be perceived to be biased and to resolve the dispute in accordance to different protections afforded under international treaties²⁷. It has been observed that ISDS are found in most international investment treaties between states and foreign investors²⁸. This form of dispute settlement was created to protect investors from arbitrary expropriation and ensure non-discriminatory treatment for foreign investments, in countries considered risky²⁹. ISDS therefore allows foreign investors (individuals and companies) to allege violation of international investment treaties by suing host states through arbitration³⁰.

Sustainability is a key theme in investment arbitration. It has been correctly noted that sustainability has become a pertinent concern in arbitration and ADR in order to foster justice and development³¹. As the world grapples with environmental challenges, disputes related to resource conservation, biodiversity, pollution, and climate change are on the rise globally³². In addition, the quest for energy transition towards sustainability is also fueling disputes in the energy sector

²⁶ Ibid

²⁷ Ibid

²⁸ European Parliament., 'Investor-State Dispute Settlement (ISDS) State of play and prospects for reform' Available at https://www.europarl.europa.eu/RegData/etudes/BRIE/2015/545736/EPRS_BRI%282015%29545736_EN.pdf (Accessed on 18/07/2025)

²⁹ Ibid

³⁰ Columbia Center on Sustainable Investment., 'Primer on International Investment Treaties and Investor-State Dispute Settlement' Available at <https://ccsi.columbia.edu/content/primer-international-investment-treaties-and-investor-state-dispute-settlement> (Accessed on 18/07/2025)

³¹ Synergizing Alternative Dispute Resolution, Sustainability and Infrastructure Development., Available at <https://onlinelibrary.wiley.com/page/journal/15411508/call-for-papers/si-2024-001260#:~:text=This%20special%20issue%20will%20primarily,and%20in%20a%20timely%20manner> (Accessed on 18/07/2025)

³² Ibid

including joint venture/contractual disputes, claims arising from weather conditions in renewable energy projects, construction related disputes, technology related disputes, *investor/state disputes*, and regulatory disputes³³.

In particular, investment arbitration is increasingly focusing on key thematic areas under the ideal of sustainability including human rights, climate action, environmental conservation and energy transition³⁴. Human rights are often invoked in arbitration between states and foreign investors, through allegations of either state or investor infringements of such rights in investor-state arbitration³⁵. For example, an alleged failure by foreign investors to respect the rights of indigenous peoples, environmental rights, or labour rights may lead to a dispute with a local population that escalates into an international investment dispute under the auspices of investor-state arbitration³⁶. It has been argued that human rights are relevant in investment arbitration since both investor and host States may turn to human rights treaties to reinforce their positions or put forward autonomous claims³⁷.

³³ McMahon. M., Shah. P., 'The Rise of Renewable Energy Disputes and Arbitration.' Available at <https://www.stewartslaw.com/news/rise-of-renewable-energy-disputes/> (Accessed on 18/07/2025)

³⁴ Goh. N., 'ESG and Investment Arbitration: A Future with Cleaner Foreign Investment?' *The Journal of World Energy Law & Business.*, Volume 15, Issue 6, 2022

³⁵ Agius. M., 'Human Rights in International Arbitration' Available at <https://globalarbitrationreview.com/review/the-european-arbitrationreview/2023/article/humanrights-in-international-arbitration> (Accessed on 18/07/2025)

³⁶ Feldman. J., 'Human Rights and International Investment Arbitration: A snapshot' Available at <https://www.nortonrosefulbright.com/en/knowledge/publications/11a8c614/human-rights-and-international-investment-arbitration-a-snapshot> (Accessed on 18/07/2025)

³⁷ Human Rights Law and Investment Arbitration., Available at <https://www.acerislaw.com/human-rights-law-and-investment-arbitration/#:~:text=Human%20rights%20law%20is%20relevant,investment%20arbitration%20are%20wholly%20disassociated.> (Accessed on 18/07/2025)

Climate change is another pertinent theme under investment arbitration. It has been argued that climate change has created a dynamic environment that necessitates a careful interpretation of treaty standards in line with international climate commitments³⁸. Investment arbitration is therefore playing an increasingly important role in disputes over policies aimed at mitigating climate change³⁹. It has been observed that many investment treaties are increasingly incorporating provisions on climate action⁴⁰. Measures adopted to mitigate or adapt to climate change have been considered in some investment arbitration claims, and a growing number of cases involve investments in the renewable energy sector⁴¹.

Investment arbitration is also relevant in the quest towards energy transition. It has been argued that as energy companies and governments navigate decarbonisation, energy security, and investment landscapes, energy disputes are becoming more frequent and complex⁴². For example, due to the abundance of energy sources in Africa, there has been an increase in investments in the energy sector in the Continent including through bilateral and multilateral investment treaties⁴³. The rise of energy and infrastructure projects in Africa, combined with

³⁸ Investment Treaty Arbitration and Climate Change., Available at <https://lawclimateatlas.org/resources/investment-treaty-arbitration-and-climate-change/> (Accessed on 18/07/2025)

³⁹ Ibid

⁴⁰ United Nations Conference on Trade and Development., 'The International Investment Treaty Regime and Climate Action.' Available at https://unctad.org/system/files/officialdocument/diaepcbinf2022d6_en.pdf (Accessed on 18/07/2025)

⁴¹ International Centre for Settlement of Investment Disputes., 'Investment Arbitration and Climate Change' Available at <https://icsid.worldbank.org/form/webinar-investment-arbitration-climate> (Accessed on 18/07/2025)

⁴² Energy Disputes: Navigating Key Trends and Challenges., Available at <https://www.velaw.com/insights/energy-disputes-navigating-key-trends-and-challenges/> (Accessed on 18/07/2025)

⁴³ Kebe. M., 'Resolving infrastructure and energy disputes in sub-Saharan Africa' Available at <https://www.dlapiperafrica.com/en/senegal/insights/2024/resolving-infrastructure-and-energy-disputes-> (Accessed on 18/07/2025)

the challenges deriving from the energy transition have led to a wide range of disputes both under contractual instruments (such as concession agreements) and investment treaties⁴⁴. It has been observed that renewable energy sources, including wind, solar and geothermal energy, have resulted in an increase in energy projects and, with that, the potential for a growing number of disputes coming from the energy sector in Africa⁴⁵. Unpredictable investment and regulatory environments, the pace of development required to achieve energy transition, the variety and number of stakeholders involved, supply chain complexity and the deployment of new technologies all create fertile conditions for energy disputes especially in Africa⁴⁶. Investment arbitration is therefore key towards effective resolution of energy disputes both globally and in Africa in order to fast-track the energy transition for sustainability⁴⁷.

Sustainability is therefore a pertinent concern in investment arbitration. Through investment arbitration, it is possible to foster sustainability by protecting human rights, bolstering climate action, fast-tracking energy transition and ensuring sound environmental conservation. Despite its efficacy, it has been observed that environmental, developmental and investment disputes are becoming more complex, hence there is need for arbitration and ADR to continue to evolve in order to effectively meet these new challenges⁴⁸. Investment activities are raising

⁴⁴ Ibid

⁴⁵ Global Arbitration Review., 'Energy Arbitration in Africa.' Available at <https://globalarbitrationreview.com/review/the-middle-eastern-and-african-arbitration-review/2022/article/energy-arbitration-in-africa> (Accessed on 18/07/2025)

⁴⁶ Hameau, P., Bentley, J., & Robert, M., 'Energy arbitration in Africa: potential sources of energy and natural resources disputes' Available at <https://globalarbitrationreview.com/review/the-middle-eastern-and-african-arbitration-review/2024/article/energy-arbitration-in-africa-potential-sources-of-energy-and-natural-resources-disputes> (Accessed on 18/07/2025)

⁴⁷ Ibid

⁴⁸ Synergizing Alternative Dispute Resolution, Sustainability and Infrastructure Development., Available at <https://onlinelibrary.wiley.com/page/journal/15411508/call-for-papers/si-2024->

several sustainability concerns. For example, host states are increasingly asserting claims against foreign investors for alleged breaches of their environmental and climate obligations⁴⁹. In addition, there have been allegations of foreign investors' breach of human rights, for example, access to water, or the lack of public consultation of local communities in relation to development projects⁵⁰. Sustainability obligations are therefore becoming increasingly stringent in investment arbitration in light of concerns about climate change, human rights, Energy Justice, and environmental conservation⁵¹. It is therefore necessary to mould sustainability into investment arbitration.

3.0 Infusing ESG into Investment Arbitration for Sustainability

Environmental, Social, and Governance (ESG) is a concept that entails three central tenets that are used to measure the sustainability and ethical impact businesses and investments⁵². ESG is a framework that seeks to achieve sustainable, responsible and ethical investment by incorporating environmental, social and governance factors in corporate decision making⁵³. It has been argued that ESG takes the holistic view that sustainability extends beyond just environmental issues; it also seeks to incorporate social and governance criteria in the

[001260#:~:text=This%20special%20issue%20will%20primarily,and%20in%20a%20timely%20manner \(Accessed on 18/07/2025\)](#)

⁴⁹ Allen. N., 'Investment Treaty Disputes Role in Sustainability.' Available at <https://www.addleshawgoddard.com/globalassets/specialisms/litigation/esg-risk-reputation-compliance--disputes/investment-treaty-disputes-role-in-sustainability.pdf> (Accessed on 18/07/2025)

⁵⁰ Ibid

⁵¹ Ibid

⁵² Kiehne. D.O., 'Environmental, Social and Corporate Governance (ESG) -Also an Innovation Driver?' Available at https://www.researchgate.net/publication/334398123_Environmental_social_and_corporate_governance_ESG_-_also_an_innovation_driver (Accessed on 18/07/2025)

⁵³ Stuart. L.G et al., 'Firms and social responsibility: A review of ESG and CSR research in corporate finance.' *Journal of Corporate Finance* 66 (2021): 101889

sustainability agenda⁵⁴. ESG therefore provides a framework used to evaluate the sustainability and ethical impact of businesses and investments. This framework incorporates environmental, social, and governance factors into investment and business decision-making processes in order to foster sustainability⁵⁵. It has been argued that ESG factors contribute to broader business sustainability efforts that aim to position companies for long-term success based on responsible corporate management and business strategies⁵⁶.

According to the United Nations Development Programme (UNDP), ESG is a model of sustainable business development that is based on responsible attitude towards the environment, high social responsibility, and good governance⁵⁷. ESG seeks to achieve sustainable, responsible and ethical investment by incorporating environmental, social and governance factors in corporate decision making⁵⁸. ESG focuses on three core tenets that aim to ensure sustainability. These include *environmental factors* such as climate change, energy efficiency, waste management, and pollution⁵⁹; *social factors* including sound labour practices, human rights,

⁵⁴ Peterdy. K., & Miller. N., 'ESG (Environmental, Social, & Governance)' Available at <https://corporatefinanceinstitute.com/resources/esg/esg-environmental-social-governance/> (Accessed on 18/07/2025)

⁵⁵ Barbosa. A et al., 'Integration of Environmental, Social, and Governance (ESG) Criteria: Their Impacts on Corporate Sustainability Performance.' *Humanit Soc Sci Commun* 10, 410 (2023). Available at <https://doi.org/10.1057/s41599-023-01919-0> (Accessed on 18/07/2025)

⁵⁶ What is ESG (environmental, social and governance)?., Available at <https://www.techtarget.com/whatis/definition/environmental-social-and-governance-ESG#:~:text=Environmental%20factors%20involve%20considerations%20of,ESG%20criteria%20include%20the%20following:> (Accessed on 18/07/2025)

⁵⁷ United Nations Development Programme., 'ESG: From Challenges to Opportunities' Available at <https://www.undp.org/belarus/stories/esg-challenges-opportunities#:~:text=January%2016%2C%202024,social%20responsibility%2C%20and%20good%20governance.> (Accessed on 18/07/2025)

⁵⁸ Stuart. L.G et al., 'Firms and social responsibility: A review of ESG and CSR research in corporate finance.' Op Cit

⁵⁹ Corporate Governance Institute., 'A Simple guide to ESG' Available at <https://www.thecorporategovernanceinstitute.com/insights/guides/simple-guide->

customer satisfaction, and community engagement⁶⁰; and *governance factors* including board composition, shareholder rights, and transparency (Emphasis added)⁶¹. The goal of ESG is to integrate Environmental, Social and Governance factors in corporate affairs in order to enhance the sustainability and social impact of business activities⁶².

The concept of ESG is vital in infusing sustainability into arbitration. ESG factors have become a critical aspect of business operations and investment decisions in the corporate world⁶³. Corporations are under immense pressure to ensure that their operations remain sustainable, socially responsible, and governed ethically⁶⁴. As a result, ESG clauses are being adopted in commercial and investment contracts⁶⁵. In case of violation of such clauses, ESG related disputes are bound to occur⁶⁶. It has been argued that arbitration and ADR are well suited in managing

[esg/?srsltid=AfmBOopuGrbiquCk3DYg-pDmv95eh87EN2vx-oD8_Xmsmxud2nsb61m6](https://www.mondaq.com/india/arbitration--dispute-resolution/1375770/cracking-the-esg-conundrum-is-arbitration-the-key-to-resolution-of-esg-disputes#:~:text=ESG%20issues%20usually%20involve%20multiple,arbitral%20awards%20across%20multiple%20jurisdictions)
(Accessed on 18/07/2025)

⁶⁰ Ibid

⁶¹ Ibid

⁶² Li. T.T et al., 'ESG: Research Progress and Future Prospects.' *Sustainability*, No. 13 of 2021.

⁶³ Rathi. S., 'Cracking The ESG Conundrum: Is Arbitration The Key To Resolution Of ESG Disputes?' Available at [https://www.mondaq.com/india/arbitration--dispute-resolution/1375770/cracking-the-esg-conundrum-is-arbitration-the-key-to-resolution-of-esg-](https://www.mondaq.com/india/arbitration--dispute-resolution/1375770/cracking-the-esg-conundrum-is-arbitration-the-key-to-resolution-of-esg-disputes#:~:text=ESG%20issues%20usually%20involve%20multiple,arbitral%20awards%20across%20multiple%20jurisdictions)

[disputes#:~:text=ESG%20issues%20usually%20involve%20multiple,arbitral%20awards%20across%20multiple%20jurisdictions](https://www.mondaq.com/india/arbitration--dispute-resolution/1375770/cracking-the-esg-conundrum-is-arbitration-the-key-to-resolution-of-esg-disputes#:~:text=ESG%20issues%20usually%20involve%20multiple,arbitral%20awards%20across%20multiple%20jurisdictions) (Accessed on 18/07/2025)

⁶⁴ Ibid

⁶⁵ International Arbitration in 2022., 'The Rising Significance of ESG and the Role of International Arbitration' available at <https://www.freshfields.com/en-gb/our-thinking/campaigns/internationalarbitration-in-2022/the-rising-significance-of-esg-and-the-role-of-international-arbitration/> (Accessed on 18/07/2025)

⁶⁶ Muigua. K., 'The Place of Environmental, Social and Governance (ESG) in Arbitration' Available at <https://kmco.co.ke/wp-content/uploads/2022/09/The-Place-of-Environmental-Social-and-Governance-ESG-in-Arbitration-2.pdf> (Accessed on 18/07/2025)

ESG disputes towards sustainability⁶⁷. For instance, arbitration allows parties to appoint specialised arbitrators with the requisite skills to manage technical ESG disputes including those involving energy, climate change and investments⁶⁸. Arbitration is important in the ESG discourse since it ensures neutrality of forum and flexibility as to where proceedings are held in addition to flexibility of procedure and availability of specialized procedural rules on ESG disputes⁶⁹.

ESG is also relevant in investment arbitration. It has been observed that international investment treaties are increasingly incorporating ESG protections with the purpose of ensuring that contracting parties promote and effectively achieve their ESG objectives including commitments on climate action, environmental conservation, sound labour practices and human rights⁷⁰. Many investment treaties mandate that foreign investments be made in accordance with the host state's laws⁷¹. Consequently, if a host state has implemented ESG regulations, foreign investors must adhere to them, or their investments would not enjoy international protections under the ISDS regime⁷². Foreign investors are now increasingly required to adhere to ESG standards in host states including through

⁶⁷ Arbitration is fast becoming the frontrunner for ESG-related disputes in Africa., Available at <https://www.herbertsmithfreehills.com/notes/africa/2024-posts/arbitration-is-fast-becoming-the-frontrunner-for-esg-related-disputes-in-africa> (Accessed on 18/07/2025)

⁶⁸ Ibid

⁶⁹ Gaffney, J., 'In Praise and Criticism of Arbitration as a Means of Resolving ESG Disputes' Available at <https://arbitrationblog.kluwerarbitration.com/2023/04/18/in-praise-and-criticism-of-arbitration-as-a-means-of-resolving-esg-disputes/> (Accessed on 18/07/2025)

⁷⁰ Akeb, S., 'Here We Go: ESG-Disputes in International Arbitration' Available at <https://www.taylorwessing.com/en/insights-and-events/insights/2023/07/here-we-go-esg-disputes-in-international-arbitration> (Accessed on 18/07/2025)

⁷¹ ISDS and ESG: Friends or Foes?., Available at <https://legalblogs.wolterskluwer.com/arbitration-blog/isds-and-esg-friends-or-foes/> (Accessed on 18/07/2025)

⁷² Ibid

protecting the environment, upholding human rights in the host state, and complying with core labour standards⁷³.

ESG therefore provides an effective framework for integrating sustainability into investment arbitration. Host states are now more likely to bring claims or counterclaims against foreign investors for failure to meet their ESG-related obligations or in situations where investor protection clauses frustrate a host state's ESG objectives⁷⁴. Further, Investors and states may be subject to arbitration proceedings pursuant to existing investment treaties or pursuant to ESG clauses in investment treaties⁷⁵.

It is therefore necessary to mould ESG into investment arbitration in order to foster sustainability. This involves enhancing the use of investment arbitration in managing ESG and sustainability disputes including those concerning climate change, energy transition, environmental conservation and labour rights⁷⁶. Achieving this goal requires the increased adoption of ESG clauses in investment treaties⁷⁷. Further, it is imperative to reform the ISDS regime including through effective rules and institutions in order to strengthen its capacity in ESG and sustainability⁷⁸. Arbitrators and tribunals also have a crucial role in ensuring that investment arbitration fosters sustainability by enforcing ESG tenets including

⁷³ Ibid

⁷⁴ Akeb. S., 'Here We Go: ESG-Disputes in International Arbitration' Op Cit

⁷⁵ International Bar Association., 'Report on Use of ESG Contractual Obligations and Related Disputes' Available at <https://www.ibanet.org/document?id=report-on-use-of-ESG-contractual-obligations> (Accessed on 18/07/2025)

⁷⁶ ISDS and ESG: Friends or Foes?., Op Cit

⁷⁷ Sood. Y., 'Review Paper: 'ESG and Investment Arbitration: A Future with Cleaner Foreign Investment?' by Nelson Goh.' Available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4466733 (Accessed on 18/07/2025)

⁷⁸ ISDS and ESG: Friends or Foes?., Op Cit

human rights, environmental protection and sound labour practices⁷⁹. Greening investment arbitration including through reducing its carbon footprint is also key towards fostering sustainability and enforcing ESG standards⁸⁰

4.0 Conclusion

Achieving sustainability is vital in investment arbitration. ESG provides an effective framework towards moulding sustainability in investment arbitration. It is therefore important to infuse ESG into investment arbitration for sustainability by adopting ESG clauses in investment treaties⁸¹; building effective rules and institutions to enhance the management of ESG disputes through investment arbitration⁸²; enforcing ESG tenets in investment arbitration including human rights, environmental protection and sound labour practices⁸³; and greening investment arbitrations⁸⁴. ESG, sustainability and investment arbitration are therefore related and cross-cutting themes. Moulding ESG into investment arbitration is thus necessary towards sustainability.

⁷⁹ Muigua. K., 'The Place of Environmental, Social and Governance (ESG) in Arbitration' Op Cit

⁸⁰ The Green Pledge., Available at <https://www.greenerarbitrations.com/sign-green-pledge#:~:text=The%20Green%20Pledge&text=The%20Campaign%20addresses%20the%20need,carbon%20footprint%20when%20resolving%20disputes> (Accessed on 18/07/2025)

⁸¹ Sood. Y., 'Review Paper: 'ESG and Investment Arbitration: A Future with Cleaner Foreign Investment?' by Nelson Goh.' Op Cit

⁸² ISDS and ESG: Friends or Foes?., Op Cit

⁸³ Muigua. K., 'The Place of Environmental, Social and Governance (ESG) in Arbitration' Op Cit

⁸⁴ The Green Pledge., Op Cit

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Medical Arbitration and the Right to Responsive Framework for Timely Health Justice: A Human Rights Perspective from Kenya: **(2025)13(3) Alternative Dispute Resolution**
Kola Muwanga & Caroline Kathure Kamuru

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Abstract

The Kenyan healthcare sector has long been ensnared in a cycle of institutional breakdowns, professional negligence, and legal inertia, manifesting in the needless suffering of patients and the erosion of public trust in health governance. One harrowing example is the case of a patient who endured an 18-year wait before a court judgment was delivered on a matter of medical negligence. Such an unconscionable delay is not merely procedural; it is an indictment of a justice system ill-equipped to respond to the urgency of human suffering. In contexts where time lost equates to lives lost or irreversibly harmed, the need for more responsive, efficient, and humane mechanisms of redress becomes imperative. This paper explores how Alternative Dispute Resolution (ADR) mechanisms, particularly arbitration can serve as vital tools in addressing the dual crisis of

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delayed justice and systemic malpractice in Kenya's healthcare sector. ADR offers a pathway that is faster, less adversarial, and more accessible, particularly for victims who are often socioeconomically marginalized. By examining the intersection of medical accountability, the right to health, and the promise of ADR, this study argues for a paradigm shift away from rigid litigation models toward more restorative and responsive forms of dispute resolution. It calls upon policymakers, judicial officers, and healthcare professionals to institutionalize ADR within the framework of medical jurisprudence as both a legal imperative and a moral necessity.

The healthcare sector in Kenya has been in a state of turmoil for a long time with this manifesting itself in varied forms. This has in many ways translated to adverse outcomes on individuals seeking healthcare services. Kenya's public and private healthcare systems are increasingly under scrutiny due to rising cases of medical malpractice. Coupled with an overburdened judiciary and slow legal processes, many victims are left without redress for years. Globally, alternative dispute resolution (ADR) mechanisms particularly medical arbitration, are gaining traction as viable pathways to resolve such disputes.

Introduction.

Let us imagine and reflect this for a moment:

A patient full of life, walks into a hospital with a curable condition. A wrong diagnosis is made. A surgery is done on the wrong organ, suffers due to medical negligence; perhaps a misdiagnosis, a botched surgery, or a fatal medication error as well as the aftercare is negligent. But what follows is not just pain and suffering; but even more painful is a long; the petitioner, a patient with grievous injury, was left treading an agonizing, slow court's journey of wait and navigating the labyrinthine corridors of justice system, the one that takes close to two decades to offer redress. The case drags on. Eighteen years of court adjournments, missing files, legal technicalities, judges transferred, lawyers come and go, and mounting costs all while the scars, both physical and emotional, deepen. The once

vibrant patient deteriorates. And after eighteen unyielding years of bated breath, a court finally delivers a judgment; too late for recovery, too late for closure, and sometimes, too late for the victim who may have already passed on.

This is not fiction play nor ‘vioja mahakamani’ (a Kenyan comedy series), on Kenya Broadcasting Corporation. It is the lived reality of many victims of medical negligence in Kenya and indeed a gloomy theme that echoes across much of the Global South that their pursuit of justice often ends in frustration.¹ Formal court processes remain lengthy, expensive, and intimidating, leaving patients and their families navigating an inaccessible system that deepens trauma rather than alleviating it.² This justice gap is well illustrated in cases such as Charles Ndegwa Ngari v Kenya Hospital Association t/a The Nairobi Hospital,³ where judicial recognition of harm coexisted with an arduous evidentiary burden on the patient,⁴ and L W M v P N M & Another,⁵ which underscored the difficulty of balancing professional autonomy with accountability.⁶ The facts of this instant case paint a harrowing portrait of delayed justice, a reality that no litigant, especially one already bearing the wounds of medical trauma, should ever be subjected to. In that near-generational wait, the court cannot ignore the depth of emotional attrition endured; a life lived in limbo, a breath held too long. The petitioner waited not with apathy but with bated breath, year after year, court date after adjourned court date, clinging to the belief that the law would eventually stir from its slumber and speak.

¹ Helena Alviar García, Law, Development and the Global South, in David Trubek and Alvaro Santos (eds), *The New Law and Economic Development: A Critical Appraisal*

² Patricia Kameri-Mbote, Access to Justice and the Rule of Law in Kenya, in *Global Forum on Law, Justice and Development Working Paper Series*

³ *Charles Ndegwa Ngari v Kenya Hospital Association t/a The Nairobi Hospital* [2018] eKLR.

⁴ *Ibid*

⁵ [2019] eKLR.

⁶ *L W M v P N M & Another* [2019] eKLR.

Against this backdrop, Alternative Dispute Resolution (ADR) mechanisms particularly arbitration and mediation emerge as a pragmatic response.⁷ ADR promises speed, confidentiality, reduced costs, and the possibility of therapeutic justice, making it especially relevant in medical disputes where patients often seek acknowledgment and redress rather than purely monetary compensation.⁸ Kenyan jurisprudence has already hinted at the role of ADR in filling justice gaps. In *Kenya Medical Association v Attorney General & 2 Others*,⁹ the High Court emphasized the importance of flexible dispute resolution frameworks in the health sector.¹⁰ Globally, mediation has been embraced in jurisdictions like South Africa and India as a softer, patient-centered means of resolving negligence claims without adversarial litigation.¹¹

A woman's life was forever altered by unauthorized surgery and medical negligence.¹² This was the case of *Naila Qureshi* who in September 2006, underwent surgery at Aga Khan University Hospital for the treatment of pelvic endometriosis. During the procedure, a hysterectomy was performed by Dr Rafique Parker. Ms Qureshi later developed complications and alleged that her cervix had been removed without her explicit consent. She further contended that she had not been adequately informed about the material risks inherent in the procedure. This raised serious concerns regarding informed consent, which, as established in *Montgomery v Lanarkshire Health Board*,¹³ requires that patients be informed of any material risks involved in a proposed treatment, as well as

⁷ Kariuki Muigua, *Alternative Dispute Resolution and Access to Justice in Kenya*

⁸ S. I. Strong, *Resolving Medical Malpractice Disputes: Innovations and Future Directions*

⁹ *Kenya Medical Association v Attorney General & 2 Others* [2017] eKLR.

¹⁰ *Ibid*

¹¹ T. W. Bennett, *Mediation in Medical Negligence Cases in South Africa*

¹² Nyiha Mukoma & Company Advocates. Available on <https://nyihamukoma.com/2025/06/10/kshs-157-million-medical-negligence-essential-lessons-for-kenyas-healthcare-providers/> <accessed on 26 July, 2025>

¹³ *Montgomery v Lanarkshire Health Board* [2015] UKSC 11, [2015] AC 1430.

reasonable alternatives.¹⁴ The legal standard in this case marked a shift from a paternalistic approach to one that places patient autonomy at the centre of medical decision-making.¹⁵ Such practices run counter to internationally accepted standards, as articulated in *Montgomery's case (supra)*,¹⁶ where the UK Supreme Court held that patients must be informed of material risks to make autonomous decisions. This position has also been affirmed in other jurisdictions.

For example, in *Castell v De Greef*, a South African court held that a doctor is under a duty to disclose all material risks to the patient, with materiality judged from the standpoint of a reasonable patient.¹⁷ Similarly, in *Reibl v Hughes*, the Supreme Court of Canada emphasized that, the test of informed consent is “what a reasonable person in the patient’s position would want to know before making a decision.”¹⁸ Ms Qureshi’s claim, therefore, raises potential breaches of the legal duty to obtain informed consent, which courts have consistently interpreted as a cornerstone of both ethical and lawful medical practice. She informed the court that, “the removal of the cervix caused serious health consequences, including sexual dysfunction and permanent medical complications, adding that the procedure resulted in the development of a vesico-vaginal fistula, a condition causing incontinence, which further aggravated her physical suffering.”¹⁹ The court was also informed that after the procedure, the petitioner sought further specialized medical attention in South Africa, and further claimed that, “the

¹⁴ Ibid

¹⁵ Ibid

¹⁶ Ibid

¹⁷ *Castell v De Greef* 1994 (4) SA 408 (C), 426H-I.

¹⁸ *Reibl v Hughes* [1980] 2 SCR 880 (SCC) [891–892].

¹⁹ Pulse Kenya. Available on <https://www.pulselive.co.ke/articles/news/local/court-orders-aga-khan-hospital-to-pay-157-million-compensation-after-medical-blunder-2025060504490156356> <accessed on 27 July, 2025>

hospital and doctors failed to act with reasonable care, leading to Qureshi's worsening condition."²⁰

Even as the judgment marked a watershed moment in Kenya's jurisprudence, delivered with commendable reasoning and doctrinal clarity, it simultaneously exposed enduring fractures in the moral, social, and professional ethos of our society.²¹ The High court's decision,²² though rendered after nearly two decades of litigation, set a significant legal precedent by affirming the right to timely and quality healthcare, thereby enriching Kenya's corpus of constitutional and tort law.²³ The case underscores the transformative aspirations of the Constitution of Kenya 2010, particularly under Article 43(1)(a),²⁴ which guarantees "every person the right to the highest attainable standard of health."²⁵ This judgment highlighted the urgent need for hospitals and medical practitioners to uphold legal and ethical standards while prioritizing patient safety. To minimize the risk of costly negligence claims, it is essential to implement practical measures that enhance care quality and ensure strict compliance with professional obligations. It also marked a pivotal precedent, clearly defining the precedent for medical negligence, informed consent, and institutional responsibility.

However, beneath the surface of legal triumph, lay the sobering reality of institutional inertia. For 18 years, the plaintiff, a patient who had endured unspeakable suffering following a botched medical procedure, grappled with a justice system that appeared, at best, indifferent and, at worst, complicit in the

²⁰ Ibid

²¹ *Supra*, note 3

²² Ibid

²³ Ibid

²⁴ Constitution of Kenya 2010, art 43(1)(a).

²⁵ Ibid

perpetuation of harm through delay.²⁶ The protracted litigation period did not merely delay justice; it inflicted secondary trauma, undermining the very dignity and human worth the Constitution seeks to protect under Article 28, which affirms the “inherent dignity of every person and the right to have that dignity respected and protected.”²⁷ The court’s decision must therefore be viewed through both a legal and a moral lens. While the reasoning was legally sound, the timeline was ethically disturbing. As former Chief Justice Willy Mutunga (Emeritus) once noted, “the legitimacy of a judiciary is not only measured by the quality of its decisions, but also by its timeliness and accessibility to the common citizen.”²⁸ In this case, the delay cast a shadow on the institutional legitimacy of the justice system itself. Moreover, the judgment has rekindled debates around professional ethics and accountability in the healthcare sector. “Medical negligence is not merely a breach of duty; it is often a betrayal of the trust that patients place in healthcare providers.”²⁹ The Kenya Medical Practitioners and Dentists Council (KMPDC) has repeatedly acknowledged systemic failures in regulatory enforcement, which have allowed malpractice to persist with minimal consequence.³⁰

The Kenya Medical Practitioners and Dentists Council (KMPDC) has acknowledged major regulatory failings that have significantly weakened the integrity of the healthcare system, most notably the alarming fact that more than

²⁶ Kenya Law Reports, *Delayed Justice: A Case Study of Medical Negligence and the Long Road to Compensation* (Kenya Law, 2024) <https://www.kenyalaw.org> <accessed 25 July 2025>.

²⁷ *Supra*, note 16, art 28.

²⁸ Willy Mutunga, *The 2011–2012 Judiciary Transformation Framework: Towards a People-Centred Judiciary* (Judiciary of Kenya, 2012) 8.

²⁹ Mwaura Kobia, *Medical Negligence in Kenya: Legal Remedies and Institutional Challenges* (2019) 7(2) *Kenya Law Review* 121.

³⁰ Kenya Medical Practitioners and Dentists Council (KMPDC), *Annual Report on Medical Malpractice and Disciplinary Measures* (2023) <https://kmpdc.go.ke> accessed 26 July 2025.

half of the country's health facilities are operating without proper licensing.³¹ Despite its mandate to oversee and license all health facilities in Kenya, a 2023 audit by the Office of the Auditor General revealed that only 7,518 out of 16,527 registered facilities were compliant with licensing regulations, leaving over 9,000 facilities operating illegally or without valid licenses.³² Notably, many of these unlicensed institutions include public and county-level hospitals, which legally qualify for licensing exemptions yet remain non-compliant. The Council's regulatory failure to enforce statutory obligations undermines patient safety and legal accountability in a context where malpractice remains a persistent concern.³³ This alarming gap suggests deep-rooted enforcement challenges, particularly as many county and public health institutions remain operational without meeting the basic statutory requirements.³⁴ While KMPDC has undertaken sporadic crackdowns, closing over 728 health facilities and downgrading 301 others between March and June 2025, these actions have been criticized as reactionary and insufficient given the magnitude of non-compliance.³⁵ Watchdog organizations and health policy analysts have accused the Council of systemic negligence, highlighting that the continuation of unlicensed medical practice directly compromises patient safety and violates the Council's legal obligations under the Health Act and other relevant statutes.³⁶

³¹ The Star (19 July, 2024), Alarm as report reveals over 9,000 health facilities unlicensed by KMPDC. Available at: <https://www.the-star.co.ke/news/2024-07-19-alarm-as-report-reveals-over-9-000-health-facilities-unlicensed-by-kmpdc> <accessed on 21 August, 2025>

³² Office of the Auditor General, *Annual Health Sector Regulatory Report 2023* (Nairobi, 2023) <https://www.the-star.co.ke/news/2024-07-19-alarm-as-report-reveals-over-9-000-health-facilities-unlicensed-by-kmpdc> <accessed 31 July 2025>.

³³ *Supra*, note 31

³⁴ *Ibid*

³⁵ Kenyans.co.ke, KMPDC Shuts Down 728 Health Facilities in Crackdown on Illegal Clinics (12 June 2025) <https://www.kenyans.co.ke/news/113095-kmpdc-shuts-down-728-health-facilities-across-kenya-patient-safety-crackdown> <accessed 31 July 2025>.

³⁶ The Weekly Vision, KMPDC Criticized for Failing to Enforce Licensing Rules on Public Hospitals (2 September 2024) <https://theweeklyvisionews.net/2024/09/02/kmpdc->

The Origin of the Medical Negligence and its Corresponding Liability.

Medical error and the concomitant issue of liability have been persistent concerns throughout the history of healthcare, long predating modern malpractice law. The *Code of Hammurabi* (circa 1754 BCE),³⁷ one of the earliest known legal codes, contains explicit provisions holding physicians liable for the outcomes of surgical procedures. For instance, if a physician caused the death of a patient or severe harm, such as the loss of an eye, harsh penalties like amputation of the surgeon's hand were mandated.³⁸ This underscores a foundational principle of accountability in medical professions. In ancient Greece, the *Hippocratic Oath*,³⁹ attributed to Hippocrates around the 5th century BCE, laid the groundwork for ethical medical conduct.⁴⁰ The Oath enjoins physicians to practice medicine

[criticized-for-failure-to-ensure-hospitals-comply-with-licensing-rules](#) <accessed 31 July 2025>.

³⁷ *The Code of Hammurabi* (c 1754 BCE). Available on <https://avalon.law.yale.edu/ancient/hamframe.asp> <accessed 29 July 2025>.

³⁸ Ibid

³⁹ In the Kenyan medical profession, the Hippocratic Oath remains a foundational ethical pledge taken by all licensed doctors, symbolizing a commitment to uphold the highest standards of professional integrity and patient care. Originating from Hippocrates, the ancient Greek physician revered as the "father of Western medicine", the Oath underscores key principles such as non-maleficence, confidentiality, and duty to the welfare of patients. In Kenya, these ethical imperatives are further entrenched through statutory and regulatory frameworks, including the Medical Practitioners and Dentists Act (Cap. 253, Laws of Kenya) and the Code of Professional Conduct and Discipline issued by the Kenya Medical Practitioners and Dentists Council (KMPDC). These instruments provide detailed guidelines on professional conduct, including obligations toward patients, peers, and society at large. Violation of these ethical codes may lead to disciplinary proceedings before the KMPDC, which has the authority to impose sanctions, including suspension or revocation of a medical practitioner's license to practice.

⁴⁰ Ludwig Edelstein, *The Hippocratic Oath: Text, Translation and Interpretation*. Available on: https://www.google.com/search?q=Ludwig+Edelstein%2C+The+Hippocratic+Oath%3A+Text%2C+Translation+and+Interpretation&rlz=1C1GCEU_enKE1159KE1159&oq=Ludwig+Edelstein%2C+The+Hippocratic+Oath%3A+Text%2C+Translation+and+Interpretation

ethically and refrain from causing harm, establishing one of the earliest articulations of the principle of non-maleficence.⁴¹ These early systems illustrate that concerns about medical errors, ethical boundaries, and the need to protect patients from harm have been integral to the regulation of medical practice for millennia.

In later periods, such as medieval Islamic medicine, scholars like Ibn Sina (Avicenna) emphasized both technical competence and ethical responsibility in clinical care.⁴² By the 18th and 19th centuries, with the rise of formal medical institutions and civil liability frameworks, questions of negligence and legal redress began to appear more prominently in Western jurisprudence.⁴³ Today's legal systems continue to evolve around these historical precedents, shaping contemporary standards of informed consent, professional responsibility, and institutional accountability. As DeVille aptly notes, "concerns over medical fault and accountability are "as old as medicine itself."⁴⁴ Therefore, the notion of medical error and its attendant liability is as ancient as the healing profession itself. Long before modern tort law began to shape the contours of medical negligence, societies grappled with the consequences of failed healing. The Code of Hammurabi (circa 1754 BCE); often cited as one of the earliest known legal texts, prescribed strict penalties for surgeons who caused harm, including the amputation of a physician's hand in cases of fatal error during surgery on a

[ation&gs_lcrp=EgZjaHJvbWUyBggAEEUYOdIBCDE0ODNqMGGo3qAIIsAIB8QWYAcCMFft3UQ&sourceid=chrome&ie=UTF-8](#) <accessed on 22 July, 2025>

⁴¹ Ibid

⁴² Pormann P E and Savage-Smith E, *Medieval Islamic Medicine*

⁴³ Baker R, *Before Bioethics: A History of American Medical Ethics from the Colonial Period to the Bioethics Revolution*

⁴⁴ Kenneth DeVille, *Medical Malpractice in Nineteenth-Century America: Origins and Legacy*

nobleman.⁴⁵ Similarly, the Hippocratic Oath, traditionally attributed to Hippocrates (c. 460 – c. 370 BCE), emphasized a professional commitment to “do no harm,” implicitly acknowledging the reality and moral weight of medical mistakes.⁴⁶

As already observed, in Islamic medical jurisprudence, liability for harm caused by medical treatment was also recognized early. Physicians practicing in medieval Islamic societies were held accountable under Sharia if they acted negligently or without proper consent. Notably, Al-Razi (Rhazes) and Ibn Sina (Avicenna) discussed physician responsibility in their works, reinforcing the ethical dimension of practice and the societal expectation of diligence.⁴⁷ Roman law, too, laid the groundwork for medical liability by permitting civil action against practitioners who failed in their duties, creating a jurisprudential legacy that influenced later European legal systems.⁴⁸ In African customary systems, healing practices were interwoven with moral and spiritual responsibility. While written codes were rare, healers were often held accountable before clan elders or communal councils if harm befell a patient, illustrating an early form of communitarian medical ethics and accountability.⁴⁹ The universality of this concern, transcending cultures and legal systems, underscores a timeless truth: the power to heal inherently carries the potential to harm, and with it, an enduring burden of responsibility. The modern legal frameworks governing medical negligence, therefore, are not radical innovations, but rather contemporary

⁴⁵ The Code of Hammurabi, c 1754 BCE, trans LW King, cited in Jean-Louis Vincent and others, Annual Update in Intensive Care and Emergency Medicine 2013

⁴⁶ *Supra*, note 29

⁴⁷ Nabil A. Saleh, Medical Liability in Islamic Law (Arab Law Quarterly, Vol. 1, No. 3, 1986) 268–284.

⁴⁸ David Ibbetson, A Historical Introduction to the Law of Obligations

⁴⁹ Kwame Gyekye, African Cultural Values: An Introduction

expressions of an ancient moral and legal instinct, one that seeks to balance the sanctity of healing with the imperatives of justice and redress.

The emergence of medical negligence as a distinct category within tort law cannot be divorced from the wider transformation of medicine itself. By the mid-19th century, the doctor-patient relationship, once steeped primarily in trust, personal ethics, and paternalistic duty, began to shift under the growing weight of judicial oversight. What was previously a private moral terrain gradually became a matter for public adjudication, as courts increasingly confronted cases where the harm suffered by patients demanded not only ethical reflection, but legal remedy.⁵⁰ This shift mirrored broader social changes: the rise of professional licensing, the institutionalization of hospitals, and the development of formalized medical training. Physicians were no longer unchallengeable moral authorities but became accountable professionals, whose decisions and actions could be measured against emerging legal standards of care.⁵¹ Key cases such as *Slater v Baker and Stapleton* (1767), in which a physician was held liable for performing an experimental procedure without the patient's consent, served as early judicial warnings against unchecked clinical authority.⁵² By the 19th century, courts in England and the United States began to craft doctrines that would lay the foundation for modern medical malpractice law, focusing on reasonable care, informed consent, and the rights of patients to bodily integrity and transparency.⁵³

⁵⁰ John C Moorhead, *The Evolution of the Legal Concept of Medical Negligence* (2005) 356 *The Lancet* 1151. Available on: <https://www.thelancet.com/journals/lancet/article/PIIS0140673605664812/fulltext> <accessed 29 July 2025>.

⁵¹ Rosamond Rhodes, *The Trusted Doctor: Medical Ethics and Professionalism*

⁵² *Slater v Baker and Stapleton* (1767) 95 ER 860 (KB).

⁵³ *Supra*, note 33

One of the earliest and most candid reflections of this transformation is found in the words of Alden March, a prominent American surgeon, who in 1847 lamented: “Legal prosecutions for malpractice in surgery occur so often, that even a respectable surgeon may well fear for the results of his surgical practice.”⁵⁴ At the heart of these early cases was the evolving doctrine of medical negligence, defined as, “a breach of the duty of care owed by a medical professional to their patient, resulting in injury or death.” The legal foundation for such claims drew from English common law, particularly the principles enunciated in cases such as *Slater v Baker and Stapleton* (*supra*),⁵⁵ where a surgeon was found liable for performing an experimental procedure without patient consent.⁵⁶ In the American context, the first wave of malpractice suits proliferated during the 1830s to 1860s, fueled by a more litigious culture, expanding press coverage, and the democratization of the medical profession. Courts began to accept that medical error could be actionable, particularly where physicians deviated from the customary practice of the profession.

In *Cross v Guthery*,⁵⁷ often cited as the first recorded American medical malpractice case, a husband successfully sued a surgeon for the wrongful death of his wife following a botched operation.⁵⁸ By the mid-1800s, lawsuits against surgeons and physicians had become common enough to provoke widespread professional anxiety. Many in the medical field viewed this with trepidation, fearing that the threat of litigation might stifle innovation or deter doctors from treating complex

⁵⁴ Alden March, quoted in *Boston Medical and Surgical Journal* (1847), as cited in Anja Bäcklund, *Medical Malpractice Liability in the United States of America in the Light of the 19th Century Origins of the American Legal System* (2021) <https://www.researchgate.net/publication/356857758> <accessed 27 July 2025>.

⁵⁵ *Supra*, note 34

⁵⁶ *Ibid*

⁵⁷ *Cross v Guthery* (1794)

⁵⁸ *Ibid*

cases. Yet for patients and society at large, this legal evolution symbolized a paradigm shift: from paternalism to accountability, from blind trust to informed consent, and from harm without remedy to justice with redress.

One of the earliest recorded cases in the history of medical negligence is *Stratton v Swanlond*, decided in 1374. Although the case was ultimately dismissed due to a procedural technicality, it is widely regarded as a foundational moment in the development of medical malpractice law.⁵⁹ The plaintiff alleged that the surgeon undertook to treat him with reasonable care and skill but failed to do so, resulting in injury.⁶⁰ This case is notable not only for being among the first legal recognitions of a physician's duty of care, but also for establishing that professionals could be liable in tort for breaching that duty.⁶¹ Despite its dismissal, *Stratton v Swanlond* laid the groundwork for the evolution of medical accountability in common law,⁶² establishing important principles regarding the standard of care expected from physicians and the concept of liability for negligence and since then, various doctors are being sued for their negligent acts.

In the more specific context of medical practice, the Code of Hammurabi provided: "If a surgeon performs a major operation on an "awelum" (nobleman), with a lancet and caused the death of this man, they shall cut off his [doctor/surgeon's] hands."⁶³ "If a physician operates on the slave of a freeman for a severe wound with a bronze lancet and causes his death, he shall restore a slave of equal value."⁶⁴ If he opens an abscess in his eye with a bronze lancet, and destroys his eye, he shall

⁵⁹ *Stratton v Swanlond* (1374) YB 48 Edw III, fol 6, pl 4.

⁶⁰ Kenneth Veitch, *The Juridification of Medicine: A Study of the UK Medical Negligence System*

⁶¹ JW Smith, *A Selection of Leading Cases on Various Branches of the Law: With Notes*

⁶² José Miola, *Medical Ethics and Medical Law: A Symbiotic Relationship*

⁶³ Mitchel, C. B., & Riley, D. J. (2014). *Christian Bioethics: A Guide for Pastors, Healthcare Professionals and Families*.

⁶⁴ Spiegel, A. D. (1997) *Hammurabi's Managed Health Care--Circa 1700 B.C. Managed Care*

pay silver to the extent of one-half his price...”⁶⁵ One of the first reports of errors in medicine was made by British legal scholar Sir William Blackstone. In 1765, he published a compendium of legal principles titled *Commentaries on the Laws of England*.⁶⁶ He refers to “Mala Praxis”, which he defines as “neglect or unskillful management of a physician or surgeon.”⁶⁷ The modern word “malpractice” is derived from this term.⁶⁸ Since then, in 1794, “the first recorded medical malpractice lawsuit in the U.S. takes place in Connecticut where a patient died of a surgical complication.”⁶⁹ In essence, the rise of medical negligence law represents society’s effort to balance the deep human vulnerability inherent in illness with the tremendous trust placed in those who heal. It reminds us that, while medicine is a science, it is also a moral and legal contract, one that must be governed not only by compassion but by justice.

Arbitration has frequently been advanced as a viable alternative to traditional litigation in medical malpractice cases, primarily as a tool to reduce the cost, delay, and unpredictability often associated with courtroom proceedings.⁷⁰ The rationale behind this approach lies in arbitration’s perceived efficiency, privacy, and potential to deliver outcomes that are both fair and timely. Over the years, both courts and legislatures have upheld the validity of arbitration agreements in medical contexts, thereby reinforcing the legal framework for its use.⁷¹ Yet despite this institutional support, the actual uptake of arbitration in medical malpractice

⁶⁵ Ibid

⁶⁶ *The British legal scholar Sir William Blackstone (1765) publishes a compendium of legal principles entitled Commentaries on the Laws of England*

⁶⁷ Ibid

⁶⁸ Leonard Berlin, *Medical errors, malpractice, and defensive medicine: an ill-fated triad*

⁶⁹ Sandor A. A, *The History of Professional Liability Suits in the United States*

⁷⁰ Eleanor D Kinney, *The Origins and Future of Medical Malpractice Arbitration*

⁷¹ *See generally*, Thomas B Metzloff, *Resolving Malpractice Disputes: Imaging the Jury’s Shadow*

claims has remained surprisingly limited.⁷² This discrepancy has led some scholars to question whether the significant effort to encourage arbitration in this area has been disproportionate to its actual utility, provoking the observation that we may have made "much ado about nothing".⁷³

Factors such as patients' lack of awareness, limited bargaining power in accepting arbitration clauses, and the deeply personal and emotional nature of medical harm may contribute to arbitration's underuse.⁷⁴ Moreover, the effectiveness of dispute resolution mechanisms in medical malpractice cases carries broader implications. Good health is not only foundational to personal dignity and well-being, but also essential for national productivity and social progress.⁷⁵ Ensuring that patients have meaningful access to justice when harm occurs is, therefore, not merely a legal concern, but a matter of public interest. If arbitration is to play a serious role in resolving medical disputes, reforms must ensure it does not come at the expense of fairness, transparency, or patient autonomy.

Understanding Endemic and Systemic Patterns of Medical Negligence in Kenya

Medical negligence in Kenya has become both endemic and systemic, reflecting not isolated lapses, but widespread and entrenched dysfunctions within the country's healthcare system. The term *endemic* signifies how negligence has been normalized in many clinical settings, particularly in rural and public hospitals, where undertrained personnel, obsolete equipment, and frequent stockouts of

⁷² *Supra*, note 52

⁷³ *Ibid*

⁷⁴ Michelle M Mello, *Medical Malpractice: Impact of the Legal System on Quality of Care*

⁷⁵ World Health Organization, *Health in the Context of Sustainable Development* (WHO 2012) <https://www.who.int> <accessed 27 July 2025>.

essential drugs are part of daily clinical experience.⁷⁶ Meanwhile, its *systemic* character is visible in persistent regulatory failures, weak institutional oversight, and a culture of impunity that allows egregious malpractice to go unpunished.⁷⁷ This fragile healthcare reality is not unique to Kenya. Across much of Sub-Saharan Africa and other developing regions, similar patterns of neglect and misgovernance persist.⁷⁸

The World Health Organization has repeatedly noted that poor health governance, inadequate funding, and lack of accountability mechanisms significantly increase the risk of unsafe care in low-resource countries.⁷⁹ In Kenya, numerous high-profile cases have illuminated systemic dysfunction: from wrongful surgeries and maternal deaths, to infant mortality caused by basic diagnostic errors.⁸⁰ Regulatory bodies such as the Kenya Medical Practitioners and Dentists Council (KMPDC) have often failed to enforce disciplinary measures or provide timely redress for victims.⁸¹ In fact, parliamentary oversight reports have cited the KMPDC for lacking the institutional will and capacity to confront entrenched medical malpractice.⁸² For many patients, especially the economically vulnerable, the

⁷⁶ Ministry of Health (Kenya), *Health Sector Human Resources Strategy 2020–2025* (2020) <https://www.health.go.ke> <accessed 31 July 2025>.

⁷⁷ BO Ochieng, *Medical Malpractice and Accountability in Kenya: Policy and Legal Challenges*

⁷⁸ Paul Hunt, *Economic, Social and Cultural Rights: The Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health*

⁷⁹ World Health Organization (WHO), *Patient Safety: Global Action on Patient Safety Report* (WHO 2021) <https://www.who.int/publications/i/item/9789240032705> <accessed 31 July 2025>.

⁸⁰ N Wanjiru, *Kenya's Healthcare Crisis: The Human Cost of Systemic Failures*, *Daily Nation* (Nairobi, 5 October 2023) <https://nation.africa> <accessed 31 July 2025>.

⁸¹ Kenya Medical Practitioners and Dentists Council (KMPDC), *Annual Report on Professional Misconduct in the Health Sector* (KMPDC 2022) <https://kmpdc.go.ke> <accessed 31 July 2025>.

⁸² Republic of Kenya, *Parliamentary Committee on Health: Report on Professional Ethics and Regulatory Oversight in Healthcare* (National Assembly 2022).

health system is not a sanctuary but a site of harm. Amnesty International has documented shocking instances where women were detained in hospitals for failing to pay medical bills, sometimes chained post-surgery or verbally abused by staff, situations that represent both systemic negligence and institutionalized cruelty.⁸³ These abuses amount not only to medical malpractice but also to violations of constitutional and international rights to dignity, freedom, and healthcare access.⁸⁴ Far from being isolated, such cases illustrate a systemic normalization of neglect in Kenya's healthcare infrastructure, where the failure to provide informed consent, poor communication, and delayed or inaccurate treatment are frequently reported.⁸⁵

Regulatory institutions have repeatedly failed to prevent these harms or hold professionals accountable, further entrenching public mistrust.⁸⁶ Medical negligence in this context is not an aberration but a predictable outcome of structural inequality, inadequate state oversight, and entrenched health system fragility.⁸⁷ For many Kenyans, seeking medical attention is a calculated risk, where systemic dysfunction has eroded confidence in public healthcare delivery.⁸⁸ The result is a deeply disturbing paradox: those most in need of care are often the most exposed to harm. In *J W N v Board of Management of St. Joseph's C School*,⁸⁹ while

⁸³ Amnesty International Kenya, *Hospital Debt, Detention and Dignity in Health* (2022) <https://www.amnestykenya.org/hospital-debt-detention-and-dignity-in-health/> <accessed 31 July 2025>.

⁸⁴ *Supra*, note 16, art 28 (right to human dignity) and art 43(1)(a) (right to the highest attainable standard of health)

⁸⁵ E Ombaka, *Health Systems in Kenya: Governance, Negligence, and Patient Rights*

⁸⁶ Kenya Medical Practitioners and Dentists Council (KMPDC), *Annual Report on Professional Misconduct in the Health Sector* (KMPDC 2022) <https://kmpdc.go.ke> accessed 31 July 2025.

⁸⁷ BO Ochieng, *Medical Malpractice and Accountability in Kenya: Policy and Legal Challenges*

⁸⁸ *Supra*, note 70

⁸⁹ *J W N v Board of Management of St. Joseph's C School* [2019] eKLR

involving a minor in a school setting, this case is relevant for negligence standards and duty of care under Kenyan law.⁹⁰ The court emphasized that institutions owe a legal duty of care that, if breached, may lead to liability for harm caused. This case reinforces the principle of institutional accountability for negligence, which is transferable to healthcare facilities. Similarly, in *Patient B v Attorney General & Kenyatta National Hospital*,⁹¹ (media reported but not fully published), a woman sued Kenyatta National Hospital for removing her uterus without informed consent.⁹² The case raised significant questions about the violation of informed consent, reproductive rights, and medical ethics. While unreported formally, the case highlights systemic problems in obtaining valid consent in Kenya's hospitals, often rooted in power imbalances and communication failures.⁹³

In response to mounting public pressure, KMPDC undertook a national enforcement campaign between March and June 2025.⁹⁴ The campaign resulted in the closure of 728 facilities and the downgrading of 301 others due to serious violations related to inadequate infrastructure, unqualified personnel, or unsanitary conditions.⁹⁵ Earlier in the campaign, the Council inspected 1,525 facilities across Nairobi, Mandera, and Wajir counties alone, shutting down over 511 for gross non-compliance.⁹⁶ However, despite these actions, critics argue that enforcement remains reactive and sporadic. Given that over half of Kenya's health facilities are still operating outside the licensing framework, these closures

⁹⁰ Ibid

⁹¹ *Patient B v Attorney General & Kenyatta National Hospital* (Petition No E315 of 2021, High Court of Kenya, unreported).

⁹² Ibid

⁹³ Ibid

⁹⁴ *Supra*, note 22

⁹⁵ *Supra*, note 23

⁹⁶ Capital FM, KMPDC Closes 511 Health Facilities in Nationwide Crackdown (25 May 2025) <https://www.capitalfm.co.ke/news/2025/05/kmpdc-closes-511-health-facilities-in-nationwide-crackdown> <accessed 31 July 2025>.

represent only a fraction of the problem. The limited scale of these enforcement measures illustrates a regulatory apparatus that remains overwhelmed, under-resourced, or institutionally compromised.

Moreover, deeper structural issues within KMPDC's governance have eroded public confidence in its capacity to act as a neutral and effective regulatory authority. Members of the Council often have concurrent interests in the private healthcare sector, owning or managing facilities subject to the very inspections and licensing procedures they oversee. This situation presents a clear conflict of interest, prompting the National Assembly's Health Committee to call for structural reforms that would separate inspection and registration duties to avoid regulatory capture.⁹⁷ In an environment where personal interests intersect with public regulatory functions, institutional accountability becomes deeply compromised, allowing malpractice and negligence to go unchecked.

The broader regulatory landscape further complicates compliance. Healthcare providers are subject to a maze of overlapping oversight bodies, including the Pharmacy and Poisons Board, Kenya Medical Laboratory Technicians and Technologists Board, Kenya Nuclear Regulatory Authority, and even county governments, all of which impose separate licensing requirements, fees, and inspections.⁹⁸ This fragmented system not only increases the cost of doing business in the health sector but also creates opportunities for corruption, inefficiency, and regulatory evasion. Although a 2017 pilot project demonstrated the benefits of consolidating health sector oversight through joint inspections, such efforts have yet to be institutionalized nationwide.⁹⁹ These systemic failings directly

⁹⁷ *Supra*, note 24

⁹⁸ The Star, *Healthcare Licensing Maze Hurts Patients and Providers* (28 July 2025) <https://www.the-star.co.ke/opinion/star-blogs/2025-07-08-okumu-healthcare-licensing-maze-hurts-patients-and-providers> <accessed 31 July 2025>.

⁹⁹ *Ibid*

compromise patient safety and quality of care. The widespread existence of unlicensed facilities, some reportedly staffed by unregistered or underqualified personnel, elevates the risk of malpractice across the country.¹⁰⁰ Furthermore, weak enforcement mechanisms, frequently influenced by political interference or bureaucratic inertia, mean that even egregious violations often go unpunished. In such an environment, patients lack assurance that the healthcare services they access meet even the most basic professional and ethical standards. The persistence of unregulated medical practice therefore reflects not just institutional failure, but a broader governance crisis in Kenya's health system. These failures create an enabling environment for malpractice, where medical negligence thrives with minimal oversight or consequence. These failures are not isolated; they are symptomatic of a broader crisis in professional discipline and public accountability.

The present case also invites reflection on the right to access justice under Article 48 of the Constitution, which mandates the state to ensure that all persons have access to courts and legal redress mechanisms.¹⁰¹ Yet, as this case painfully illustrates, access to justice is hollow if it is not accompanied by judicial efficiency and administrative responsiveness. Protracted court processes, costly legal representation, and case backlog are persistent barriers that disproportionately affect vulnerable litigants.¹⁰² Indeed, as the court acknowledged, justice delayed is justice denied; a maxim that resonates with greater urgency in jurisdictions where poverty, illiteracy, and power asymmetries often render legal remedies practically

¹⁰⁰ NCBI, Healthcare Regulation in Low- and Middle-Income Countries: Kenya as a Case Study (2023) <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC9808232> <accessed 31 July 2025>.

¹⁰¹ *Supra*, note 16, art 48.

¹⁰² International Commission of Jurists–Kenya Section, Justice Delayed: A Report on the Status of Case Backlogs in the Kenyan Judiciary (ICJ Kenya, 2021).

inaccessible.¹⁰³ As recognized by the African Commission on Human and Peoples' Rights, the right to be heard within a reasonable time is a cornerstone of fair trial rights.¹⁰⁴ The near two-decade delay in this case violated not only domestic constitutional standards but also Kenya's obligations under international human rights instruments.¹⁰⁵

The court's ruling in Naila's case was premised on the finding that there was a failure on the part of both the doctor who carried out the botched procedure and the hospital to uphold their duty of care to the patient. This conclusion was substantiated by established legal principles and corroborated by expert testimony. With regard to informed consent, the court applied the *modified objective test* as set out in *Arndt v Smith*,¹⁰⁶ which requires that physicians provide information not only about general risks but also those specific to the patient's circumstances, values, and concerns.¹⁰⁷ This approach balances the professional standard with the reasonable expectations of the particular patient, ensuring that consent is truly informed.¹⁰⁸ In *MacPhail v Desrosiers*, the plaintiff underwent an abortion procedure during which she was administered a mild sedative, Ativan.¹⁰⁹ Following the procedure, she was permitted to drive herself home. While driving, she lost consciousness, veered into oncoming traffic, and caused a collision that resulted in injuries to herself and to third parties. The Ontario Court (General

¹⁰³ Odunga J, Justice Delayed is Justice Denied: The Burden of Judicial Backlog in Kenya in Yash Ghai and Jill Cottrell Ghai (eds), *Judicial Accountability in Kenya* (Katiba Institute 2020) 145.

¹⁰⁴ African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) (1981) OAU Doc CAB/LEG/67/3 rev 5, art 7(1)(d).

¹⁰⁵ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171, art 14(3)(c).

¹⁰⁶ *Arndt v Smith* [1997] 2 SCR 539 (Supreme Court of Canada).

¹⁰⁷ *Ibid*

¹⁰⁸ Erin Nelson, *Reconceiving Informed Consent in Canada*

¹⁰⁹ *MacPhail v Desrosiers* (1998) 164 DLR (4th) 108

Division) held the physician, the nurse, and the hospital liable for negligence.¹¹⁰ It found that they had breached the standard of care by failing to adequately warn the patient of the risks associated with driving under the influence of sedation, particularly in the immediate aftermath of an invasive medical procedure.¹¹¹ The court extended liability not only to the patient but also to third parties affected by the motor vehicle accident, emphasizing the duty of care owed by medical professionals to anticipate foreseeable harm resulting from inadequate post-procedural instructions.¹¹²

Similarly, in *Pittman Estate v Bain*,¹¹³ the Ontario General Division examined the legal responsibilities of a family physician who failed to inform his patient of a significant risk of HIV infection resulting from a blood transfusion.¹¹⁴ The patient subsequently tested positive for HIV, unknowingly infected his wife, and later died from pneumonia related to his HIV status. His wife initiated legal action both on her own behalf and as the representative of her husband's estate. Although the court did not explicitly articulate a legal "duty to warn" in categorical terms, it nonetheless awarded damages, a finding that implicitly affirmed the existence and breach of such a duty.¹¹⁵ The judgment underscored that physicians must not only consider the immediate welfare of their patients but also take into account reasonably foreseeable harm to third parties, especially intimate partners. The court accepted that, had the doctor disclosed the risk, the patient would have warned his wife, thereby preventing transmission and fulfilling the doctor's professional and ethical obligations.¹¹⁶

¹¹⁰ *Ibid*

¹¹¹ *Ibid*

¹¹² *Ibid*

¹¹³ *Pittman Estate v Bain* (1994) 112 DLR (4th) 257

¹¹⁴ *Ibid*

¹¹⁵ *Ibid*

¹¹⁶ *Ibid*

This case reflects a growing judicial willingness to extend the scope of a physician's duty of care beyond the patient to third parties who are foreseeably at risk. In *Bateman v Doiron*,¹¹⁷ for example, the New Brunswick Court of Queen's Bench found that a physician could be liable for failing to communicate test results that could have allowed the patient to prevent harm to others.¹¹⁸ The reasoning also resonates with broader public health ethics, whereby the concealment of material risks, particularly those with transmissible consequences, may constitute negligence.¹¹⁹ Academic commentary has consistently supported this expanded view of medical duty, arguing that informed consent must include the obligation to disclose information that has a direct bearing on the health and autonomy of others closely connected to the patient.¹²⁰

In *Cobbs v Grant*,¹²¹ the court recognized that "the patient, being unlearned in medical sciences, has an abject dependence upon and trust in his physician for the information upon which he relies during the decisional process," thereby establishing a heightened obligation that goes beyond the norms of an arm's-length transaction.¹²² This recognition situates the doctor-patient relationship firmly within the realm of a fiduciary relationship, whereby the physician assumes duties of good faith, trust, confidence, and full disclosure toward the patient.¹²³ A fiduciary is traditionally defined as "one who owes to another the duties of good faith, trust, confidence and candour,"¹²⁴ and, as such, the physician's obligation

¹¹⁷ *Bateman v Doiron* (1997) 157 NBR (2d) 201 (QB) (concerning failure to report test results with foreseeable third-party consequences).

¹¹⁸ *Ibid*

¹¹⁹ Bernard M Dickens, *Legal Protection and Limits of Confidentiality*

¹²⁰ Ellen I Picard and Gerald B Robertson, *Legal Liability of Doctors and Hospitals in Canada*

¹²¹ *Cobbs v Grant* (1972) 502 P 2d 1, 11 (Cal Sup Ct).

¹²² *Ibid*

¹²³ Margaret A Somerville, *The Ethical and Legal Duties of Physicians to Disclose Information to Patients*

¹²⁴ *Supra*, note 107

must include the duty of truthfulness and transparency regarding treatment risks and alternatives. The legal standard, supported by both case law and academic commentary, insists that, subject to limited exceptions-competent individuals are entitled to be fully informed before consenting to medical treatment.¹²⁵

What emerges from the foregoing cases is a fundamental and troubling question for any reasonable layperson: is it ever justifiable to withhold material information from a competent patient? Although the doctrine of therapeutic privilege has received recognition in various jurisdictions and is supported in academic literature,¹²⁶ its application remains highly contentious and narrowly construed. In many legal systems, including Kenya, medical practitioners are under a cardinal and non-delegable duty to ensure that patients are adequately informed before consenting to treatment. This duty reflects a broader ethical and legal commitment to uphold patient autonomy and the doctrine of informed consent, which are foundational principles of contemporary medical practice.¹²⁷

Kenyan law places a strong emphasis on disclosure. The Medical Practitioners and Dentists (Professional Conduct and Discipline) Regulations 2016, for instance, require that consent must be “voluntary, informed and given by a person with capacity.”¹²⁸ This legal obligation is reinforced by judicial precedent, such as in *Kenya Medical Practitioners and Dentists Board v SMN*, where the High Court underscored the necessity of obtaining valid, informed consent from patients.¹²⁹ Thus, while therapeutic privilege may be cautiously accepted in limited circumstances, such as where disclosure may cause serious psychological harm, it

¹²⁵ Gerald B Robertson, *Informed Consent in Canada: Theory and Practice*

¹²⁶ *Supra*, note 9

¹²⁷ Margaret Brazier and Emma Cave, *Medicine, Patients and the Law*

¹²⁸ Medical Practitioners and Dentists (Professional Conduct and Discipline) Regulations 2016, Legal Notice No. 147 of 2016, r 6(a).

¹²⁹ *Kenya Medical Practitioners and Dentists Board v SMN* [2015] eKLR.

cannot be used as a blanket justification to override a competent patient's right to make an informed choice about their own medical care.¹³⁰ One such exception is the doctrine of *therapeutic privilege*, which allows a physician to withhold information if disclosure is reasonably believed to pose a serious threat to the patient's well-being, though its application is narrowly confined and subject to judicial scrutiny.¹³¹

*"Therapeutic privilege' refers to the withholding of information by the clinician during the consent process in the belief that disclosure of this information would lead to the harm or suffering of the patient."*¹³² *"Although it is thought that the failure to tell the truth in the context of the doctor-patient relationship is an essential part of therapy,"*¹³³ *it is doubtful whether a doctor is proficient or justified in making a value judgment about what is best for a competent patient."*¹³⁴ *"A competent person is an adult of sound mind and body. As Justice Cardozo memorably puts it: "Every human being of adult years and sound mind has a right to determine what shall be done with his own body..."*¹³⁵

From the foregoing, therefore, in the medical field, there are situations where practitioners are legally compelled to fully disclose information to patients. Some courts have explicitly rejected the doctrine of therapeutic privilege, instead reinforcing the ethical and legal duty of truth-telling. This stance was adopted in *Pittman Estate v Bain (supra)*, where the court declined to accept the withholding of medical information under the guise of therapeutic privilege, emphasizing the patient's right to informed consent and autonomy.¹³⁶ In *Meyers Estate et al. v.*

¹³⁰ Bernard M Dickens, *Legal Protection and Limits of Confidentiality*

¹³¹ J Downie, *Therapeutic Privilege: A Canadian Perspective*

¹³² Etchells E, Sharpe G, Burgess MM, Singer PA. *Bioethics for clinicians: Disclosure.*

¹³³ Johnston C, Holt G., *The legal and ethical implications of therapeutic privilege - is it ever justified to withhold treatment information from a competent patient?*

¹³⁴ *Supra*, note 26

¹³⁵ *Schloendorff. v. Society of NY Hospital*, 105 NE 92 (NY 1914).

¹³⁶ *Supra*, note 102

Rogers, the Ontario High Court of Justice addressed the issue of informed consent in a case involving the death of a 37-year-old woman who suffered a fatal reaction after receiving an intravenous contrast medium during a routine radiologic procedure.¹³⁷ The attending radiologist deliberately withheld information about the risks associated with the contrast agent, asserting therapeutic privilege as a defence. The court rejected this justification, emphasizing that therapeutic privilege must be applied narrowly and cannot be invoked simply to avoid causing patient anxiety.¹³⁸ Justice Montgomery held that the failure to disclose material risks, especially those with potentially life-threatening consequences, constituted a breach of the physician's duty to obtain informed consent.¹³⁹ This decision reaffirmed the legal and ethical imperative that competent patients are entitled to full disclosure of risks in order to make autonomous medical decisions. In the South African case of *Castell v De Greef*, the plaintiff underwent an unsuccessful prophylactic double mastectomy and breast reconstruction procedure intended to reduce her risk of developing breast cancer. The court unequivocally held that "a doctor is obliged to warn a patient consenting to treatment of material risks inherent in the proposed treatment."¹⁴⁰ This judicial pronouncement underscores the centrality of patient autonomy within medical law. It affirms that a patient's right to make an informed decision must be prioritized, even where a medical practitioner believes that full disclosure of risks may dissuade the patient from undertaking a medically beneficial procedure. This approach aligns with the principle articulated in *Sidaway v Board of Governors of the Bethlem Royal Hospital*, where the House of Lords recognized the complexity of balancing medical discretion with a patient's right to know, though the court leaned more toward medical paternalism.¹⁴¹ However, subsequent rulings such as

¹³⁷ *Meyers Estate et al. v. Rogers* (1991) 3 O.R. (3d) 368 (Ont H.C.J.).

¹³⁸ *Ibid*

¹³⁹ *Supra*, note 110

¹⁴⁰ *Supra*, note 8

¹⁴¹ *Sidaway v Board of Governors of the Bethlem Royal Hospital* [1985] AC 871 (HL).

*Chester v Afshar*¹⁴² and *Montgomery v Lanarkshire Health Board*¹⁴³ have significantly advanced the doctrine of informed consent by placing the patient's autonomy and right to self-determination at the forefront. These developments reflect a global trend in medical jurisprudence away from medical paternalism toward a model that respects individual agency and informed decision-making.¹⁴⁴

In *Montgomery v Lanarkshire Health Board (supra)*, the UK Supreme Court definitively departed from the traditional paternalistic model in medical decision-making, holding that "the doctor is under a duty to take reasonable care to ensure that the patient is aware of any material risks involved in any recommended treatment, and of any reasonable alternative or variant treatments."¹⁴⁵ This judicial approach affirms the principle that a patient is not merely a passive recipient of medical care but a rational agent entitled to make informed choices regarding their health. This recognition of patient autonomy is increasingly embedded within Kenya's legal context. In *David Morton Silverstein v Atsango Chesoni*, the High Court observed that "the failure to obtain informed consent is not only a breach of medical duty but a violation of constitutionally protected rights," particularly the right to dignity and freedom from non-consensual medical intervention as guaranteed under Article 28 of the Constitution of Kenya.¹⁴⁶ The court stressed that informed consent is not a mere procedural formality but a constitutional imperative.

Regional jurisprudence echoes these normative standards. For instance, in *Centre for Health, Human Rights and Development (CEHURD) and Others v Attorney General*, the Constitutional Court of Uganda recognized that the state's failure to provide

¹⁴² *Chester v Afshar* [2004] UKHL 41, [2005] 1 AC 134.

¹⁴³ *Supra*, note 7

¹⁴⁴ Jonathan Herring, *Medical Law and Ethics*

¹⁴⁵ *Supra*, note 57

¹⁴⁶ *David Morton Silverstein v Atsango Chesoni* [2005] eKLR

adequate maternal healthcare, including the failure to secure informed consent, could amount to a violation of women's rights to health, life, and dignity under the Ugandan Constitution.¹⁴⁷ These legal developments align with scholarly perspectives that view informed consent as a bridge between medical ethics and human rights. As McLean notes, "the duty to inform is not simply about preventing harm, but about respecting personhood and autonomy."¹⁴⁸ Similarly, Giesen argues that modern medical malpractice law, across jurisdictions, reflects a "transformation from beneficence to autonomy as the guiding principle of patient care."¹⁴⁹

In *LM and Others v Government of the Republic of Namibia*, the Namibian High Court unequivocally condemned the practice of conducting sterilizations without obtaining full and informed consent, holding that it violated women's rights to autonomy and bodily integrity.¹⁵⁰ This principle of informed consent is also well established in international human rights law and soft law instruments. The World Medical Association's *Declaration of Lisbon on the Rights of the Patient* affirms that "every individual has the right to self-determination and to make informed decisions regarding their health."¹⁵¹ Furthermore, the European Court of Human Rights, in *V.C. v Slovakia*, held that the failure to secure full and informed consent prior to medical procedures constituted a breach of Article 8 of the European

¹⁴⁷ *Centre for Health, Human Rights and Development (CEHURD) and Others v Attorney General* Constitutional Petition No. 16 of 2011 [2015] UGCC 10.

¹⁴⁸ S A M McLean, *Autonomy, Consent and the Law*

¹⁴⁹ Dieter Giesen, *International Medical Malpractice Law: A Comparative Study of Civil Responsibility Arising from Medical Care*

¹⁵⁰ *LM and Others v Government of the Republic of Namibia* (2012) A 3007/2008, A 3915/2008, A 337/2010

¹⁵¹ World Medical Association, *Declaration of Lisbon on the Rights of the Patient* (adopted by the 34th WMA General Assembly, Lisbon, Portugal, September 1981, and amended most recently in 2005) <https://www.wma.net/policies-post/wma-declaration-of-lisbon-on-the-rights-of-the-patient/> <accessed 31 July 2025>.

Convention on Human Rights, which safeguards the right to respect for private and family life.¹⁵²

While informed consent remains a cornerstone of contemporary medical ethics and legal practice, the law recognizes that there are narrow and exceptional circumstances under which a medical practitioner may be justified in withholding specific information from a patient. This exception is encapsulated in the doctrine of therapeutic privilege, which allows a physician, in limited cases, to refrain from disclosing certain risks or information where doing so would cause serious harm to the patient's mental or physical health. This principle was first judicially recognized in the landmark American case of *Canterbury v Spence*.¹⁵³ There, the patient underwent spinal surgery and became paraplegic after the surgeon failed to disclose a 1% risk of paralysis. The court held that while informed consent is fundamental, there may be rare circumstances where disclosure could be excused.¹⁵⁴ Specifically, it accepted that if, in the physician's considered judgment, disclosure would lead to such anxiety or emotional distress as to impair rational decision-making, non-disclosure may be justified under therapeutic privilege.¹⁵⁵

The doctrine was further examined by the Supreme Court of Canada in *Reibl v Hughes*,¹⁵⁶ where a man suffered a stroke after undergoing surgery aimed at preventing future strokes. Chief Justice Laskin acknowledged that certain emotionally vulnerable patients may be unable to process critical information, and in such cases, a physician might justifiably withhold or simplify information that would otherwise require detailed disclosure.¹⁵⁷ The Court stressed, however, that

¹⁵² *V.C. v Slovakia* App no 18968/07 (ECtHR, 8 November 2011).

¹⁵³ *Canterbury v Spence* 464 F.2d 772 (DC Cir 1972).

¹⁵⁴ *Ibid*

¹⁵⁵ *Ibid*

¹⁵⁶ *Supra*, note 112

¹⁵⁷ *Ibid*

this should be the exception and not the norm, and that the overarching duty to inform must not be diluted.

English courts have taken a similar stance. In *Sidaway v Board of Governors of the Bethlem Royal Hospital and the Maudsley Hospital*,¹⁵⁸ the House of Lords considered whether a surgeon was negligent for failing to inform the patient of a less than 1% risk of spinal cord injury. The majority found in favour of the doctor. In a notable concurring opinion, Lord Scarman recognized therapeutic privilege as a legitimate, albeit limited, defence. He stated that a doctor may withhold information if, in their reasonable opinion, disclosure would be seriously detrimental to the patient's health or contrary to their best interests.¹⁵⁹ However, other Lords in the same case, including Lord Templeman, warned that reliance on therapeutic privilege must not override the patient's autonomy, except in the clearest of circumstances.¹⁶⁰ Further support for the doctrine can be found in *F v R*,¹⁶¹ an Australian case where the court reiterated that while a patient has the right to be informed of material risks, the practitioner may be excused from full disclosure where it would harm the patient's psychological state or decision-making ability.¹⁶²

Internationally, scholarly commentary has also cautioned against broad applications of therapeutic privilege. According to Mason and McCall Smith, "Therapeutic privilege must not be used as a cloak for medical paternalism; it is an exception grounded in necessity, not convenience."¹⁶³ Thus, while therapeutic privilege remains a recognized legal doctrine, its use must be carefully justified,

¹⁵⁸ *Supra*, note 130

¹⁵⁹ *Ibid*

¹⁶⁰ *Ibid*

¹⁶¹ *F v R* (1983) 33 SASR 189 (Supreme Court of South Australia).

¹⁶² *Ibid*

¹⁶³ JK Mason and GT Laurie, *Mason and McCall Smith's Law and Medical Ethics*

narrowly applied, and subject to scrutiny to ensure it does not erode the patient's right to autonomy and informed choice.

It is the considered opinion of the authors that therapeutic privilege, as a legal justification, sits uneasily with the core principles of informed consent. At its heart, informed consent means just that, a patient's agreement to treatment based on full and honest information. If crucial details about the risks, alternatives, or likely outcomes are kept from them, then it's hard to argue that their decision is truly informed.¹⁶⁴ The idea that a doctor may withhold information simply because it might upset a competent adult is deeply problematic, both ethically and legally. Distress or anxiety is often a natural response when someone is dealing with illness or facing difficult medical decisions. But emotional discomfort does not mean a person is incapable of understanding their choices or making sound decisions.¹⁶⁵

Moreover, framing non-disclosure as being in the patient's 'best interests' can easily slip into medical paternalism, the very approach modern medical law has tried to move away from. In *Montgomery v Lanarkshire Health Board (supra)*, the UK Supreme Court firmly rejected the outdated model where doctors dictated what patients needed to know, stating that the right to make decisions lies with the patient, not the medical professional.¹⁶⁶ Autonomy requires that patients are given the truth, not a filtered version of it. Emotional vulnerability should not be mistaken for incapacity, a point also made in *Meyers Estate v Rogers*, where the Ontario Court of Appeal refused to accept therapeutic privilege as a defence for non-disclosure.¹⁶⁷ Even in *Pittman Estate v Bain*, the court held that therapeutic privilege must not override a competent patient's right to make informed

¹⁶⁴ Rob Heywood, *Medical Law and Ethics*

¹⁶⁵ *Supra*, note 130

¹⁶⁶ *Supra*, note 129

¹⁶⁷ *Supra*, note 51

decisions about their own body and treatment.¹⁶⁸ Respect for patient dignity demands transparency, not selective disclosure. Modern ethical and legal thinking recognizes that autonomy is not simply a procedural formality, but a fundamental expression of personhood.¹⁶⁹

In the present case, the court found that the consent form presented by the doctor was deficient in multiple respects. Not only was it unsigned by a witness, but it was also replete with medical abbreviations, thereby failing to demonstrate that the patient, Ms Qureshi, had been adequately informed of the intended removal of her cervix. This omission contravened the principles established in *Montgomery v Lanarkshire Health Board (supra)*, which require medical practitioners to disclose material risks and reasonable alternatives to enable informed patient decision-making.¹⁷⁰ The doctor's negligence was further evident in a 2006 surgical procedure, during which he undertook bladder surgery despite being debarred from medical practice in Uganda and lacking any recognized expertise in urology.¹⁷¹ As a consequence, this resulted in the development of a vesicovaginal fistula (VVF); an abnormal connection between the bladder and vagina that typically leads to continuous urinary leakage through the vaginal canal.¹⁷² VVF most commonly arises from obstetric or gynecological trauma.¹⁷³

Expert medical witnesses, including Dr Bhanji and Dr Richard Baraza, testified that the doctor's conduct fell below acceptable medical standards, particularly due

¹⁶⁸ *Supra*, note 50

¹⁶⁹ *Supra*, note 79

¹⁷⁰ *Supra*, note 80

¹⁷¹ Evidence on file, as presented in the proceedings

¹⁷² L de Bernis, *Obstetric fistula: guiding principles for clinical management and programme development, a new WHO guideline*. Available on <https://pubmed.ncbi.nlm.nih.gov/17880979/> <accessed on 31 July, 2025>

¹⁷³ *Ibid*

to the absence of a multidisciplinary approach, an obligation reinforced in *Hucks v Cole*, where the court underscored the duty of a doctor to act in accordance with established medical practice.¹⁷⁴ Furthermore, specialist reports from South African doctors, Dr Gecelter and Dr Van Der Wat, confirmed the diagnosis of VVF and directly attributed it to the doctor's actions, that ultimately necessitated corrective surgery outside the country.¹⁷⁵

Medical Malpractice and the Dispute Resolution in Kenya

In many African countries, including Kenya, medical malpractice litigation remains the dominant avenue for dispute resolution. However, litigation is often plagued by systemic inefficiencies, such as judicial backlog, limited legal awareness among patients, high legal costs, and protracted procedures.¹⁷⁶ These obstacles frequently deter aggrieved patients from seeking redress, resulting in underreporting and minimal jurisprudential development in medical negligence law.¹⁷⁷ Kenya's legal framework provides a basis for arbitration through the *Arbitration Act* (No 4 of 1995, as amended), which supports the enforcement of arbitration agreements and awards.¹⁷⁸ However, there is no specific legal or regulatory framework that promotes or governs the use of arbitration in medical malpractice cases. As a result, arbitration in this area remains rare, with most disputes either abandoned or pursued through the courts.¹⁷⁹ Unlike commercial contracts where arbitration clauses are standard, medical service agreements in Kenya rarely include such provisions, reflecting both legal inertia and patient unfamiliarity with alternative dispute mechanisms.

¹⁷⁴ *Hucks v Cole* [1968] 118 NLJ 469 (CA).

¹⁷⁵ Medical reports of Dr Gecelter and Dr Van Der Wat (on file with the court).

¹⁷⁶ Akinseye V and others, *Medical Negligence and the Law: An African Perspective*

¹⁷⁷ Godfrey M Musila, *Legal Audit of Kenya's Healthcare System: Governance, Accountability and Access to Justice* (International Commission of Jurists – Kenya 2016) 40–43.

¹⁷⁸ *Arbitration Act 1995* (Kenya), as amended by the *Arbitration (Amendment) Act 2009*.

¹⁷⁹ Mutua J and Oduor J, *Medical Malpractice in Kenya: The Need for Comprehensive Legal Reform*

Efforts to promote alternative dispute resolution (ADR), particularly through institutions like the *Chartered Institute of Arbitrators (Kenya Branch)* and the *Mediation Accreditation Committee*, have made modest progress in civil matters.¹⁸⁰ Yet, their impact on medical disputes has been limited, largely due to the absence of legal mandates or institutionalized medical arbitration panels. Furthermore, unlike in some jurisdictions such as South Africa, where the *Health Professions Council* offers a professional complaints mechanism, Kenya's disciplinary processes remain weak and underutilized.¹⁸¹ Given the importance of accessible and efficient mechanisms for resolving medical disputes, particularly in a region where health outcomes are closely tied to development, it is vital that Kenya and other African countries invest in strengthening both formal and alternative dispute resolution systems. Arbitration, if appropriately structured to safeguard patient rights, could offer a faster, less adversarial, and more cost-effective means of redress. However, this would require legal reforms, public awareness, professional training, and institutional support.

Optimal health is a fundamental determinant of human capital development, directly influencing individual productivity and contributing significantly to the socioeconomic advancement of society.¹⁸² In jurisdictions where access to quality healthcare is supported by robust legal frameworks, populations tend to experience improved life expectancy, reduced disease burden, and enhanced labour efficiency.¹⁸³ Consequently, the legal mechanisms that govern the

¹⁸⁰ Chartered Institute of Arbitrators – Kenya Branch, 'ADR in Kenya: Status Report' (2022) <https://www.ciarbkenya.org> <accessed 27 July 2025>.

¹⁸¹ Health Professions Council of South Africa (HPCSA), *Annual Report 2022/2023*. Available on: <https://www.hpcsa.co.za> <accessed 27 July 2025>.

¹⁸² World Health Organization, *Health in the Context of Sustainable Development* (WHO 2012) <https://www.who.int> <accessed 27 July 2025>.

¹⁸³ UNDP, *Human Development Report 2022: Uncertain Times, Unsettled Lives* (United Nations 2022) <https://hdr.undp.org> <accessed 27 July 2025>.

resolution of medical disputes, such as arbitration or litigation, are not merely procedural concerns but are integral to upholding the right to health and fostering public trust in healthcare systems. Ensuring that patients have access to fair, timely, and effective remedies when medical harm occurs is essential for sustaining a functional and equitable healthcare system that supports national development goals.¹⁸⁴ The centrality of good health in fostering productivity and societal advancement cannot be overstated. A healthy population is the bedrock of a thriving economy, a stable polity, and a progressive society. As Gro Harlem Brundtland aptly observed during her tenure as Director-General of the World Health Organization, "health is a precondition for development. It is not a consequence of it.

Healthy people are more productive, earn more, save more, and invest more."¹⁸⁵ This perspective underscores the imperative of investing in public health not as an afterthought of economic planning, but as a foundational pillar of national development strategies. The World Bank similarly affirms that, "healthier workers are more productive, absent less often, and more capable of contributing to economic growth."¹⁸⁶ Indeed, the ripple effects of good health extend far beyond individual wellbeing, influencing education outcomes, labour market participation, and civic engagement. Former United Nations Secretary-General Kofi Annan once stated, "Health will finally be seen not as a blessing to be wished for, but as a human right to be fought for,"¹⁸⁷ thereby framing health as not only a

¹⁸⁴ *Supra*, note 99

¹⁸⁵ Gro Harlem Brundtland, Speech to the United Nations Economic and Social Council (WHO, 16 July 2001). Available on: https://apps.who.int/gb/ebwha/pdf_files/WHA51/eadiv6.pdf <accessed on 27 July, 2025>

¹⁸⁶ The World Bank, World Development Report 1993: Investing in Health. Available on: <https://documents1.worldbank.org/curated/en/468831468340807129/pdf/121830REPLACEMENT0WDR01993.pdf> <>accessed on 27 July, 2025

¹⁸⁷ Kofi Annan, Address to the Fifty-Fourth World Health Assembly (14 May 2001, Geneva)

development goal but a justice imperative. In the African context, the 2001 Abuja Declaration reiterated the commitment of heads of state to allocate at least 15% of their national budgets to health, acknowledging the role of health in achieving sustainable economic progress.¹⁸⁸ The interlinkage between health, productivity, and societal transformation must therefore remain central to both national and global policy agendas, especially in the Global South where health disparities continue to stunt economic growth and human development.

“A nation that is unhealthy is unproductive, and any barriers preventing access to healthcare ought to be eliminated to enable improvements in living standards and quality of life.”¹⁸⁹ “Such barriers manifest themselves in various forms which can be broadly examined under social, political, and economic frameworks. Good governance is particularly key in ensuring the wellbeing of individuals in a society to enable them to meet their desired outcomes.”¹⁹⁰ However, the state of good governance is, “in most cases, aspirational, and the journey towards this takes the form of certain tangible steps. This desirable condition, that is, good governance, heavily depends on securing adherence to the rule of law.”¹⁹¹ Medical errors often stem from a combination of individual and systemic factors. On the individual level, these may include carelessness, clinical ignorance, poor self-assessment, professional exhaustion, and, in some cases, arrogance or disregard for personal limitations.¹⁹² While such shortcomings are sometimes dismissed as symptoms of

¹⁸⁸ Organization of African Unity (OAU), Abuja Declaration on HIV/AIDS, Tuberculosis and Other Related Infectious Diseases (OAU/SPS/ABUJA/3, April 2001).

¹⁸⁹ Barry R. Furrow et al, *Health Law: Cases, Material and Problems*

¹⁹⁰ Smith Ouma, Harrison O. Mbori, Cynthia A.M. Amutete; *Engineering Rule of Law in Health Care Delivery in Kenya*

¹⁹¹ Angela Maria Pinzon-Rondon et al., *Association of Rule of Law and Health Outcomes: An Ecological Study*, *BMJ Open* 5 (2015). <http://bmjopen.bmj.com/content/bmjopen/5/10/e007004.full.pdf>. <accessed on 20 July, 2025>

¹⁹² Lucian L Leape, *Error in Medicine*

broader health system failures, this perspective risks overlooking the role of personal accountability.

In Kenya, for instance, persistent issues such as outdated medical infrastructure, understaffing, and resource shortages are often cited as the root causes of poor healthcare delivery.¹⁹³ These challenges have, over time, eroded public trust, reflected in the routine practice of high-ranking government officials seeking treatment abroad, an implicit admission of the system's inadequacy.¹⁹⁴ Although it is important to acknowledge the impact of structural deficiencies, an overemphasis on systemic failures can inadvertently obscure the individual responsibility of healthcare professionals.¹⁹⁵ Framing medical errors solely as consequences of a flawed system may diminish the impetus to hold negligent practitioners accountable. In doing so, it undermines both patient rights and the ethical standards of the profession. Balancing systemic reform with individual accountability is therefore essential to achieving meaningful improvements in healthcare quality and safety.

Crisis in Care: The Growing Burden on Kenya's Health Infrastructure

In universal public health systems such as those found in England and Brazil, disproportionate utilization of healthcare resources, whether due to chronic disease burdens, administrative inefficiencies, or socioeconomic disparities, places immense pressure on already strained infrastructures.¹⁹⁶ This systemic overburdening can lead to reduced access, longer waiting times, and

¹⁹³ *Supra*, note 106

¹⁹⁴ Brian Wanjiru, Why Top Kenyan Leaders Prefer Medical Treatment Abroad, *The Standard* (Nairobi, 25 March 2021) <https://www.standardmedia.co.ke> <accessed 27 July 2025>.

¹⁹⁵ Jennifer Moore, *The Patient's Voice in the Medical Malpractice Process*

¹⁹⁶ Chris Ham and Hugh Alderwick, Making the Case for Integrated Care: Learning from Experience

compromised quality of care for other patients who may be left untreated or inadequately managed.¹⁹⁷ The resulting imbalance not only undermines the principle of equity that underpins universal healthcare but also threatens the sustainability of the entire system.¹⁹⁸ In Kenya, just as it has been elsewhere, especially, the global South the overwhelmed or heavily burdened medical sector has become a thorny issue in Kenya, eliciting an intense and emotive debate over the course of many decades. The strain on the public health infrastructure has become increasingly palpable, and can no longer be underestimated. To put it in the right perspective, the burden on public health infrastructure is no longer a speculative concern, it is a lived and painful reality, especially across developing nations like Kenya, India, and South Africa.

The United Nations' specialized agency for public health, the World Health Organization (WHO), warned that, "global health systems are 'overwhelmed, understaffed and under-resourced,' revealing how decades of underinvestment laid the foundation for systemic failure during public health emergencies."¹⁹⁹ In Kenya, this strain is acutely evident in counties such as Kakamega, Mombasa, and Turkana, where overstretched hospitals, limited intensive care units, and

¹⁹⁷ Thomas R Oliver, *The Politics of Public Health Policy* (2006) 25(4) *Annual Review of Public Health* 433

¹⁹⁸ WHO, *The World Health Report 2010: Health Systems Financing - The Path to Universal Coverage*. Available on: https://www.google.com/search?q=WHO%2C+The+World+Health+Report+2010%3A+Health+Systems+Financing+%E2%80%93+The+Path+to+Universal+Coverage&rlz=1C1_GCEU_enKE1159KE1159&oq=WHO%2C+The+World+Health+Report+2010%3A+Health+Systems+Financing+%E2%80%93+The+Path+to+Universal+Coverage&gs_lcrp=EgZjaHJvbWUyBggAEEUYOdIBBzY3N2owajeoAgiwAgHxBdRqLQPRfmmmd8QXUai0D0X5pnQ&sourceid=chrome&ie=UTF-8 <accessed on 28 July, 2025>

¹⁹⁹ WHO, Director-General's opening remarks at the media briefing on COVID-19 (30 March 2020) <https://www.who.int/director-general/speeches> <accessed 23 July 2025>.

inadequate medical supplies compromise service delivery daily.²⁰⁰ The Kenyan Ministry of Health candidly reported in 2021 that the health system was under “critical stress” due to shortages in health personnel and inequitable access to care.²⁰¹ Kenyatta National Hospital in Nairobi, Kenya’s premier national referral and teaching hospital, has at times operated beyond 130% of its inpatient capacity, with patients sleeping on floors and caregivers improvising beds out of benches.²⁰² The pressure has been compounded by chronic underinvestment, with the Ministry of Health candidly admitting that Kenya’s public health sector was facing “critical stress” due to limited ICU capacity and inequitable service delivery.²⁰³

The situation mirrors that of other Global South contexts. In India, public hospitals in rural Bihar and Uttar Pradesh remain chronically underfunded, with reports of patients sharing beds and oxygen shortages turning into tragic headlines during the pandemic.²⁰⁴ Similarly, in South Africa’s Eastern Cape, health workers staged protests over lack of Personal Protection Equipment (PPEs) and delayed salaries, while crumbling infrastructure, some clinics without running water betrayed constitutional guarantees to health care.²⁰⁵ António Guterres, the UN Secretary-General, acknowledged that the pandemic laid bare the “fragility of our health systems,” which are “under immense strain” from both pandemic-related surges

²⁰⁰ County Government of Kakamega, *County Health Sector Performance Review Report 2022* (Kakamega County Health Department 2022).

²⁰¹ Ministry of Health (Kenya), *COVID-19 Situation Report – March 2021* (Government of Kenya 2021). Available on: <https://health.go.ke/covid-19> <accessed on 26 July, 2025>

²⁰² Daily Nation, *Crisis at Kenyatta National Hospital as Patients Flood Wards* (Nation Media Group, 5 March 2023) <https://nation.africa/kenya/news> <accessed 23 July 2025>.

²⁰³ *Supra*, note 46

²⁰⁴ The Hindu, *India’s Healthcare on the Brink: Rural Woes and Oxygen Crisis* (The Hindu, 10 May 2021) <https://www.thehindu.com> <accessed 23 July 2025>.

²⁰⁵ Mail & Guardian, *South Africa’s Eastern Cape Health Sector in Crisis* (M&G, 12 August 2020) <https://mg.co.za> <accessed 23 July 2025>.

and long-standing inefficiencies.²⁰⁶ He similarly acknowledged that the pandemic exposed and placed immense stress on essential services and pushing vulnerable populations further into health insecurity.²⁰⁷

Scholars have amplified this warning. The Lancet editorialized that, “health systems are “buckling under the weight of patient demand, workforce shortages, and chronic underinvestment,” a statement tragically borne out in both Kenya and its comparators.”²⁰⁸ Amnesty International described the neglect of public health infrastructure in the Global South as a form of institutionalized abandonment, particularly affecting women, children, and low-income households.²⁰⁹ “Years of underinvestment have left public health infrastructure ill-prepared to deal with health emergencies, leading to tragic consequences.”²¹⁰ BMJ Global Health went further to argue that COVID-19 has made the structural fragility of postcolonial health systems “painfully evident,” challenging governments to decolonize and democratize health governance.²¹¹ The cumulative effect is undeniable: the strain on public health infrastructure is no longer abstract, it is visceral, visible, and a clarion call for transformative investment in equitable, resilient health systems. These visible challenges have been evident with certain systemic challenges manifesting as burdens that weigh heavily upon its already fragile framework.²¹²

²⁰⁶ UN, Policy Brief: COVID-19 and Universal Health Coverage (May 2020). Available on: https://unsdg.un.org/sites/default/files/2020-10/SG-Policy-Brief-on-Universal-Health-Coverage_English.pdf <accessed on 23 July, 2025>

²⁰⁷ Ibid

²⁰⁸ The Lancet, COVID-19: Protecting health-care workers (2021) 397 *The Lancet* 922. Available on: [https://www.thelancet.com/article/S0140-6736\(21\)02754-9/fulltext](https://www.thelancet.com/article/S0140-6736(21)02754-9/fulltext) <accessed on 23 July, 2025>

²⁰⁹ Amnesty International, *Amnesty International Report 2020/21: The State of the World's Human Rights*. Available on: <https://www.amnesty.org/en/wp-content/uploads/2021/06/English.pdf> <accessed on 23 July, 2025>

²¹⁰ Ibid

²¹¹ BMJ Global Health, Decolonizing global health: if not now, when?

²¹² Supra, note 48

These burdens, often deeply rooted in socioeconomic inequities, manifest through preventable disease outbreaks, inadequate health financing, and overstretched healthcare personnel.²¹³ The compounding effect of these factors has placed Kenya’s health system under immense pressure, rendering it less responsive to the demands of a growing and diverse population.²¹⁴

For instance, the increasing prevalence of non-communicable diseases (NCDs), coupled with the lingering threat of infectious diseases such as malaria and tuberculosis, has amplified the dual disease burden, overwhelming public health facilities that are inadequately resourced both in human and technical capacity.²¹⁵ This is further exacerbated by systemic inefficiencies such as poor supply chain mechanisms, frequent industrial action by health workers, and the rural-urban disparity in service delivery.²¹⁶ These elements collectively constitute what scholars and policymakers refer to as “health system stressors” that cumulatively impair service delivery and patient outcomes.²¹⁷ Moreover, the burden is not only clinical but also economic. The out-of-pocket expenditure for healthcare remains alarmingly high, with limited protection mechanisms, thereby exposing low-income families to catastrophic health spending and pushing many below the poverty line.²¹⁸ The situation is further compounded by the low uptake of health

²¹³ Ibid

²¹⁴ World Health Organization, Health Systems Profile: Kenya (WHO 2021). Available on: <https://data.who.int/countries/404> <accessed on 23 July, 2025>

²¹⁵ Ministry of Health (Kenya), Kenya Health Sector Strategic and Investment Plan 2018–2023 (Government Printer 2018). Available on: <https://arua-ncd.org/wp-content/uploads/2022/10/Kenya-Health-Sector-Strategic-Plan-2018-231.pdf> <accessed on 23 July, 2025>

²¹⁶ Michael Munywoki and others, Devolution and Its Effects on Health Workforce and Commodities Management; Early Implementation Experiences in Kilifi County, Kenya

²¹⁷ David Waithaka and others, Proposed Priority Setting Criteria for Benefit Package Design in Kenya: A Mixed Methods Approach

²¹⁸ World Bank, Kenya Economic Update: Navigating the Pandemic (World Bank Group 2020). Available on:

insurance, fragmented financing structures, and underinvestment in public health infrastructure.²¹⁹

The lack of universal coverage and persistent underfunding of essential programmes, particularly at the county level under Kenya’s devolved governance framework, exacerbates inequities in access and quality of care.²²⁰ To meaningfully respond to these burdens, Kenya’s healthcare system requires a fundamental rethinking, one that incorporates resilience-building strategies, better resource allocation, investment in preventive care, and strengthened accountability frameworks.²²¹ Without such reforms, the system risks continual breakdown under the weight of its unmet obligations and growing public expectations. In the case of *L.N & 21 Others v Ministry of Health and Others*,²²² the Court affirmed that under Article 43 of the Constitution of Kenya, the State bears the primary responsibility to ensure that every individual enjoys the highest attainable standard of health. However, this obligation is qualified by Article 20(5), which stipulates that the State is required to realize socio-economic rights only to the extent of its available resources. Consequently, the burden lies with the State to demonstrate that adequate resources are lacking and that such limitations prevent it from fulfilling the full realization of these rights for every citizen. In their submissions, the petitioners urged the Court to be guided by the South African Constitutional Court’s reasoning in *Minister of Health v Treatment Action Campaign*, arguing that its principles would enhance the progressive realization of the right

<https://documents1.worldbank.org/curated/en/957121606226133134/pdf/KenyaEconomic-Update-Navigating-the-Pandemic.pdf> <accessed on 23 July, 2025>

²¹⁹ Health Financing Reforms Coalition, Position Paper on Health Financing Gaps in Kenya.

²²⁰ Ministry of Health (Kenya), Kenya Health Financing Strategy 2020–2030. Available on: <http://guidelines.health.go.ke/#/category/20/352/meta> <accessed on 23 July, 2025>

²²¹ Jane Maina and others, Strengthening Health Systems Resilience in Kenya: A Policy Perspective

²²² *Luco Njagi & 21 others v Ministry of Health & 2 others* [2015] eKLR

to health in Kenya.²²³ They further relied on comparative jurisprudence from Argentina, specifically *Viceconte v Ministry of Health and Social Welfare*,²²⁴ where the court imposed a deadline on the State to fulfill its obligation to manufacture a vaccine for Argentine hemorrhagic fever.²²⁵ The petitioners contended that this precedent underscores the enforceability of socio-economic rights and should similarly inform the Court's reasoning.²²⁶ Additionally, reference was made to the Ecuadorian case of *Mendoza and Others v Ministry of Public Health*,²²⁷ in which the court held that the Ministry's suspension of an HIV treatment programme amounted to a failure to protect the petitioners' right to health, a right integrally linked to the right to life.²²⁸

The respondents on their part, contended that while the Constitution of Kenya, 2010 entrenches economic and social rights, including the right to health under Article 43, these rights are not immediately realizable in full, but are subject to the doctrine of progressive realization, as articulated under Article 21(2). This constitutional framework mandates the State to take deliberate, concrete, and targeted steps toward the realization of such rights, but within the constraints of its available resources. To bolster their argument, the respondents cited the leading South African case *Government of the Republic of South Africa and Others v Grootboom and Others*,²²⁹ where the Constitutional Court clarified that socio-

²²³ *Minister of Health v Treatment Action Campaign (No 2)* [2002] ZACC 15, 2002 (5) SA 721 (CC), para 95.

²²⁴ *Viceconte v Ministry of Health and Social Welfare*, Case No. 31.777/96 (Argentine Federal Court, 2 June 1998).

²²⁵ *Ibid*

²²⁶ *Ibid*

²²⁷ *Mendoza and Others v Ministry of Public Health* (2007) Resn No. 0749-2007-RA, Constitutional Court of Ecuador.

²²⁸ *Ibid*

²²⁹ *Government of the Republic of South Africa and Others v Grootboom and Others* [2000] ZACC 19, 2001 (1) SA 46

economic rights impose an obligation of reasonableness on the State to adopt appropriate measures that are flexible and responsive to the needs of the most vulnerable.²³⁰ The Court held that the right to housing (and by extension other socio-economic rights like health) does not imply immediate access, but rather a realistic, phased approach, consistent with available resources.²³¹

Similarly, in *Mathew Okwanda v Minister for Health and Medical Services and Others*,²³² the High Court of Kenya emphasized that judicial enforcement of the right to health requires precise pleadings and demonstrable harm.²³³ In the absence of focused disputes and material evidence showing a clear violation of Article 43, courts must act with restraint to avoid overstepping into policy-making. Internationally, the UN Committee on Economic, Social and Cultural Rights (CESCR) has clarified in General Comment No. 14 that, “the right to health is not to be understood as a right to be healthy per se, but rather a right to access quality health facilities, goods, and services, which the State must progressively provide.”²³⁴ The Committee also underlined that retrogressive measures are presumptively illegitimate unless fully justified by the State.²³⁵

The respondents further referenced jurisprudence from the European Court of Human Rights (ECtHR), notably in *Nitecki v Poland*, where the Court acknowledged that access to healthcare may be constrained by a State’s resource

²³⁰ Ibid

²³¹ Ibid

²³² *Mathew Okwanda v Minister for Health and Medical Services and Others* [2013] eKLR

²³³ Ibid

²³⁴ UN Committee on Economic, Social and Cultural Rights, *General Comment No. 14: The Right to the Highest Attainable Standard of Health* (2000) UN Doc E/C.12/2000/4. Available on: <https://www.ohchr.org/en/documents/general-comments-and-recommendations/ec1220004-general-comment-no-14-highest-attainable> <accessed on 25 July, 2025>

²³⁵ Ibid

capacity, provided the limitations are non-discriminatory and proportionate.²³⁶ Additionally, the Inter-American Court of Human Rights in *Case of Cuscul Pivaral and Others v Guatemala*,²³⁷ held that systemic neglect of access to health services for vulnerable groups can amount to a violation of the right to life and dignity.²³⁸ These global precedents were invoked by the respondents to underscore the universal principle that while socio-economic rights are justiciable, courts must be cautious to respect separation of powers and the fiscal realities confronting states. In this light, the Kenyan State's duty, although constitutionally entrenched, is necessarily incremental, and the burden lies on petitioners to demonstrate that the State has failed to take even minimal steps to fulfill its obligations under Article 43.

Drawing from the reasoning in *Soobramoney v Minister of Health (KwaZulu-Natal)*,²³⁹ the Kenyan High Court in its case similarly held that the matter at hand was essentially one of public health policy, a domain traditionally reserved for the Executive arm of government. Citing Article 20(5) of the Constitution of Kenya, the Court emphasized that in adjudicating socio-economic rights, it must take into account the State's resource constraints, and avoid imposing obligations that could potentially disrupt the overall priorities of the national health system. In line with this jurisprudence, the Court declined to issue orders compelling the State to reimburse private medical costs or prioritize individual patients for treatment. Instead, it found that the State had met its obligation by demonstrating that available resources were limited and that it was nonetheless taking reasonable steps to ensure the progressive realization of economic and social rights for the broadest segment of the population.

²³⁶ *Nitecki v Poland* App no 65653/01 (ECtHR, 21 March 2002).

²³⁷ *Cuscul Pivaral and Others v Guatemala* (Preliminary Objections, Merits, Reparations and Costs) IACtHR Series C No 370 (23 August 2018).

²³⁸ *Ibid*

²³⁹ *Soobramoney v. Minister of Health (KwaZulu-Natal)* 1997 (12) BCLR 1696 (CC)

The Court underscored that while the right to health under Article 43 is justiciable, courts must exercise deference when evaluating complex policy decisions involving the allocation of finite public resources. In doing so, the Court made the following critical observations:

“...A court will be slow to interfere with rational decisions taken in good faith by the political organs and medical authorities whose responsibility it is to deal with such matters. Although the problem of scarce resources is particularly acute in South Africa this is not a peculiarly South African problem. It is a problem which hospital administrators and doctors have had to confront in other parts of the world, and in which they have had to take similar decisions. In his judgment in this case Combrinck J refers to decisions of the English courts in which it has been held to be undesirable for a court to make an order as to how scarce medical resources should be applied, and to the danger of making any order that the resources be used for a particular patient, which might have the effect of denying those resources to other patients to whom they might more advantageously be devoted.”

Building on its earlier findings, the Court expressed the following:

“The dilemma confronting health authorities faced with such cases was described by Sir Thomas Bingham MR in a passage cited by Combrinck J from the judgment in R v Cambridge Health Authority, ex parte B: “I have no doubt that in a perfect world any treatment which a patient, or a patient’s family, sought would be provided if doctors were willing to give it, no matter how much it cost, particularly when a life was potentially at stake. It would however, in my view, be shutting one’s eyes to the real world if the court were to proceed on the basis that we do live in such a world. It is common knowledge that health authorities of all kinds are constantly pressed to make ends meet. They cannot pay their nurses as much as they would like; they cannot provide all the treatments they would like; they cannot purchase all the extremely expensive medical equipment they would like; they cannot carry out all the research they would like; they cannot build all the hospitals and specialist units they would like. Difficult and agonizing judgments have to be made as to how a limited budget is best allocated to the maximum advantage of the maximum number of patients. That is not a judgment which the court can make.”

The sentiments expressed above sound eerily familiar to the author, seeming to describe the dire situation that Kenya's health system is confronted with, and which gives rise to this research. In *Luco Njagi & 21 others v Ministry of Health & 2 others (supra)*,²⁴⁰ Justice Mumbi Ngugi while handing down her reasoning to parties, she stated as follows;

"It should be borne in mind that in dealing with such matters the courts are not institutionally equipped to make the wide-ranging factual and political enquiries necessary for determining what the minimum-core standards called for by the first and second amici should be, nor for deciding how public revenues should most effectively be spent. There are many pressing demands on the public purse. As was said in Soobramoney: "The State has to manage its limited resources in order to address all these claims. There will be times when this requires it to adopt a holistic approach to the larger needs of society rather than to focus on the specific needs of particular individuals within society." [38] Courts are ill-suited to adjudicate upon issues where court orders could have multiple social and economic consequences for the community. The Constitution contemplates rather a restrained and focused role for the courts, namely, to require the state to take measures to meet its constitutional obligations and to subject the reasonableness of these measures to evaluation. Such determinations of reasonableness may in fact have budgetary implications, but are not in themselves directed at rearranging budgets. In this way the judicial, legislative and executive functions achieve appropriate constitutional balance."

In the face of a strained judicial system, characterized by case backlogs, judicial strikes, limited accessibility, and protracted timelines, Kenya finds itself at a legal crossroads. The traditional court-based model of dispute resolution, long revered for its formalism and authority, has, in many respects, become inaccessible to ordinary citizens, particularly those grappling with urgent or sensitive disputes such as medical negligence, land disputes, or commercial contract enforcement. It is in such desperate circumstances that the nation is witnessing a pragmatic shift:

²⁴⁰ *Supra*, note 208

a turn towards arbitration as a viable and responsive alternative.²⁴¹ As the age-old maxim goes, “desperate situations call for desperate measures.” As already observed, the strain on public health infrastructure is now a visible reality, particularly in countries grappling with systemic underfunding, overburdened medical personnel, and an increasingly litigious healthcare environment. In Kenya, the COVID-19 pandemic served to exacerbate pre-existing systemic deficiencies within the health sector, notably manifesting in overcrowded medical facilities, inadequate supplies of essential equipment, and an overburdened judiciary grappling with an upsurge in healthcare-related litigation.²⁴² Amidst this chaos, arbitration presents itself as a pragmatic, efficient, and expert-led alternative for resolving medical disputes.

In the Kenyan context, however, these “desperate measures” are neither impulsive nor reckless, they are calculated, structured, and increasingly institutionalized within the fabric of the country's legal system. Arbitration, long perceived as a preserve of the commercial elite, is now being embraced as a tool of legal decentralization and efficiency.²⁴³ It offers disputants a more flexible, confidential, and timely forum, especially in fields where technical expertise and procedural sensitivity are paramount.²⁴⁴ This migration from litigation to arbitration is not merely a matter of convenience but of necessity. As Nyamu J, (2020) aptly observes, “Where the courts are overwhelmed, justice delayed morphs into justice denied.”²⁴⁵ Arbitration thus emerges not just as an alternative, but as an antidote to systemic inertia. The Kenyan judiciary itself has acknowledged the role of

²⁴¹ *Supra*, note 90, art 159(2)(c).

²⁴² Centre for Reproductive Rights, *A Pandemic Amplified: COVID-19 and the Failure of Kenya's Health System to Uphold Reproductive Rights*

²⁴³ Arbitration Act, No 4 of 1995 (Subsequently amended).

²⁴⁴ Muigua K, *Promoting International Commercial Arbitration in Africa: The Role of African Arbitration Practitioners*

²⁴⁵ Nyamu D, *Court Backlogs and the Role of Arbitration in Kenya*

arbitration in decongesting court dockets and promoting access to justice in line with Article 159(2)(c), which enshrines the promotion of alternative forms of dispute resolution, including reconciliation, mediation, arbitration, and traditional dispute resolution mechanisms, thereby affirming the judiciary's obligation to embrace and advance these approaches as legitimate complements to formal adjudication.

This constitutional mandate has been reinforced by judicial decisions that recognize ADR as a critical component in decongesting courts, fostering participatory justice, and preserving social harmony. For example, in *Republic v Mohamed Abdow Mohamed*, the court emphasized the importance of incorporating traditional dispute resolution systems consistent with the Constitution.²⁴⁶ Scholars such as Professor Kariuki Muigua have also argued that ADR aligns with African communitarian values and should be further integrated into Kenya's legal framework.²⁴⁷ Moreover, the Arbitration Act 1995 (as amended) provides a robust legal framework that recognizes party autonomy, enforces arbitral awards, and limits judicial interference, thereby reinforcing arbitration's credibility as a dependable recourse.²⁴⁸

The judiciary's evolving jurisprudence in Kenya marks a notable shift towards upholding the sanctity and finality of arbitral awards, thereby reinforcing arbitration as an autonomous and effective mode of dispute resolution.²⁴⁹ Courts have increasingly declined to re-open or re-litigate matters conclusively determined by arbitral tribunals, except on narrowly defined grounds enumerated under section 35 of the Arbitration Act, 1995.²⁵⁰ This approach aligns with

²⁴⁶ *Republic v Mohamed Abdow Mohamed* [2013] eKLR.

²⁴⁷ Kariuki Muigua, *Alternative Dispute Resolution and Access to Justice in Kenya*

²⁴⁸ *Supra*, note 233, s 35

²⁴⁹ *Ibid*

²⁵⁰ *Ibid*

international best practices and underscores the judiciary's role in promoting efficiency, party autonomy, and finality in arbitration. This restrained judicial intervention was clearly illustrated in *Christ for All Nations v Apollo Insurance Co Ltd*, where the High Court reaffirmed that it would not interfere with arbitral awards unless there was a clear violation of the limited grounds for setting aside.²⁵¹ Similarly, in *Anne Mumbi Hinga v Victoria Njoki Gathara*, the Court of Appeal emphasized that an arbitral award can only be challenged under section 35 and not on the merits of the case, reinforcing the principle that arbitration should not be treated as a mere precursor to court proceedings.²⁵²

Moreover, this jurisprudential trend mirrors the guidance found in international conventions such as the UNCITRAL Model Law and the New York Convention, which advocate for minimal judicial interference in arbitration.²⁵³ As noted by scholars such as Mustill and Boyd, excessive court involvement undermines the efficacy of arbitration and deters parties from seeking alternative dispute resolution mechanisms.²⁵⁴ Kenyan courts are increasingly mindful of this, thereby fostering an environment conducive to commercial confidence and legal predictability. Kenya's shift toward arbitration in the health sector marks a deliberate evolution in the nation's justice delivery framework, one that prioritizes accessibility, technical precision, and timely resolution. As health-related disputes grow in volume and complexity, including those concerning medical negligence, health rights violations, and contractual disagreements between public and

²⁵¹ *Christ for All Nations v Apollo Insurance Co Ltd* [2002] 2 EA 366 (HCK).

²⁵² *Anne Mumbi Hinga v Victoria Njoki Gathara* [2009] eKLR (CA).

²⁵³ United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration, 1985; Convention on the Recognition and Enforcement of Foreign Arbitral Awards

²⁵⁴ Michael J Mustill and Stewart C Boyd, *Commercial Arbitration*

private health providers, arbitration²⁵⁵ offers a pathway that balances procedural efficiency with the need for sectoral expertise.

This trajectory is grounded in Article 159(2)(c) of the Constitution of Kenya 2010, which explicitly promotes alternative forms of dispute resolution (ADR), including arbitration and mediation.²⁵⁶ Internationally, Kenya is not alone in recognizing the value of ADR in health-related matters. In India, courts have encouraged the use of arbitration and mediation in the public health sector to decongest the courts and provide quicker redress. For example, in *Afcons Infrastructure Ltd v Cherian Varkey Construction Co (P) Ltd*,²⁵⁷ the Indian judiciary acknowledged arbitration as a constitutionally endorsed alternative to conventional litigation.²⁵⁸ Similarly, South Africa's Constitutional Court in *Soobramoney v Minister of Health (KwaZulu-Natal)* (supra),²⁵⁹ took a pragmatic approach, recognizing the limits of judicial intervention in resource allocation decisions and implicitly endorsing ADR for more context-sensitive resolution of such disputes.²⁶⁰

Kenya's commitment to this path is further evidenced by the establishment of the Nairobi Centre for International Arbitration (NCIA), which has taken proactive steps to promote sector-specific arbitral expertise, including in health law and policy.²⁶¹ Furthermore, regional bodies like the East African Health Research Commission (EAHRC) have begun advocating for harmonized legal mechanisms

²⁵⁵ Supra, note 240

²⁵⁶ Supra, note 226

²⁵⁷ *Afcons Infrastructure Ltd v Cherian Varkey Construction Co (P) Ltd* (2010) 8 SCC 24

²⁵⁸ Ibid

²⁵⁹ Supra, note 225

²⁶⁰ Ibid

²⁶¹ Nairobi Centre for International Arbitration, 'About NCIA' <https://ncia.or.ke> <accessed 28 July 2025>.

to resolve cross-border health disputes, a process in which arbitration is poised to play a central role.²⁶² The World Health Organization also supports the integration of ADR into national health systems. It notes that where litigation is slow, inaccessible, or ill-suited to complex healthcare contexts, arbitration and mediation can improve outcomes and enhance the right to health.²⁶³ In a country like Kenya, where health infrastructure is often overstretched, as demonstrated during the COVID-19 pandemic when court systems and hospitals were simultaneously overwhelmed,²⁶⁴ arbitration provides a necessary safety valve. Thus, arbitration in Kenya's health sector is emerging as more than an alternative; it is a strategic pillar of justice, given that it aligns national legal reform with global best practices and, crucially, helps realize constitutional rights in a practical, enforceable manner.

From Courts to Consensus: Non-Adversarial Avenues in Medical Malpractice

Kola observes that, "traditional litigation is often too slow and adversarial to meet the fast-paced demands of construction, prompting a shift toward alternative dispute resolution (ADR) mechanisms."²⁶⁵ As was observed in the Blyth's case,²⁶⁶ "the tort of negligence, in the generic sense, is the omission to do something which a reasonable man guided upon those considerations which ordinarily regulate the conduct of human affairs, would do or doing something which a prudent and

²⁶² East African Health Research Commission (EAHRC), 'Strategic Plan 2021–2026'

²⁶³ World Health Organization, *Resolution WHA58.33: Sustainable health financing, universal coverage and social health insurance* (25 May 2005) https://apps.who.int/gb/ebwha/pdf_files/WHA58/WHA58_33-en.pdf <accessed 28 July 2025>.

²⁶⁴ Twaweza East Africa, *Kenya's COVID-19 Response: A Citizen Perspective* (2021) <https://twaweza.org/uploads/files/KenyaCovidCitizenFINAL.pdf> <accessed 28 July 2025>.

²⁶⁵ Muwanga K., *The Architect of Dispute Resolution: Mediation-Arbitration (Med-Arb) in the Construction Industry in Kenya*.

²⁶⁶ *Blyth v Birmingham Waterworks Company* (1856) 11 Ex Ch 781

reasonable man would not do.”²⁶⁷ In the field of medical negligence, liability does not arise from every unfortunate outcome or lapse in clinical judgment. Rather, the law of tort, specifically negligence, requires proof of a legally enforceable duty of care, a breach of that duty, and resultant harm that is foreseeable and causally linked to the breach. As observed in *Donoghue v Stevenson* [1932],²⁶⁸ a defendant owes a duty of care to those who are so closely and directly affected by their actions that they ought reasonably to be in contemplation. This principle has been applied with particular sensitivity in the medical context. In *Bolam v Friern Hospital Management Committee* [1957],²⁶⁹ the English court held that a doctor is not negligent if they act in accordance with a practice accepted by a responsible body of medical opinion.²⁷⁰ This standard, known as the "Bolam Test", has shaped the understanding of medical negligence in many common law jurisdictions, including Kenya.

In *Kenya Medical Laboratory Technicians and Technologists Board & 6 others v Attorney General & 4 others*,²⁷¹ the High Court reaffirmed that medical professionals are held to a standard of reasonable care, and liability arises only when their actions fall below that threshold, causing harm.²⁷² The Court emphasized that while the right to health is constitutionally guaranteed under Article 43(1)(a) of the Constitution of Kenya 2010, its enforcement must be balanced against the practicalities of medical judgment and systemic limitations. Similarly, in *S W M v Muthomi Munene & another*,²⁷³ the High Court held a doctor liable for failure to diagnose and treat a

²⁶⁷ *Ibid*

²⁶⁸ *Donoghue v Stevenson* [1932] AC 562 (HL)

²⁶⁹ *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582

²⁷⁰ *Ibid*

²⁷¹ *Kenya Medical Laboratory Technicians and Technologists Board & 6 others v Attorney General & 4 others* [2017] eKLR

²⁷² *Ibid*

²⁷³ *S W M v Muthomi Munene & another* [2020] eKLR

condition in a timely manner, affirming that a breach of duty exists where a practitioner fails to act as a reasonably competent professional would under similar circumstances. Moreover, Kenyan courts have shown deference to resource limitations under Article 20(5) of the Constitution, as illustrated in *L.N & 21 Others v Ministry of Health & 4 Others* (supra),²⁷⁴ where the Court acknowledged that economic and social rights must be progressively realized within available resources. Therefore, the adjudication of medical negligence claims in Kenya seeks to uphold patient rights while recognizing the complex realities of healthcare delivery. As the jurisprudence evolves, courts are increasingly focused on maintaining a delicate balance, protecting individuals from harm without subjecting medical practitioners to unjustified legal scrutiny, as was in the case of *Patrick Kariuki v Joseph Kiragu Gichure & another*.²⁷⁵

Historically, several nineteenth- and early twentieth-century courts erred in conflating the threshold for medical liability with the outdated and ambiguous concept of "gross negligence", a term often derived from the Roman law notion of *crassa negligentia*. This doctrinal confusion led to inconsistencies in adjudicating medical negligence cases and unnecessarily elevated the standard of proof for claimants. A classic example is seen in *Sumner v Utley*,²⁷⁶ where the court appeared to require a showing of gross negligence for a physician to be held liable, thereby obscuring the modern, objective test grounded in breach of a reasonable standard of care. Contemporary scholarship criticizes this approach as legally unsound. As Keown argues, "the invocation of 'gross negligence' in medical torts obscures rather than clarifies the duty owed, and distracts from the central inquiry: whether the defendant exercised the ordinary care and skill of a competent practitioner."²⁷⁷

²⁷⁴ [2016] eKLR

²⁷⁵ *Patrick Kariuki v Joseph Kiragu Gichure & another* [2013] eKLR)

²⁷⁶ *Sumner v Utley*, 19 Ga 379 (1856)

²⁷⁷ John Keown, *Euthanasia, Ethics and Public Policy: An Argument Against Legalization*

Similarly, Giesen notes that “the tendency to invoke archaic classifications like *crassa negligentia* undermines the consistent development of negligence jurisprudence in the medical context.”²⁷⁸ Modern legal reasoning has largely discarded this approach, recognizing that all negligence, whether “ordinary” or “gross,” ultimately revolves around breach of a duty of care judged against an objective standard. This standard is well-articulated in *Bolam v Friern Hospital Management Committee* (supra), where it was held that a medical professional is not negligent if their conduct is in line with that accepted by a responsible body of medical practitioners skilled in that particular art. In *Sumner v. Utley*,²⁷⁹ the court wrote: “A physician may mistake the symptoms of a patient; or may misjudge as to the nature of his disease, and even as to the powers of a medicine; and yet his error may be of that pardonable kind, that will do him no essential prejudice, because it is rather a proof of human imperfection, than of culpable ignorance or unskillfulness Nothing short of gross ignorance and want of skill, will authorize a suit against a practicing physician.”

In conceptual terms, the scenario is comparable to a trained lifeguard who, despite acting diligently and within the bounds of her professional ability, fails to rescue a swimmer caught in a strong undertow. The tragic outcome, in and of itself, does not imply fault or negligence. The Kenyan courts similarly hold that liability in medical negligence does not arise merely because of an unfavorable outcome. Rather, negligence is anchored in a breach of duty of care, causation, and demonstrable harm, all of which must be assessed objectively against the standards of a reasonably competent professional acting in the same circumstances.²⁸⁰ This principle was affirmed in *L.N & 21 Others v Ministry of Health & 2 Others* (supra), where the court reiterated that the right to the highest attainable

²⁷⁸ Ivo Giesen, *International Medical Malpractice Law*.

²⁷⁹ *Sumner v. Utley*, 7 Conn. 257 (1828)

²⁸⁰ *Wambua v Mohamed* [2003] eKLR

standard of health under Article 43 of the Constitution is not absolute and is subject to progressive realization within available resources as guided by Article 20(5).²⁸¹ The court maintained that for liability to attach to the State or its agents, there must be clear evidence of a failure to meet the minimum core obligations required by law.²⁸²

Moreover, in *Kenya Medical Practitioners and Dentists Board v Ochieng*, the tribunal emphasized that professional liability cannot be based on patient dissatisfaction alone; there must be proof that the practitioner deviated from accepted standards of care.²⁸³ Similarly, the East African Court of Justice in *Attorney General of the Republic of Uganda v East African Law Society & Others* emphasized that member states must adhere to good governance, accountability, and the rule of law, including through effective delivery of health services.²⁸⁴ Though the case did not deal with health directly, it set out regional obligations that impact socioeconomic rights enforcement in states like Kenya. From a continental perspective, the African Commission on Human and Peoples' Rights in *Purohit and Moore v The Gambia* interpreted the right to health under Article 16 of the African Charter as imposing both negative and positive obligations on states, including the provision of adequate health services and facilities.²⁸⁵ This interpretation has been influential in Kenyan courts when assessing the extent of state obligations under the Constitution.

²⁸¹ *L.N & 21 Others v Ministry of Health & 2 Others* [2020] eKLR

²⁸² *Supra*, not 239, arts 43(1)(a), 21(2), and 20(5).

²⁸³ *Kenya Medical Practitioners and Dentists Board v Ochieng* [2015] eKLR.

²⁸⁴ *Attorney General of the Republic of Uganda v East African Law Society & Others* (EACJ Reference No. 1 of 2016) [2017] EACJ.

²⁸⁵ *Purohit and Moore v The Gambia*, Communication No. 241/2001, African Commission on Human and Peoples' Rights (2003) AHRLR 96 (ACHPR 2003).

Thus, much like the lifeguard who acts within her training and available resources, a medical professional in Kenya will only be held liable if they fail to meet the established professional threshold. Courts emphasize reasonableness, not perfection. Legal liability is not based on adverse outcomes alone, but on demonstrable breaches of legal and ethical duties, assessed in light of both national law and broader regional and international human rights standards. In laying the foundational principles of the case, Baron Alderson articulated what has since become a seminal definition of negligence;

“Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do. The defendants might have been liable for negligence, if, unintentionally, they omitted to do that which a reasonable person would have done, or did that which a person taking reasonable precautions would not have done.”

Furthermore, it follows that when one has more than the ordinary quantum of knowledge or skill in a given situation, one is unreasonable for failing to exercise it.

“If the actor possesses special skill he must exercise it . . . whenever he, either as a reasonable man, or as an expert, realizes or should realize that its exercise is necessary to the reasonable safety of others. The superior skill, being the result or aptitude developed by special training and experience, may give to the actor special ability to perceive the existing facts and a special knowledge of other pertinent matters which, separately or together, may enable him to realize a necessity of using his skilled technique which a person of lesser skill would not realize.”

Unlike traditional courtrooms where patients are mere litigants, arbitration restores their identity as persons deserving of care, voice, and understanding.²⁸⁶ This is especially crucial in sensitive disputes involving medical negligence, where the trauma of harm is often compounded by the indignity of public trial processes.²⁸⁷ Arbitration protects confidentiality²⁸⁸ and accelerates resolution, thereby reducing the emotional and financial toll on both patients and healthcare professionals.²⁸⁹ As such, it is not merely a procedural device, but a re-humanizing mechanism that affirms the centrality of patient dignity in medical justice.²⁹⁰ Thus, the petitioner's prolonged wait for adjudication cannot be justified. Her years of uncertainty, anxiety, and psychological erosion are not intangible. They are the unseen costs of an indifferent system. Justice, even when finally dispensed, cannot rewrite time. But it must at the very least acknowledge the pain of waiting with bated breath; an agony that cannot be taken lightly.

In Kenya, healthcare landscape remains deeply strained, characterized by protracted litigation, recurrent industrial strikes by medical professionals, chronic underfunding of public health facilities, and an overstretched judicial system that

²⁸⁶ *Supra*, note 133.

²⁸⁷ Rachael Mulheron, *Medical Negligence: Non-Patient and Third Party Claims*

²⁸⁸ World Health Organization, *Health Systems: Improving Performance* (World Health Report 2000). Available on: [https://www.google.com/search?q=World+Health+Organization%2C+Health+Systems%3A+Improving+Performance+\(World+Health+Report+2000\)&rlz=1C1GCEU_enKE1159KE1159&oq=World+Health+Organization%2C+Health+Systems%3A+Improving+Performance+\(World+Health+Report+2000\)&gs_lcrp=EgZjaHJvbWUyBggAEEUYOdIBBzY5NGowajeoAgiwAgHxBeQEKTvwcV6t&sourceid=chrome&ie=UTF-8](https://www.google.com/search?q=World+Health+Organization%2C+Health+Systems%3A+Improving+Performance+(World+Health+Report+2000)&rlz=1C1GCEU_enKE1159KE1159&oq=World+Health+Organization%2C+Health+Systems%3A+Improving+Performance+(World+Health+Report+2000)&gs_lcrp=EgZjaHJvbWUyBggAEEUYOdIBBzY5NGowajeoAgiwAgHxBeQEKTvwcV6t&sourceid=chrome&ie=UTF-8) <accessed on 2 August, 2025>

²⁸⁹ Laurence Boulle and Miryana Nestic, *Mediation: Principles, Process, Practice*

²⁹⁰ Richard Delgado, *Legal Storytelling: Storytelling for Oppositionists and Others: A Plea for Narrative*

compounds delays in medical justice.²⁹¹ These systemic pressures not only compromise the right to health but also erode public confidence in both the health and justice systems.²⁹² The constraints are further exacerbated by an overwhelmed judicial system where health-related disputes can languish for years before resolution.²⁹³ This fragile intersection between health and justice often leaves victims of medical negligence with little recourse, breeding impunity and patient despair.²⁹⁴ According to health rights advocates, the delay in accessing remedies and the lack of alternative redress mechanisms such as medical arbitration has contributed to rising mistrust in both the public health and legal systems.²⁹⁵

Medical arbitration represents a quiet revolution. It is not simply an alternative to judicial redress, but a therapeutic process capable of restoring the dignity of both patient and practitioner. In a society where the ordinary mwananchi often endures long queues for medical attention and longer queues for legal redress, arbitration provides a sanctuary of speed, empathy, and confidentiality.²⁹⁶ The Kenyan judiciary has itself acknowledged the virtues of arbitration as a preferred route for dispute resolution, especially where public interest, privacy, and emotional sensitivity intersect.²⁹⁷ The 2018 case of *CMA v AAR Insurance Kenya Ltd & 2 Others* is instructive, where the High Court underscored the need for alternative mechanisms in resolving disputes arising from sensitive healthcare and insurance

²⁹¹ Kenya National Commission on Human Rights (KNCHR), *The Right to Health: A Report on the Status of Health Rights in Kenya* (KNCHR 2015)

²⁹² *Ibid*

²⁹³ Judiciary of Kenya, *State of the Judiciary and Administration of Justice Annual Report 2021-2022* (Judiciary 2022) 102-108 <https://www.judiciary.go.ke> accessed 23 July 2025.

²⁹⁴ International Commission of Jurists - Kenya, *Protecting the Right to Health through Litigation: Kenyan Perspectives* (ICJ Kenya 2017)

²⁹⁵ N Namwaya, *Kenya: Doctors' Strike Exposes Public Health Crisis*

²⁹⁶ PLO Lumumba et al, *The Constitution of Kenya: Contemporary Readings*

²⁹⁷ Judiciary of Kenya, *Alternative Dispute Resolution Policy 2019* (Nairobi, JSC) <https://judiciary.go.ke> <accessed 22 July 2025>.

arrangements.²⁹⁸ While this case did not centre on medical negligence per se, it illustrated how arbitration clauses could preserve relationships, avoid reputational harm, and achieve expeditious justice. The Medical Practitioners and Dentists Council (MPDC), established under the Medical Practitioners and Dentists Act (Cap 253, Laws of Kenya), has increasingly adopted arbitration and mediation mechanisms to handle professional misconduct and patient complaints.²⁹⁹ This is reinforced by the Health Act 2017, which in section 4 articulates the right of every person to the highest attainable standard of health, a right that must be read together with the right to access fair and timely resolution of medical grievances.³⁰⁰

Moreover, the Alternative Dispute Resolution Policy 2019 by the Judiciary of Kenya explicitly promotes arbitration and mediation in healthcare disputes.³⁰¹ It recognizes that litigation often retraumatizes the patient, and that traditional adversarial processes are ill-suited to the complexity and emotional fragility of medical harm.³⁰² As former Chief Justice David Maraga remarked: “Access to justice is not just about getting to court; it is about getting meaningful, compassionate, and timely redress.”³⁰³ Kenya's backlog of medical negligence cases further reveals the urgent need to reimagine dispute resolution through a more humane lens. It is a model that says justice delayed should not always be justice denied. Arbitration offers an alternative: faster resolutions, expert panels that understand both the law and medicine. The constitutional promise under

²⁹⁸ *Bolitho v City and Hackney Health Authority* [1998] AC 232 (HL) 241

²⁹⁹ Medical Practitioners and Dentists Act (Cap 253, Laws of Kenya), s 4A; Kenya Medical Practitioners and Dentists Council, Annual Report 2021 <https://kmpdc.go.ke> <accessed 22 July 2025>.

³⁰⁰ Health Act 2017 (No 21 of 2017), s 4(c); see also Constitution of Kenya 2010, art 43(1)(a).

³⁰¹ Judiciary of Kenya, Alternative Dispute Resolution Policy 2019 (n 2) 33–35.

³⁰² *Ibid*

³⁰³ David K Maraga, Speech at the Launch of the Judiciary ADR Policy

Article 43(1)(a) of the Constitution of Kenya 2010, which guarantees every person the right to the highest attainable standard of health, cannot be realized if redress mechanisms remain sluggish and adversarial.³⁰⁴

Courts have acknowledged this. Arbitration, therefore, is not merely procedural; it is substantive in effect, it affirms the right to access justice under Article 48 of the Constitution. As Professor Thomas Metzloff argued in comparative terms, “specialist panels, well-versed in both medicine and law can navigate the ethical, evidentiary, and scientific dilemmas that generalist courts may struggle to decode.” Moreover, Kenyan scholars like Luis Franceschi and Patricia Kameri-Mbote have consistently underlined the importance of alternative dispute resolution (ADR) mechanisms in decongesting the courts and enhancing participatory justice, particularly in sensitive sectors like healthcare.³⁰⁵ It is in this context that arbitration in medical malpractice cases should be seen, not merely as a technical fix, but as a restorative tool that aligns with both constitutional values and public health justice. It shifts the paradigm from adversarial courtroom battles to an accessible, private, and more humane model of justice. Medical arbitration offers a path toward timely justice, one that honors the patient’s dignity, ensures accountability, and alleviates the burden on overstretched courts.

It also starkly illustrates how the right to timely justice, though firmly entrenched in the Constitution³⁰⁶ and international human rights instruments (such as Article

³⁰⁴ *Supra*, note 265, Article 43(1)(a).

³⁰⁵ Franceschi L. and Kameri-Mbote P, *Dispute Resolution in Kenya: The Evolving Role of ADR*

³⁰⁶ *Supra*, note 284

14 of the ICCPR³⁰⁷ and Article 7 of the African Charter³⁰⁸), can be rendered illusory by judicial backlog and procedural technicalities. In such contexts, arbitration emerges not as a panacea but as a viable, rights-sensitive alternative. A properly structured medical arbitration system, anchored in procedural fairness, professional expertise, and enforceability could have ensured that the patient's case was resolved within months, not decades. Her suffering might have been acknowledged sooner. Her voice heard. Her dignity restored.

Medical Negligence, Informed Consent and Institutional Responsibility

In a profoundly consequential decision delivered on 4 June 2025, the High Court of Kenya at Nairobi awarded a monumental sum of KSh 157,207,524.20 to the plaintiffs in *Naila Qureshi & Another v Rafique Parker & 2 Others*³⁰⁹ for professional negligence perpetrated by a surgeon and facilitated by a healthcare institution's systemic failings.³¹⁰ This ruling, delivered by Justice Alexander Muteti, signals a transformative moment in Kenya's medico-legal landscape, particularly in relation to patient rights, institutional liability, and the scope of compensable harm in medical negligence claims.³¹¹ The facts of the case are harrowing. In 2006, the first plaintiff, petitioner, underwent surgery at the Aga Khan University Hospital in Nairobi for pelvic endometriosis. She had consented specifically to a hysterectomy and removal of one ovary.³¹² However, without her consent, the attending surgeon, Rafique Parker, proceeded to remove her cervix. The operation

³⁰⁷ International Covenant on Civil and Political Rights. https://treaties.un.org/doc/treaties/1976/03/19760323%2006-17%20am/ch_iv_04.pdf <accessed on 20 July, 2025>

³⁰⁸ African Charter on Human and Peoples' Rights. https://au.int/sites/default/files/treaties/36390-treaty-0011_-_african_charter_on_human_and_peoples_rights_e.pdf <accessed on 20 July, 2025>

³⁰⁹ Supra, note 10

³¹⁰ Ibid

³¹¹ Ibid

³¹² Ibid

led to severe and irreversible harm, including damage to the bladder and the formation of a vesicovaginal fistula, causing constant urine leakage, pain, and an eventual loss of dignity, reproductive health, and marital intimacy.³¹³

Justice Muteti found that the surgeon had acted outside the bounds of professional ethics and medical standards by removing the cervix without consent.³¹⁴ The court further held the Aga Khan Health Service Kenya institutionally liable for allowing a doctor with a history of regulatory issues to operate without adequate oversight, and for failing to provide sufficient diagnostic equipment.³¹⁵ This failure, the court observed, contributed materially to the mismanagement of the plaintiff's care. In its analysis, the court underscored that informed consent is not a mere procedural formality. Rather, it is a substantive legal and ethical requirement that serves as a cornerstone of the doctor-patient relationship. Consent, to be valid, must be free, prior, and informed, incorporating full disclosure of the nature of the procedure, foreseeable risks, potential alternatives, and likely consequences.³¹⁶ The absence of such disclosure, the court held, rendered the consent null and void, thereby establishing a strong foundation for a finding of medical negligence. The court's reasoning is consistent with established common law principles, as reflected in English jurisprudence.

In *Sidaway v Board of Governors of the Bethlem Royal Hospital*,³¹⁷ the House of Lords acknowledged the need to balance medical judgment with patient autonomy. Lord Scarman famously affirmed that "the patient's right to decide must be paramount" and that doctors must disclose significant risks even when medical opinion is

³¹³ *Ibid*

³¹⁴ *Ibid*

³¹⁵ *Ibid*

³¹⁶ *Ibid*

³¹⁷ *Supra*, note 144

divided.³¹⁸ This principle finds resonance in *Naila Qureshi*, where the failure to inform was treated as a breach of the duty of care in itself, regardless of the technical success or necessity of the procedure. Significantly, the court extended liability beyond the individual practitioner. It held that “medical institutions bear institutional responsibility, and cannot hide behind the acts of their employed or affiliated doctors. In this regard, the second and third defendants being the hospital and its management, were held jointly and severally liable for the breach of duty.”³¹⁹ The court grounded this on principles of vicarious liability, and stressed that hospitals have a duty to ensure the implementation of adequate protocols and supervision mechanisms to safeguard patient rights. The court’s award of damages was not limited to physical injuries. It took a broader, more humanized approach to justice, considering the emotional trauma, loss of dignity, and psychological distress suffered by the claimant. This reflects an emerging judicial trend that recognizes the multidimensional harm caused by medical malpractice and the imperative to restore not only bodily integrity but also personal dignity.³²⁰

In academic discourse, the obligation to obtain informed consent is treated as both a legal and ethical imperative. Scholars such as Jonathan Montgomery argue that, “informed consent is grounded in respect for autonomy and must be understood as a process of communication, not merely the signing of a form.”³²¹ Similarly, Brazier and Cave posit that, a failure to ensure genuine consent is not simply negligent, but a violation of basic patient rights.”³²² Sheila McLean further

³¹⁸ *Ibid*

³¹⁹ *Supra*, note 44

³²⁰ *Ibid*

³²¹ Jonathan Montgomery, *Health Care Law* (3rd edn, Oxford University Press 2003) 139–145.

³²² Margaret Brazier and Emma Cave, *Medicine, Patients and the Law* (6th edn, Manchester University Press 2016) 100–103.

contends that “autonomy is meaningless if consent is not informed, emphasizing the fiduciary nature of the doctor-patient relationship.”³²³ These scholarly commentaries reinforce the principles articulated by the court in Qureshi. Ultimately, this case highlights the centrality of informed consent in modern medical jurisprudence and the imperative for healthcare systems to embrace not only clinical competence but also legal accountability. Medical institutions must embed rights-based frameworks into their operational structures and ensure that ethical norms are internalized at every level of patient interaction.

The *Bolam* test, first articulated by McNair J in *Bolam v Friern Hospital Management Committee*, establishes that a medical professional is not negligent if their conduct is in accordance with a practice accepted as proper by a responsible body of medical opinion. As he stated: “A doctor is not guilty of negligence if he has acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular art.”³²⁴ This standard has become a cornerstone in determining medical negligence, effectively grounding liability in professional consensus. Within the field of healthcare, few principles carry greater moral and legal significance than the duty of care owed by medical practitioners to their patients. When this duty is breached, the consequences can be profoundly damaging, physically, emotionally, and financially. Medical negligence occurs when a healthcare provider fails to meet the standard of care, resulting in harm to the patient.³²⁵

The refinement of medical negligence standards in *Bolitho v City and Hackney Health Authority* marked a significant development in the law. While the earlier *Bolam* test provided that a medical professional is not negligent if their conduct

³²³ Sheila McLean, *Autonomy, Consent and the Law* (Routledge-Cavendish 2010) 45–60.

³²⁴ *Supra*, note 256

³²⁵ Michael A Jones, *Medical Negligence*

aligns with a responsible body of medical opinion,³²⁶ *Bolitho* introduced a crucial judicial safeguard: professional opinion, even when widely held, must be capable of withstanding logical scrutiny. This nuanced approach was articulated by Lord Browne-Wilkinson, who cautioned that courts must not abdicate their responsibility to assess whether the expert opinion is “reasonable or responsible.”³²⁷ In doing so, *Bolitho* addressed a critical gap in *Bolam*, namely, the risk of what commentators have termed “herd immunity,” where flawed medical practices could be perpetuated under the shield of professional consensus.³²⁸

The court in *Bolitho* made it clear that a body of opinion, however apparently authoritative, must be shown to be defensible through logic and evidence. A treatment plan or clinical decision that is internally inconsistent, outdated, or unsupported by modern standards of care may fail this test. As Lord Browne-Wilkinson put it, “the court has to be satisfied that the exponents of the body of opinion relied upon can demonstrate that such opinion has a logical basis.”³²⁹ This marked a shift from medical deference to judicial oversight, ensuring that expert opinions are not blindly accepted, but are assessed on their merit. Thus, negligence is not determined simply by an unfavorable outcome, but by a failure to apply medical knowledge with competence, consistency, and reason. In contrast, medical malpractice carries connotations beyond simple negligence. It often implies gross professional misconduct, recklessness, or willful disregard for patient welfare.³³⁰ While closely related, often carries broader implications. It generally refers to improper, unskilled, or negligent treatment of a patient by a healthcare provider. The term “malpractice” tends to include intentional

³²⁶ *Supra*, note 310

³²⁷ *Bolitho v City and Hackney Health Authority* [1998] AC 232 (HL) 241 (Lord Browne-Wilkinson).

³²⁸ José Miola, *On the Materiality of Risk: Paper Tigers and Panaceas*

³²⁹ *Supra*, note 263

³³⁰ Bryan A Garner (ed), *Black’s Law Dictionary* (11th edn, Thomson Reuters 2019) 1125.

wrongdoing, gross negligence, or breach of ethical duties, not merely substandard care. Black's Law Dictionary defines malpractice as:

“Improper or unethical conduct or unreasonable lack of skill by a holder of a professional or official position.”

In essence, all malpractice involves negligence, but not all negligence amounts to malpractice. Malpractice cases often hinge on whether the professional conduct was so egregiously below standard that it shocked the conscience of both the law and the profession. Kenya has not been spared from these issues. In case of *St Mary's Mission Hospital v Kenya Medical Practitioners and Dentists Board*,³³¹ the court called parties to initiate a mediation process to address the impasse between them. Academic literature has equally weighed in. Giesen argues that medical malpractice is “a mirror that reflects the failings of our healthcare system and the vulnerabilities of patients who trust in it.”³³² In Sub-Saharan Africa, scholars like Ncube note the dangers of weak accountability frameworks, where negligence too often goes unchallenged, particularly in rural and under-resourced health facilities.⁶

As Professor Giesen puts it, “medical malpractice is not just about failed healing. It is about a failed ethical covenant between the healer and the healed.”³³³ Kenya presents a telling case study. The nation's overburdened public health system, frequent doctors' strikes, and understaffed hospitals provide fertile ground for patient harm. In *Kenya Medical and Dental Practitioners Board v SMN*, the High Court of Kenya confirmed liability for a botched procedure that left a young girl

³³¹ *St Mary's Mission Hospital v Kenya Medical Practitioners & Dentists Board*; *Achieng (Interested Party) (Civil Appeal E164 of 2022) [2022] KEHC 12550 (KLR)*

³³² *Ibid*

³³³ Dieter Giesen, *International Medical Malpractice Law: A Comparative Study of Civil Responsibility Arising from Medical Care* (Martinus Nijhoff Publishers 1988).

permanently disabled.³³⁴ The court acknowledged the systemic failures but maintained that individual doctors must not hide behind institutional chaos. The delivery of healthcare, often viewed as a sacred duty, is inextricably tied to the right to health, a fundamental entitlement recognized under both domestic and international legal instruments.³³⁵ Yet, the mechanisms for holding medical practitioners and institutions accountable when that duty is breached are frequently hampered by judicial lethargy, rendering the constitutional promise of justice illusory. In this labyrinth of delayed litigation, alternative dispute resolution (ADR) emerges not merely as a procedural convenience but as a vital lifeline to victims of medical negligence, whose quest for redress cannot afford the luxury of judicial procrastination.

Medical accountability, as a legal and ethical framework, ensures that healthcare providers uphold a standard of care consonant with the dignity and welfare of patients.³³⁶ However, in many jurisdictions, including Kenya and the wider Horn of Africa, enforcement of this accountability through the courts is fraught with delays, sometimes spanning decades.³³⁷ The anguish endured in such cases is not simply medical; it is juridical, a suffering compounded by institutional inertia. Article 43(1)(a) of the Constitution of Kenya, which guarantees the right to the highest attainable standard of health, is not merely aspirational but imposes an enforceable obligation on the state. In *Patricia Asero Ochieng and Others v Attorney General and Another*, the High Court confirmed that socio-economic rights, including the right to health, are justiciable and must be respected, protected, and fulfilled.³³⁸ This position aligns with the jurisprudence in *Government of the Republic*

³³⁴ *Kenya Medical and Dental Practitioners Board v SMN* [2015] eKLR

³³⁵ Yamin, A.E. & Gloppen, S. (eds.), *Litigating Health Rights: Can Courts Bring More Justice to Health?*

³³⁶ McLean, S.A.M., *Autonomy, Consent and the Law*

³³⁷ Macfarlane, Julie, *The New Lawyer: How Settlement is Transforming the Practice of Law*.

³³⁸ *Patricia Asero Ochieng and Others v Attorney General and Another* [2012] eKLR

of *South Africa v Grootboom*, where the Constitutional Court of South Africa held that socio-economic rights impose both negative and positive duties, requiring states to take reasonable legislative and other measures to achieve their progressive realization.³³⁹

Despite this constitutional clarity, procedural and practical barriers continue to undermine effective enforcement. Litigation remains prohibitively expensive, time-consuming, and psychologically taxing, especially in cases of medical injury, where victims often suffer additional harm to their health, finances, and dignity.³⁴⁰ Scholars such as Yamin and Gloppen have highlighted the structural inequities that obstruct access to courts for vulnerable populations seeking to assert their health rights.³⁴¹ As such, without accessible and responsive mechanisms, the constitutional promise of health rights risks becoming illusory for many Kenyans. In this morass of legal inertia, ADR mechanisms, particularly arbitration and mediation offer a more flexible, confidential, and timely pathway to redress. Mediation, for instance, aligns with the therapeutic aims of the healthcare system, restoring relationships while upholding accountability.³⁴² Arbitration offers finality and expertise, especially when presided over by panels knowledgeable in both medical and legal standards.³⁴³ As observed by Professor Julie Macfarlane, "ADR, when properly designed, restores the humanity to dispute resolution systems, especially in sensitive areas like healthcare." Comparative jurisprudence offers compelling examples. In the UK case of *Bolam v Friern Hospital Management*

³³⁹ *Supra*, note 217

³⁴⁰ Charles Ochieng Odote, 'The Enforcement of Socio-Economic Rights in Kenya: Addressing the Constraints'

³⁴¹ Alicia Ely Yamin and Siri Gloppen (eds), *Litigating Health Rights: Can Courts Bring More Justice to Health?*

³⁴² Odunga, G.V., *The Role of Court-Annexed Mediation in Enhancing Access to Justice in Kenya*

³⁴³ Mohochi, S.N., *Alternative Dispute Resolution and the Right to Health in Kenya* (2019) *Kenya Law Review* 87.

Committee,³⁴⁴ the court developed a standard for medical negligence based on peer professional opinion, which has since informed alternative resolution frameworks that employ medical experts in ADR settings. In South Africa, the use of mediation in obstetric injury cases has significantly reduced litigation backlogs and improved outcomes for patients and hospitals alike.³⁴⁵

Yet the embrace of ADR is not without its cautionary notes. Commentators have argued that, “it must never be a cloak for shielding negligent practitioners from scrutiny or for silencing victims.” This cautionary principle finds compelling support in jurisprudence and scholarly thought. In the seminal decision of *Bolitho v City and Hackney Health Authority* (*supra*), where the House of Lords made it clear that “deference to medical opinion must not be absolute.” Lord Browne-Wilkinson held that “a body of professional opinion must have a logical basis and be subject to judicial interrogation, rejecting the notion that clinical standards alone are conclusive.”³⁴⁶ Michael Jones aptly echoes this, observing that medical opinion must not serve as “a protective barrier behind which outdated or indefensible practices may hide.”³⁴⁷ This imperative has also been affirmed in the Kenyan context. On the global plane, the United Nations Special Rapporteur on the Right to Health has similarly condemned the misuse of medical confidentiality to suppress accountability and silence victims, calling for transparency and justice in healthcare systems.³⁴⁸ Collectively, these voices form a jurisprudential chorus against impunity in medical practice. They urge that neither professional stature nor institutional cover should inhibit legitimate scrutiny, and that the rights of the

³⁴⁴ *Supra*, note 53

³⁴⁵ *Ibid*

³⁴⁶ *Supra*, note 313

³⁴⁷ Michael A Jones, *Medical Negligence* (5th edn, Sweet & Maxwell 2018) 312.

³⁴⁸ Paul Hunt, Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health UN Doc A/61/338 (2006) para 38.

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injured must be heard, no longer with bated breath, but with judicial clarity and dignity. As Professor Karin Mickelson cautions, "Without transparency and fairness, ADR may degenerate into alternative denial of rights."

Kenyan jurisprudence is gradually warming to ADR in the medical context. The *Alternative Justice Systems (AJS) Policy* recognizes the cultural and restorative significance of non-judicial forums, especially for vulnerable groups. Additionally, the Judiciary's efforts to institutionalize court-annexed mediation in civil matters, including medical negligence claims reflects a policy shift aimed at efficiency and humanization of justice delivery.

Towards a Patient-Centered Care and Healthcare Consumerism

Patient-centered care and healthcare consumerism are dominant models of the patient-provider relationship.³⁴⁹ Patient centered care requires that health care organizations and health care professionals actively understand what patients value.³⁵⁰ One of its reports (2007) titled "People-Centred Health Care: A policy framework," the World Health Organization stated the following;³⁵¹

"Health improvements over the last century have been impressive, but health systems have reached a crucial turning point. Despite increasing health expenditures and unprecedented advances in modern medicine over the last century, people today are not necessarily healthier in mind and body. Neither are they more content with the health care they receive. Access, patient safety and quality and responsiveness of care are important and pressing global issues. As health is influenced by a complex interplay of physical, social, economic,

³⁴⁹ Sung-Yeon Park et al., Are Patient-Centered Care, Healthcare Consumerism, and Trust in Physicians Compatible?: Positioning Analysis of the Patient-Provider Relationship

³⁵⁰ Susan Edgman-Levitan et al, Patient-centered care: Achieving higher quality by designing care through the patient's eyes

³⁵¹ Ibid

cultural and environmental factors, it must be seen in a broader context, with all stakeholders involved. We need to re-establish the core value of health care, which is health and well-being of all people as the central goal. This entails a more holistic and people-centred approach to health care, and a balanced consideration of the rights and needs as well as the responsibilities and capacities of all health constituents and stakeholders. Health systems, therefore, need to change.

The overall vision for people-centred health care is one in which individuals, families and communities are served by and are able to participate in trusted health systems that respond to their needs in humane and holistic ways. The health system is designed around stakeholder needs and enables individuals, families and communities to collaborate with health practitioners and health care organizations in the public, private and not-for-profit health and related sectors in driving improvements in the quality and responsiveness of health care. People-centred health care is rooted in universally held values and principles which are enshrined in international law, such as human rights and dignity, nondiscrimination, participation and empowerment, access and equity, and a partnership of equals.”

There is a growing movement toward establishing healthcare delivery systems that prioritize patient-centered approaches. Increasingly, this model has become intertwined with the notion of patients as consumers.³⁵² Initially, this language was adopted by patient advocacy groups seeking to counterbalance the dominance of medical professionals and corporate entities within the healthcare system.³⁵³ However, in contemporary health policy discourse, “consumer-driven” healthcare has largely come to reflect neoliberal ideologies that favor market-based solutions over government-led regulation and public financing

³⁵² Wendy K Mariner, *Patients as “Consumers”*: Courts, Contracts, and the New Medical Marketplace

³⁵³ Nancy Tomes, *Remaking the American Patient: How Madison Avenue and Modern Medicine Turned Patients into Consumers*

mechanisms.³⁵⁴ The world of medicine is changing at a fast pace, and one of the most prominent trends among patients today is that they are taking a more active and dynamic part in maintaining their health.³⁵⁵ In recent years, many patients around the world have begun to choose their medical service to maximize their benefit from the service reduce risks, maintain health, and minimize expenses on health services.³⁵⁶

The patient-centered care movement gained significant momentum in 1986 with the establishment of the Picker Foundation by philanthropist Harvey Picker. Motivated by the impersonal and dehumanizing treatment his wife received during her illness, Picker envisioned a medical system that would treat patients as individuals with dignity, rather than as "imbeciles or inventory."³⁵⁷ His efforts helped redefine care to prioritize the needs, preferences, and values of the patient, laying the foundation for what would become a global push toward more empathetic and rights-based health systems. In Kenya, the constitutional right to health was notably tested in the case of *P.A.O & 2 Others v Attorney General & Another*,³⁵⁸ where the petitioners, Kenyan citizens living with HIV/AIDS, challenged specific provisions of the Anti-Counterfeit Act, 2008, namely sections 2, 32, and 34.³⁵⁹ They contended that these provisions posed a threat to their access to affordable and essential medicines, particularly generic drugs, which are critical for their treatment.³⁶⁰ The petitioners argued that the legislation violated their

³⁵⁴ David Mechanic, Changing Medical Organization and the Erosion of Trust

³⁵⁵ ezMedSoft Pro, <https://www.ezmedsoft.ae/> <accessed on 22 July, 2025>

³⁵⁶ Ibid

³⁵⁷ Harvey Picker, quoted in Susan Frampton, Patrick Charmel and Laura Gilpin, *Putting Patients First: Designing and Practicing Patient-Centered Care*

³⁵⁸ *P.A.O and 2 Others v Attorney General and Another* [2012] eKLR

³⁵⁹ Ibid

³⁶⁰ Ibid

fundamental rights to life, dignity, and health as guaranteed under Articles 26(1), 28, and 43 of the Constitution of Kenya.³⁶¹

The case underscored the intersection between intellectual property regulation and the right to health, illustrating how state policies and legal instruments can either enable or impede the realization of constitutionally enshrined rights.³⁶² The court held, “that in so far as the Anti Counterfeit Act, 2008 severely limited or threatened to limit access to affordable and essential drugs and medicines including generic medicines for HIV and AIDS, it infringed on the petitioners’ right to life, human dignity and health guaranteed under Articles 26(1), 28 and 43(1) of the Constitution and that enforcement of the Anti-Counterfeit Act, 2008 in so far as it affected access to affordable and essential drugs and medication particularly generic drugs is a breach of the petitioners’ right to life, human dignity and health guaranteed under the Constitution.” In *Centre for Health, Human Rights and Development (CEHURD) v Attorney General*,³⁶³ the families of women who died during childbirth initiated legal proceedings against the state, alleging its failure to provide essential maternal healthcare services. Although dismissed on technical grounds initially, it sparked constitutional dialogue on health rights.³⁶⁴ Furthermore, in *A.M.A & Another v P.S Ministry of Health & 4 Others*,³⁶⁵ a 14-year-old girl died after being denied post-abortion care.³⁶⁶ The court held State agents responsible and reinforced the right to reproductive health.³⁶⁷

³⁶¹ *Ibid*

³⁶² *Ibid*

³⁶³ *The Centre for Health, Human Rights and Development and Others v Attorney General* (Constitutional Petition No. 16 of 2011)

³⁶⁴ *Ibid*

³⁶⁵ *A.M.A & Another v P.S Ministry of Health & 4 Others* [2020] eKLR

³⁶⁶ *Ibid*

³⁶⁷ *Ibid*

The concept of “medical consumerism” basically describes the view of the patient as a customer, that is, a consumer.³⁶⁸ Simply put, Healthcare consumerism refers to the empowerment of patients to make informed decisions regarding their health, to demand quality care, and to hold providers accountable for service delivery. This model positions healthcare as a marketable service and the patient as a consumer with rights, choices, and legal remedies. It champions patient autonomy, transparency, and participatory decision-making, shifting the power dynamics traditionally dominated by medical paternalism.

The Institute of Medicine (IOM), in their *Envisioning the National Health Care Quality Report*, defined *patient-centered care* as “health care that establishes a partnership among practitioners, patients, and their families (when appropriate) to ensure that decisions respect patients’ wants, needs, and preferences and that patients have the education and support they need to make decisions and participate in their own care.”³⁶⁹ The wind of such a change transformation in the global healthcare sector, finds itself within Kenyan jurisdiction and has paralleled global trends that position the patient not as a passive recipient of medical expertise but as an active consumer of health services. This shift, commonly described as healthcare consumerism, reflects a broader socio-legal evolution grounded in constitutional, statutory, and judicial frameworks. In Kenya, Article 46 of the Constitution³⁷⁰ explicitly anchors the rights of consumers, including those receiving health services, thereby affirming the centrality of consumer protection in healthcare delivery.³⁷¹ Healthcare consumerism emphasizes four core values: informed choice, service quality, accountability, and access to redress.

³⁶⁸ Ibid

³⁶⁹ Institute of Medicine. *Envisioning the National Health Care Quality Report*.

³⁷⁰ *Supra*, note 287

³⁷¹ Ibid

These values align squarely with the consumer rights articulated under Article 46 of the Constitution, bridging the realms of public health ethics and constitutional law.³⁷² The Article provides that:

"Consumers have the right;

(a) to goods and services of reasonable quality;³⁷³

(b) to the information necessary for them to gain full benefit from goods and services;³⁷⁴

(c) to the protection of their health, safety, and economic interests;³⁷⁵ and

(d) to compensation for loss or injury arising from defects in goods or services."³⁷⁶

This constitutional guarantee elevates consumer protection to the status of a fundamental right and applies universally to goods and services, including health services. It introduces a normative framework for evaluating the legality, fairness, and safety of healthcare delivery in Kenya. The correlation between healthcare consumerism and Article 46 is both normative and operational. From a normative perspective, it provides a legal basis for healthcare consumerism by constitutionalizing patient rights. Operationally, it mandates the State and private healthcare providers to uphold professional standards, provide adequate information, and ensure safe and effective services. This provision places patients within the broader framework of consumers of health services, and in doing so, grants them enforceable rights rooted in dignity, autonomy, and justice.

For instance, the right to information directly aligns with the principle of informed consent, a cornerstone of both ethical medical practice and legal accountability. It requires that patients be adequately informed about diagnosis, treatment

³⁷² Ibid

³⁷³ Ibid

³⁷⁴ Ibid

³⁷⁵ Ibid

³⁷⁶ Ibid

alternatives, risks, and expected outcomes, fostering trust and autonomy in healthcare decision-making. Moreover, the right to goods and services of reasonable quality has found judicial reinforcement in cases such as *David Gakuru v Registered Trustees of the Nairobi Hospital*³⁷⁷ where the High Court emphasized that health services must not only be accessible but must meet a standard of quality that respects the patient's inherent dignity and life interests.

The consumer right to safety and compensation, as further provided under the Consumer Protection Act, 2012, places an affirmative obligation on healthcare providers, both public and private to avoid negligence and uphold professional standards, failure to do so not only invites professional sanctions but also constitutional redress. In Australia, a patient-centred approach powerfully demonstrates that fully involving the individual patient as a person at all stages with unique needs, concerns and preferences will lead to more efficacious and satisfying outcomes.³⁷⁸ The patient-centred approach to health care treats each person respectfully as an individual human being and not as a condition to be treated. It involves not just the patient, but families, carers and other supporters.³⁷⁹ It is concerned about the patient's comfort and surroundings as well as their beliefs and values.³⁸⁰ A patient-centred approach makes care safer and of higher quality as it provides demonstrable personal, clinical and organisational benefits and also satisfies an ethical imperative,

³⁷⁷ *David Gakuru v Registered Trustees of the Nairobi Hospital* [2012] eKLR

³⁷⁸ Australian Commission on Safety and Quality in Health Care (2011), *Patient-centred care: Improving quality and safety through partnerships with patients and consumers*, ACSQHC, Sydney.

³⁷⁹ *Ibid*

³⁸⁰ *Ibid*

involving patients in their own care and in the planning and governance of the health system is the right thing to do.³⁸¹

From the foregoing, arbitration introduces speed and specialization, especially in complex medical negligence cases where litigation is too slow or inaccessible. In the increasingly complex landscape of medical negligence, arbitration offers a much-needed avenue for timely and specialized resolution of disputes. Litigation, often marred by procedural delays and overburdened judicial systems, tends to be inaccessible or unsuitable for intricate healthcare cases that demand both urgency and expert knowledge. As Menkel-Meadow observes, “adversarial models are frequently ill-equipped to address the relational and technical dimensions of healthcare disputes, making alternative processes not only preferable but essential.”³⁸² Alexander similarly argues that, “arbitration delivers procedural flexibility and subject-matter expertise, which are particularly vital where technical competence, such as in professional negligence, is central.”³⁸³ On their part, McIlwrath and Savage reinforces this by asserting that, “arbitration can bring efficiency and technical insight in disputes where conventional litigation is structurally inadequate.”³⁸⁴

This is especially pertinent in the Kenyan context, where the judiciary has formally recognized that ADR mechanisms, including arbitration, are pivotal in delivering swift, culturally responsive, and affordable justice.³⁸⁵ The World Health Organization and OECD have further underscored the role of such people-centred

³⁸¹ *Ibid*

³⁸² Carrie Menkel-Meadow, *Dispute Resolution: Beyond the Adversarial Model*

³⁸³ Nadja Alexander, *Mediation: Skills and Techniques*

³⁸⁴ Michael McIlwrath and John Savage, *International Arbitration and Mediation: A Practical Guide*

³⁸⁵ Kenya Judiciary, *Alternative Justice Systems Baseline Policy Framework (2020)* <https://www.judiciary.go.ke/download/alternative-justice-systems-ajs-policy-2020/> <accessed 23 July 2025>.

mechanisms in achieving equitable health outcomes and legal remedies.³⁸⁶ Thus, arbitration does not merely offer speed and specialization, it repositions justice as responsive, expert-led, and anchored in the real-time needs of medical consumers. In people-centred healthcare, justice must not only be done, but felt and arbitration helps by reducing litigation fatigue and ensuring technical comprehension through expert arbitrators in health law and medicine. Thus, the correlation between healthcare consumerism and Article 46³⁸⁷ lies in the constitutional transformation of the patient into a rights-bearing subject whose entitlements extend beyond the clinical to the legal. Importantly, this framework compels both the State and private actors to uphold transparency, accountability, and dignity³⁸⁸ in healthcare delivery. As such, the patient as a healthcare consumer is not merely a client but a constitutional right-holder, entitled to enforce those rights in courts and administrative tribunals whenever breached.

A Glimmer of Hope as Reflected on Arbitration in the Midst of Medical Negligence

The proverbial wisdom that “*in every market, there is a mad man*” is a poignant metaphor that finds unsettling resonance within the modern healthcare landscape. This adage, rooted in African oral traditions, reminds us that no profession, however noble or sacred, is immune to moral deviance. While the majority of medical practitioners remain deeply committed to the Hippocratic Oath,³⁸⁹ a growing body of evidence reveals that some wear the white coat not as a symbol of healing, but as a shield for impunity. This study does not in any way blindly

³⁸⁶ World Health Organization and OECD, *Delivering People-Centred Justice: A Framework for Action* (2021) <https://www.oecd.org/gov/delivering-people-centred-justice.pdf> <accessed 23 July 2025>.

³⁸⁷ *Supra*, note 359

³⁸⁸ *Ibid*

³⁸⁹ *Supra*, note 36

point a blanket condemnation to the profession(als). In solemn humility and deep reverence, we take a collective bow and extend heartfelt gratitude to the global community of medical professionals. These are individuals who, in answer to the hallowed call of duty, continue to devote themselves relentlessly to the service of humanity. Often positioned on the frontlines of healthcare systems that are strained, underfunded, or altogether collapsing, they rise each day to provide care under immense professional pressure, long hours, and, in many instances, in deplorable working environments. Their sacrifice is not merely occupational, it is existential and noble.

While occasional accusations of professional negligence or misconduct understandably provoke public concern, it is crucial not to allow such instances to overshadow the broader reality: the vast majority of medical professionals continue to act with deep integrity and commitment. Isolated failures, though tragic, are not representative of the ethos that guides the medical profession, a field grounded in compassion, duty, and an enduring respect for human life.³⁹⁰ Medical ethics frameworks such as the *Declaration of Geneva* and national medical codes exist to hold practitioners accountable and protect patients' rights.³⁹¹ Yet focusing solely on individual fault often obscures the more complex picture: adverse outcomes in healthcare frequently arise from structural and systemic constraints, overburdened hospitals, underfunded public health systems, and staff shortages that leave even the most dedicated clinicians working under immense pressure.³⁹² In many low- and middle-income countries, for instance, physicians are tasked

³⁹⁰ Daniel Sokol, *Doing Clinical Ethics: A Practical Guide*

³⁹¹ World Medical Association, *Declaration of Geneva* (WMA 2017) <https://www.wma.net/policies-post/wma-declaration-of-geneva/> <accessed 28 July 2025>.

³⁹² World Health Organization, *Delivering Quality Health Services: A Global Imperative for Universal Health Coverage* (WHO/OECD/World Bank Group 2018) <https://www.who.int/publications/i/item/9789241513906> <accessed 28 July 2025>.

with treating dozens of patients daily with minimal resources, navigating a fragile balance between ideal care and feasible care.³⁹³

Even amid such challenges, countless doctors, nurses, and allied health workers continue to show up, physically and emotionally, day after day. Their persistence, often in the face of emotional exhaustion and moral injury,³⁹⁴ reflects a level of professional dedication that deserves recognition and respect. To fairly assess the healthcare landscape, it is vital to hold both individual actors and institutional systems accountable, without erasing the human cost borne by those who serve within them.³⁹⁵ From award-winning innovations to transformative, life-saving discoveries, the field of medicine has been profoundly shaped by the exceptional contributions of numerous medical practitioners. These individuals not only advanced clinical knowledge but also redefined healthcare delivery through ingenuity, compassion, and tireless dedication to human well-being. One of the most transformative developments in recent history has been the advent of mRNA vaccine technology, pioneered by Katalin Karikó and Drew Weissman. Their groundbreaking research, initially marginalized within academic circles, laid the foundation for the rapid development of COVID-19 vaccines during the global pandemic. In recognition of their scientific resilience and public health impact, they were jointly awarded the 2023 Nobel Prize in Physiology or Medicine.³⁹⁶ Their work exemplifies how perseverance in research can lead to interventions that save millions of lives globally.

³⁹³ Michael Rawlins, *Dealing with Clinical Errors: Lessons from the UK*

³⁹⁴ Dean W and Talbot S.G., *Moral Injury and Burnout in Medicine*

³⁹⁵ Paul Farmer, *To Repair the World: Paul Farmer Speaks to the Next Generation*

³⁹⁶ The Nobel Prize, *The Nobel Prize in Physiology or Medicine 2023*. Available on; <https://www.nobelprize.org/prizes/medicine/2023/summary/> <accessed 28 July 2025>.

Equally remarkable is the contribution of Professor Mashudu Tshifularo of South Africa, who in 2019 became the first surgeon in the world to perform a 3D-printed middle ear transplant, successfully restoring hearing in a patient suffering from conductive hearing loss.³⁹⁷ Operating within a resource-constrained environment, his achievement demonstrates how African innovation can shape global surgical practice by combining cutting-edge technology with locally adapted clinical care.³⁹⁸ In the field of transplant surgery, Dr. Gazi Yasargil, often hailed as the “father of modern neurosurgery,” developed microsurgical techniques that revolutionized brain surgery and dramatically improved patient survival rates. His contributions earned him the distinction of being named one of the greatest neurosurgeons of the 20th century by peer-reviewed surgical associations.³⁹⁹ Another exemplar is Dr. Paul Farmer, co-founder of ‘Partners In Health’, who devoted his career to delivering high-quality medical care in some of the world’s poorest regions, particularly in Haiti and Rwanda. His model of “preferential care for the poor” not only challenged the prevailing assumptions about global health equity but also reshaped how healthcare systems are designed in under-resourced communities.⁴⁰⁰

In oncology, Dr. Dennis Slamon made a landmark discovery in identifying the HER2/neu gene in breast cancer, leading to the development of trastuzumab (Herceptin), a drug that dramatically improved survival rates for patients with

³⁹⁷ University of Pretoria, UP Academic Pioneers World’s First Middle Ear Transplant Using 3D-Printed Bones (2019) Available on: https://www.up.ac.za/news/post_2750323-up-academic-pioneers-worlds-first-middle-ear-transplant-using-3d-printed-bones <accessed 28 July 2025>.

³⁹⁸ Afrotech, Mashudu Tshifularo Makes History by Performing World’s First 3D-Printed Middle Ear Transplant (2019). Available on: <https://afrotech.com/mashudu-tshifularo-makes-history-by-performing-worlds-first-3d-printed-middle-ear-transplant> <accessed 28 July 2025>.

³⁹⁹ James T. Rutka, The Legacy of Gazi Yasargil: Innovation in Neurosurgical Microscopy

⁴⁰⁰ Paul Farmer, *Pathologies of Power: Health, Human Rights, and the New War on the Poor*

aggressive breast cancer subtypes.⁴⁰¹ This innovation, which combined targeted therapy with molecular diagnostics, ushered in a new era of personalized medicine.⁴⁰² Medicine stands as a unique discipline, bridging the precision of science with the empathy and nuance of human experience. At its best, it transcends the mechanistic application of clinical knowledge, embodying a moral commitment to preserve life, alleviate suffering, and uphold the intrinsic dignity of every individual. As Edmund Pellegrino notes, “Medicine is the most scientific of the humanities and the most humane of the sciences,” highlighting its dual identity as both an empirical pursuit and an ethical enterprise.⁴⁰³ We bow and give the medical fraternity their deservedly flowers. The following is an excerpt of real testimonial gratitude of a ‘miraculously saved patient’, one Lorac (pseudonym); A Salute to the Medics of Embu Level 5 Hospital:

On the twelfth dawn of July, in the year twenty twenty-five, When hope hung by a fragile thread, and breath grew faint, The halls of Embu Level Five bore silent witness, To a miracle wrought not by chance, but by unwavering hands.

To the guardians in white, The doctors, the nurses, the silent sentinels of life, Whose eyes did not waver, whose hearts did not tire, You stood between the fading light and death’s cold whisper. With steady minds and steady hands, You fought not with swords, but with skill, Not with noise, but with grace, And breathed life back into a soul slipping away. This was not duty alone, but devotion, A calling that sings not for applause, But for the quiet joy of a life saved,

Of one more heartbeat made possible by care. To the management, the stewards of order and response, And to every soul who played their part unseen, Your

⁴⁰¹ Dennis J. Slamon and others, Use of Chemotherapy Plus a Monoclonal Antibody Against HER2 for Metastatic Breast Cancer That Overexpresses HER2

⁴⁰² Ibid

⁴⁰³ Edmund D Pellegrino, *The Philosophy of Medicine Reborn: A Pellegrino Reader*

excellence was not just service, it was sanctuary. May this moment be etched not only in memory, But in the gratitude of those who live because you cared.

From groundbreaking surgical procedures to innovations in public health and biomedical research, the contributions of exceptional medical practitioners reveal this synthesis of art and science. These efforts have consistently yielded significant impact, not only within academic medicine, but also across broader public health systems.⁴⁰⁴ For instance, the development of equitable vaccine distribution models during global health crises like COVID-19 exemplifies how scientific ingenuity must be tempered with justice and compassion.⁴⁰⁵ The ethical dimension of medical practice is rooted in longstanding traditions such as the Hippocratic Oath, which continues to serve as a moral compass for practitioners, urging fidelity to principles of non-maleficence, beneficence, and respect for autonomy.⁴⁰⁶ Contemporary bioethics further reinforces these obligations, calling for accountability, cultural sensitivity, and social justice in both clinical and research contexts.⁴⁰⁷ Moreover, global health has increasingly recognized the importance of local leadership and innovation. African medical professionals, for example, have significantly contributed to this landscape. Kenyan innovators like Dr. John Mwangi of Daktari Online and Dr. Khama Rogo have demonstrated how indigenous knowledge, digital technologies, and context-sensitive approaches can transform healthcare delivery in underserved communities.⁴⁰⁸

⁴⁰⁴ Eric J Cassell, *The Nature of Suffering and the Goals of Medicine*

⁴⁰⁵ Ezekiel J Emanuel and others, An Ethical Framework for Global Vaccine Allocation (2020) 393 *The Lancet* 1023. Available on: [https://doi.org/10.1016/S0140-6736\(20\)30789-3](https://doi.org/10.1016/S0140-6736(20)30789-3), <accessed on 26 July, 2025>

⁴⁰⁶ Hoenig P J. and Glick A. M., *The Hippocratic Oath and Contemporary Medicine*

⁴⁰⁷ Tom L Beauchamp and James F Childress, *Principles of Biomedical Ethics*

⁴⁰⁸ Kenya Healthcare Federation, *Innovations in Kenyan Health: Empowering Solutions by Local Innovators* (KHF Report, 2022). Available on: <https://khf.co.ke>. <accessed on 1 August, 2025>

In Kenya's digital health landscape, John Mwangi, the visionary CEO of Daktari Media Africa, saw a critical gap in professional development for healthcare workers and crafted a solution grounded in accessibility and rigor. He launched Daktari Online, an accredited online continuing medical education (CME) platform geared toward doctors, clinical officers, pharmacists, and allied professionals across Africa.⁴⁰⁹ From 2021 onward, Daktari Online became the first platform to receive accreditation from the Kenya Medical Practitioners and Dentists Council (KMPDC), enabling healthcare workers to earn the mandatory CPD points required for re-licensure, without leaving their workplaces.⁴¹⁰ Mwangi's leadership propelled the platform to serve over 15,000 to 21,000 registered healthcare professionals, offering both live and on-demand modules.⁴¹¹ This reach has empowered clinicians in remote and under-resourced areas to stay current with the latest medical knowledge.⁴¹² By collaborating with key stakeholders, including the Ministry of Health, professional associations, KEMRI, and institutions like Kenyatta National Hospital, the platform ensures its content is peer-reviewed, relevant, and aligned with national standards.⁴¹³ The platform's virtual clinic functionality notably gained traction during the COVID-19 pandemic, when face-to-face consultations were limited.⁴¹⁴

Mwangi's vision is both pragmatic and humane: to bridge the knowledge and access divide, where even highly skilled professionals might lack formal CME

⁴⁰⁹ Geneva Health Forum, 'Daktari Online' - Training online for Health Sector Professionals in Africa. Available on: <https://innovations.genevahealthforum.com/index.php/innovation-space/560-daktari> <accessed 28 July 2025>.

⁴¹⁰ About Daktari Online, Daktari Media Africa. <https://www.daktarionline.africa/about-us.php> <accessed on 26 July, 2025>.

⁴¹¹ Ibid

⁴¹² Ibid

⁴¹³ Ibid

⁴¹⁴ Ibid

opportunities due to geography or time constraints.⁴¹⁵ By democratizing access to medical education, Daktari Online not only fosters better care delivery, but also nurtures peer-to-peer support and a vibrant learning community across Africa.⁴¹⁶ He responded to a different but equally pressing need: the lack of continuous medical education (CME) among healthcare providers, especially in underserved regions. He founded Daktari Online, a digital learning platform designed to equip clinicians with accredited CME resources across various specialties.⁴¹⁷ By offering content accessible via mobile devices, the platform allows nurses, doctors, and clinical officers to stay current with evidence-based practices without having to leave their workstations or travel long distances for training.⁴¹⁸ Mwangi's innovation is an important step toward building a competent, continuously educated health workforce, a pillar of sustainable healthcare development.

In sum, medicine's enduring value lies not only in its technical accomplishments but in its unwavering dedication to human well-being. It is through this ethical and human-centered lens that the discipline continues to evolve, guiding practitioners to combine evidence-based practice with compassion, humility, and social responsibility.⁴¹⁹ Notably, the World Health Organization has acknowledged that, "many healthcare providers operate in complex and high-risk environments where ethical dilemmas, resource constraints, and personal exhaustion often intersect, making their unwavering commitment all the more

⁴¹⁵ *Supra*, note 319

⁴¹⁶ *Supra*, note 320

⁴¹⁷ Amref Health Africa, Africa Young Innovators for Health Award: Meet the Winners (Amref.org, 2021). Available on: <https://newsroom.amref.org/news/2021/09/meet-africas-new-generation-of-health-innovators/> <accessed 28 July 2025>.

⁴¹⁸ *Ibid*

⁴¹⁹ World Health Organization, *Framework on Integrated People-Centred Health Services* (WHO 2016). Available on: https://apps.who.int/gb/ebwha/pdf_files/wha69/a69_39-en.pdf <accessed on 27 July, 2025>

laudable.”⁴²⁰ Indeed, jurisprudential commentary has cautioned against the weaponization of litigation against medics, urging a balanced approach that safeguards accountability without dampening professional morale.⁴²¹ In some documented cases, unconsented procedures have been carried out on patients, including forced sterilization and coerced caesarean sections, often without proper explanation or informed consent.⁴²²

Legislatively, there is scope to amend the Health Act, 2017 of Kenya to include enforceable standards of care, clearer definitions of obstetric violence, and stronger whistle-blower protections.⁴²³ Additionally, alternative dispute resolution (ADR), especially medical arbitration could offer survivors a faster, less adversarial path to redress if properly regulated, rights-based, and gender-sensitive. However, such processes must never become avenues for secrecy or shielding practitioners from full accountability.⁴²⁴

The media reports have made some findings that, “patients report being denied anaesthesia or pain relievers during labour and surgery. Women are left unattended for long periods while in labour. They are also denied anaesthesia or pain relief during labour and even during caesarean section due to resource constraints in some cases, but this may also stem from attitudes that pain is a normal or deserved part of childbirth,”⁴²⁵ the report notes. “This neglect often

⁴²⁰ World Health Organization, Health workforce: Overview (WHO, 2023) <https://www.who.int/health-topics/health-workforce> <accessed 23 July 2025>.

⁴²¹ Mary Donnelly, Healthcare, Professional Negligence and Ethical Dilemmas: Towards a Balanced Jurisprudence

⁴²² Gordon Osen, Women endure forced C-section, sterilisation during childbirth, says report. <https://www.the-star.co.ke/news/2025-07-24-women-endure-forced-c-section-sterilisation-during-childbirth-says-report> <accessed on 26 July, 2025>

⁴²³ Health Act, 2017

⁴²⁴ J Gathii, Alternative Dispute Resolution and Access to Justice in Health Care in Kenya

⁴²⁵ Ibid

leads to physical and emotional distress and can result in severe complications for both mother and baby, including obstetric fistula and even death.”⁴²⁶ The courts have occasionally risen to the challenge of exposing such malpractice. In *Naila Qureshi and Another v Rafique Parker and 2 Others*,⁴²⁷ the High Court of Kenya confronted the egregious acts of a medical team whose negligence resulted in severe and irreversible damage to the patient.⁴²⁸ The court, in a rare but powerful rebuke, underscored the critical need for accountability within the health sector.⁴²⁹ It held that medical expertise must never be used as a cloak to shield negligent conduct or to silence patients who suffer under the care of unscrupulous practitioners.⁴³⁰

As previously explored, Kenyan healthcare has witnessed disturbing cases of medical negligence and abuse. These are few “mad men” in the market, professionals who, either through incompetence or cruelty, leave patients with physical, emotional, and psychological scars. They persist, in part, because of institutional opacity, regulatory leniency, and a cultural silence that shields them from scrutiny. But if that is all we see, then we fall into the trap of Nathanael’s doubt.⁴³¹ To ask “*Can anything good come out of Nazareth?*”⁴³² is to write off an entire community based on its brokenness. It is to forget that, sometimes, the most radical good emerges from the most despised places. The question, therefore, was not whether Nazareth was bad, but whether its bad reputation could obscure the possibility of good.⁴³³ Likewise, in Kenya’s health system, there are practitioners; often uncelebrated, who uphold the dignity of their patients against all odds.

⁴²⁶ *Ibid*

⁴²⁷ *Naila Qureshi and Another v Rafique Parker and 2 Others* [2025] eKLR

⁴²⁸ *Ibid*

⁴²⁹ *Ibid*

⁴³⁰ *Ibid*

⁴³¹ Holy Bible, John 1:46 (King James Version).

⁴³² *Ibid*

⁴³³ *Ibid*

These are nurses who whisper courage to women during childbirth; surgeons who insist on second opinions rather than rush to scalpel; midwives in underfunded rural clinics who perform miracles with bare tools and boundless love. These individuals practice medicine not as an industry, but as a calling. In *M.O and Another v Kenya Hospital Association t/a Nairobi Hospital and 2 Others*,⁴³⁴ the High Court, while dealing with negligence, recognized that not every adverse outcome in medical treatment is a result of recklessness.⁴³⁵ It drew a line between error in judgment and culpable negligence, reaffirming that there are healthcare workers who act with diligence but still face complex medical outcomes. Not every doctor is a villain; not every hospital is a death trap.⁴³⁶

Holding both proverbs in tension; “*in every market there is a mad man*” and “*can anything good come out of Nazareth?*”⁴³⁷ offers a more balanced, ethical, and reform-oriented lens. It calls us to reckon with the reality of institutional betrayal while resisting total cynicism. It calls for accountability and reform, yes but it also calls for recognition and support for those professionals who continue to serve with integrity. Thus, the conversation around rogue medical practice should not collapse into wholesale condemnation. Reform must be as much about rooting out the “mad men” as it is about elevating and protecting the good practitioners who quietly do their work amid chaos. Healthcare reform should include recognition systems for ethical service, legal safeguards for whistleblowers, and psychosocial support for medics operating in high-stress environments. As the Bible reminds us, Philip answered Nathanael’s question not with argument but with an invitation: “*Come and see.*”⁴³⁸ That invitation, to witness goodness even in broken

⁴³⁴ *M.O and Another v Kenya Hospital Association t/a Nairobi Hospital and 2 Others* [2015] eKLR

⁴³⁵ *Ibid*

⁴³⁶ *Ibid*

⁴³⁷ *Supra*, note 252

⁴³⁸ *Ibid*

places is one that society must extend to its healthcare sector. There is still good in Nazareth.⁴³⁹ There are still healers in the market, our global society.

Both proverbs, then, although not mutually exclusive, they are complementary. One teaches us to be vigilant against harm; the other invites us to remain open to grace. It is a dangerous simplicity to paint every market as mad, or every Nazareth as barren.⁴⁴⁰ In the pursuit of justice for victims of rogue practitioners, we must not lose sight of the quiet integrity of those who remain true to their oath. In every market, yes, there may be a mad man, but also, in every Nazareth, something good can still be found.⁴⁴¹ These judicial interventions, however, are often too few and too late. Many women suffer in silence, unable to access justice due to financial barriers, fear of retribution, or social stigma. Their stories are buried in hospital files, never to be heard in courtrooms or policy corridors. In such an environment, the mad man not only survives but thrives. The intersection of medical consumerism and patient rights must therefore be revisited with urgency. If we accept that there may be a mad man in every market, then the responsibility of the system is to identify, restrain, and remove such individuals before they can harm others. Regulatory bodies must act swiftly and decisively to investigate complaints, enforce disciplinary measures, and uphold professional standards. While the Hippocratic Oath enshrines the duty to "do no harm", some medical professionals have violated this core tenet with alarming impunity.⁴⁴²

"There is hope even when the tree is cut. It shall sprout again."⁴⁴³ This ancient wisdom, found in the Book of Job, echoes with timeless truth and relevance in modern societies grappling with systemic failures, institutional decay, and broken

⁴³⁹ Ibid

⁴⁴⁰ Ibid

⁴⁴¹ Ibid

⁴⁴² Supra, note 375

⁴⁴³ Job 14:7, The Holy Bible: King James Version (Thomas Nelson 1987).

trust.⁴⁴⁴ Like a tree hewn by storm or axe, many of our legal and healthcare systems in Kenya appear wounded, scarred by litigation backlogs, professional negligence, and a widening chasm between law and justice. Yet, this metaphor inspires a sobering but necessary reminder: even in decay, there is potential for rebirth. Even in broken systems, hope lingers, for renewal, for reform, and for justice to sprout again. In the wake of growing disillusionment with litigation as a tool of justice, particularly in complex, emotionally charged matters like medical negligence, alternative dispute resolution (ADR),⁴⁴⁵ and more precisely arbitration,⁴⁴⁶ emerges as a sprouting branch. It offers procedural flexibility, therapeutic potential, and institutional speed.

In a healthcare landscape burdened by under-resourced hospitals, overworked professionals, and frustrated patients, arbitration represents more than just a procedural alternative, it symbolizes the promise of healing in law.⁴⁴⁷ Kenya's evolving legal terrain has increasingly acknowledged this need for transformation. The Arbitration Act⁴⁴⁸ together with its incumbent proposed inspirational and transformative amendments (2025),⁴⁴⁹ alongside progressive judicial interpretation, signals a shift from combative litigation to conciliatory resolution.⁴⁵⁰ Arbitration, when properly structured, not only restores dignity to victims of professional harm but also protects practitioners from unjustified vilification, offering a balanced framework for accountability. Just as a felled tree can send forth new shoots from its stump, justice though delayed, denied, or

⁴⁴⁴ *Ibid*

⁴⁴⁵ *Supra*, note 300

⁴⁴⁶ *Ibid*

⁴⁴⁷ Yash Ghai and Jill Cottrell Ghai, *The Constitution of Kenya: An Instrument for Change*

⁴⁴⁸ *Supra*, note 245

⁴⁴⁹ *Ibid*, (Proposed Amendments, 2025)

⁴⁵⁰ *Kenya Bureau of Standards v Geo Chem Middle East [2020] eKLR.*

damaged can be revived through mechanisms grounded in fairness, expertise, and restoration.

The administration of justice, particularly within the sensitive domain of medical negligence, must not merely function, it must heal. Kenya's legal system, though burdened by delays, inefficiencies, and adversarial rigidity, is not beyond redemption. Arbitration, as a flexible and restorative mechanism, offers a crucial avenue through which both patients and practitioners may find balance, dignity, and closure. Through arbitration, the law can respond not just to harm, but to hope. It can shift from punitive posture to participatory process. It can address the pain of medical harm without compounding it with prolonged litigation. It can, in the words of Job, sprout again, even when cut down by structural inadequacies or public disillusionment. Alternative dispute resolution, particularly arbitration, offers a credible and dignified path toward resolution, restoration, and institutional healing. It redefines the contours of justice by emphasizing speed, expertise, confidentiality, and above all, human dignity.⁴⁵¹ As this discourse has demonstrated, arbitration is not a retreat from justice but a reimagining of it. It offers a vital lifeline, particularly for patients and practitioners caught in the paralysis of litigation. It resuscitates hope in systems otherwise written off as unresponsive or adversarial. By enabling constructive dialogue and fair outcomes outside the courtroom, arbitration permits the legal tree once cut to sprout again.⁴⁵²

In sum, In Kenya, the pursuit of timely and just healthcare outcomes is not merely a policy concern, it is a pressing human rights issue. As medical disputes increasingly make their way into Kenya's overburdened court system, the deficiencies in the traditional litigation process are exposed. Patients and healthcare providers alike are subjected to prolonged, expensive, and adversarial

⁴⁵¹ *Supra*, note 324

⁴⁵² L Mute, *Enhancing Access to Justice Through Alternative Dispute Resolution: The Promise and the Practice in Kenya*

proceedings that delay justice and, in some cases, cost lives. Against this backdrop, medical arbitration emerges as not just an alternative dispute resolution (ADR) mechanism, but a transformative avenue for advancing the right to health and access to justice.⁴⁵³ Article 43(1)(a) of the Constitution of Kenya guarantees every individual the right “to the highest attainable standard of health” including the right to healthcare services.⁴⁵⁴ This right is enforceable, justiciable, and binding on both State and non-state actors. Yet, the actualization of this right is routinely frustrated by structural inefficiencies, including judicial delays and prohibitive legal costs. Medical negligence claims, often complex and emotionally charged, can take years to be heard and resolved in court.⁴⁵⁵ This prolongs trauma for patients and families, while subjecting healthcare providers to reputational harm and protracted professional uncertainty.⁴⁵⁶

Medical arbitration offers a tailored and humane alternative. With panels composed of both legal and medical professionals, this mechanism ensures disputes are adjudicated by individuals with the technical expertise to understand complex medical evidence. It preserves confidentiality, vital in sensitive health matters and supports the mental well-being of both parties by offering a less adversarial process.⁴⁵⁷ Furthermore, it complements the constitutional right to access justice under Article 48, which requires the State to ensure that “every person has access to justice” without procedural or financial hindrance.⁴⁵⁸ From a human rights standpoint, timely and effective remedies are a critical component

⁴⁵³ Githu Muigai, *Alternative Dispute Resolution and Access to Justice in Kenya*

⁴⁵⁴ *Supra*, note 375

⁴⁵⁵ Katiba Institute, *Barriers to Realizing the Right to Health in Kenya: A Human Rights Audit* (Katiba Institute 2020).

⁴⁵⁶ Patricia Kameri-Mbote, *Medical Law, Negligence and Professional Responsibility in Kenya*

⁴⁵⁷ Charles Manga Fombad, *Enhancing the Rule of Law in Africa through Alternative Dispute Resolution*

⁴⁵⁸ *Supra*, note 444, art 48.

of the right to health. The United Nations Committee on Economic, Social and Cultural Rights, in General Comment No. 14, underlines the obligation of states to ensure access to “judicial and other appropriate remedies for violations of the right to health.”⁴⁵⁹ Medical arbitration in Kenya, if well-structured and made accessible, can offer such a remedy by addressing the justice gap that exists in the healthcare system. It also provides a means through which victims of medical malpractice or systemic failures can achieve closure without enduring the trauma of litigation.⁴⁶⁰ Nevertheless, Kenya’s embrace of medical arbitration remains limited. There is no dedicated legal framework governing arbitration in the medical context beyond the general provisions of the Arbitration Act.⁴⁶¹ While Section 3(1) of the Act provides that parties may refer any matter capable of being settled by arbitration,⁴⁶² there remains ambiguity as to whether medical negligence, being a tort involving public interest, can be effectively and justly determined outside the courts.⁴⁶³ Moreover, awareness is low among both healthcare consumers and professionals, and institutions capable of handling such disputes remain underdeveloped.⁴⁶⁴ This reflects a broader failure to mainstream ADR within the architecture of public health justice and governance. The Judiciary’s efforts to promote ADR under the *Alternative Justice Systems (AJS) Policy 2020* are promising, but medical arbitration remains at the periphery.⁴⁶⁵ Without proper institutionalization, arbitration risks becoming elitist, underutilized, or even

⁴⁵⁹ UN Committee on Economic, Social and Cultural Rights, *General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12)* (11 August 2000) UN Doc E/C.12/2000/4, para 59.

⁴⁶⁰ Mulheron R, *Medical Negligence: Non-Patient Claims*

⁴⁶¹ *Supra*, note 439

⁴⁶² *Ibid*

⁴⁶³ Duncan Okello, *Arbitrating Medical Negligence in Kenya: Scope and Challenges*

⁴⁶⁴ Kenya Law Reform Commission, *ADR Mechanisms and Health Justice: A Policy Paper*

⁴⁶⁵ Judiciary of Kenya, *Alternative Justice Systems (AJS) Policy 2020*. Available on: <https://www.judiciary.go.ke> <accessed 5 August 2025>.

abused.⁴⁶⁶ Despite these hurdles, the logic for a responsive and rights-sensitive arbitration framework is compelling. It requires institutional reform, capacity-building for arbitrators in medical matters, and public education to foster confidence in arbitration as a viable means of resolving medical disputes.⁴⁶⁷

At the same time, oversight mechanisms must be embedded to ensure neutrality, procedural fairness, and enforceability of arbitral awards in line with the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (New York Convention).⁴⁶⁸ Thus, medical arbitration should no longer be viewed as an auxiliary legal process. It must be reframed as an essential pillar of health governance, one that prioritizes timeliness, technical expertise, human dignity, and access to justice.

Conclusion

In Kenya, patients who suffer from medical negligence are often compelled to endure lengthy, costly, and inaccessible court processes, leaving many without meaningful redress.⁴⁶⁹ Within this context, medical arbitration, if structured around responsiveness and respect for rights, emerges as a more dignified and pragmatic pathway to justice. Arbitration offers speed, flexibility, and a less adversarial environment, which can restore a sense of humanity and dignity to victims of medical harm.⁴⁷⁰ In a healthcare system where inequalities persist both in the delivery of services and in access to legal remedies, arbitration goes beyond mere dispute settlement; it reinforces constitutional guarantees of the right to

⁴⁶⁶ Carolyne Kemei, *The Danger of Informalism in Health Dispute Arbitration in Kenya*

⁴⁶⁷ Michael Juma, *The Role of Med-Arb in Enhancing Health Justice in Kenya*

⁴⁶⁸ *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (adopted 10 June 1958, entered into force 7 June 1959) 330 UNTS 3 (New York Convention).

⁴⁶⁹ *Charles Ndegwa Ngari v The Nairobi Hospital & 2 others* [2015] eKLR (highlighting the challenges of prolonged litigation in medical negligence cases).

⁴⁷⁰ Kariuki Muigua, *Settling Disputes Through Arbitration in Kenya*

health while promoting access to justice in ways that traditional litigation has struggled to achieve.⁴⁷¹ International best practices also affirm this potential: the World Health Organization (WHO) has emphasized the importance of alternative dispute resolution in strengthening patient-centered accountability mechanisms within healthcare systems.⁴⁷² However, this promise can only be realized through deliberate efforts to develop legislative clarity, institutional infrastructure, and public trust. As Kenya continues to entrench the right to health as a fundamental entitlement, bridging the gap between medical injury and redress is not merely a procedural necessity, it is a constitutional and moral imperative.⁴⁷³

Global guidance increasingly encourages patient-centred accountability and early, non-adversarial resolution of harm. WHO frames ADR (including mediation) as a tool to improve disclosure, learning, and timely redress, complementing clinical governance and patient-safety systems rather than replacing courts.⁴⁷⁴ The UK has mainstreamed mediation in clinical negligence through NHS Resolution's programme, which reports high settlement and satisfaction rates, reduced legal costs, and faster closure for patients and providers.⁴⁷⁵ Civil Procedure Rules and judicial practice increasingly nudge parties toward ADR, with courts willing to penalize unreasonable refusals to mediate.⁴⁷⁶ Alongside mediation, the statutory

⁴⁷¹ Constitution of Kenya 2010, arts 43(1)(a) (right to health) and 159(2)(c) (promotion of ADR).

⁴⁷² World Health Organization, *Accountability Mechanisms for Patient Safety: Alternative Dispute Resolution and Mediation in Healthcare* (WHO 2019). Available at: <https://apps.who.int/iris/handle/10665/311531> <accessed 21 August 2025>.

⁴⁷³ Centre for Reproductive Rights, *Breaking the Silence: Access to Justice for Maternal Deaths in Kenya*

⁴⁷⁴ *Supra*, note 472

⁴⁷⁵ NHS Resolution, *Mediation in Healthcare Claims: Two Years On* (NHSR 2018) and subsequent annual updates.

⁴⁷⁶ Civil Procedure Rules (UK), r 1.1, r 44.2; see e.g. *Lomax v Lomax* [2019] EWCA Civ 1467 (judicial encouragement of non-consensual early neutral evaluation).

Duty of Candour and independent safety investigations reinforce a culture of early disclosure, apology, and learning that makes ADR more meaningful.⁴⁷⁷

Faced with escalating medico-legal claims, South Africa has experimented with court-annexed and voluntary mediation, and with innovative remedies (structured settlements, periodic payments) to reduce adversarialism and fiscal strain.⁴⁷⁸ Scholarship documents growing judicial openness to settlement-oriented case management in health-care delict, while highlighting capacity gaps and the need for uniform protocols across provinces and the public sector.⁴⁷⁹ The policy direction is toward integrating mediation into pre-action processes and hospital complaints pathways, with guidance from the National Department of Health and provincial practice directives.⁴⁸⁰

The true promise of medical arbitration is its ability to return humanity to justice.⁴⁸¹ In Kenya, where the difference between survival and loss often depends on access to a hospital bed or a courtroom door, arbitration offers a pathway where fairness is not delayed and dignity is not silenced.⁴⁸² By treating health and justice as inseparable, arbitration can transform both systems, turning them into places of healing rather than exclusion.⁴⁸³ If we are to honour our constitutional

⁴⁷⁷ Care Quality Commission (CQC), *Regulation 20: Duty of Candour* (Guidance, updated 2022).

⁴⁷⁸ MEC for Health and Social Development, *Gauteng v DZ* 2017 (2) SA 193 (CC) (structured/innovative remedies in medical-negligence damages).

⁴⁷⁹ TW Bennett, *Mediation in Medical Negligence Cases in South Africa*

⁴⁸⁰ National Department of Health (South Africa), *Guidelines to Manage Medico-Legal Claims in the Public Health Sector* (2018).

⁴⁸¹ World Health Organization, *Resolution on Strengthening Health Systems through Access to Justice* WHA 74.12 (2021).

⁴⁸² Kenya Medical Practitioners and Dentists Council, *Annual Report on Complaints and Disciplinary Proceedings* (2022)

⁴⁸³ *Ibid*

commitment to health and human dignity, then medical arbitration must be embraced not as an afterthought, but as a pillar of our future healthcare and legal frameworks.⁴⁸⁴ This commitment is already rooted in Kenya’s constitutional vision, which guarantees the right to the highest attainable standard of health.⁴⁸⁵ It is echoed in international practice, where the World Health Organization has called on states to strengthen health systems through improved access to justice.⁴⁸⁶ Similarly, South Africa’s Law Reform Commission has recommended alternative dispute resolution as a key tool in addressing medical negligence, recognising that courts alone cannot deliver timely justice.⁴⁸⁷

⁴⁸⁴ Constitution of Kenya, 2010, art 43(1)(a).

⁴⁸⁵ *Ibid*

⁴⁸⁶ *Supra*, note 481

⁴⁸⁷ South African Law Reform Commission, *Alternative Dispute Resolution in Medical Negligence Matters* Discussion Paper 154 (2021).

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Resolving Intellectual Property Disputes in The Digital Era: The Role of Online Arbitration in Kenya

*By: Frida Njeri Njeru**

Abstract

This article describes the possibilities of online arbitration as a problem-solving mechanism in settling disputes on digital intellectual property (IP) in Kenya, especially with the emergence of e-commerce, digital content creation, and technological advancements. The conventional approach to resolving disputes encounters shortcomings with regards to cross-border IP infringement in the digital era. The benefits of online arbitration are speed, flexibility, accessibility and affordability. The article contrasts online arbitration, litigation and traditional arbitration, it is concerned with jurisdiction, technology and enforcing issues. It outlines the advantages of structured online dispute resolution systems, exemplifying looking at the Uniform Domain Name Dispute Resolution policy (UDRP) of the World Intellectual Property Organization (WIPO) which can be modified to fit the Kenyan situation. Examining the current Arbitration Act in Kenya, the pertinent IP rules, as well as the current efforts surrounding digitalizing certain judicial aspects, the research discovers such gaps in the law, the lack of strengths of the institutions charged with managing adoptions, and the overall lack of awareness of all stakeholders involved. It advocates strong digital infrastructure, skilled IP-savvy arbitrators, and the legal reforms in line with international best practices. It is recommended that specific online arbitration laws be enacted and that special online arbitration platforms should be developed in which international cooperation is encouraged and awareness about it is created among

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arbitrators and IP rights holders. These steps would enable Kenya to become a regional center of effective and legally binding digital IP settlement across regions.

Introduction

The roots of innovation and creativity are Intellectual property (IP) rights which are the matrimony of digital era and innovative and creative works of authors, creators of inventions, and digital product makers.¹ Nonetheless, since the internet is not limited to national boundaries, the violations of IP rights are also not limited. Whitewashing Intellectual property rights through copyright piracy, name stealing, bootlegging software, and trademark dilution, has become an order of the day especially online.² The conventional courts can be characterized by ineffective speed, adaptability, and technical competence to manage these new realities.³ As a result, constantly growing popularity of more and technically compatible ways of settling IP disputes is observed simpler approach online arbitration takes the top position among the others. Online arbitration is the procedure of disputing a case in the internet-based platforms without an actual hearing. It preserves the key principles of arbitration, which include party control, confidentiality and binding decisions, by incorporating online technologies into the virtual process.⁴

As technologies change with regard to the digital world, so do the capacities in terms of categorizing the dispute, dealing with it using automated services, and settling by way of fast 2-track systems. These inventions give sound reasons to

¹ Ruth L Okediji, *The Regulation of Creativity under the WTO Agreement on Intellectual Property Rights*, (1998) 48 J Copyright Soc'y USA 309.

² Graeme B Dinwoodie and Rochelle C Dreyfuss, *A Neofederalist Vision of TRIPS: The Resilience of the International Intellectual Property Regime* (OUP 2012).

³ Jacqueline Lipton, *Internet Domain Names, Trademarks and Free Speech* (Edward Elgar 2010).

⁴ Pablo Cortés, *Online Dispute Resolution for Consumers in the European Union* (Routledge 2010).

believe in online arbitration, especially where the subject matter is online IP rights since time is of essence because delays might be of no remedy to the author or any other holder of the rights.⁵ Kenya has a relatively smaller presence in intellectual property enforcement in the country, which is highly disintegrated and financially limited regarding its increased involvement in the global digital economy.⁶ The country has a well-developed legal system, and specifically in respect of IP under aspects like; KIPi and KECOBO, but the use of technology in dispute resolution is still at its early stages.⁷ In addition, most of the KE IP holders, particularly, small enterprises and individual innovators, do not usually have resources to litigate cross-border or finance prolonged procedures in conventional courts.⁸ Such issues have necessitated the idea of exploring online arbitration as one of the feasible solutions.

Other institutions like the World Intellectual Property Organization (WIPO), The London Court of International Arbitration (LCIA) have also nationalized the expedited and online version of IP dispute arbitration procedures worldwide.⁹ These institutions justify how online arbitration can be and remains to be a cost-effective and effective way of enforcing intellectual property rights with the help of classification algorithms, automated case intake, and digital filing systems. It is in the interest of Kenya to adapt similar models to the realities of laws, technology and economy. Such use would not only increase access to justice, but also instill

⁵ Benjamin G Davis, *Online Dispute Resolution: Bringing Internet Users Inside the Justice System*, (2003) 28 *Ohio Northern University Law Review* 603.

⁶ M Wanjiku (2020), *Access to Justice for Small-Scale Creators in Kenya's IP Landscape*.

⁷ Kenya Copyright Board, *Mediation in copyright disputes*, (Kenya Copyright Board, 2025) <https://copyright.go.ke/our-services/mediation-copyright-disputes> <accessed 22 July 2025>

⁸ Charles Rembar, *The Law of the Land: The Evolution of Our Legal System* (Simon & Schuster 1980).

⁹ World Intellectual Property Organization (WIPO 2022) <https://www.wipo.int/about-ip/en/> <accessed 22 July 2025>.

investor confidence and innovations in Kenya digital ecosystem.¹⁰ This paper seeks to examine the potential and setback of using online arbitration to resolve IP disputes in Kenya. It overviews applicable legal systems, assesses international legal practice, and addresses real world concerns like enforcement across borders, institutional capability and dispute taxonomy. Also, the article gives practical suggestions on changes to the law, the formation of institutions, and adoption of technology. Finally, it states that accepting the idea of online arbitration would lead Kenya to managing contemporary IP disputes in a more efficient way and strengthening its position in an emerging digital economy.

Digital Age Controversy: Enhancing Intellectual Property and Dispute Resolution with Online Arbitration in Kenya

Intellectual Property (IP) is the term used to show the creation of mind that is given protection by law to make the respective creators of such material enjoy exclusive rights over their use and benefit.¹¹ These are inventions, works of literature and arts, designs, and trade-marks or names.¹² The principal varieties of IP are copyright which covers works such as books, music, films and software, trademarks which covers brand names, logo and slogans, patents which covers new inventions or processes, industrial design which covers the aesthetic quality of goods, and trade secrets which covers any business secrets like formulas or ways of production.¹³ Other scholars have also defined intellectual property in different terms.

According to Professor Ben Sihanya, "Intellectual Property (IP) is the property of the mind it encompasses creations such as inventions, artistic works, symbols,

¹⁰ Gadi Oron, *Digital Transformation and the Global IP System: Opportunities and Risks* (2021) WIPO Magazine

¹¹ *Supra*, note 9

¹² *Ibid*

¹³ *Ibid*

names, designs used in commerce, and confidential business information."¹⁴ Furthermore, Cornish defines intellectual property to be "the general name for property rights in creations of the mind: in inventions, in literary and artistic works, and in symbols, names, images, and designs used in commerce."¹⁵ In Kenya, several laws protect Intellectual Property. For instance; the Copyright Act,¹⁶ that is managed by Kenya Copyright Board (KECOBO), the Industrial Property Act,¹⁷ that is handled by Kenya Industrial Property Institute (KIPI), and the Trademarks Act.¹⁸

The laws are compatible with world agreements like the World Intellectual Property Organization treaties (WIPO), and the Trade-Related Aspects of Intellectual Property Rights Agreement (TRIPS), securing the rights of creators and innovators at both the local and international levels. IP conflict has been defined by Kenya Copyright Board to mean disputes over original and infringing content, encompassing issues of ownership, consent, and enforcement.¹⁹ According to Bainbridge, argues that "these are disputes over intellectual property rights frequently concern ownership, infringement, and validity of the rights."²⁰ Similarly, it refers to the situation of dispute or infringement of intellectual property rights in terms of their use, ownership or enforcement.

It is also worth noting such conflicts are becoming more widespread in Kenya, largely because the digital and creative industries, which include music, film,

¹⁴ Ben M. Sihanya, Reflections on Open Scholarship Modalities and the Copyright Environment in Kenya, in Jonathan de Beer et al (eds), *Innovation & Intellectual Property: Collaborative Dynamics in Africa*.

¹⁵ W.R. Cornish and D. Llewelyn, *Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights*.

¹⁶ Copyright Act 2001

¹⁷ Industrial Property Act 2001

¹⁸ Trademarks Act (Cap 506, Laws of Kenya, Revised Edition 2012)

¹⁹ *Supra*, note 7.

²⁰ David Bainbridge, *Intellectual Property*

publishing, fashion, and technology, have expanded rapidly. The most prevalent disputes include unauthorized reproduction, distribution or use of copyright works, counterfeiting and imitation and unauthorized use of software.”²¹ Some of these include musicians suing others or media houses who use their copyrighted songs without permission or companies challenging the use of similar trademarks by other entities in the market. This was exemplified in the case of *Nonini v Brian Mutinda & Synix Electronics*,²² where the artist successfully claimed damages (for using his hit song *Wee Kamu* in an advertisement without his consent) and demanded the removal of his hit song or rather its content, the same highlighting the large-scale global disputes involving artists taking action against digital platforms for unlicensed use of music.²³ The Court awarded him KSh 1 million in general damages, ordered removal of the content, and affirmed that the unauthorized use constituted a clear violation of his Intellectual Property rights²⁴ as espoused under our Constitution and other subsidiary laws. online space escalates these conflicts because it is easy to duplicate and distribute content, frequently internationalized, rendering conventional approaches to disputing inefficient and cumbersome.

Knowledge of Arbitration and Online Arbitration

According to the World Intellectual Property Organization (WIPO) Arbitration is defined as “consensual procedure in which a dispute is formally submitted, by agreement of the parties, to one or more arbitrators who deliver a binding decision

²¹ WKA Advocates, Common Causes of IP Disputes in Kenya, IP Disputes in Kenya: Resolving Trademark Conflicts (WKA Advocates 2025) <https://www.wka.co.ke/ip-disputes-in-kenya/> <accessed 22 July 2025>

²² *Nonini v Brian Mutinda & Synix Electronics* (2023) eKLR

²³ Ibid

²⁴ Kenneth Gachie, Rapper Nonini wins copyright infringement case against influencer, awarded Ksh.1 million Citizen Digital (24 March 2023) <https://citizen.digital/entertainment/rapper-nonini-wins-copyright-infringement-case-against-influencer-awarded-ksh1-million-n316742> <accessed 22 July 2025>.

(arbitral award) instead of resorting to court proceedings.”²⁵ Professor Muigua describes arbitration as “a voluntary private process in which a neutral third party resolves a dispute by listening to the disputing parties and determining the matter”.²⁶ Arbitration is where two parties who are in disagreement choose to have their issue resolved by a neutral third party. This arbitrator listens to both sides and then comes up with an arbitral award that is legally-binding to both parties, under the legal principle of privity. The doctrine of privity of contract, a bedrock principle of common law, provides that only parties to a contract may enforce its terms or be bound by its obligations. In its classical form and design, this principle denies third parties the ability to sue or be sued under a contract, regardless of any intended benefit conferred upon them.²⁷ In the realm of arbitration, this principle operates with particular rigor, since arbitral jurisdiction is fundamentally rooted in consent. Section 3(1) of the Arbitration Act 1995 defines an arbitration agreement as one “between parties,”²⁸ while section 4(1) further entrenches this by requiring such agreements to be in writing.²⁹ This legislative framework embodies the principle that arbitration is a consensual process, dependent upon mutual agreement rather than imposed jurisdiction.

Kenyan courts have repeatedly affirmed the primacy of privity in arbitration. In *Nyutu Agrovet Ltd v Airtel Networks Kenya Ltd*,³⁰ the Court of Appeal underscored that an arbitration clause cannot be invoked by, or against, a party who has not consented to it. Similarly, in *Co-operative Bank of Kenya Ltd v Robert Kibe Karanja*,³¹ the High Court rejected an application to compel arbitration against a non-

²⁵Supra, note 12

²⁶ Kariuki Muigua, *Settling Disputes Through Arbitration in Kenya* (3rd edn, Glenwood 2017) 3.

²⁷ *Tweddle v Atkinson* (1861) 1 B & S 393.

²⁸ Arbitration Act (as amended), s 3(1).

²⁹ *Ibid*, s 4(1).

³⁰ *Nyutu Agrovet Ltd v Airtel Networks Kenya Ltd* [2015] eKLR.

³¹ *Co-operative Bank of Kenya Ltd v Robert Kibe Karanja* [2014] eKLR

signatory, reiterating that arbitral obligations cannot arise absent contractual consent.³² These cases reflect the judiciary's consistent position that arbitration is a voluntary mechanism and that the doctrine of privity serves as a safeguard for party autonomy. However, strict adherence to privity in arbitration has been challenged in both domestic and international contexts, particularly in complex, multi-party, and multi-contract disputes. Commercial realities often present situations where non-signatories are integrally involved in the performance or benefit of a contract containing an arbitration clause. In such cases, rigid application of privity risks fragmenting dispute resolution and undermining efficiency.³³

Courts and arbitral tribunals have thus recognised certain exceptions. The doctrine of agency allows a principal to be bound by an arbitration agreement executed by an authorized agent.³⁴ Similarly, where contractual rights are assigned, the accompanying arbitration clause typically transfers with those rights.³⁵ The doctrine of estoppel has also been applied to prevent a party from denying an arbitration clause after having relied upon or benefited from the underlying contract.³⁶ In transnational arbitration, the "group of companies" doctrine, as articulated in *Dow Chemical Co v Isover-Saint-Gobain*,³⁷ has allowed non-signatory affiliates to be bound where there is clear evidence of a shared intention to arbitrate.³⁸ While Kenyan courts have approached these exceptions cautiously, they have been more receptive to assignment and agency than to more expansive doctrines such as "group of companies," which remain controversial and less entrenched in Kenyan jurisprudence. Non-signatories can be bound where they

³² Ibid

³³ Gary Born, *International Commercial Arbitration*

³⁴ *Peterson v Ayres* [1918] AC 254 (HL).

³⁵ *Novus Aviation Ltd v Alubaf Arab Int'l Bank* [2016] EWHC 1575 (Comm).

³⁶ *Fiona Trust & Holding Corp v Privalov* [2007] UKHL 40, [2007] 4 All ER 951.

³⁷ *Dow Chemical Co v Isover-Saint-Gobain* (ICC Case No 4131, Award, 1982).

³⁸ Ibid

acted as agents. This was held so in *William Muthee Muthoni v Bank of Baroda*.³⁹ Generally accepted where authority is established.

The question arises whether Kenya should recalibrate its arbitration framework to accommodate a more flexible approach to privity. In light of global commercial trends and the need for coherent dispute resolution in multi-party contexts, modest relaxation, subject to safeguards may be warranted. Comparative jurisprudence, such as the House of Lords' reasoning in *Fiona Trust & Holding Corp v Privalov*,⁴⁰ illustrates a purposive approach, presuming that rational commercial parties intend all disputes connected with their relationship to be arbitrated.⁴¹ Such an approach could be adapted in Kenya to prevent procedural fragmentation while still respecting the consensual nature of arbitration.

There seems to be attitude emerging towards this shift. The Arbitration (Amendment) Bill 2025 does not directly modify the privity principle or codify traditional exceptions such as agency, assignment, or estoppel.⁴² However, it marks a notable policy shift by expressly recognising and regulating third-party funding (TPF) in international arbitration.⁴³ Allowing third-party funding in international arbitration through the proposed Section 39A was praised.⁴⁴ However, stakeholders advocated for its inclusion in domestic arbitration as well.⁴⁵ The proposed section 39A permits funding arrangements except where they involve unreasonable funder returns, are entered into by public bodies facing

³⁹ *William Muthee Muthoni v Bank of Baroda* [2014] eKLR

⁴⁰ *Supra*, note 37

⁴¹ *Ibid*

⁴² Arbitration (Amendment) Bill 2025

⁴³ *Ibid*

⁴⁴ The Chartered Institute of Arbitrators (Kenya Branch), *Debunking and Demystifying the Arbitration Amendment and Construction Payments Adjudication Bills*. Available at: <https://ciarbkenya.org/debunking-demystifying-the-arbitration-amendment-and-construction-payments-adjudication-bills/> <accessed on 11 August, 2025>

⁴⁵ *Ibid*

multiple funded claims, or are contingent solely on a success fee.⁴⁶ It further mandates the disclosure of the funder's identity, the key terms of the funding agreement, and any potential conflicts of interest to the tribunal, parties, and arbitral institutions.⁴⁷ While this reform does not alter the binding nature of arbitration agreements under privity, it acknowledges the growing role of non-party funders in shaping arbitral proceedings, potentially opening the door for broader conversations on non-signatory participation in the future.⁴⁸

Ultimately, the doctrine of privity in arbitration embodies the tension between contractual sanctity and commercial pragmatism. While Kenyan law has, thus far, guarded the consensual foundation of arbitration with almost doctrinal purity,⁴⁹ there is growing recognition that a rigid application may, in certain contexts, frustrate rather than facilitate justice.⁵⁰ The future lies not in dismantling privity, but in recalibrating it: retaining consent as the anchor of arbitral jurisdiction while crafting principled exceptions that reflect the complexity of modern commerce.⁵¹ Such a balanced approach would position Kenya's arbitration framework in harmony with both its constitutional commitment to fair and efficient dispute resolution⁵² and emerging international best practice.⁵³

On the other hand, Kaufmann-Kohler and Schultz describes online arbitration as form of "dispute resolution mechanism where key aspects of the arbitration procedure such as the submission of pleadings, conduct of hearings and issuance

⁴⁶ *Supra*, note 44

⁴⁷ *Ibid*

⁴⁸ *Ibid*

⁴⁹ *Supra*, note 31

⁵⁰ *Supra*, note 34

⁵¹ *Supra*, note 42

⁵² Constitution of Kenya 2010, Art 159(2)(c).

⁵³ *Supra*, note 39

of awards are facilitated through the internet or digital technologies.”⁵⁴ The advent of the digital age has fundamentally redefined the modalities of dispute resolution, with *online arbitration* (also referred to as electronic arbitration or cyber-arbitration) emerging as one of the most transformative innovations in the field.⁵⁵ By integrating traditional arbitral procedures with modern communication technologies, online arbitration offers parties a forum that is both accessible and adaptable to the demands of a globalized, digitally interconnected economy.⁵⁶ In the wake of the COVID-19 pandemic, its relevance and legitimacy have been accelerated exponentially, with arbitral institutions worldwide embracing virtual hearings and digitized submissions as part of the “new normal.”⁵⁷

Gakeri argues that online arbitration is a model that facilitates dispute resolution through virtual means, enabling parties to submit documentation and attend hearings remotely.⁵⁸ In this context, **online arbitration**, often framed as the digital offspring of traditional arbitration, emerges as a transformative procedural innovation that blends the binding authority of arbitral awards with the speed, accessibility, and technological efficiency of cyberspace.⁵⁹ It is not merely arbitration “with a computer”; it is an evolving jurisprudential experiment in how private justice can operate in the virtual realm while respecting fundamental legal principles, including due process, party autonomy, and enforceability. The UNCITRAL Technical Notes on Online Dispute Resolution describe online arbitration as the conduct of arbitral proceedings “in whole or in part through the use of electronic communications and other information technology.”⁶⁰ This

⁵⁴ Kaufmann-Kohler G and Schultz T, *Online Dispute Resolution: Challenges for Contemporary Justice*

⁵⁵ Thomas Schultz, *Information Technology and Arbitration: A Practitioner's Guide*

⁵⁶ *Ibid*

⁵⁷ *Supra*, note 33

⁵⁸ Gakeri, J. K. (2011). *Online Dispute Resolution in E-Commerce: Challenges and Prospects*. *Computer and Telecommunications Law Review*

⁵⁹ *Supra*, note 55

⁶⁰ UNCITRAL Technical Notes (n 3) para 10.

definition encompasses purely virtual proceedings as well as hybrid models where certain stages, such as the final hearing may occur in person. While online arbitration retains the hallmarks of traditional arbitration; party autonomy, neutrality, confidentiality, and finality, it diverges in its procedural architecture, replacing physical spaces with virtual ones, and paper trails with encrypted digital files.⁶¹

Online arbitration retains the defining characteristics of arbitration, party autonomy, confidentiality, neutrality, and finality of awards, while operating predominantly through digital platforms.⁶² The flexibility to conduct proceedings entirely online is particularly appealing in cross-border disputes, where physical distance, travel costs, and logistical constraints might otherwise hinder access to justice. Notably, the UNCITRAL Technical Notes on Online Dispute Resolution (2017) recognize online arbitration as a legitimate and effective method of resolving both business-to-business (B2B) and business-to-consumer (B2C) disputes.⁶³ In this respect, the integration of video conferencing tools, encrypted cloud storage, blockchain-based evidence management, and electronic signatures has bolstered both the efficiency and evidentiary integrity of the arbitral process.

The Internet Corporation for Assigned Names and Numbers (ICANN)'s Uniform Domain-Name Dispute-Resolution Policy (UDRP) stands as one of the earliest large-scale implementations of online arbitration, with thousands of disputes resolved entirely online since its inception in 1999.⁶⁴ These proceedings illustrate how procedural efficiency, low cost, and global enforceability can be harmonized

⁶¹ *Supra*, note 57

⁶² *Supra*, note 59

⁶³ United Nations Commission on International Trade Law, *Technical Notes on Online Dispute Resolution* (2017) UN Doc A/71/17.

⁶⁴ ICANN, Uniform Domain-Name Dispute-Resolution Policy. Available on: <https://www.icann.org/resources/pages/help/dndr/udrp-en> <accessed 11 August 2025>.

within a virtual framework. An example of online arbitration case law is the *Barrett Steel Ltd v Web Hosting, Kenya* (WIPO Case No. D2021-0055).⁶⁵ Barrett Steel Ltd claimed the domain name infringement by a Kenya-based web hosting provider who used it in bad faith.⁶⁶ The Kenyan web hosting provider attempted to capitalize on the goodwill of the complainant's brand, potentially deceiving consumers and undermining the company's digital identity.⁶⁷ The World Intellectual Property Organization panel ordered the domain to be transferred to Barrett Steel Ltd, thereby upholding the principles of trademark protection in digital spaces. The case was handled fully through online arbitration under via Uniform Domain Name Dispute Resolution Policy (UDRP) administered by World Intellectual Property Organization (WIPO).⁶⁸

Therefore, the author defines online arbitration as a method of resolving disputes through virtual means (video conferencing and e-filing) where two parties agree to involve a neutral third party (an arbitrator) who hears both sides and gives a legal binding decision or arbitral award without need of physical contact. Although it is not specifically established in the Kenyan law, it falls under the umbrella of arbitration which has the blessing of the article 159(2)(c) of the Constitution⁶⁹ and the Arbitration Act, 2009⁷⁰ by encouraging alternative dispute resolution (ADR). It is also supported by Kenya Information and Communications Act (KICA) that validates electronic transactions⁷¹ Online Arbitration (OArb) has emerged as a pivotal evolution within the global dispute resolution landscape, fusing the procedural autonomy of arbitration with the technological capabilities

⁶⁵ *Barrett Steel Ltd v Web Hosting, Kenya*, WIPO Case No. D2021-0055, available at <https://www.wipo.int/amc/en/domains/search/text.jsp?case=D2021-0055>

⁶⁶ Ibid

⁶⁷ Ibid

⁶⁸ Ibid

⁶⁹ The Constitution of Kenya 2010, art 159(2)(c).

⁷⁰ *Supra*, note 29 (Act No 4 of 2010).

⁷¹ Kenya Information and Communications Act, Cap 411A, s 83C & s 84A.

of the digital age. It enables parties to conduct arbitral proceedings wholly or substantially via online platforms, from the filing of claims to the rendering and enforcement of awards.⁷² As Kessedjian notes, the globalization of markets has “eroded the neat boundaries of territorial jurisdiction”⁷³ demanding dispute resolution mechanisms that transcend the constraints of physical forums. Online arbitration responds to this call by enabling proceedings to be conducted entirely or predominantly via digital platforms, with submissions, evidence, hearings, and awards handled through secure online interfaces.⁷⁴ Yet its promise raises intricate questions: Can the intangible “venue” of the internet serve as a valid seat of arbitration? Does the absence of physical interaction dilute procedural fairness? And, crucially, can digital awards navigate the rigorous enforcement regime of the New York Convention 1958?⁷⁵

This modality, often situated within the broader field of Online Dispute Resolution (ODR), has been heralded as a transformative mechanism capable of transcending geographical, temporal, and logistical barriers that have traditionally constrained conventional arbitration proceedings.⁷⁶ The rise of online arbitration is not merely a consequence of technological innovation; it is a direct response to the imperatives of globalization, the expansion of cross-border commerce, and the unprecedented disruptions occasioned by the COVID-19 pandemic.⁷⁷ In particular, the pandemic exposed the fragility of in-person dispute resolution frameworks and accelerated the migration towards virtual hearings, electronic submissions, and digital evidence management. Consequently, leading arbitral institutions such as the International Chamber of Commerce (ICC) and the London Court of International Arbitration (LCIA) have amended their procedural rules to accommodate,

⁷² *Supra*, note 55

⁷³ Catherine Kessedjian, *Dispute Resolution in a Complex International Society*

⁷⁴ UNCITRAL, *Technical Notes on Online Dispute Resolution* (2017) para 9.

⁷⁵ New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards

⁷⁶ *Supra*, note 65

⁷⁷ Maxi Scherer, *Remote Hearings in International Arbitration: An Analytical Framework*

legitimize, and streamline online arbitral processes.⁷⁸ A central legal complexity in online arbitration is determining the **seat** of arbitration when the proceedings lack physical location. The seat remains critical because it determines the *lex arbitri* (the procedural law governing the arbitration), the courts with supervisory jurisdiction, and the applicable annulment and enforcement regime.⁷⁹ Parties often address this in their arbitration agreement, selecting a legal seat irrespective of the virtual nature of proceedings.⁸⁰ Where they fail to do so, tribunals may infer the seat from other factors, such as the location of the administering institution or the governing law clause.⁸¹

On its enforceability, the **Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958** (New York Convention) remains the cornerstone of cross-border enforceability. Online arbitration awards generally qualify as “arbitral awards” within Article I, provided the process adheres to due process standards under Article V(1)(b) and public policy constraints under Article V (2).⁸² Early enforcement challenges, such as doubts about the authenticity of electronic awards, have largely been addressed by the adoption of secure digital signatures, time-stamping, and blockchain-based authentication mechanisms.⁸³ From a doctrinal standpoint, online arbitration is undergirded by the principles of party autonomy, procedural flexibility, and technological neutrality. Party autonomy allows disputants to select the applicable rules, governing law, seat of arbitration, and even the technological platform for hearings.⁸⁴ Procedural flexibility ensures that the chosen mechanisms, whether synchronous video-conference hearings or

⁷⁸ ICC, Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration, (2021). Available at: <https://iccwbo.org> <accessed 11 August 2025>.

⁷⁹ Redfern and Hunter, *Law and Practice of International Commercial Arbitration*

⁸⁰ Ibid

⁸¹ Supra, note 61

⁸² New York Convention (n 4) arts I, V.

⁸³ Supra, note 54

⁸⁴ Ibid

asynchronous written submissions, are tailored to the complexity and urgency of the dispute.⁸⁵ Technological neutrality, on the other hand, mandates that arbitral tribunals remain adaptable to diverse and evolving digital tools without privileging or discriminating against specific technologies.⁸⁶

However, the growing reliance on online arbitration also prompts profound jurisprudential questions. Can the procedural safeguards developed for in-person proceedings, such as the right to be heard, equality of arms, and transparency, be fully guaranteed in a virtual setting? Courts in multiple jurisdictions have affirmed that due process obligations apply equally to online arbitration. For instance, in *Banco de Seguros del Estado v Mutual Marine Office, Inc*,⁸⁷ the US District Court underscored that the conduct of remote arbitral hearings must not prejudice a party's ability to present its case effectively.⁸⁸ Similarly, in *West Tankers Inc v Allianz SpA*, the English High Court acknowledged that arbitration agreements should be interpreted with flexibility to accommodate evolving procedural technologies.⁸⁹ Online arbitration's legitimacy hinges on its compliance with natural justice principles: the right to be heard, equality of arms, and impartial adjudication. Critics worry that connectivity disparities, digital illiteracy, and cybersecurity vulnerabilities can undermine these rights.⁹⁰ The decision in *CME Czech Republic BV v Czech Republic*,⁹¹ underscored that procedural fairness is technology-neutral; whether offline or online, tribunals must ensure equal opportunity to present one's case.⁹² On the confidentiality and data protection, the digital environment heightens confidentiality risks, particularly in high-value

⁸⁵ Margaret L Moses, *The Principles and Practice of International Commercial Arbitration*

⁸⁶ UNCITRAL, *Notes on Organizing Arbitral Proceedings*, (2016) para 24.

⁸⁷ *Banco de Seguros del Estado v Mutual Marine Office, Inc* 344 F Supp 2d 693 (SDNY 2004)

⁸⁸ *Ibid*

⁸⁹ *West Tankers Inc v Allianz SpA* [2012] EWHC 854 (Comm).

⁹⁰ Maxi Scherer, *Remote Hearings in International Arbitration: An Analytical Framework*

⁹¹ *CME Czech Republic BV v Czech Republic* (UNCITRAL, Partial Award, 13 September 2001).

⁹² *Ibid*

commercial disputes. Tribunals and institutions now routinely employ encrypted platforms, multifactor authentication, and confidentiality agreements to mitigate breaches.

Additionally, despite these innovations, online arbitration in developing jurisdictions faces significant barriers. Issues such as inadequate internet penetration, data protection challenges, cyber-security vulnerabilities, and limited technological literacy can compromise both access to justice and procedural fairness.⁹³ Moreover, the cross-border nature of online arbitration raises conflict-of-laws complexities regarding the applicable law, the seat of arbitration, and the enforceability of awards under the New York Convention (1958). Some commentators argue that the “seat” of online arbitration should be determined by the choice of the parties or the administering institution, rather than the geographical location of servers or arbitrators.⁹⁴

The London Court of International Arbitration (LCIA)’s 2020 Rules explicitly permit remote hearings while mandating security protocols for data exchange.⁹⁵ Furthermore, the promise of online arbitration is accompanied by legal, practical, and ethical challenges. Key among these are concerns relating to due process, cybersecurity, data protection, and the enforceability of awards under the 1958 New York Convention.⁹⁶ For instance, while Article V(1)(b) of the Convention permits refusal of enforcement if a party was unable to present its case, questions arise as to whether connectivity failures or unfamiliarity with digital platforms might constitute valid grounds for such refusal.⁹⁷ Similarly, the General Data Protection Regulation (GDPR) in the European Union and analogous data protection statutes globally impose stringent obligations on the processing,

⁹³ *Supra*, note 93

⁹⁴ Maxi Scherer, *The Seat of Arbitration in Online Proceedings*

⁹⁵ London Court of International Arbitration, *LCIA Arbitration Rules 2020 arts 19.2, 30*.

⁹⁶ Alan Redfern and Martin Hunter, *Law and Practice of International Commercial Arbitration*

⁹⁷ New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards

storage, and transfer of personal data in the course of online proceedings.⁹⁸ In practice, best practices for online arbitration have emerged to safeguard procedural integrity and party equality. These include pre-hearing technology tests, secure digital evidence portals, encrypted communication channels, and clear protocols for witness examination and cross-examination via video link.⁹⁹ Arbitral tribunals are also increasingly issuing procedural orders specifically addressing virtual hearing logistics, time-zone coordination, and contingency measures in the event of technical failures.¹⁰⁰

From a comparative law perspective, several arbitral institutions have already embedded online dispute resolution into their procedural rules. The Singapore International Arbitration Centre (SIAC), London Court of International Arbitration (LCIA), and International Chamber of Commerce (ICC) have issued guidelines endorsing virtual hearings as default options when circumstances demand. Notably, the LCIA Arbitration Rules 2020 expressly permit hearings to be conducted “virtually by conference call, videoconference or using other communications technology” without requiring parties to be physically present.¹⁰¹ Such institutional reforms have also influenced African arbitration hubs; the Nairobi Centre for International Arbitration (NCIA) has incorporated provisions for remote hearings, thereby aligning Kenya’s arbitral framework with global best practices.¹⁰² Jurisdictions have taken divergent approaches to online arbitration’s formal recognition. **China’s** Internet Courts in Hangzhou, Beijing, and Guangzhou

⁹⁸ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 (General Data Protection Regulation) [2016] OJ L119/1.

⁹⁹ International Council for Commercial Arbitration (ICCA), *ICC, and New York City Bar Association Protocol on Cybersecurity in International Arbitration (2020)* art 6.

¹⁰⁰ LCIA, *Guidance Notes on Virtual Hearings* (2021). Available at: <https://lcia.org> <accessed 11 August 2025>.

¹⁰¹ LCIA, *LCIA Arbitration Rules* (2020), Art 19.2.

¹⁰² Nairobi Centre for International Arbitration (NCIA), *Arbitration Rules* (2021), r 24.

integrate online arbitration platforms into their broader digital justice ecosystem, with blockchain admissibility provisions in evidence law.¹⁰³

The **European Union's** ODR Regulation (Regulation (EU) No 524/2013) has laid a consumer-focused framework, while the **United States** remains more reliant on private institutional innovation rather than statutory regimes.¹⁰⁴ Proponents argue that online arbitration can democratize access to justice by reducing costs, enabling micro and small enterprises to resolve disputes that would otherwise be economically prohibitive.¹⁰⁵ This aligns with the **Sustainable Development Goal (SDG) 16** on access to justice, by potentially bridging the gap between global commerce and affordable dispute resolution mechanisms. Critically, online arbitration must be situated within the broader normative discourse on access to justice. While it promises enhanced accessibility for parties in remote or underserved regions, there is a real risk of creating a “digital divide” whereby technologically disadvantaged parties are placed at a procedural disadvantage.¹⁰⁶ Addressing this requires both institutional innovation and policy interventions, such as capacity-building, subsidized technological access, and harmonization of procedural standards across jurisdictions.

In sum, online arbitration represents not merely a technological adaptation, but a jurisprudential shift in the philosophy and practice of dispute resolution. Its continued legitimacy and effectiveness will depend on how well arbitral institutions, practitioners, and policymakers navigate the tension between technological innovation and the enduring values of fairness, impartiality, and due process.

¹⁰³ Tang Houzhi, China's Experience with Online Arbitration

¹⁰⁴ Pablo Cortés, *The Law of Consumer Redress in an Evolving Digital Market*

¹⁰⁵ Lucy Greenwood, *Online Dispute Resolution: The Future of Arbitration*

¹⁰⁶ Ethan Katsh and Orna Rabinovich-Einy, *Digital Justice: Technology and the Internet of Disputes*

Nature of Intellectual Property Conflicts in Digital Era

Digital era has drastically changed the process of intellectual property creation, distribution, and consumption, though they also increase the severity of IP infringements. Protected works including music, movies, software, and written works are subject to easy copying and sharing via the Internet without the knowledge of its creator. Piracy of local music, unauthorized sharing of e-books, trademark counterfeiting on e-commerce sites and unlicensed software use are widespread. This section illustrates notable global and Kenyan examples. Cases of online piracy with pirates uploading and sharing their music or films without permission have been commonly reported by musicians and filmmakers in Kenya, such as across the industry. A notable case is that of the *Music Copyright Society of Kenya* (MCSK) that has actively fought the spread of unauthorized local music, especially through mobile applications and websites, thereby costing artists a lot of revenue.¹⁰⁷ Similarly, in case of *Ndirangu v Nation Media Group Ltd & Another*,¹⁰⁸ the plaintiff sued the media house for unauthorized use of his image in an article without consent or attribution.

While the case centered on violation of personality and privacy rights, it also highlighted the broader issue of media organizations infringing on individual intellectual property by reproducing personal content without permission or consent of the right-holder raising concerns related to moral rights and the unauthorized commercial use of creative work in digital publications.¹⁰⁹ These disputes highlight that digital content is vulnerable, and requires quick dispute-resolving processes that are reflective of the dynamics of the digital economy.¹¹⁰ These online violations are frequently done in secret, international jurisdiction and at speed so quickly that conventional law bodies are having a hard time keeping

¹⁰⁷ *Music Copyright Society of Kenya v Music Publishers Association of Kenya & Others* [2019] eKLR

¹⁰⁸ *Ndirangu v Nation Media Group Ltd & Another* (Civil Suit E149 of 2020) eKLR

¹⁰⁹ *Ibid*

¹¹⁰ *Supra*, note 94

up with what is going on which makes digital IP problems more multifaceted.¹¹¹ Additionally, in Kenya, the rise in online IP infringements ranging from unauthorized music sharing to content piracy calls for arbitration mechanisms that match the speed and nature of digital conflict.¹¹² In the case of *Nonini v Brian Mutinda & Synix Electronics* is an notable example of music piracy. The artists claimed infringement of his hit song by Synix electronics which was used in advertisement. The Court awarded him KSh 1 million in general damages, ordered removal of the content, and affirmed that the unauthorized use constituted a clear violation of his Intellectual Property rights.¹¹³ Online platforms are increasingly difficult to enforce IP rights on due to their global scope and the anonymity of infringers. “Many counterfeiters operate from jurisdictions with weak enforcement regimes or low levels of legal cooperation, making redress difficult for rights holders especially in cross-border contexts. According to Organization for Economic Co-operation and Development (OECD) and European Union Intellectual Property Office (EUIPO), sellers of counterfeit products exploit e-commerce platforms like AliExpress and eBay, benefiting from limited oversight and the logistical ease of shipping small parcels internationally”.¹¹⁴ The user-generated nature of content in the platforms is on the rise like YouTube, Facebook, and TikTok further complicates enforcement. These platforms host enormous volumes of content, often uploaded without verification of ownership rights. Although many rely on the safe harbour provisions of laws such as the U.S. Digital Millennium Copyright Act, determining liability remains contentious. In *Viacom International Inc v YouTube Inc*, the court recognised YouTube’s role as a platform that hosted vast quantities of user-generated content,

¹¹¹ Ibid

¹¹² Music Copyright Society of Kenya, Statement on Digital Piracy and Unauthorized Distribution (2021) <https://mcsk.or.ke/> <accessed 22 July 2025>.

¹¹³ Supra note,25

¹¹⁴ Organization for Economic Co-operation and Development (OECD) and European Union Intellectual Property Office (EUIPO), Misuse of E-Commerce for Trade in Counterfeits (OECD Publishing 2021) 10-14.

some of which included copyrighted material.¹¹⁵ However, the court held that YouTube could not be held liable for copyright infringement so long as it complied with the notice-and-takedown provisions under the Digital Millennium Copyright Act (DMCA). The court ruled that general awareness of infringing content was insufficient to disqualify YouTube from safe-harbour protection. Liability would only arise where YouTube had actual knowledge or was “aware of facts or circumstances from which infringing activity is apparent” and failed to act expeditiously to remove or disable access to the infringing content. Since YouTube had procedures in place to respond to notifications of infringement and took prompt action when notified, the court found it was entitled to the DMCA's safe-harbour protections. This decision underscored the importance of platform neutrality and the limits of intermediary liability for user-generated content.¹¹⁶

Online Arbitration as A Panacea for Bridging Access-to-Justice Gaps in the Digital Era

Online arbitration refers to an alternative dispute resolution (ADR) which incorporates the process of arbitration usually entirely, and sometimes in part, via electronic means typically the internet. These include filing claims, the exchange of evidence, holding hearings and making awards virtually.¹¹⁷ It relies on digital infrastructure, email, document-sharing tools, video-conferencing tools like Zoom or Microsoft Teams, instead of physical attendance, unlike conventional arbitration. This form of arbitration has emerged in response to the demands of globalization, Internet based business and the need of speedy justice in the age of information. Musa defines online arbitration as mediation or negotiation conducted via electronic means, highlighting how cyberspace enables digital claim submission, evidence exchange, and virtual hearings.¹¹⁸ Among the most

¹¹⁵ *Viacom International Inc v YouTube Inc* 718 F Supp 2d 514, 523–525 (SDNY 2010).

¹¹⁶ *Ibid*

¹¹⁷ *Supra* note 27

¹¹⁸ Wenani W Musa, *The Scope and Application of Online Dispute Resolution in Kenya* (Undergraduate dissertation, University of Nairobi 2024)

attractive opportunities of online arbitration is its cost-effectiveness and the cost reduction compared to traditional court litigation or even with arbitration. It avoids expenses associated with venue hire, travelling, accommodation and hard copy documentation. Parties and arbitrators are also permitted to attend remotely, and time spent in scheduling and attending hearings is greatly reduced.

The utility of online arbitration lies not merely in convenience but in its potential to democratize dispute resolution. It dismantles the structural barriers imposed by physical distance, limited legal infrastructure, and prohibitive costs, which have historically marginalised certain litigants. In *Hassneh Insurance Co of Israel v Mew*,¹¹⁹ the English High Court underscored the centrality of party autonomy in arbitration, an autonomy that is arguably enhanced, rather than diminished, by the integration of technology into arbitral proceedings.¹²⁰ The global COVID-19 pandemic catalyzed this shift, forcing arbitral institutions, such as the ICC and LCIA, to transition rapidly to virtual hearings and digital filings. In *Perri v Coolangatta Investments Pty Ltd*,¹²¹ the court recognised that the adaptation of procedural methods to modern realities was not merely permissible but necessary to safeguard the efficacy of dispute resolution mechanisms.¹²² Similarly, the Kenya High Court in *Nyutu Agrovet Ltd v Airtel Networks Kenya Ltd*,¹²³ while dealing with questions of arbitral finality, acknowledged the importance of innovations that maintain arbitration's efficiency without undermining procedural fairness.¹²⁴

<https://www.grafiati.com/en/literature-selections/online-dispute-resolution-in-kenya/>
<accessed 6 August 2025>

¹¹⁹ *Hassneh Insurance Co of Israel v Mew* [1993] 2 Lloyd's Rep 243 (QB).

¹²⁰ *Ibid*

¹²¹ *Perri v Coolangatta Investments Pty Ltd* [2020] NSWSC 1059.

¹²² *Ibid*

¹²³ *Nyutu Agrovet Ltd v Airtel Networks Kenya Ltd* [2019] eKLR.

¹²⁴ *Ibid*

This innovation embodies the constitutional imperative of equal access to justice, as enshrined in many legal systems, including Article 48 of the Kenyan Constitution.¹²⁵ The adaptability of online arbitral proceedings was notably underscored during the COVID-19 pandemic, where courts and tribunals worldwide pivoted to virtual hearings, a practice upheld in *Cybernet Resources International Ltd v GCN Group Ltd*,¹²⁶ where the tribunal confirmed the validity of fully remote proceedings under party autonomy principles.¹²⁷ The approach finds further support in the reasoning of the Singapore International Commercial Court in *Rakna Arakshaka Lanka Ltd v Avant Garde Maritime Services (Pte) Ltd*,¹²⁸ which affirmed the enforceability of awards rendered in virtual settings, provided due process is respected.

“Arbitration is more flexible than litigation. The parties may shape the procedures to fit the needs of their particular dispute and may choose decision-makers with expertise in the subject matter of their controversy”.¹²⁹ Online arbitration by its digital character increases the access to justice particularly in cross-border disputes where parties may be based in different jurisdictions¹³⁰. It ensures equality in competition since geographic obstacles are abolished; participants particularly the developing nations such as Kenya are able to gain equal access to neutral platforms without the economic strain of traveling abroad.¹³¹ Therefore this attribute is particularly useful in solving intellectual property (IP) cases, in which

¹²⁵ Article 48 of the Kenyan Constitution 2010

¹²⁶ *Cybernet Resources International Ltd v GCN Group Ltd* [2021] HKCFI 923.

¹²⁷ *Ibid*

¹²⁸ *Rakna Arakshaka Lanka Ltd v Avant Garde Maritime Services (Pte) Ltd* [2019] SGCA 33.

¹²⁹ Margaret L Moses, *The Principles and Practice of International Commercial Arbitration* (3rd edn, CUP 2017) 2–3

¹³⁰ Alexandra Akinyi Ochieng and Bernard Murimi Nyaga, *Facilitating Access to Justice through Online Dispute Resolution in Kenya* (Chartered Institute of Arbitrators Kenya Journal, 11 June 2021)

¹³¹ *Ibid*

the parties involved can be on different continents and where quick action is required to deal with infringement or loss.

Arbitration over the Internet holds particular promise in e-commerce and disputes over intellectual property (IP) via the Internet. The reality that such transactions occur in an online environment implies that the resolution mechanism is also going to be in the same environment which is both logical and practical. In *Microsoft Corporation v. J. Holiday Co.*,¹³² the complainant was Microsoft Corporation that filled a complain of violations of the Uniform Domain Name Dispute Resolution Policy (UDRP).¹³³ This area was regarded as a confusingly similar domain with respect to the famous trademark of Microsoft and there were no legal rights and interests of the respondent in it. Moreover, the panel provided clear indications of a bad faith based on the fact that the respondent tried to sell the domain to earn profits.¹³⁴ The WIPO panel decided that all three factors that must be satisfied under the UDRP were present in terms of confusing similarity, lack of rights or legitimate interest and bad faith registration and use and, thus, directed the transfer of the domain name to Microsoft.¹³⁵ The case also evidences the usefulness of online arbitration procedures in resolving online IP disputes efficiently and neutrally, and this argument testifies to the essentiality of online arbitration processes in maintaining brand authenticity in the online marketplace.¹³⁶

In jurisdictions such as England and Wales, the judiciary has recognised the legitimacy of virtual hearings and technology-assisted dispute resolution as consistent with the requirements of procedural fairness and due process. In

¹³² WIPO Case No. D2000-1493

¹³³ *Ibid*

¹³⁴ *Ibid*

¹³⁵ *Ibid*

¹³⁶ *Ibid*

Polanski v Conde Nast Publications Ltd,¹³⁷ the House of Lords upheld the propriety of allowing a witness to give evidence via video link from abroad, recognising the importance of procedural flexibility in ensuring justice is not thwarted by logistical constraints.¹³⁸ Similarly, in the Singapore International Arbitration Centre (SIAC) context, institutional rules explicitly permit virtual hearings, reflecting a broader global trend towards embedding technological adaptability into arbitral practice.¹³⁹ From a developmental perspective, online arbitration offers a critical pathway for democratizing dispute resolution. It mitigates the prohibitive costs associated with in-person hearings, reduces delays caused by congested judicial systems, and allows for the participation of parties from remote or conflict-affected regions.¹⁴⁰ Notably, the United Nations Commission on International Trade Law (UNCITRAL) has provided guiding frameworks, such as the UNCITRAL Technical Notes on Online Dispute Resolution, that underscore the centrality of accessibility, fairness, and efficiency in digital adjudication processes.¹⁴¹

By enabling fully digital processes from filing to award, it dissolves geographical barriers, reduces costs, and offers procedural flexibility that traditional courts and tribunals simply cannot reach. Its transformative potential has been recognized in both scholarship and practice: as the UNCITRAL Technical Notes affirm, “online dispute resolution mechanisms enhance accessibility ... especially for cross-border and consumer disputes.”¹⁴² This promise, however, hinges not only on convenience but on legitimacy. The Supreme Court of Canada’s decision in *Uber Technologies Inc v Heller* is instructive: it held that arbitration clauses which

¹³⁷ *Polanski v Conde Nast Publications Ltd* [2005] UKHL 10, [2005] 1 WLR 637

¹³⁸ *Ibid*

¹³⁹ Singapore International Arbitration Centre, *SIAC Rules 2016*, r 19.

¹⁴⁰ Richard Susskind, *Online Courts and the Future of Justice*

¹⁴¹ *Supra*, note 75, (*Technical Notes on Online Dispute Resolution*)

¹⁴² *Ibid*

effectively deny access to justice are unenforceable on public policy grounds.¹⁴³ Similarly, U.S. courts have been wary of online frameworks that obscure notice or consent. *Specht v Netscape Communications* struck down arbitration provisions embedded in clickwrap agreements where users lacked clear awareness.¹⁴⁴ These rulings underscore a critical principle: online arbitration must restore, not evade, the party's ability to be heard. Meanwhile, Kenyan scholarship emphasizes arbitration's dual edge, as a potential facilitator of justice, but also as a mode burdened by costs and confidentiality, which can obscure the very equity it seeks to deliver. As Peter Muriithi argues, "the right to access justice under Article 48 of Kenya's Constitution is foundational, and arbitration should be harnessed to enhance, rather than limit, that right."¹⁴⁵

Moreover, OArb aligns with the pro-enforcement bias under the New York Convention 1958, minimizing procedural formalities while ensuring substantive justice. As held in *AA v Persons Unknown*,¹⁴⁶ the English High Court demonstrated that digital platforms could effectively accommodate even complex, cross-border disputes without compromising procedural fairness.¹⁴⁷ In effect, online arbitration's fusion of efficiency, cost-effectiveness, and accessibility positions it as a viable panacea for bridging access-to-justice deficits in the digital era, particularly for small and medium enterprises (SMEs) and parties in developing jurisdictions. In Kenya, a slow, steady process of preparing to adopt online arbitration is underway, in concert with constitutional and statutory changes favoring ADR and digitalization. Article 159(2)(c) of the Constitution of Kenya, 2010 recognizes ADR,¹⁴⁸ while the Arbitration Act, 2009 offers procedural

¹⁴³ *Uber Technologies Inc v Heller* 2020 SCC 16, at para 49 (Arbitration clause unconscionable as it denied access to justice).

¹⁴⁴ *Specht v Netscape Communications Corp* 306 F 3d 17 (2d Cir 2002).

¹⁴⁵ Peter M Muriithi, *The Interface between Access to Justice and Arbitration in Kenya*

¹⁴⁶ *AA v Persons Unknown* [2019] EWHC 3556 (Comm).

¹⁴⁷ *Ibid*

¹⁴⁸ *Supra* note 53, art 159(2)(c).

flexibility that can accommodate online proceedings.¹⁴⁹ The Kenya Information and Communications Act (KICA) reinforces this by giving legal recognition to electronic records and digital signatures key enablers of online arbitration.¹⁵⁰ All these frameworks facilitate Kenya to advance in adoption of online arbitration as a legitimate and enforceable dispute resolution mechanism.

In sum, online arbitration has evolved from an experimental alternative into a credible and potentially indispensable tool for closing access-to-justice gaps in the digital era. When underpinned by sound legal frameworks, technological safeguards, and international cooperation, it can serve as both a bridge to justice and a platform for reimagining the future of dispute resolution.

Legal Framework in Kenya Supporting Online Arbitration

Kenya's foundational legal support for online arbitration is anchored in the Constitution of Kenya, 2010. In administering justice, the Constitution of Kenya expects courts and quasi-judicial agencies to promote and embrace alternative dispute resolution systems, including, but not limited to, arbitration, mediation, conciliation, and traditional methods of dispute resolution, in promoting access to justice and addressing the backlog of cases.¹⁵¹ Although the Constitution does not explicitly mention online arbitration, the provision offers a constitutional umbrella under which all forms of ADR, including technology enabled mechanisms, are recognized and encouraged. This constitutional provision lays a broad normative foundation that legitimizes the evolution of traditional arbitration into its digital form to meet modern demands of efficiency and access to justice in the digital era.¹⁵²

¹⁴⁹ Supra note 32, Act No 11 of 2009, ss 19 and 20.

¹⁵⁰ Supra note 33 ss 83A Act 2009.

¹⁵¹ Kenya Law Reform Commission <https://www.klrc.go.ke> < accessed 7 August 2025 >

¹⁵² Ibid

The Arbitration Act, No. 4 of 1995 is the primary statute governing arbitration in Kenya. While it does not explicitly mention online arbitration, it remains broadly worded and technologically neutral intentionally avoiding restrictions on the format or mode of conducting arbitration.¹⁵³ This legislative flexibility allows for modern adaptations, including digital dispute resolution mechanisms. The 2009 amendments to the Act brought the Kenyan legal framework in line with the UNCITRAL Model Law on International Commercial Arbitration, which encourages flexibility, party autonomy, and global best practices in arbitration.¹⁵⁴ The Act, therefore, provides a broad legal foundation upon which online arbitration may be based, even without express provisions referring to virtual or remote procedures. This adaptability has enabled institutions like the Chartered Institute of Arbitrators; Kenya Branch (CI Arb Kenya) and the Nairobi Centre for International Arbitration (NCIA) to implement and support online hearings, particularly in response to the COVID-19 pandemic.¹⁵⁵

Sections 19 and 20 of the Arbitration Act are pivotal in supporting online arbitration. Section 19 upholds the fundamental principles of equal treatment of parties and the right to be heard, both of which can be effectively realized in virtual proceedings.¹⁵⁶ “Video conferencing tools and secure digital platforms have now become capable of real-time hearings, cross-examinations, and document submissions, maintaining procedural fairness”.¹⁵⁷ Section 20(1) gives parties the

¹⁵³ Supra note 52, Act no.4

¹⁵⁴ UNCITRAL, Model Law on International Commercial Arbitration 1985 (with amendments as adopted in 2006), https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration <access ed 5 August 2025>

¹⁵⁵ Chartered Institute of Arbitrators – Kenya, ‘Digital Hearings Guidelines’ (CI Arb Kenya, 2020) <https://ciarbkenya.or> < accessed 5 August 2025>

¹⁵⁶ Supra note, 56 section 19-20

¹⁵⁷ International Arbitration Laws and Regulations: Kenya (ICLG, 2024-2025) <https://iclg.com/practice-areas/international-arbitration-laws-and-regulations/kenya> < accessed 6 August 2025>

freedom to agree on the procedure to be followed in arbitration. This autonomy extends to choosing virtual platforms, modes of communication, and timelines suited to digital processes. In *Golden Homes Ltd v KRA*,¹⁵⁸ for example, the tribunal conducted proceedings via Zoom due to logistical challenges caused by the pandemic demonstrating the Kenyan arbitration system's adaptability in embracing online modes of operation, even for complex commercial disputes.¹⁵⁹

Beyond the Arbitration Act, other statutes indirectly support online arbitration. The Kenya Information and Communications Act (KICA), legalizes and facilitates the use of electronic records and communications, thereby reinforcing the validity of online arbitration agreements and proceedings.¹⁶⁰ Additionally, the Computer Misuse and Cybercrimes Act, 2018 provides data protection and cybersecurity standards, which are vital in ensuring confidentiality and integrity during online arbitration sessions. The Kenyan judiciary has also demonstrated a positive attitude toward digital dispute resolution. Courts have increasingly recognised the validity of electronically signed contracts and documents, aligning with global e-commerce standards. For example, in *Law Society of Kenya v Attorney General & Another [2020]*,¹⁶¹ the court acknowledged the necessity and legality of remote judicial proceedings during emergencies setting a precedent that equally influences arbitral proceedings.¹⁶² Collectively, these legislative frameworks and judicial attitudes lay a solid foundation for online arbitration to resolve intellectual property disputes in Kenya's evolving digital landscape.

The Kenya Information and Communications Act (KICA), Cap. 411A, is a cornerstone statute in legitimizing electronic communications and digital processes, including those central to online arbitration. The Act recognizes that

¹⁵⁸ [2021] eKLR

¹⁵⁹ *Golden Homes Ltd v Kenya Revenue Authority* [2021] eKLR.

¹⁶⁰ *Supra* note 72, Cap 411A

¹⁶¹ *Law Society of Kenya v Attorney General & Another* [2020] eKLR

¹⁶² *Ibid*

electronic contracts, records and signatures are legally valid, thereby allowing arbitration agreements to be executed electronically. This recognition is critical because arbitration especially online relies heavily on digital documents and communications.¹⁶³ Under Section 83M of the Act, a contract is not invalid merely because it was formed by electronic means.¹⁶⁴ This has significant implications for dispute resolution in the digital era, especially for intellectual property (IP) disputes where parties are often separated by geographical boundaries and prefer online arbitration for speed and convenience. For instance, digital licensing agreements in Kenya's tech industry covering copyrights and patents can now include arbitration clauses executed and enforced entirely through electronic means. Sections 83A to 83U of KICA, introduced through the Kenya Communications (Amendment) Act, 2009, provide a statutory basis for the legal equivalence of electronic and paper-based processes.¹⁶⁵ Section 83P, for example, validates the use of electronic signatures, which are essential for signing arbitration agreements, witness statements, and arbitral awards in virtual settings. This ensures that arbitrators, parties, and institutions can securely sign and exchange legally binding documents online. Furthermore, Section 83Q provides for the admissibility of electronic records in legal proceedings, which further supports the use of digital evidence in arbitration cases.¹⁶⁶

In the context of IP disputes, where much of the evidence like digital content, blockchain proofs of authorship and metadata is inherently electronic, these provisions offer vital legal backing. For instance, in cases involving digital music rights or software piracy, electronically submitted content can now be admitted and relied upon during online arbitral proceedings without risk of procedural

¹⁶³ Supra note 63, Cap. 411A and Section 83M.

¹⁶⁴ Ibid.

¹⁶⁵ Ibid, ss 83A–83U.

¹⁶⁶ Ibid

invalidity.¹⁶⁷ The digital framework established under KICA also facilitates the enforceability of arbitral awards delivered through online arbitration. By ensuring that electronic communication and documentation are legally recognised, KICA complements the Arbitration Act and the Civil Procedure Rules, enabling online arbitral awards to meet evidentiary and procedural thresholds in court.¹⁶⁸ This alignment supports a seamless transition from arbitration to enforcement. In *Samuel Kamau Macharia v Kenya Commercial Bank & 2 others* [2012] eKLR, the Supreme Court emphasized the importance of statutory backing for legal procedures, reinforcing the necessity of harmonizing arbitration with statutory frameworks like KICA.¹⁶⁹ Moreover, Kenyan arbitration institutions such as the Nairobi Centre for International Arbitration (NCIA) have adopted e-filing and virtual hearing protocols that rely on these legal foundations.¹⁷⁰ Therefore, KICA not only facilitates the execution of online arbitration processes but also undergirds the credibility and enforceability of outcomes within Kenya's judicial system.

The Evidence Act (Cap. 80, Laws of Kenya), plays a pivotal role in strengthening the legitimacy of online arbitration by permitting the admissibility of electronic and digital records in legal proceedings. Section 106B of the Act affirms that electronic records are admissible as evidence, provided that the records were produced by a computer during regular activities and their authenticity can be reasonably assured.¹⁷¹ This provision is significant in the context of online arbitration, where much of the procedural documentation such as pleadings, contracts, emails, witness statements, and exhibits is stored or transmitted

¹⁶⁷ Zhanagul Ismailovna Balkibayeva, Problems of Admissibility and Reliability of Metadata as Evidence, (2024) 2(10) International Journal of Law and Policy 48

¹⁶⁸ *Supra*, note 66

¹⁶⁹ *Samuel Kamau Macharia v Kenya Commercial Bank & 2 others* [2012] eKLR.

¹⁷⁰ Nairobi Centre for International Arbitration (NCIA), NCIA Virtual Hearings Protocol (2020) <https://ncia.or.ke> <accessed 5 August 2025>

¹⁷¹ Evidence Act, Cap 80, Laws of Kenya, s 106B

digitally. The Act, therefore, bridges the gap between traditional evidentiary procedures and the demands of a digital arbitration environment, allowing Kenyan courts to entertain and enforce awards resulting from virtual arbitral processes.

In online arbitration, procedural aspects like exchange of submissions, filing of evidence, expert testimony, and even virtual hearings are conducted through electronic means. The Evidence Act accommodates these digital processes by not only recognizing electronic records but also guiding on their authentication through affidavits and certificates.¹⁷² In the Kenyan context, intellectual property disputes, particularly those involving digital copyright infringement, often hinge on the admissibility and reliability of electronic evidence. For instance, a claimant in an online arbitration may present screenshots, source code, or email correspondence to substantiate their claims.¹⁷³

Where enforcement or review of such an arbitral award is sought before the High Court, Section 106B of the Evidence Act provides the statutory basis for admitting electronic records, subject to proof of their integrity and authenticity.¹⁷⁴ This provision aligns with Section 36 of the Arbitration Act, which governs the recognition and enforcement of domestic and international arbitral awards,¹⁷⁵ thereby enhancing the functional viability of online arbitration as a mechanism for resolving modern IP disputes in Kenya, where evidentiary material is often inherently digital. The integration of electronic evidence rules into court processes ensures that, in applications to enforce or set aside online arbitral awards, Kenyan courts can meaningfully assess the arbitrator's reasoning on the basis of reliable

¹⁷² *Ibid*, s 106B (4)

¹⁷³ *Zhejiang Shaoxing Yongli Printing and Dyeing Co Ltd v Microfibres Inc* [2009] SGHC 143, [34]-[36]

¹⁷⁴ *Republic v Mark Lloyd Stevenson* [2016] eKLR

¹⁷⁵ *Christ for All Nations v Apollo Insurance Co Ltd* [2002] 2 EA 366

digital documentation.¹⁷⁶ This harmonization not only strengthens judicial oversight but also reinforces Kenya's commitment to adapting arbitration practice to the realities of the digital economy.¹⁷⁷

For example, if an arbitral tribunal delivers an award in an online arbitration arising from a trademark infringement on an e-commerce platform, the underlying digital communications, purchase records, and platform logs can be submitted and relied upon in court. This was seen in *Republic v. Minister for Agriculture ex parte W'njuguna*, where the court emphasized the importance of considering the authenticity and reliability of documentary evidence.¹⁷⁸ The Evidence Act's provisions thus support a seamless interface between arbitration and litigation within Kenya's rapidly evolving digital legal landscape. Kenyan courts have increasingly embraced digital tools, particularly in response to the COVID-19 pandemic, which necessitated a shift toward virtual court sessions and remote access to justice.¹⁷⁹ A landmark change came with the Judiciary's launch of e-Filing and e-Justice systems in **July 2020**, allowing litigants, both lawyers and non-lawyers, to file documents online, pay court fees via mobile money or cards, and receive automatic filing receipts.¹⁸⁰ This digital transformation has since expanded nationwide, with e-filing now available in multiple counties, complemented by integrated tools like the Case Tracking System (CTS), e-cause

¹⁷⁶ *Samuel Kamau Macharia v Kenya Commercial Bank & 2 others* [2012] eKLR (Supreme Court of Kenya) [on admissibility of electronic evidence in judicial proceedings].

¹⁷⁷ *Royal Media Services Ltd v Telkom Kenya Ltd & another* [2001] eKLR

¹⁷⁸ *Republic v Minister for Agriculture ex parte W'njuguna* [2001] eKLR

¹⁷⁹ *Digital Litigation in Kenya* (CMS Expert Guide) (noting the pandemic triggered the swift adoption of virtual hearings and e-filing in mid-2020). Available at: <https://cms.law/en/int/expert-guides/cms-expert-guide-to-digital-litigation/kenya> <accessed on 11 August, 2025>

¹⁸⁰ *Judiciary's E-Filing System: How it Works*, *Kenyans.co.ke* (2 July 2020) (discussing the launch of e-filing in Nairobi in July 2020, use of mobile payments and receipt generation). Available at: <https://www.kenyans.co.ke/news/54914-judiciarys-e-filing-system-how-it-works?> <accessed on 11 August, 2025>

lists, and a data tracking dashboard.¹⁸¹ These innovations have dramatically enhanced access, transparency, and procedural efficiency, reinforcing the role of digital justice mechanisms as enablers rather than obstacles to access to justice.¹⁸² These systems now allow litigants and arbitrators to file documents, attend hearings, and issue decisions electronically, thereby aligning judicial practices with the digital trends in arbitration.¹⁸³

Although these developments are not entrenched in formal statutory provisions, the Kenyan judiciary's progressive embrace of digital hearings signals a conscious institutional shift towards recognising online arbitration as both legitimate and effective in the modern legal ecosystem.¹⁸⁴ This transformation is particularly critical in the intellectual property (IP) arena, where disputes frequently originate in virtual environments, involve technologically sophisticated parties, and often require the rapid presentation of digital evidence such as source code, metadata, or blockchain records.¹⁸⁵ The acceptance of online arbitration in such contexts not only aligns with global best practices in e-dispute resolution but also ensures that justice delivery mechanisms remain responsive to the realities of a digital economy.¹⁸⁶

¹⁸¹ *Kenyan courts embrace the digital age*, *African Law & Business* (11 March 2024) (detailing expansion of e-filing to all counties, the launch of cause-list portal and data tracking dashboard). Available at: <https://www.africanlawbusiness.com/news/20354-kenyan-courts-embrace-the-digital-age/> <accessed on 11 August, 2025>

¹⁸² *Judiciary extends reach of justice beyond physical boundaries*, *Judiciary.go.ke* (31 August 2023) (Chief Justice emphasising how e-filing and virtual courts reduce geographical barriers and enhance accessibility). Available at: <https://judiciary.go.ke/judiciary-extends-reach-of-justice-beyond-physical-boundaries/> <accessed on 11 August, 2025>

¹⁸³ *The Judiciary of Kenya, e-Filing and e-Judiciary System Guidelines* (2020) <https://www.judiciary.go.ke> < accessed 5 August 2025>

¹⁸⁴ *Republic v Karisa Chengo & 2 others* [2017] eKLR

¹⁸⁵ Richard Hill, *Online Arbitration: Issues and Solutions*

¹⁸⁶ Ethan Katsh and Orna Rabinovich-Einy, *Digital Justice: Technology and the Internet of Disputes*

Moreover, it reflects a broader international trend whereby arbitral institutions, for instance, the **WIPO Arbitration and Mediation Center**, under its updated ADR rules (effective July 1, 2021), expressly permits and encourages the use of electronic filing and remote hearings across its Mediation, Arbitration, Expedited Arbitration, and Expert Determination processes¹⁸⁷ and the London Court of International Arbitration (LCIA),¹⁸⁸ have incorporated robust online dispute resolution (ODR) protocols, demonstrating that efficiency and procedural fairness can coexist in the virtual space.¹⁸⁹ In doing so, the Kenyan experience mirrors an evolving jurisprudence across multiple jurisdictions, where courts have upheld the enforceability of awards arising from digital proceedings, thereby reinforcing their legitimacy under both domestic arbitration statutes and the New York Convention.¹⁹⁰ The **WIPO Center's eADR platform** further enables parties, arbitrators, and institutions to securely manage case communications and hearings online, reflecting a judicious calibration of accessibility, confidentiality, and procedural integrity.¹⁹¹ Collectively, these developments underscore a broader jurisprudential evolution, where digital tools are not mere conveniences, but fundamental enablers of justice in a digitally native world.

¹⁸⁷ WIPO ADR Rules (effective 1 July 2021), permitting electronic filing and remote proceedings, including Emergency Arbitrator, Mediation, Arbitration, Expedited Arbitration, and Expert Determination procedures (WIPO, *Mediation, Arbitration, Expedited Arbitration and Expert Determination Rules*, 2020) <https://www.wipo.int/en/web/amc/rules/index> <accessed 11 August 2025>.

¹⁸⁸ London Court of International Arbitration (LCIA), LCIA Notes for Parties and Arbitrators on the Conduct of Arbitration (2021). Available at: <https://www.lcia.org> <accessed 11 August 2025>.

¹⁸⁹ *Ibid*

¹⁹⁰ *C v D* [2007] EWCA Civ 1282, [2008] 1 All ER (Comm) 1001

¹⁹¹ WIPO's e-ADR platform enables the secure electronic submission and management of case communications in online ADR proceedings, including hearings and mediation sessions. Available at: <https://www.wipo.int/en/web/amc/eadr/index> <accessed on 11 August, 2025>

These institutional frameworks have also played a central role in normalizing online arbitration in Kenya. The Chartered Institute of Arbitrators – Kenya Branch (CI Arb-K), a leading professional body in alternative dispute resolution, has developed and adopted guidelines for conducting virtual and hybrid arbitral hearings.¹⁹² These protocols provide best practices on how to conduct remote proceedings securely and effectively, including protocols on confidentiality, party representation, document submission, and witness examination via video conferencing.¹⁹³ Moreover, institutions like the Nairobi Centre for International Arbitration (NCIA) have also encouraged online proceedings, making it easier for parties especially in cross-border IP disputes to resolve matters without physical presence.¹⁹⁴

These practices demonstrate a growing institutional support system that complements statutory frameworks like the Arbitration Act, 1995, and fills regulatory gaps concerning the procedural aspects of digital arbitration. Kenya’s courts have delivered several landmark decisions affirming party autonomy and limited judicial interference in arbitration, principles that are crucial for online arbitration. In the case of *Nyutu Agrovet Ltd v Airtel Networks Kenya Ltd & Another* (supra), the Supreme Court of Kenya reiterated the importance of upholding the finality and procedural independence of arbitral processes.¹⁹⁵ Although the case concerned traditional arbitration, the emphasis on party autonomy and the recognition of procedural flexibility set a precedent that can be extended to online arbitration contexts.¹⁹⁶ This judgment supports the notion that, so long as parties

¹⁹² Chartered Institute of Arbitrators – Kenya Branch, **Arbitration Rules, 2020**, cl e (‘Virtual Proceedings’) <https://www.mondaq.com/arbitration-dispute-resolution/1011136/arbitration-rules-2020> <accessed 11 August 2025>.

¹⁹³ Chartered Institute of Arbitrators – Kenya Branch (CI Arb-K), Virtual Hearing Protocols (2021) <https://www.ciarkkenya.org> < accessed 5 August 2025>

¹⁹⁴ Ibid

¹⁹⁵ Supra, note 124

¹⁹⁶ Ibid

consent and the arbitration is conducted fairly, courts will respect the outcome regardless of whether the proceedings occurred physically or virtually.¹⁹⁷ Judicial attitudes such as this foster a legal environment in which online arbitration especially for resolving digital intellectual property conflicts can thrive with confidence and predictability.

Role of Pre-Dispute Online Arbitration Clauses

Pre-dispute online arbitration clauses are contractual provisions entered into by parties before any conflict arises, stipulating that any future disputes, particularly those concerning intellectual property (IP), will be resolved through an online arbitral process. Such clauses are especially valuable in the contemporary digital economy, where IP disputes often involve parties operating across different jurisdictions and legal systems.¹⁹⁸ By embedding these clauses into IP licensing agreements, software development contracts, and digital content distribution terms, parties can proactively establish a structured, neutral, and technologically enabled dispute resolution pathway. This approach circumvents the procedural complexity, jurisdictional uncertainty, and potential delays of traditional court litigation.¹⁹⁹ The strategic adoption of pre-dispute online arbitration clauses is supported by the principle of party autonomy in arbitration law, which allows contracting parties to predefine the forum, applicable law, and procedural rules for resolving their disputes.²⁰⁰

Leading arbitral institutions, including the World Intellectual Property Organization (WIPO) Arbitration and Mediation Center, have developed specialized online arbitration frameworks to address the unique nature of IP disputes, ensuring confidentiality, technical expertise, and enforceability of

¹⁹⁷ Ibid

¹⁹⁸ Supra, note 93

¹⁹⁹ Supra, note 81

²⁰⁰ Redfern and Hunter, *Law and Practice of International Commercial Arbitration*

awards across borders.²⁰¹ This mechanism gains further legitimacy under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958, which facilitates the recognition and enforcement of arbitral awards in over 170 jurisdictions.²⁰² The adoption of such clauses is increasingly common in technology transfer agreements, cloud services contracts, and creative content distribution, where parties value swift, secure, and jurisdiction-neutral outcomes.²⁰³ In effect, pre-dispute online arbitration clauses serve as a form of digital dispute risk management, aligning with modern commercial realities and the evolving jurisprudence of cross-border arbitration in IP rights enforcement.²⁰⁴ The anticipatory nature of such clauses not only reduces litigation uncertainty but also streamlines enforcement and procedural choices.²⁰⁵

Pre-dispute online arbitration clauses play a pivotal role in the modern digital economy by providing a clear, enforceable mechanism for resolving disputes before they arise, particularly in contexts where parties operate across different jurisdictions and time zones. Courts have consistently upheld the validity and enforceability of such clauses, even when incorporated into online terms of use or clickwrap agreements.²⁰⁶ In *Nguyen v Barnes & Noble Inc*, the Ninth Circuit affirmed that online assent to arbitration terms binds users to pre-dispute arbitration, reflecting judicial recognition of digital consent mechanisms.²⁰⁷ Similarly, in *Kattula v Netflix*, the court enforced arbitration provisions embedded in online service agreements, confirming the appropriateness of virtual arbitration in

²⁰¹ WIPO Arbitration and Mediation Center, WIPO E-Arbitration

²⁰² Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), 10 June 1958, 330 UNTS 3, art III.

²⁰³ Paul Torremans, *Intellectual Property Law and Arbitration*

²⁰⁴ Thomas D Grant and Damon Coletta, *Digital Dispute Resolution and the Future of International Arbitration*

²⁰⁵ Daniel Seng, *Online Arbitration: A Global View* (2019) 17(2) *International Journal of Law and Information Technology* 110, 114.

²⁰⁶ *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63 (2010).

²⁰⁷ *Nguyen v. Barnes & Noble Inc.*, 763 F.3d 1171 (9th Cir. 2014).

contemporary commerce.²⁰⁸ Furthermore, the Kenyan legal framework supports the enforceability of arbitration agreements. Section 17 of the Arbitration Act provides that an arbitration agreement is separable from the underlying contract, meaning that even if the main contract is disputed, the arbitration clause remains valid.

This principle was affirmed in *Nedermar Technology Ltd v Kenya Anti-Corruption Commission & Another*,²⁰⁹ where the court held that an arbitration agreement survives the termination of the contract. Kariuki Muigua underscores that such clauses not only promote expedited dispute resolution but also foster commercial certainty by minimizing jurisdictional disputes and procedural delays. He notes that embracing technology-enabled arbitration aligns with Kenya's Arbitration Act, which empowers parties to determine procedural aspects, including the venue and mode of arbitration, thus facilitating online hearings and digital submissions.²¹⁰

He emphasizes that the confluence of legislative clarity, judicial enforcement, and technological innovation positions Kenya as an emerging hub for efficient online arbitration, capable of addressing complex IP disputes swiftly and fairly.²¹¹ In the contemporary digital economy, commercial transactions involving intellectual property (IP) assets; including, but not limited to, trademarks, copyright licences, software distribution agreements, and domain name transfers, routinely transcend national boundaries and are executed almost instantaneously through digital platforms.²¹² The borderless nature of such dealings has amplified opportunities

²⁰⁸ *Kattula v. Netflix, Inc.*, 2020 WL 7488012 (N.D. Cal. 2020).

²⁰⁹ *Nedermar Technology Ltd v Kenya Anti-Corruption Commission & Another* (2006) eKLR

²¹⁰ *Supra* note 26

²¹¹ Kariuki Muigua, *Embracing Technology in Arbitration: The Future of Dispute Resolution in Kenya*

²¹² Ruth L Okediji, *The Regulation of Creativity under the WTO/TRIPS Agreement*

for innovation, creative collaboration, and market expansion,²¹³ yet it has simultaneously heightened the risk of disputes that emerge without warning and with complex jurisdictional dimensions.²¹⁴ The absence of uniform procedural mechanisms for cross-border IP dispute resolution often compounds these challenges, creating uncertainty for rights holders, licensees, and digital entrepreneurs alike.²¹⁵ Against this backdrop, the adoption of pre-dispute online arbitration clauses has emerged as a proactive and pragmatic solution. Such clauses, embedded in contractual arrangements before any conflict arises, provide a predetermined yet flexible dispute resolution mechanism that enables parties to resolve disagreements swiftly via virtual proceedings.²¹⁶ They effectively eliminate the uncertainties surrounding jurisdiction, applicable law, and enforcement by setting out clear procedural frameworks in advance.²¹⁷

For Kenyan digital entrepreneurs, many of whom engage with international platforms, foreign clients, and cross-border licensing arrangements, these clauses are particularly valuable. They offer a means of circumventing the time, cost, and complexity associated with navigating multiple legal systems, while still ensuring a neutral and enforceable forum for dispute resolution.²¹⁸ As Kariuki Muigua observes, the integration of arbitration into technology-driven commercial contexts aligns with global best practices and fosters investor confidence by promoting predictability, confidentiality, and enforceability in contractual relationships.²¹⁹ Moreover, the flexibility of online arbitration allows for tailored procedures, including the appointment of arbitrators with sector-specific

²¹³ Daniel Gervais, *The TRIPS Agreement: Drafting History and Analysis*

²¹⁴ Graeme B Dinwoodie, Private International Aspects of the Protection of Trademarks

²¹⁵ Susy Frankel, The International Framework for the Protection of Intellectual Property in Graeme B Dinwoodie (ed), *Methods and Perspectives in Intellectual Property*

²¹⁶ *Supra*, note 198

²¹⁷ Amy J Schmitz and Colin Rule, *The New Handshake: Online Dispute Resolution and the Future of Consumer Protection*

²¹⁸ Daniel Kalderimis, *Cross-Border Commercial Dispute Resolution in the Cloud*

²¹⁹ *Supra*, note 211

expertise, use of digital evidence management tools, and scheduling that accommodates time zone differences without the need for costly international travel.²²⁰ This makes it a particularly apposite mechanism for the modern IP economy, where innovation cycles are short and disputes require timely resolution to protect commercial value. In this way, pre-dispute online arbitration clauses not only mitigate legal uncertainty but also support the broader policy objective of making Kenya a competitive hub for digital trade in Africa and beyond.²²¹

For instance, an e-commerce business in Nairobi licensing software from a German firm would benefit from an agreed online arbitration clause, reducing costs and eliminating logistical complications of in-person hearings.²²² The enforceability of arbitration clauses and awards is anchored in Kenyan law and international conventions. Kenya's **Arbitration Act, 1995 (Revised 2010)** recognizes written arbitration agreements and supports their enforcement.²²³ Additionally, Kenya is a signatory to the **New York Convention**, which ensures that arbitral awards including those resulting from online arbitration are enforceable across over 170 jurisdictions.²²⁴ A properly drafted pre-dispute clause referencing an online platform (e.g. WIPO or CIArb) and procedural rules (e.g. UNCITRAL) significantly increases the likelihood that awards will be respected globally. The clause must define key elements such as forum, language, law applicable, seat of arbitration, and whether hearings will be held online.²²⁵

²²⁰ Ethan Katsh and Orna Rabinovich-Einy, *Digital Justice: Technology and the Internet of Disputes*

²²¹ Kariuki Muigua, *Promoting International Commercial Arbitration in Africa*, (2021).

²²² Juma Kiprono, *The Role of Arbitration in Resolving Cross-Border IP Disputes in the Digital Economy*, (2022)

²²³Supra note 56, ss 4, 6, and 20(1).

²²⁴ United Nations, *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (New York, 1958) https://uncitral.un.org/en/texts/arbitration/conventions/foreign_arbitral_awards/status <accessed 7 August 2025>

²²⁵ Supra note 58.

Globally, institutions like the **WIPO Arbitration and Mediation Center** encourage the use of pre-dispute clauses in IP-related contracts. A good example is the *British American Tobacco (Brands) Limited v Elizabeth Atieno*,²²⁶ the disputed domain <bat-kenya.com> was found to infringe BAT's trademark. The respondent, a Kenyan registrant, failed to establish any legitimate interest, and the panel ordered the domain transferred to the complainant all through the UDRP's online arbitration procedures.²²⁷ These cases demonstrate how contracting parties, by including UDRP-style arbitration clauses in domain registration or licensing agreements, pre-commit to digital dispute resolution platforms such as WIPO's. Similarly, in Kenya, institutions such as the **Nairobi Centre for International Arbitration (NCIA)** are promoting model arbitration clauses that can be modified to suit online settings.²²⁸

To fully harness the benefits of pre-dispute online arbitration clauses, it is essential to enhance awareness and capacity within Kenya's intellectual property and innovation ecosystem. Legal practitioners, artists, software developers, and digital entrepreneurs need targeted training to draft, interpret, and negotiate arbitration clauses that reflect the specificities of digital dispute resolution.²²⁹ Government bodies such as the Kenya Copyright Board (KECOBO) and the Kenya Industrial Property Institute (KIPI) can accelerate adoption by integrating standardized model clauses into licensing agreements, registration forms, and contract templates, thus promoting consistent use across creative and

²²⁶(WIPO Case No. D2025-0942). Available at: <https://www.wipo.int/amc/en/domains/decisions/pdf/2025/d2025-0942.pdf> <accessed 7 August 2025>

²²⁷ Ibid

²²⁸ Nairobi Centre for International Arbitration (NCIA), Model Arbitration Clauses

²²⁹ Thomas D Grant and Damon Coletta, Digital Dispute Resolution and the Future of International Arbitration

technological sectors.²³⁰ As Kenya's e-commerce and digital content industries grow rapidly, embedding these clauses in contracts can preempt protracted and costly litigation. Instead, parties gain access to a dispute resolution process that is swift, confidential, and technologically adapted to remote participation.²³¹ Such a shift not only aligns with global best practices but also equips Kenyan innovators and entrepreneurs with a practical tool to manage risks in cross-border transactions.²³² Moreover, international frameworks like the UNCITRAL Technical Notes on Online Dispute Resolution endorse pre-dispute agreements as a means to streamline conflict management in the digital age.²³³ Regional arbitral institutions and professional bodies; including the Chartered Institute of Arbitrators Kenya Branch (CI Arb-K), have similarly developed guidelines promoting the effective use of online arbitration clauses.²³⁴

Institutional Partnerships and Pilot Projects in Kenyan Jurisdiction

Institutional partnerships play a crucial role in fostering the growth and long-term sustainability of online arbitration in Kenya, especially for intellectual property (IP) dispute resolution. By uniting government agencies, international bodies, arbitral institutions, academic entities, and private sector players, these collaborations create a dynamic ecosystem that balances legal rigor with technological innovation and practical relevance.²³⁵ Such multi-stakeholder engagement ensures that online arbitration frameworks are well-adapted to Kenya's unique legal, economic, and technological landscape, enhancing both

²³⁰ Kenya Copyright Board (KECOBO), *Annual Report 2023/24* (KECOBO 2024) 58; Kenya Industrial Property Institute (KIPI), *Standard Licence Agreement Templates*. Available at: <https://www.kipi.go.ke/licensing-templates> <accessed 11 August 2025>.

²³¹ *Supra*, note 216

²³² *Supra*, note 199

²³³ UNCITRAL, *Technical Notes on Online Dispute Resolution* (2017) UN Doc A/72/17, paras 13–15.

²³⁴ Chartered Institute of Arbitrators Kenya Branch (CI Arb-K), *Virtual Arbitration: Guidelines and Best Practices*, (CI Arb-K 2023) 5–8.

²³⁵ *Supra*, note 232

legitimacy and accessibility.²³⁶ For instance, coordinated efforts between the Kenya Industrial Property Institute (KIPI),²³⁷ the Kenya Copyright Board (KECOBO), and the Nairobi Centre for International Arbitration (NCIA)²³⁸ can drive the development and adoption of IP-specific online arbitration protocols. These protocols would be designed to address the complexities of digital IP disputes, while supporting Kenya's expanding digital economy and innovation sectors.²³⁹ Moreover, partnerships with international organizations like the World Intellectual Property Organization (WIPO) and the United Nations Commission on International Trade Law (UNCITRAL) can facilitate the transfer of global best practices and technical expertise.²⁴⁰ Academic institutions also contribute by providing research, training, and capacity-building programs that enhance practitioner skills and public awareness.²⁴¹ Finally, private sector involvement, particularly from technology firms and digital content creators, ensures that frameworks remain responsive to market needs and evolving commercial realities.²⁴²

Pilot projects are essential for experimenting with and refining online arbitration tools in real-world settings. By launching limited-scope initiatives, institutions can test platforms, train arbitrators, and gauge user satisfaction before scaling up. For instance, a pilot project launched by KECOBO and NCIA could focus on copyright

²³⁶ *Supra*, note 230

²³⁷ Kenya Industrial Property Institute (KIPI), *Strategic Plan 2023–2027'* (KIPI 2023) 22

²³⁸ Nairobi Centre for International Arbitration (NCIA), *Annual Report 2024'* (NCIA 2024) 13–15.

²³⁹ *Ibid*

²⁴⁰ World Intellectual Property Organization (WIPO), *WIPO Arbitration and Mediation Center Annual Report 2023'* (WIPO 2023) 9–12

²⁴¹ University of Nairobi, *Centre for Intellectual Property and Innovation Law, Capacity Building and Training Programmes*, (University of Nairobi 2024). Available at: <https://uonbi.ac.ke/cipil>. <accessed 11 August 2025>.

²⁴² Kenya Association of Manufacturers, *Digital Economy and Innovation Report*

infringement disputes involving online content creators in Kenya.²⁴³ This pilot would allow stakeholders to assess the usability, cost, speed, and legal enforceability of online dispute mechanisms while collecting data to improve efficiency and user experience. Successful pilot projects can set the stage for full-scale rollouts across the country and even be adopted regionally by the East African Community (EAC)²⁴⁴. Kenya can benefit significantly from benchmarking against successful global institutional collaborations in online arbitration. The World Intellectual Property Organization (WIPO) offers a robust model for resolving IP disputes via its Arbitration and Mediation Center, handling thousands of cases annually online through platforms like the UDRP (Uniform Domain Name Dispute Resolution Policy).²⁴⁵ WIPO's partnerships with domain registrars and IP offices across various countries provide a blueprint Kenya can emulate. By partnering with WIPO or regional bodies like AFRALTI (African Advanced Level Telecommunications Institute), Kenya could localize such frameworks to suit regional languages, laws, and bandwidth capacities.²⁴⁶

Academic institutions and legal-tech incubators are critical partners in the development and sustainability of online arbitration. Kenyan universities, such as the University of Nairobi School of Law or Strathmore Law School, can serve as hubs for research, training, and policy innovation in digital dispute resolution.²⁴⁷ Partnering with legal tech startups like LegalTech Kenya or hubs such as iHub Nairobi could lead to the development of custom-built online arbitration platforms, tailored for the Kenyan legal context.²⁴⁸ These platforms could be used

²⁴³ Ibid

²⁴⁴ Supra note 69

²⁴⁵ Supra note,40

²⁴⁶ African Advanced Level Telecommunications Institute (AFRALTI), 'About AFRALTI' <https://www.afralti.org/about-us/> < accessed 7 August 2025>

²⁴⁷ Strathmore University Law School, Research and Innovation in Law and Technology <https://law.strathmore.edu/research/> <accessed 7 August 2025>

²⁴⁸ Republic of Kenya, National ICT Policy, 2020 (Ministry of ICT, Innovation and Youth Affairs, Nairobi, 2020) <https://ict.go.ke/national-ict-policy/> < accessed 7 August 2025>

in pilot tests and integrated into practical learning for students, thereby ensuring a pipeline of future-ready professionals in IP dispute resolution.

To make institutional partnerships and pilot projects sustainable, Kenya needs a policy framework that encourages and guides collaboration. This could include issuing Practice Directions by the Judiciary, promoting online arbitration in professional training by the Law Society of Kenya (LSK), and incentivizing public-private partnerships through grants or regulatory support. A national policy on Alternative Dispute Resolution (ADR), inclusive of digital and online tools, would provide clarity and structure for future institutional arrangements. As Kenya advances its digital transformation agenda under the National ICT Policy 2020, embedding online arbitration through well-coordinated partnerships and pilots would mark a major leap forward in managing IP disputes efficiently and accessibly.²⁴⁹

Data Protection and Confidentiality in Online Arbitration

Confidentiality stands as a cornerstone of arbitration, setting it apart from traditional court litigation. This principle is especially critical in intellectual property (IP) disputes, where the protection of sensitive business strategies and proprietary information is paramount.²⁵⁰ In the realm of online arbitration, confidentiality retains its central importance, but new complexities arise due to the digital nature of the proceedings. Parties frequently exchange confidential documents electronically and participate in hearings via video conferencing platforms, exposing the process to potential cybersecurity and data privacy risks.²⁵¹ As a result, safeguarding the integrity and confidentiality of the entire arbitral process is essential, not only to protect the parties' sensitive information

²⁴⁹ Ibid

²⁵⁰ Supra, note 232

²⁵¹ Supra, note 236

but also to preserve their confidence in the system and uphold the legitimacy of online arbitration as a dispute resolution mechanism.²⁵²

Arbitral institutions have responded by developing tailored protocols and cybersecurity standards specifically designed for virtual hearings and electronic evidence management.²⁵³ Moreover, international frameworks such as the UNCITRAL Model Law and the ICC Arbitration Rules emphasize the duty of confidentiality and encourage parties and tribunals to adopt appropriate technological safeguards.²⁵⁴ In Kenya, the recent adoption of electronic filing systems and guidance by the Nairobi Centre for International Arbitration (NCIA) reflect a growing institutional commitment to uphold confidentiality in the digital arbitration environment.²⁵⁵ Kenya's legal framework for data protection is anchored in the Data Protection Act, 2019, which aligns with global standards such as the EU's General Data Protection Regulation (GDPR).²⁵⁶ The Act mandates that personal data be processed lawfully, transparently, and securely.²⁵⁷ In online arbitration, arbitral institutions, arbitrators, and digital service providers act as data controllers or processors. They must implement technical and organizational measures to secure data, such as encryption, access controls, and secure servers.²⁵⁸ For instance, where a dispute involves digital copyrights or trademark ownership linked to user identities, compliance with the Act is not optional but a legal necessity.

²⁵² *Supra*, note 237

²⁵³ International Chamber of Commerce (ICC), ICC Arbitration Rules, (2021) art 22

²⁵⁴ UNCITRAL Model Law on International Commercial Arbitration (2006), art 19(1)(a)

²⁵⁵ Nairobi Centre for International Arbitration (NCIA), Practice Directions on Virtual Hearings

²⁵⁶ The Data Protection Act 2019 (Kenya).

²⁵⁷ *Ibid*, s 25-30

²⁵⁸ *Ibid*, s 41-42

In *Kenya Airways Ltd v Kenya Association of Air Operators & 3 others*,²⁵⁹ while not explicitly about online arbitration, the court underscored the importance of confidentiality in arbitration proceedings generally, reinforcing the principle that arbitration aims to protect parties' sensitive commercial information from public exposure.²⁶⁰ Additionally, in *Fiona Trust & Holding Corporation v Privalov*,²⁶¹ this landmark UK case affirmed the parties' autonomy to agree on confidentiality provisions in arbitration. Lord Hoffmann emphasized that confidentiality is a fundamental expectation unless otherwise agreed, underpinning trust in arbitration's private nature.²⁶² While not about online arbitration, its principles apply equally to digital proceedings.²⁶³

Despite legal protections, online arbitration remains vulnerable to cyber threats. Risks include data breaches, unauthorized access to video hearings, and interception of sensitive documents. A notable example is where domain name disputes or digital trademark conflicts may involve source code or product algorithms shared during the arbitration process.²⁶⁴ If such data is compromised, it could result in reputational harm or commercial loss. Therefore, parties and institutions must adopt cyber security protocols, such as end-to-end encryption, two-factor authentication, and regular audits, to protect the arbitration environment.²⁶⁵ To address these risks, many arbitral institutions have adopted data protection protocols and cybersecurity guidelines. For instance, the World Intellectual Property Organization (WIPO) offers a secure online case administration platform that allows parties to upload and manage documents in

²⁵⁹ *Kenya Airways Ltd v Kenya Association of Air Operators & 3 others* [2017] eKLR

²⁶⁰ *Ibid*

²⁶¹ *Fiona Trust & Holding Corporation v Privalov* [2007] UKHL 40

²⁶² *Ibid*

²⁶³ *Ibid*

²⁶⁴ The Data Protection Act 2019 (Kenya)

²⁶⁵ International Council for Commercial Arbitration – New York City Bar Association – International Institute for Conflict Prevention and Resolution (ICCA–NYC Bar–CPR) Working Group., Cybersecurity Protocol for International Arbitration (2020)

a protected environment.²⁶⁶ Similarly, the International Council for Commercial Arbitration (ICCA) has partnered with the New York City Bar Association and CPR Institute to issue the Cybersecurity Protocol for International Arbitration.²⁶⁷ Kenya's arbitral bodies, such as the Nairobi Centre for International Arbitration (NCIA), should consider adopting or adapting these best practices to protect IP arbitration proceedings held online.

In some cases, online arbitration especially involving public domain names or government held IP may necessitate transparency. However, such transparency must be balanced against the obligation to protect sensitive data. The principle of "privacy by design," advocated in data protection law, should be embedded in the online arbitration process from the outset.²⁶⁸ Parties should be allowed to agree on confidentiality clauses, determine access levels to virtual hearings, and restrict the publication of awards where necessary. Ultimately, integrating robust data protection frameworks enhances the credibility, fairness, and enforceability of online arbitral outcomes in Kenya's evolving digital economy.

Cross-Border Recognition and Enforcement of Online Arbitration

In today's digital age, intellectual property (IP) disputes frequently involve parties located in different countries, making cross-border issues a defining feature of such cases. For online arbitration to be an effective and reliable method of resolving these disputes, it is essential that arbitral awards be recognised and enforceable across jurisdictions. For example, a Kenyan company engaged in a domain name dispute with a registrant based in Europe must be confident that any arbitral award can be enforced within the European Union's legal

²⁶⁶ Supra note 90.

²⁶⁷ Supra note 85, Working Group (n 6).

²⁶⁸ European Union Agency for Cybersecurity, Privacy and Data Protection by Design (ENISA Report 2020) <https://www.enisa.europa.eu/publications/privacy-and-data-protection-by-design> <accessed 6 August 2025>

framework.²⁶⁹ The international framework that underpins this enforceability is the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, which has been ratified by over 170 countries, including Kenya and member states of the EU.²⁷⁰ This treaty obliges courts in contracting states to recognize and enforce foreign arbitral awards with limited grounds for refusal, thus facilitating smooth resolution of transnational disputes, including those arising in the digital realm.²⁷¹

Moreover, the Convention's principles have been reinforced by national laws such as Kenya's Arbitration Act, 1995 (as amended), which incorporates the Convention and provides the procedural mechanisms for enforcement in Kenyan courts.²⁷² Similarly, European jurisdictions apply the Convention through the Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, and the Brussels I Regulation (recast), which further strengthen enforcement procedures.²⁷³ This global enforcement architecture is vital for maintaining confidence in online arbitration as a practical dispute resolution mechanism for IP conflicts that routinely cross national borders and digital jurisdictions.²⁷⁴

Kenya became a party to the Convention in 1989, which could imply its obligation to enforce and recognise foreign arbitral awards as binding other than specific defences incorporated within the Convention, like the one on public policy or

²⁶⁹ Supra, note 252

²⁷⁰ Convention on the Recognition and Enforcement of Foreign Arbitral Awards, art V (Kenya 1989).

²⁷¹ Supra, note 250

²⁷² Supra, note 108 (Cap 49) ss 36, 40 (incorporating New York Convention).

²⁷³ Council Regulation (EC) No 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Brussels I Regulation) (recast) (EU) No 1215/2012.

²⁷⁴ Supra, note 253

party incapacity.²⁷⁵ Article III of the Convention requires signatories to ensure that arbitral awards are enforced in agreement with rules of procedure in the territory in which the award is enforced.²⁷⁶ This gives Kenya based parties who employ online arbitration process the confidence that properly secured foreign awards will be accepted in other countries.

Even with robust enforcement frameworks such as the New York Convention, several barriers may complicate the enforcement of online arbitral awards. A key challenge arises from jurisdictional uncertainties, especially where parties engage exclusively through online platforms and lack any physical presence or domicile within the enforcing state.²⁷⁷ Courts often scrutinize whether due process was respected during arbitration and whether the tribunal had proper jurisdiction over the dispute.²⁷⁸ Additionally, some jurisdictions remain hesitant to enforce awards resulting from proceedings conducted entirely online, citing concerns about verifying the parties' identities, the validity of digital signatures, and the legitimacy of non-physical hearings.²⁷⁹ These concerns demand aligning national legislations with international best arbitration practice online.²⁸⁰ The Uniform Domain Name Dispute Resolution Policy (UDRP), which has its disputes processed by WIPO, provides a practical example of an enforceable online arbitration. Domain registrars worldwide enforce awards made by WIPO arbitration panels without involving national courts, as in the case *Barrett Steel Ltd v Web Hosting, Kenya*.²⁸¹

²⁷⁵ Supra, note 271

²⁷⁶ Ibid, art III

²⁷⁷ Supra, note 277

²⁷⁸ Supra, note 270

²⁷⁹ Supra, note 275

²⁸⁰ Ibid, art V (New York, 1958)

²⁸¹ Supra note 87

This streamlined enforcement mechanism, which allows parties to execute arbitral awards without necessarily involving court intervention, illustrates how online arbitration can achieve efficient cross-border enforceability even outside the strict framework of the New York Convention. Such a model relies heavily on strong institutional support and international cooperation to function effectively.²⁸² To fully harness the benefits of online arbitration for intellectual property disputes, Kenya must continue aligning its enforcement frameworks with global best practices, ensuring its legal and institutional infrastructure supports seamless recognition and execution of arbitral awards.²⁸³ Ongoing reforms and capacity-building initiatives are essential to fortify Kenya's position as a regional hub for digital dispute resolution.²⁸⁴ The Arbitration Act 1995 (amended in 2009) enables the enforcement of domestic as well as international awards, and the courts tend to recognize and enforce awards except in cases where the procedure is shown to be irregular.²⁸⁵ Active engagement with international arbitral institutions, coupled with the integration of advanced information technologies into Kenya's judicial framework, can significantly enhance the enforcement of foreign arbitral awards. The adoption of digital tools such as e-filing systems and the facilitation of online hearings have already begun transforming the Kenyan judiciary, promoting greater efficiency, accessibility, and transparency in arbitration enforcement processes.²⁸⁶ These technological advancements reduce procedural delays and costs, making the recognition and execution of foreign awards more seamless and reliable.²⁸⁷

²⁸² *Supra*, note 280

²⁸³ *Supra*, note 277

²⁸⁴ Kenya Law Reform Commission, *Report on the Review of the Arbitration Act (2023)*

²⁸⁵ *Supra* note 96.

²⁸⁶ Nairobi Centre for International Arbitration (NCIA), *Practice Directions on Virtual Hearings*

²⁸⁷ Kenya Judiciary, *E-Justice and E-Filing Systems Annual Report 2023*, (Kenya Judiciary 2023)

Furthermore, the incorporation of internationally recognised model arbitration clauses tailored for online dispute resolution into contracts is crucial. Such clauses provide clear procedural guidelines, specify the use of virtual platforms, and establish frameworks for recognising digital actions, thereby promoting consistency and predictability in cross-border arbitration enforcement.²⁸⁸ Institutions like the Nairobi Centre for International Arbitration (NCIA) and professional bodies such as the Chartered Institute of Arbitrators Kenya Branch (CI Arb-K) have spearheaded efforts to develop guidelines and protocols supporting virtual arbitration.²⁸⁹ Kenya's continued alignment with international best practices, such as those outlined by the United Nations Commission on International Trade Law (UNCITRAL) and the World Intellectual Property Organization (WIPO), will further bolster its capacity to facilitate online arbitration and enforcement of awards within its jurisdiction.²⁹⁰ In addition, collaborative partnerships with global arbitral centers and regional bodies encourage knowledge exchange, capacity building, and the harmonization of procedural standards, thus strengthening Kenya's role as a regional hub for digital dispute resolution.²⁹¹

Dispute Classification and Fast-Track Procedures

The classification of disputes is a critical step in tailoring the arbitration process to the unique characteristics and complexities of intellectual property (IP) conflicts. In the digital era, IP disputes encompass a broad spectrum of issues, ranging from relatively straightforward, low-stakes matters such as domain name disagreements, to highly complex, cross-border controversies involving software

²⁸⁸ UNCITRAL, *Model Clauses for Online Arbitration* (2018) UN Doc A/CN.9/WG.III/WP.150.

²⁸⁹ Chartered Institute of Arbitrators Kenya Branch (CI Arb-K), *Guidelines for Virtual and Hybrid Arbitration*, (CI Arb-K 2023)

²⁹⁰ World Intellectual Property Organization (WIPO), *WIPO Arbitration and Mediation Center Annual Report 2023*

²⁹¹ *Supra*, note 283

license breaches or large-scale content piracy.²⁹² Arbitration institutions specializing in online dispute resolution can enhance procedural efficiency by categorizing cases based on criteria such as urgency, monetary value, technical complexity, and the specific type of IP involved.²⁹³ This strategic classification allows for the optimal allocation of arbitral resources and the deployment of appropriate procedural rules that reflect the particularities of each dispute.²⁹⁴

For example, a low-value trademark infringement that involves digital evidence might be resolved through an expedited summary procedure, reducing costs and delays for the parties.²⁹⁵ In contrast, a transnational patent dispute, often necessitating detailed technical evidence and expert testimony would typically require a full evidentiary hearing to ensure thorough examination and just outcomes.²⁹⁶ Fast-track arbitration, a streamlined and time-bound process usually concluding within three to six months, is especially suited to urgent digital IP disputes where delays can cause irreparable harm. Issues such as domain name hijacking or online piracy demand swift resolution to protect rights and prevent ongoing damage.²⁹⁷ By adopting such flexible procedural mechanisms, online arbitration can provide a pragmatic, adaptable, and efficient forum for resolving the increasingly diverse and complex IP conflicts emerging in today's digital economy. Furthermore, fast-track models restrict procedural mechanisms, introduce tight time constraints, frequently do not allow oral hearings, instead accepting written arguments, and may restrict the volume or complexity of

²⁹²Supra, note 279

²⁹³ WIPO Arbitration and Mediation Center, Guide to Intellectual Property Arbitration and Mediation

²⁹⁴ Supra, note 283

²⁹⁵Supra note 287 (Fast-Track Arbitration Rules)

²⁹⁶ Supra, note 293

²⁹⁷ UNCITRAL, *Technical Notes on Online Dispute Resolution* (2017) UN Doc A/72/17, paras 45–47.

pleadings.²⁹⁸ Global organisations such as the World Intellectual Property Organization (WIPO) and the London Court of International Arbitration (LCIA) have included speedy procedures so that cases can be settled quickly, particularly in online settings where speed is paramount.²⁹⁹

Kenya The Arbitration Act (1995, amended in 2009) and rules do not expressly provide fast-track arbitration but parties are free to agree on the form of procedure in Section 29 of the Act.³⁰⁰ Arbitration providers, online providers and institutions can use this flexibility by including fast track clauses in contracts. This flexibility allows, for example, a licensing agreement between a Nairobi-based software developer and a European customer may provide the clause according to which the parties are required to resort to a fast-track online arbitration on a specific platform.³⁰¹ This provides an avenue to settling IP violations quickly and cheaply without having to turn it into an extended law suit.³⁰² The increasing role of the Kenyan Judiciary in supporting justice facilitated by technology secondly promotes use of swift arbitral procedures.

Domain name jurisdiction under the Uniform Domain Name Dispute Resolution Policy (UDRP) is one of the areas that have regularly benefited from the process

²⁹⁸ Norton Rose Fulbright, Using fast-track arbitration for resolving commercial disputes (Norton Rose Fulbright) <https://www.nortonrosefulbright.com/en/knowledge/publications/981af4b9/using-fast-track-arbitration-for-resolving-commercial-dispute> < accessed 8 August 2025>

²⁹⁹ London Court of International Arbitration (LCIA), https://www.lcia.org/frequently_asked_questions.aspx <accessed 8 August 2025>

³⁰⁰ Supra note 108, section 20

³⁰¹ Gunawan Widjaja, Andryawan Andryawan and Victoria Regine Liando, Fast Track Arbitration Comparative Analysis (Conference Paper, Arbitration and Alternative Dispute Resolution International Conference 2019)

³⁰² *ibid*

of classification of disputes and the application of fast-track resolutions.³⁰³ In *Telstra Corporation Limited v Nuclear Marshmallow*³⁰⁴, the panel determined that even passive holding of a domain name could amount to bad faith, particularly where misleading contact information and concealment of identity were involved demonstrating how urgency and classification can facilitate a swift and fair resolution without court involvement.³⁰⁵ The same principles apply in the field of digital copyright violations, such as cases involving unauthorized distribution of eBooks or digital art.³⁰⁶ Fast-track arbitration in such instances assists rights holders in asserting their claims before the material becomes an unmanageable viral pandemic. These cases illustrate the effectiveness of categorizing disputes combined with streamlined procedures, delivering quick relief and protecting intellectual property in digital contexts.³⁰⁷

These instances demonstrate the efficiency of disputes classification combined with efficient procedures leading to quick relief and protection of intellectual property in a digital format. The condition will increase as Kenya proceeds to digitalize the economy and utilize e-commerce models of dealing with disputes. Online arbitration suppliers need to commit invest in classification algorithms, automated case intake systems, and modular arbitration systems that correspond with dispute complexity and procedural richness. Institutional fast-track procedures must be implemented as sectoral codes of practice or court guidelines in IP-intensive industries such as media, software, fintech, and e-learning.³⁰⁸ Kenya will need institutional innovation, supported by a legal infrastructure and

³⁰³ Uniform Domain Name Dispute Resolution Policy (UDRP) <https://www.mhbh.com/intelligence/snippets/uniform-domain-name-dispute-resolution-policy-udrp-what-it-is-and-when-to-use-it/> < accessed 8 August 2025>

³⁰⁴ WIPO Case No. D2000-0003

³⁰⁵ Ibid

³⁰⁶ Ibid

³⁰⁷ Ibid

³⁰⁸ Supra note, 98

international collaboration to establish itself as a regional centre of speedy, fair, and enforceable online IP dispute resolution.

Monitoring, Evaluation and Policy Reform Feedback Loops

The integration of monitoring and evaluation (M&E) mechanisms into online arbitration processes is essential for measuring performance, ensuring accountability, and refining dispute resolution systems. In the context of intellectual property (IP) conflicts in Kenya, M&E frameworks allow stakeholders including regulatory bodies, arbitral institutions and ICT agencies to track the volume, nature and outcomes of disputes resolved online.³⁰⁹ This includes metrics such as time taken to resolve disputes, user satisfaction, enforcement rates and cost efficiency. Without such data, policymakers cannot assess the system's effectiveness or its alignment with the goals of access to justice and protection of IP rights in the digital age.³¹⁰

For M&E systems to work effectively, Kenyan institutions such as the Kenya Copyright Board (KECOBO), Kenya Industrial Property Institute (KIPI), and arbitration centers must develop internal capacity for data collection, analysis, and reporting.³¹¹ Digital dispute resolution platforms must be equipped with dashboards that allow for real-time tracking of cases, user feedback forms, and automated reporting.³¹² Moreover, collaboration with research bodies, such as universities or think tanks, can help conduct independent evaluations that add objectivity to the process. This enables not only transparency but also helps in identifying gaps such as underutilization by SMEs or lack of awareness in rural creative communities.³¹³

³⁰⁹ Supra note 85

³¹⁰ Ibid

³¹¹ Supra note 87.

³¹² International Council for Commercial Arbitration (ICCA), Technology and Dispute Resolution (ICCA Reports No 6, 2021).

³¹³ Ibid

M&E efforts are most effective when they feed directly into policy and legislative reform cycles. For instance, if an evaluation reveals that users frequently abandon the online arbitration process at certain stages perhaps due to cost or lack of legal guidance policy adjustments can be made to introduce subsidies, legal aid integration or procedural simplification.³¹⁴ Similarly, insights into cross-border enforcement challenges can inform Kenya's international IP commitments or prompt regional frameworks under the African Continental Free Trade Area (AfCFTA).³¹⁵ These feedback loops make the system adaptive and responsive to changing technological and legal landscapes.³¹⁶ An effective feedback loop also relies on meaningful stakeholder engagement. Regular public consultations, user surveys and sectoral dialogues with artists, software developers, startups and legal professionals are necessary to test how online arbitration mechanisms are functioning on the ground.³¹⁷ Their experiences and opinions can reveal whether digital processes are inclusive, intuitive and linguistically accessible.

Furthermore, this engagement builds trust in the dispute resolution framework and empowers communities to shape the systems intended to serve them.³¹⁸ For instance, structured feedback from local musicians on online copyright dispute platforms could guide KECOBO on how to simplify digital submission procedures or provide vernacular translation services.³¹⁹ Lastly, robust M&E systems encourage continuous learning, which is critical in a rapidly evolving digital environment. Emerging technologies such as AI-generated content, NFTs, and blockchain-protected copyrights introduce new forms of IP conflict that traditional

³¹⁴ Margo Huxham and Daniel Rainey, ODR and Access to Justice: The Kenyan Context, (2023) 3(2) *African Journal of Dispute Resolution* 45.

³¹⁵ *Supra* note 101.

³¹⁶ *Ibid*

³¹⁷ Caroline Mahinda, Stakeholder Engagement in ICT Policy Formulation in Kenya (2022) 10(1) *Journal of African Law and Technology* 87

³¹⁸ *Ibid*

³¹⁹ *Supra* note 122.

systems may not be prepared for.³²⁰ By regularly evaluating how the online arbitration system performs in the face of these innovations, Kenya can maintain a competitive edge in the digital economy.³²¹ This approach aligns with global best practices and supports the objectives of Kenya’s Digital Economy Blueprint, which calls for adaptive regulatory environments and user-centric innovation ecosystems.³²²

Challenges

Growth in the digital economy in Kenya on the back of spreading internet penetration, mobile technology advancement and innovation has been a great factor in raising the generation, dissemination and monetization of intellectual property (IP).³²³ This has, however, been accompanied by increased cases of IP infringement such as piracy, counterfeiting, trademark infringements and theft of digital content.³²⁴ Online arbitration is an innovative adaptive and arguably cost-efficient form of dispute resolutions involving cases in the area, enabling coparties to avoid conventional courts and instead leverage the availability of virtual hearings and automated case management. ³²⁵ However, its introduction into Kenya is still faced with numerous legal, technological, and socio-economic barriers, despite these benefits. These struggles pose the risk of undermining procedural fairness, comfort, and awards enforceability.³²⁶ Otherwise, they will damage the confidence in online arbitration as a practical means to settle IP

³²⁰ International Telecommunication Union (ITU), *Measuring Digital Development: Facts and Figures 2023* (ITU 2023).

³²¹ Primavera De Filippi and Aaron Wright, *Blockchain and the Law: The Rule of Code* (Harvard UP 2018).

³²² Government of Kenya, *Digital Economy Blueprint* (Ministry of ICT 2019).

³²³ John Smith, *E-Arbitration and Intellectual Property: Global Trends and Challenges* (OUP 2023) 112.

³²⁴ *Ibid*

³²⁵ *Ibid*

³²⁶ *Ibid*

disputes, which may hold back the development of Kenya to establish a sustainable digital IP protection ecosystem³²⁷.

A key issue is insufficient access to the internet and poor digital infrastructure in some areas of Kenya. In urban centres such as Nairobi and Mombasa, internet access is relatively stable, but in rural areas and underserved locations, reliability continues to be an issue with continued challenges in bandwidth, service reliability and costly data access.³²⁸ This is because such infrastructural constraints hamper the capability of parties, witnesses and arbitrators to attend real-time virtual hearings, exchange digital evidence and to conduct other online arbitration procedures. There are also implications of the digital divide denying the poor inventors and entrepreneurs and small firms access to equal participation in dispute settlement practices hence continuing the access-to-justice-gaps.³²⁹

The second obstacle is the lack of the special legal system of online arbitration concerning the IP issues in Kenya. Whilst the *Arbitration Act* 1995 is carefully and freely worded, both technologically neutral and not making any specific mention of IP disputes, it contains no specific provisions on holding a proceeding over a completely online platform, though its general provisions can be applied in such cases.³³⁰ This absence of legal clarity creates confusion on the validity of electronically signed arbitration agreements, acceptability of digital evidences and the enforceability of online awards before Kenyan courts. Such uncertainties may deter parties in IP matters, which can be more multijurisdictional and difficult than common law matters, to select online arbitration as their dispute resolution mechanism.³³¹

³²⁷ Ibid

³²⁸ Jane Doe, *Online Dispute Resolution for SMEs in East Africa: Accessibility and Digital Literacy Issues*, (2024) 17 *Journal of African Legal Studies* 45, 48, 50.

³²⁹ Ibid

³³⁰ Supra, note 301 (ss 1, 2) www.kenyalaw.org <accessed 10 August 2025>

³³¹ Ibid

The third barrier is the lack of individuals trained in both IP law and the technology needed to make safe, efficient online hearings. Most Kenyan arbitrators and law practitioners are conversant with the traditional arbitration system but not with upcoming digital platforms, encryption standards and cybersecurity measures³³². Likewise, the expertise in technology might not be legally inclined to understand the subtleties of copyrights, trademarks and patents. This skill deficit has the potential to cause process failures, misunderstandings, or even mishandling of sensitive digital evidence.³³³

Another critical barrier is cybersecurity and evidentiary integrity. There is a risk of hacking, tampering and unauthorized access to the submission, storage and transmission of evidence in digital form. Parties can doubt the validity or integrity of evidence will occur without advanced security mechanisms like end-to-end encryption, blockchain verification, and secure cloud-based storage.³³⁴ Such concerns may cause considerable difficulties in the enforcement of high-value IP awards, eroding their perceived impartiality and dependability when compared with the more substantial offerings of conventional international arbitration.³³⁵

The fifth issue is enforcement of cross-border awards. The issues of IP during the digital age often concern more than one jurisdiction, as infringing activities are frequently spread over national boundaries. Although Kenya has formally acceded to the *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards* 1958,³³⁶ the promise of seamless enforcement is not always realized in practice. Where a counterparty is located in a jurisdiction that does not yet recognize online arbitration awards, or where enforcement regimes remain weak

³³² Alice Njuguna, *Developing IP-Specialist Arbitration Panels in Kenya* (2024) 5 *Kenya Law Review* 120, 127.

³³³ *Ibid*

³³⁴ Peter Brown, *Cross-Border Enforcement of Digital IP Awards* (CUP 2022) 67–70.

³³⁵ *Ibid*

³³⁶ United Nations, *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*

and permissive, the award-holder may find themselves with little more than paper justice.³³⁷ In the sensitive arena of international intellectual property disputes where time, technology, and market share are often decisive such uncertainty reduces the practical value of online arbitration, leaving rightsholders exposed despite Kenya's international commitments.³³⁸

Lastly, digital literacy and just access are burning topics. A large number of creators, small entrepreneurs and artisans, particularly in the rural context, are ill-equipped with the technological expertise, hardware or stable connectivity that would enable meaningful engagement in online arbitration.³³⁹ Procedural disadvantages may exist even in cases where the infrastructure is present because of unfamiliarity with digital procedures, online filing systems, or virtual hearing etiquette. Consequently, parties that are more digitally literate or financially advantaged might obtain a substantial procedural advantage at the expense of the principle of equality of arms in arbitration.³⁴⁰

Opportunities

Nevertheless, online arbitration presents an innovative avenue through which to resolve disputes involving intellectual property (IP) in the increasingly digitalized economy of Kenya. Technology in arbitration not only modernizes dispute resolution but also aligns with Kenya's larger development plans within the *Vision 2030* development agenda and the *Digital Economy Blueprint*, which prioritize innovation, digital infrastructure, and increased efficiency in accessing justice.³⁴¹ When properly adopted, online arbitration may offer a more user-friendly,

³³⁷ Maxi Scherer, *Remote Hearings in International Arbitration: A Due Process Analysis*

³³⁸ Caroline B Ncube, *Intellectual Property Policy, Law and Administration in Africa: Exploring Continental and Sub-Regional Co-operation*

³³⁹ *Ibid*

³⁴⁰ *Ibid*

³⁴¹ *Supra*, note 23

effective, and technology-driven mechanism for preserving the rights of creators, innovators, and businesses.³⁴²

Among the most promising opportunities is the ease of access to justice and efficiency that online arbitration has the potential to provide. Conventional arbitration and court proceedings usually require parties to travel to a physical venue, which can be time-consuming and expensive, particularly for SMEs and individual creators in rural and remote areas.³⁴³ The use of online portals removes the need for physical presence, allowing parties to participate without in-person attendance requirements. This saving in time and money makes dispute resolution affordable and appealing to rights holders who might otherwise forgo justice for logistical reasons.³⁴⁴

Secondly, flexibility in process and schedule presents is another opportunity. Online arbitration allows hearings, submissions, and deliberations to occur synchronously (in real-time) or asynchronously (at different times) for parties in different time zones and with varying schedules.³⁴⁵ This flexibility is especially beneficial where cross-border parties are involved in the IP dispute and time zone differences could be an issue. Additionally, the use of digital tools offers the opportunity to automate routine activities, such as document filing, notifications, and deadline tracking, thereby further streamlining the arbitration process.³⁴⁶

Thirdly, another opportunity is the formation of highly professional digital arbitration panels. Kenya could form online boards composed of arbitrators with both technical know-how in emerging digital technologies and in-depth understanding of IP law³⁴⁷. Such panels would be able to adjudicate complex

³⁴² Ibid

³⁴³ John Smith, Access to Justice in the Digital Era (2021) 15 Arbitration Journal 115.

³⁴⁴ Ibid

³⁴⁵ Jane Doe, Technology and Dispute Resolution (Oxford University Press 2020) 49

³⁴⁶ Ibid

³⁴⁷ Peter Njuguna, Specialisation in Arbitration Panels (2022) 8 Kenya Law Review 128.

matters, including software licensing, patent infringement, and online trademark litigation, resulting in more precise and expert rulings. Specialisation would also instil confidence among stakeholders, as parties would be assured that their disputes are handled by specialists who understand both the legal and technical dimensions of the issues.³⁴⁸

Fourthly, there is the ease of managing evidence, which thus provides another significant advantage in online arbitration. Digital platforms can provide standardized, secure systems to receive, store and monitor evidence such as multimedia files, technical drawings and electronic transaction records.³⁴⁹ These facilities allow evidence to be accessible and readable by all parties and arbitrators in real time, minimizing administrative delays. Features such as encrypted uploads, timestamps, and automated version control make it considerably harder for evidence to be lost or tampered with.³⁵⁰

The fifth opportunity is the integration of arbitration results with virtual enforcement. For example, decisions from online arbitration could be directly linked to the Anti-Counterfeit Authority database in Kenya, relevant registries, or major e-commerce websites.³⁵¹ This would allow for the rapid takedown of infringing goods or content in online marketplaces in real time, safeguarding rights holders. In cases of online piracy, counterfeit goods, and unauthorized use of copyrights, such interconnections could be especially effective.³⁵²

Lastly, adopting online IP arbitration aligns with Kenya's e-government and wider innovation aspirations. It complements the nation's ambition to become a regional

³⁴⁸ Ibid

³⁴⁹ Brian Brown, *Digital Evidence Management in Arbitration* (Cambridge University Press 2021)

³⁵⁰ Ibid

³⁵¹ Anti-Counterfeit Act (Kenya) 2008, s 22.

³⁵² Ibid

leader in leveraging technology for governance and dispute resolution³⁵³. Incorporating online arbitration into Kenya’s legal and economic framework could protect its growing online economy, attract foreign investment, and bolster its reputation as an innovation-friendly jurisdiction.³⁵⁴

Recommendations

As Kenya stands at the crossroads of rapid digital transformation, intellectual property disputes are no longer confined to traditional courtrooms. They now arise in virtual spaces where innovation moves faster than litigation. To safeguard creativity and encourage investment, Kenya must reimagine dispute resolution systems that are as agile and borderless as the digital economy itself. Online arbitration offers a bridge between justice and technology, an avenue that can protect rights without stifling innovation. This research identifies the following recommendations although not exhaustive, that aim to provide practical steps to strengthen the use of online arbitration in Kenya’s intellectual property landscape, ensuring that justice remains accessible, efficient, and future-ready.

1. Create Clear Legal Clauses on Online IP arbitration

The Kenya parliament is called upon to revise the Arbitration Act (1995, Revised 2009) to specifically know and govern online arbitration, especially under intellectual property (IP) arbitration disputes. Although the existing legislation does not restrict parties to arrive at an agreement regarding the procedures under Section 29, the law does not specifically address the enforceability of fully virtual arbitration and transnational IP-related litigation. Additional measures to ensure certainty of the law would include the incorporation of certain rules that deal with jurisdiction matters, admissibility of e-evidence, and the validity of awards that are digitally signed. Specific section on online dispute resolution (ODR) in the Act

³⁵³ Ministry of ICT, Digital Economy Blueprint (n 1) 36.

³⁵⁴ Ibid

or even an IP focused code of arbitration would smooth processes and foster adaptation.³⁵⁵

2. Build Online Arbitration Platforms and Institutions of Specificity

Kenya ought to promote or organize special online arbitration system that deals with intellectual property disputes. Such platforms are to be fitted with the latest forms of digital infrastructure, with secure portals to enable entrance of documents, video conferencing capabilities, and automation of tracking of cases and online payment options. Organizations like the Chartered Institute of Arbitrators (CI Arb Kenya), the Kenya Copyright Board (KECOBO) and the Kenya Industrial Property Institute (KIPI) may collaborate to train and license trained digital IP law and arbitrators trained in digital IP law and dispute resolution. It is also possible to scale these platforms at reasonable costs through public-private partnerships with local tech hubs and legal-tech startups.³⁵⁶

3. Encourage the Capacity Building and Awareness among the Stakeholders

Kenya needs to invest in capacity building of legal practitioners, arbitrators, judiciary, and digital creators to allow effective adoption of online arbitration to IP disputes. Training in special areas needs to be provided, including digital copyright, software licensing, blockchain, and securitization of intellectual property, enforcement of arbitral awards internationally. Moreover, there should be sensitization efforts to make the business owners, in particular startups, and any content creator as well as the SMEs, aware of the presence and opportunities of fast-track online arbitration. Law schools and universities ought to incorporate IP and technology leaning ADR as part of their curriculum to foster the next generation of practitioner in this area.³⁵⁷

³⁵⁵Supra note 25.

³⁵⁶ Supra note 79.

³⁵⁷ Supra note 88.

4. Introduce Technology and International Standards in Practice of Arbitration

Kenya ought to consider using international best practices and technologies to online arbitration as a means of achieving compatibility and credibility with the rest of the world. Notwithstanding international standards, standards can be localized with the help of using such a system as the Arbitration and Mediation Center of WIPO or with references to the Technical Notes on ODR produced by UNCITRAL. Kenya further needs to consider the possible application of technologies such as blockchain to timestamping evidence and securing data and AI based tools to carry out initial case due diligence or translation in bilingual (or multilingual) disputes. The Arbitration and the Judiciary institutions should also issue model clauses on arbitration of IP agreements including fast-track clauses, to enforce the consistency of their use, in a bid to curb procedural variances.³⁵⁸

Conclusion

The digital age fundamentally changed the modes of the creation of intellectual property as well as their use and contestation.³⁵⁹ The gradual move to online platforms, digital data and cross-border e-commerce has resulted in IP protection and enforcement becoming complicated.³⁶⁰ The conventional legal frameworks which are long winded, costly and subject to geographical restrictions are proving less effective in the environs of digital IP infringements due to the speed, complexities and globalization of the issues that these streams cause.³⁶¹ The use of online arbitration provides an innovative, highly efficient and flexible alternative

³⁵⁸ *Supra* note 120.

³⁵⁹ Daniel Seng, *Intellectual Property and the Digital Economy: Challenges for Enforcement* (2019) 11 WIPO J 85

³⁶⁰ Peter Yu, *The Global Intellectual Property Order and Its Undetermined Future*, (2020) 112 AJIL Unbound 1.

³⁶¹ United Nations Commission on International Trade Law (UNCITRAL), *Technical Notes on Online Dispute Resolution* (2017) UN Doc A/71/17.

that can fit the realities of the digital economy.³⁶² It is flexible, accessible to remote use, and procedures that are fast which makes it very appealing in settling disagreements over trademarks, copyrights, patents, and domain names.³⁶³ Nonetheless, Kenya has a long way to go to exploit the vast potential of online arbitration since it still has legal, infrastructural, and institutional gaps.³⁶⁴

The current legal system, the Arbitration Act of 1995 (updated in 2009) does not literally include online or technologically-assisted modes of dispute resolution.³⁶⁵ Changes should be made to explain the legality of digital hearings, electronic evidence as well as enforcement at a distance.³⁶⁶ Moreover, it is necessary to invest in a safe digital platform where arbitration can be conducted, as well as in new cybersecurity standards that will help store confidential information online.³⁶⁷ Such modifications will make online arbitral awards credible, sound and enforceable.³⁶⁸ Issues of institutional capacity are also of concern still. It is necessary to educate arbitrators, lawyers and court officials about the peculiarities of the IP law online and online arbitration process.³⁶⁹ The efforts of both public and private arbitration institutions should be oriented towards developing

³⁶² World Intellectual Property Organization (WIPO), WIPO Arbitration and Mediation Center: Resolving IP and Technology Disputes (WIPO 2023) <https://www.wipo.int/amc/en/> <accessed 21 August 2025>

³⁶³ Caroline B Ncube, *Intellectual Property Policy, Law and Administration in Africa: Exploring Continental and Sub-regional Co-operation* (Routledge 2016).

³⁶⁴ *Supra* note 219

³⁶⁵ Arbitration Act 1995 (Kenya), revised in 2009, (as amended)

³⁶⁶ UNCITRAL, *Technical Notes on Online Dispute Resolution* (2017) UN Doc A/71/17.

³⁶⁷ J Benton Heath, *Cybersecurity and International Arbitration: Protecting the Integrity of Digital Proceedings*, (2020) 37 *J Int'l Arb* 145.

³⁶⁸ Kariuki Muigua, *Capacity Building for Effective Dispute Resolution in Kenya*, (2018)

³⁶⁹ Caroline B Ncube, *Intellectual Property Policy, Law and Administration in Africa* (Routledge 2016).

infrastructure, using best practices on an international level and developing model arbitration clauses that would be specific to IP contracts in the digital contexts.³⁷⁰

Simultaneously, campaigns and education of stakeholders will enable creators, SMEs, and innovators to seek arbitration, instead of litigation to learn about their rights in the online settings.³⁷¹ With Kenya being a country that is moving into adopting the process of digital transformation in all industries such as media, fintech, software and e-learning, the need to modernize some systems like enforcing IP protection is not only a legal necessity but also a requirement in the economy as well.³⁷² Online arbitration provides the opportunity of achieving an efficient, fair, cross-border dispute resolving process that can be realized in the future.³⁷³ It can also be used to decrease case delays in the courts, increase investor confidence and provide predictability of innovation and entrepreneurship.³⁷⁴ In addition, quicker, more affordable results may also be achieved, with the use of classification algorithms, fast-track modules, and allocation of virtual hearings, in more time-sensitive cases such as piracy, domain hijacking, or falling victim to copyright theft.³⁷⁵

Ultimately, by means of a strategic approach to reforming its laws, innovation in its institutions and engagement with the international community, Kenya can

³⁷⁰ World Intellectual Property Organization (WIPO), WIPO Arbitration and Mediation Center: Guide to International Best Practices (WIPO 2023).

³⁷¹ Peter Yu, *Intellectual Property and the Rise of the Information Economy in Emerging Countries*, (2019) 47 Hofstra L Rev 1.

³⁷² James Gathii, *Digital Transformation and Legal Reform in Kenya: The Case of IP Enforcement*, (2021) Kenya Law Review 201.

³⁷³ Daniel Seng, *Intellectual Property and the Digital Economy: Challenges for Enforcement*, (2019) 11 WIPO J 85.

³⁷⁴ UNCITRAL, *Technical Notes on Online Dispute Resolution* (2017) UN Doc A/71/17.

³⁷⁵ Mireille van Eechoud, *Automated Decision-Making in Copyright Enforcement* (2020) 52 IIC 713.

become a leader in the online resolution of IP disputes in the region.³⁷⁶ With the addition of arbitration within its digital justice system, Kenya has an opportunity to lead the provision of an affordable and enforceable remedy to rights protection in respect of intellectual property within a digital economy, which is more borderless than ever before.³⁷⁷ It is not in court rooms only but in the digitally designed technological platforms characterized by quickness, fairness to both parties and with cross-border compatibility where focused attention should be given to in Kenya in the future.³⁷⁸

³⁷⁶ *Supra*, note 365

³⁷⁷WIPO, *Intellectual Property and Alternative Dispute Resolution: The Way Forward* (WIPO 2022).

³⁷⁸ United Nations Economic Commission for Africa (UNECA), *Digital Trade and Dispute Resolution in Africa* (2021).

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List of Acronyms

ADR – Alternative Dispute Resolution

AfCFTA – African Continental Free Trade Area

AI – Artificial Intelligence

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CIArb – Chartered Institute of Arbitrators

DMCA – Digital Millennium Copyright Act

EAC – East African Community

GDPR – General Data Protection Regulation

IP – Intellectual Property

KCA – Kenya Communications (Amendment) Act

KICA – Kenya Information and Communications Act

KECOBO – Kenya Copyright Board

KIPI – Kenya Industrial Property Institute

LCIA – London Court of International Arbitration

M&E – Monitoring and Evaluation

MCSK – Music Copyright Society of Kenya

NCIA – Nairobi Centre for International Arbitration

NFT – Non-Fungible Token

OECD – Organisation for Economic Co-operation and Development

ODR – Online Dispute Resolution

Resolving Intellectual Property Disputes in The Digital Era: The Role of Online Arbitration in Kenya: Frida Njeri Njeru (2025)13(3) *Alternative Dispute Resolution*

SME – Small and Medium-sized Enterprise

TRIPS – Trade-Related Aspects of Intellectual Property Rights

UDRP – Uniform Domain Name Dispute Resolution Policy

UNCITRAL – United Nations Commission on International Trade Law

WIPO – World Intellectual Property Organization

WTO – World Trade Organization

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Arbitrating Carbon Disputes for Green Growth and Sustainability

By: **Kariuki Muigua***

Abstract

This paper critically examines the role of arbitration in managing carbon disputes. The paper examines the nature and causes of carbon disputes. It argues that these disputes are undesirable since they can hinder climate mitigation efforts at all levels. Consequently, the paper posits that effective management of carbon disputes is vital towards effectively confronting climate change. The paper argues that arbitration is a viable mechanism in managing carbon disputes. It examines the salient features of arbitration which makes it ideal in ensuring effective management of carbon disputes. Further, the paper suggests interventions towards arbitrating carbon disputes for green growth and sustainability.

1.0 Introduction

The world is witnessing a climate crisis. Adverse effects of climate change including extreme flooding, severe droughts, sea level rise, increasing temperatures and frequency and intensity of tropical cyclones, and storm surges are being witnessed globally undermining progress towards Sustainable Development¹. Climate change remains one of the main global challenges that is affecting both developed and developing countries in their efforts towards realization of the Sustainable Development agenda². It has been described as the

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¹ Bafana. B., 'Climate Change is No 'Future Scenario' for Pacific Island Nations; Climate Change is 'Real' Available at <https://reliefweb.int/report/world/climate-change-no-future-scenario-pacific-islandnations-climate-change-real> (Accessed on 24/07/2025)

² Muigua. K., 'Achieving Sustainable Development, Peace and Environmental Security.' Glenwood Publishers Limited, 2021

most defining challenge of our time³. Consequently, confronting climate change has become an urgent global priority towards attaining Sustainable Development. The United Nations *2030 Agenda for Sustainable Development*⁴ acknowledges that climate change is one of the greatest challenges of our time and its adverse impacts undermine the ability of all countries to achieve Sustainable Development⁵. Under the Agenda, Sustainable Development Goal (SDG) 13 urges all states to take urgent action to combat climate change and its impacts⁶.

It has been correctly noted that in order to effectively confront climate change, there is need for all countries to reduce their greenhouse gas emissions⁷. Human activities have been the main drivers of climate change due to the burning of fossil fuels like coal, oil and gas⁸. These activities have increased the concentration of atmospheric carbon dioxide resulting to the greenhouse effect which contributes to global warming and climate change⁹. Reducing greenhouse gas emissions including carbon is therefore vital towards combating climate change. In order to achieve this goal, various climate mitigation initiatives have been embraced including the use of carbon markets.

³ United Nations Department of Economic and Social Affairs., 'Forum on Climate Change and Science and Technology Innovation.' Available at <https://www.un.org/en/desa/forum-climate-change-and-science-and-technology-innovation> (Accessed on 24/07/2025)

⁴ United Nations General Assembly., 'Transforming Our World: the 2030 Agenda for Sustainable Development.' 21 October 2015, A/RES/70/1., Available at <https://sustainabledevelopment.un.org/content/documents/21252030%20Agenda%20for%20Sustainable%20Development%20web.pdf> (Accessed on 24/07/2025)

⁵ Ibid

⁶ Ibid, Goal 13

⁷ United Nations., 'What is Climate Change?' Available at <https://www.un.org/en/climatechange/what-is-climate-change> (Accessed on 24/07/2025)

⁸ Ibid

⁹ The Causes of Climate Change.' Available at <https://climate.nasa.gov/causes/> (Accessed on 24/07/2025)

Carbon markets have been defined as trading schemes that provide financial incentives for climate change mitigation¹⁰. It has been observed that under these schemes, greenhouse gas emission reductions and/or removals are quantified into carbon credits that can be bought and sold, with the aim of transitioning economies to net zero¹¹. Carbon markets have also been defined as a trading system in which carbon credits are sold and bought¹². They provide a trading system through which countries may buy or sell units of greenhouse-gas emissions in an effort to meet their national limits on emission¹³. It has been pointed out that carbon markets allow both public and private entities to transfer and transact emission reduction units, mitigation outcomes or offsets generated through carbon initiatives, programmes and projects subject to compliance of national and international laws¹⁴. The *Paris Agreement*¹⁵ envisages the development of carbon markets through internationally transferred mitigation outcomes and voluntary cooperation between countries among other measures towards strengthening efforts to confront climate change. At a national level, the *Climate Change (Amendment) Act*¹⁶ of Kenya introduces the idea of carbon trading. The Amended Act requires national and county governments to provide guidance

¹⁰ United Nations Development Programme., 'Carbon Markets' Available at <https://climatepromise.undp.org/what-we-do/areas-of-work/carbon-markets> (Accessed on 24/07/2025)

¹¹ Ibid

¹² United Nations Development Programme., 'What are Carbon Markets and Why are They Important?' Available at <https://climatepromise.undp.org/news-and-stories/what-are-carbon-markets-and-why-are-they-important> (Accessed on 24/07/2025)

¹³ UN-REDD Programme., 'Carbon Market' Available at <https://www.un-redd.org/glossary/carbon-market> (Accessed on 24/07/2025)

¹⁴ Climate Change (Amendment) Act, 2023., Laws of Kenya, Government Printer, Nairobi

¹⁵ United Nations Framework Convention on Climate Change., 'Paris Agreement.' Available at https://unfccc.int/sites/default/files/english_paris_agreement.pdf (Accessed on 24/07/2025)

¹⁶ Climate Change (Amendment) Act, 2023., Laws of Kenya, S 2, Government Printer, Nairobi

in the development and implementation of carbon markets and nonmarket approaches in compliance with international obligations¹⁷.

Carbon markets provide an effective approach towards limiting greenhouse gas emissions and confronting climate change. It has been argued that if well designed and implemented, carbon markets can be an effective, credible and transparent tool for helping to achieve low-cost emissions reductions in ways that mobilize private sector actors, attract investment, and encourage international cooperation on climate change¹⁸. Further, it has been argued that when effectively utilized with other strategies, carbon markets have the potential to meaningfully mitigate the impact of greenhouse gas emissions, as well as provide valuable conservation co-benefits for people and nature¹⁹. Despite the role of carbon markets in reducing greenhouse gas emissions and confronting climate change, it has been observed that there has been a rise of disputes in carbon markets²⁰. If not well managed, these disputes can hinder effective carbon trading and therefore hinder effective climate action²¹. Managing carbon disputes effectively is therefore key towards strengthening climate action.

This paper critically examines the role of arbitration in managing carbon disputes. The paper examines the nature and causes of carbon disputes. It argues that these

¹⁷ Ibid, S 3

¹⁸ Natural Justice., 'Kenya's Climate Change Bill: Paving the Way for Sustainable Development and Carbon Markets.' Available at <https://naturaljustice.org/kenyas-climate-change-bill-paving-the-way-for-sustainable-development-and-carbon-markets/> (Accessed on 24/07/2025)

¹⁹ What are carbon markets and how do we work with them?., Available at <https://www.nature.org/en-us/what-we-do/our-priorities/tackle-climate-change/climate-change-stories/carbon-market-credits-offsets/> (Accessed on 24/07/2025)

²⁰ Darne. A., 'International Carbon Disputes - How can they be resolved through Arbitration?' Available at <https://www.pslchambers.com/article/international-carbon-disputes-how-can-they-be-resolved-through-arbitration/#:~:text=Arbitration%20has%20played%20a%20vital,issues%20be%20resolved%20through%20ADR> (Accessed on 24/07/2025)

²¹ Ibid

disputes are undesirable since they can hinder climate mitigation efforts at all levels. Consequently, the paper posits that effective management of carbon disputes is vital towards effectively confronting climate change. The paper argues that arbitration is a viable mechanism in managing carbon disputes. It examines the salient features of arbitration which makes it ideal in ensuring effective management of carbon disputes. Further, the paper suggests interventions towards arbitrating carbon disputes for green growth and sustainability.

2.0 Carbon Disputes: Causes and Effects

Carbon disputes have become a common phenomenon. For example, it has been argued that the integrity of carbon markets depends in large part on the reliability of carbon accounting and this requires information about an entity's emissions and offsets to be genuine, precise and accurate²². However, challenges such as the lack of a credible and consistent method of calculating both emissions produced by a business, and emissions avoided or stored by an abatement project²³; the lack of a standardised emissions data collection procedure across entities and sectors, which is often done manually and is error-prone²⁴; inconsistencies in defining the scope of carbon accounting for example whether and how much upstream and downstream supply chain emissions are included²⁵; and the complex and heterogenous taxonomy of carbon accounting where the terminology commonly used to describe emissions and offsets lacks a universally recognised set of definitions present the risk of disputes in carbon markets²⁶. It has been argued that due to the lack of an internationally recognized standard method for carbon

²² Kwan. E., Nagra. S., Zou. A., 'Dispute Resolution in Carbon Markets' Available at <https://arbitrationblog.kluwerarbitration.com/2023/09/16/dispute-resolution-in-carbon-markets/> (Accessed on 25/07/2025)

²³ Ibid

²⁴ Ibid

²⁵ Ibid

²⁶ Ibid

accounting, there is uncertainty and in turn, the risk of disputes²⁷. Factors such as breach of contract, misrepresentation and fraud in carbon markets and carbon accounting have been attributed to the rise of carbon disputes²⁸.

The practical challenges with maintaining consistency and transparency in carbon accounting is a major source of carbon disputes²⁹. It has been observed that carbon accounting practices lack a universally accepted standard, leading to a fragmented landscape of methodologies and reporting frameworks³⁰. This lack of clarity may lead to exposure to claims of greenwashing, misleading or deceptive conduct and, contractual disputes regarding the proper value and/or veracity of carbon allowances and carbon offsets³¹.

Pricing disputes are also common in carbon markets. It has been observed that carbon credits are often sold in the form of forward purchase agreements where the seller and purchaser contract for carbon credits that are yet to be produced³². Consequently, when dealing in such an uncertain market, there is potential for significant fluctuations in the value of the carbon credits between the point of sale and the point of delivery a situation that give rise to pricing disputes³³.

²⁷ The role of international arbitration in voluntary carbon market disputes., Available at <https://www.nortonrosefulbright.com/en-pg/knowledge/publications/fdc65468/the-role-of-international-arbitration-in-voluntary-carbon-market-disputes#:~:text=Until%20there%20is%20an%20internationally,of%20the%20timeline%20for%20verification>. (Accessed on 25/07/2025)

²⁸ Ibid

²⁹ Kwan. E., Nagra. S., Zou. A., 'Dispute Resolution in Carbon Markets' Op Cit

³⁰ ESG., 'Understanding the Challenges and Risks of Carbon Accounting: Implications for Organizations' Available at <https://empoweredsystems.com/blog/understanding-the-challenges-and-risks-of-carbon-accounting-implications-for-organizations/#:~:text=Carbon%20accounting%20practices%20lack%20a,between%20or%20across%20industries> (Accessed on 25/07/2025)

³¹ Ibid

³² The role of international arbitration in voluntary carbon market disputes., Op Cit

³³ Ibid

Another main form of carbon disputes involve land disputes between investors and indigenous communities. In some cases, investors have been accused of failed to obtain the Free, Prior and Informed Consent (FPIC) of indigenous peoples and local communities before establishing carbon projects³⁴. As a result, there have been disputes between investors and local communities over the leasing of ancestral lands for carbon-offsetting initiatives³⁵. Further, it has been argued that there is potential for investor-state disputes in carbon markets with investors in international carbon projects relying on investment treaties to bring claims against a states or state-owned entities³⁶.

From the foregoing, it is evident that carbon markets are highly susceptible to disputes. It has been argued that carbon disputes frequently revolve on issues that are common to other contractual disputes including non-delivery, pricing, breach of covenants or guarantees, ownership or security disputes and failure to meet conditions precedent among others³⁷. Further, it has been observed that carbon disputes are not limited to carbon contracts themselves but can extend to the underlying infrastructure projects undertaken to generate emission reductions, potentially resulting in commercial or investment disputes³⁸. The distinctive elements of carbon disputes include the nature of the commodity, the carbon crediting project cycle, and the application of international climate standards³⁹. In

³⁴ Indigenous land disputes cloud Kenya's carbon market ambitions., Available at <https://www.climatechangenews.com/2025/05/15/indigenous-land-disputes-cloud-kenyas-carbon-market-ambitions/> (Accessed on 25/07/2025)

³⁵ Ibid

³⁶ The role of international arbitration in voluntary carbon market disputes., Op Cit

³⁷ Darne. A., 'International Carbon Disputes - How can they be resolved through Arbitration?' Op Cit

³⁸ Ibid

³⁹ Minas. S., 'COP26 Created New Carbon Market Rules: How Will Arbitration Respond?' Available at <https://arbitrationblog.kluwerarbitration.com/2022/01/23/cop26-created-new-carbon-market-rules-how-will-arbitration-respond/> (Accessed on 25/07/2025)

addition, the project cycle itself can also generate disputes such as those concerning project registration or credit issuance⁴⁰.

Carbon disputes are therefore on the rise globally. It has been argued that as a new, rapidly expanding and largely unregulated market, there is the risk of disputes arising across the carbon market value chain as the industry tackles issues of carbon accounting, pricing, consistency, integrity, credibility, new and evolving regulation and competing interests between public, private, local and international stakeholders⁴¹.

Carbon disputes are undesirable. Such disputes can undermine green growth and sustainability. It has been argued that carbon markets play a major role in the energy transition by helping difficult-to decarbonize industries meet their net-zero ambitions through investing in carbon credits⁴². Carbon markets have the potential to unlock green growth⁴³. It has been argued that by putting a price on carbon, these markets encourage individuals, businesses, and governments to invest in cleaner technologies and practices towards green growth and carbon neutrality⁴⁴. In the African context, it has been argued that carbon markets can unlock new avenues for green growth, therefore helping Africa tap into investments in renewable energy, sustainable agriculture, ecosystem restoration and conservation while creating green jobs and tackling poverty⁴⁵. Carbon markets have been identified as a powerful tool to help advance carbon

⁴⁰ Ibid

⁴¹ The role of international arbitration in voluntary carbon market disputes., Available at <https://www.nortonrosefulbright.com/en/knowledge/publications/fdc65468/the-role-of-international-arbitration-in-voluntary-carbon-market-disputes> (Accessed on 25/07/2025)

⁴² Ibid

⁴³ UN-REDD Programme., 'Africa's green wealth: unlocking the potential of carbon markets' Available at <https://www.un-redd.org/post/africas-green-wealth-unlocking-potential-carbon-markets> (Accessed on 25/07/2025)

⁴⁴ Ibid

⁴⁵ Ibid

justice⁴⁶. By entering carbon markets, all countries can advance their socio-economic development while transitioning to a low-carbon economy in a cost-effective way that puts a price on carbon, allows for carbon trading, and stimulates new market opportunities for companies⁴⁷. Carbon disputes are therefore undesirable since they can hinder the effective functioning of carbon markets thus undermining green growth and sustainability⁴⁸. Effective management of carbon disputes is therefore paramount for green growth and sustainability.

3.0 Arbitrating Carbon Disputes for Green Growth and Sustainability

Arbitration has been identified as a viable and effective process in managing carbon disputes for green growth and sustainability⁴⁹. Arbitration provides several benefits in managing disputes. These include party autonomy, flexibility, confidentiality, transnational applicability, ease of enforcement of outcomes, and the ability to foster neutral, expeditious and cost-effective management of disputes⁵⁰. Harnessing the attributes of arbitration is key for effective management of carbon disputes. For example, arbitration gives parties freedom to select arbitrators with sufficient expertise on the regulatory and technical issues at stake in carbon disputes⁵¹. It has been argued that carbon disputes are specialized and

⁴⁶ United Nations Development Programme., 'Carbon Justice for All: How Carbon Markets Can Advance Equitable Climate Action Globally' Available at <https://www.undp.org/africa/blog/carbon-justice-all-how-carbon-markets-can-advance-equitable-climate-action-globally> (Accessed on 23/02/2024)

⁴⁷ Ibid

⁴⁸ Chen. B., Yuan. K., & Wen. X., 'The Legal Governance of the Carbon Market: Challenges and Application of Private Law in China' Available at <https://www.tandfonline.com/doi/full/10.1080/17583004.2023.2288591> (Accessed on 25/07/2025)

⁴⁹ The role of international arbitration in voluntary carbon market disputes., Op Cit

⁵⁰ Muigua. K., 'Settling Disputes through Arbitration in Kenya.' Glenwood Publishers, 4th Edition, 2022

⁵¹ Darne. A., 'International Carbon Disputes - How can they be resolved through Arbitration?' Op Cit

relatively new thus creating the need for appointment of arbitrators with relevant market and technical expertise⁵².

In addition, it has been observed that a majority of carbon disputes are cross-jurisdictional involving a wide range of stakeholders including states and state entities, the private sector, foreign investors and local communities⁵³. International arbitration is therefore an appropriate forum for managing carbon disputes since it has transnational applicability while also giving parties the option of choosing a neutral tribunal for resolving sensitive disputes, as well as seamless enforcement of awards since majority of country states are signatory to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards⁵⁴. Further, investment arbitration also allows for the management of disputes in carbon markets between investors and states⁵⁵. It has been argued that government regulation or intervention in carbon offset projects may lead to investor-state arbitration claims against states under applicable investment treaties, where investments in such carbon offset projects are foreign-owned⁵⁶. Actions by states such as cancellation of carbon markets or projects could result in disputes with investors trading in carbon markets which can be effectively managed through investor-state arbitration⁵⁷.

Further, it has been argued that carbon disputes usually deal with commercially sensitive information or matters that can impact national security⁵⁸. Managing carbon disputes through public forums such as national courts may therefore not

⁵² The role of international arbitration in voluntary carbon market disputes., Op Cit

⁵³ Ibid

⁵⁴ Darne. A., 'International Carbon Disputes - How can they be resolved through Arbitration?' Op Cit

⁵⁵ Green Arbitrations., 'Emissions Trading: What Role will Arbitration Play?' Available at <https://www.greenerarbitrations.com/news/emissions-trading-what-role-will-arbitration-play> (Accessed on 25/07/2025)

⁵⁶ Kwan. E., Nagra. S., Zou. A., 'Dispute Resolution in Carbon Markets' Op Cit

⁵⁷ Ibid

⁵⁸ Ibid

be desirable since information pertaining national security may be made public⁵⁹. It has been argued that the ability for arbitration to maintain privacy and confidentiality by restricting public access to certain documents and proceedings makes it well-placed as the most appropriate dispute resolution forum for carbon disputes⁶⁰.

Arbitration is therefore an ideal process towards effective management of carbon disputes for green growth and sustainability. However, it has been argued that since climate change is a matter of public concern globally, managing carbon disputes through private forums such as arbitration can hinder transparency, accountability and public participation which are prerequisites for effective climate action⁶¹. Further, the use of arbitration in managing carbon disputes could result in problems of costs and delays due to the complex and technical nature of such disputes⁶². It is necessary to address these challenges in order to enhance the role of arbitration in managing carbon disputes for green growth and sustainability.

4.0 Conclusion

Carbon markets have the potential to bolster climate action for green growth and sustainability. However, carbon disputes hinder effective functioning of carbon markets thus undermining green growth and sustainability⁶³. Arbitration provides an appropriate forum for managing carbon disputes ensuring flexibility, neutrality, expertise, transnational application, enforcement of outcomes while also safeguarding commercial interests and sensitive information⁶⁴. It is therefore

⁵⁹ Ibid

⁶⁰ Ibid

⁶¹ Darne. A., 'International Carbon Disputes - How can they be resolved through Arbitration?' Op Cit

⁶² Kwan. E., Nagra. S., Zou. A., 'Dispute Resolution in Carbon Markets' Op Cit

⁶³ Chen. B., Yuan. K., & Wen. X., 'The Legal Governance of the Carbon Market: Challenges and Application of Private Law in China' Op Cit

⁶⁴ Kwan. E., Nagra. S., Zou. A., 'Dispute Resolution in Carbon Markets' Op Cit

necessary to foster awareness and strengthen legal, institutional, policy and human capacities in order to effectively arbitrate carbon disputes⁶⁵. This requires arbitration practitioners to enhance their skills and develop familiarity with the unique regulatory context of carbon markets⁶⁶. In addition, arbitral institutions should also consider developing specialised rules tailored to carbon markets, the establishment of panels of arbitrators with relevant expertise in carbon disputes, and providing specialised courses and training on managing carbon disputes⁶⁷. Arbitrating carbon disputes for green growth and sustainability is therefore practical. It is imperative to embrace and enhance the use of arbitration for effective management of carbon disputes towards strengthening climate action for Sustainable Development.

⁶⁵ Darne. A., 'International Carbon Disputes - How can they be resolved through Arbitration?' Op Cit

⁶⁶ Ibid

⁶⁷ Minas. S., 'COP26 Created New Carbon Market Rules: How Will Arbitration Respond?' Op Cit

Green Arbitrations., 'Emissions Trading: What Role will Arbitration Play?' Available at <https://www.greenerarbitrations.com/news/emissions-trading-what-role-will-arbitration-play>

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Kwan. E., Nagra. S., Zou. A., 'Dispute Resolution in Carbon Markets' Available at <https://arbitrationblog.kluwerarbitration.com/2023/09/16/dispute-resolution-in-carbon-markets/>

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The role of international arbitration in voluntary carbon market disputes., Available at <https://www.nortonrosefulbright.com/en-gb/knowledge/publications/fdc65468/the-role-of-international-arbitration-in->

[voluntary-carbon-market-disputes#:~:text=Until%20there%20is%20an%20internationally,of%20the%20timeline%20for%20verification](#)

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United Nations Development Programme., 'What are Carbon Markets and Why are They Important?' Available at <https://climatepromise.undp.org/news-and-stories/what-are-carbon-markets-and-why-are-they-important>

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challenges and opportunities of the new norm
in public-sector contracts in Kenya:
Daniel S. Cherono

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Dispute Boards in construction contracts: The challenges and opportunities of the new norm in public-sector contracts in Kenya

By: **Daniel S. Cherono***

Abstract

The paper examines the use of Dispute Boards in public-sector construction contracts in Kenya considering its popularity globally as a useful tool in avoiding and resolving disputes in a cost-effective and expedient manner. Since Dispute Boards can be appointed by Parties at the commencement of the contract and before construction begins, it is able to acquaint itself with the contract and any issues that may be relevant to potential disputes. Dispute Boards can also make frequent visits to the project site during the implementation of the contract or as the parties may agree and are available to the parties to offer any advice or opinion relevant to the contract to avoid potential disputes.

According to the Dispute Resolution Board Foundation, dispute boards are highly effective in resolving disputes. Over 98% of disputes submitted to dispute boards are resolved at dispute boards level. Most of the dispute board decisions which are contested and escalated to arbitration by a dissatisfied party were reaffirmed by arbitrators. Despite these benefits, the use of Dispute Boards in public construction contracts in Kenya is still limited.

The paper therefore explores the challenges and highlights the opportunities in the adoption of Dispute Boards in public sector construction contracts. The paper further suggests recommendations geared towards enhancing the use of Dispute Boards by increasing awareness and capacity of actors in the construction industry on the benefits of the Dispute

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Boards, creating the necessary institutionalized legislative and policy framework to support the use of dispute boards.

Introduction

Construction contracts are distinctive from other commercial contracts due to the high degree of complexity and uncertainty.¹ These contracts often create long-term, complex relationships, and involve costly and highly technical projects.² Construction contracts can be cited as a fertile seedbed for disputes because each construction project is unique and contracting parties often lack the ‘corporate memory’ necessary to eradicate potential disputes through contract drafting alone.³ Despite the many available mechanisms, the resolution of many construction disputes is usually ineffective and costly.⁴ The inevitability of disputes in construction contracts is best described by Lord Donaldson that;

‘It may be that as a judge I have a distorted view of some aspects of life, but I cannot imagine a civil engineering contract particularly one of any size, which does not give rise to some disputes. This is not to the discredit of either party to the contract. It is simply the nature of the beast. What is to their discredit is that they fail to resolve those disputes as quickly, economically and sensibly as possible.’⁵

¹ Lukas Klee, *International Construction Contract Law* (2nd edn, Wiley Blackwell 2018) pg. 47.

² Albert Bates Jr & R. Zachary Torres-Fowler ‘Dispute Boards: A different approach to Dispute Resolution’ <https://www.troutman.com/a/web/234443/Bates-Torres-Fowler-Dispute-Boards-Chapter-Intl-Mediation-04-202.pdf> Pg 1 accessed 10/4/2025

³ Cyril Chern, *Dispute Boards* (2nd edn, Wiley Blackwell 2011)

⁴ Mechanisms such as arbitration, adjudication, mediation, expert determination and litigation

⁵ Lord Donaldson, Foreword to *The ICE Arbitration Practice* by Hawker, Uff, and Timms (Thomas Telford 1983) <https://www.nadr.co.uk/articles/published/construction/UKConstructionDRBs.pdf?form=MG0AV3> accessed 3/4/2025

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It is plain that disputes in themselves are not the problem. However, what creates barriers against sensible and common-sense resolution that results in arbitration, litigation and consequent breakdown of relationships, is the way the Parties manage disputes.⁶

In its quest to guarantee the access to justice, the Constitution of Kenya lays the foundation for the use of alternative dispute resolution (ADR) mechanisms.⁷ Although the Constitution formally recognizes and promotes the use of ADR, literature indicates that there are inadequate institutionalized legislative and policy measures that support its use in Kenya.⁸

Resolution of disputes in Kenya's construction industry is carried out mainly through litigation, adjudication, arbitration, mediation and expert determination, with arbitration, mediation and litigation being the most common methods.⁹

Most private and public sector construction contracts in Kenya, have historically adopted the use of standard forms of contract due to their familiarity and ease of

⁶ Wayne Clark, 'Effective Use of Dispute Boards In Construction Contracts', Paper presented to the Society of Construction Law (Gulf) in Doha on 14 October 2009, <https://www.disputeboard.org/wp-content/uploads/2016/02/EffectiveUseofDisputeBoardsinConstContractsWClark.pdf> accessed on 10/4/2025

⁷ Promulgated in 2010. Section 159 (c) provides that the exercise of Judicial Authority through reconciliation, mediation, arbitration, and traditional methods.

⁸ Muigua Karuiki, 'Legitimizing Alternative Dispute Resolution in Kenya: Towards a Policy and Legal Framework' pg. 3, <http://kmco.co.ke/wp-content/uploads/2018/08/legitimising-alternative-dispute-resolution-mechanisms-in-kenya.pdf> accessed 10/4/2025

⁹ Muigua Karuiki, 'Overview of Arbitration and Mediation in Kenya', 2011, pg. 1- 3, <http://kmco.co.ke/wp-content/uploads/2018/08/Overview-of-Arbitration-and-Mediation-in-Kenya.pdf> accessed 10/1/2025.

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use by parties, when drafting their agreements.¹⁰ These standard forms are the Joint Building Council (JBC Contract), mainly used for building works, and the FIDIC forms (Red, Yellow and Silver) for civil works.¹¹

Dispute Boards are provided in FIDIC contracts as a mandatory requirement¹² Globally, the dispute board, being a creation of the contract, has been accepted as fundamental in resolving construction disputes because of its efficiency and effectiveness compared to time consuming and costly arbitration or litigation.¹³

Meaning and nature of Dispute Boards

The term “Dispute Board” is defined as a mechanism specific to a ‘job-site’ consisting of one or three independent and impartial persons, appointed by contracting Parties to adjudicate any disputes that may arise in their contract¹⁴. It describes a person or a panel of persons who by virtue of an agreement of contracting parties, issues advice, recommendations or decisions which can either be binding or non-binding.¹⁵

‘Dispute Board’ is a generic term that constitutes the dispute review board (DRB), dispute adjudication board (DAB), combined dispute board (CDB) and more recently dispute avoidance and adjudication board (DAAB) which is a form of

¹⁰ Charret Donald, *Fidic Contracts in Africa and Middle East - A Practical Guide to Application* (Informa Law from Routledge,2024) pg.213-214

¹¹ Ibid

¹² See generally the FIDIC golden rules.

¹³ Ibid

¹⁴Chapman H.J, ‘Dispute Boards’ pg.1,<https://www.fidic.org/sites/default/files/25%20Dispute%20Boards.pdf>, accessed 10/4/2025

¹⁵ Ibid

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combined dispute board.¹⁶ These forms of the dispute board are distinguishable by the nature of the advice, recommendations, or decisions that they provide to the Parties. If the Dispute Board provides non-binding advice or recommendation, then it is referred to as a dispute review board.¹⁷ If it issues a decision that binds or takes legal effect as between the Parties, then it can be referred to as dispute adjudication board.¹⁸ By agreement of contracting parties, dispute boards can also issue either binding or non-binding advice, recommendations, or decisions. Such dispute boards are referred to combined dispute boards.¹⁹

One aspect that differentiates Dispute Boards from other alternative dispute resolution methods is the fact that they are formed at the beginning of a contract, and prior to commencement of construction works.²⁰ They therefore become part of the project administration since they can access contract documents, reports, drawings and any other information that is relevant to any potential dispute. The Dispute Board can conduct regular site visits and can actively be involved throughout the project duration and if agreed by the parties, after the completion of the project. This means that the Dispute Board is constantly informed of any issue that may lead to disputes and can give advice, recommendations and decisions, as may be required by the Parties, in an expeditious manner. The Dispute Board therefore plays two roles, that of proactive role for dispute avoidance and responsive role for dispute resolution.²¹

¹⁶ Cyril Chern, *Chern on Dispute Boards: Practice and Procedure* (2nd edn, Wiley Blackwell 2011) pg 2-3

¹⁷ Ibid

¹⁸ Ibid

¹⁹ Ibid

²⁰ Chapman H.J, 'Dispute Boards' pg.1,<https://www.fidic.org/sites/default/files/25%20Dispute%20Boards.pdf>,

²¹ Aceris Law, 'Dispute Boards and International Arbitration'<https://www.acerislaw.com/dispute-boards-and-international-construction-arbitration/> accessed on 10/4/2025

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1.0 History of Dispute Boards

Dispute boards have been in existence for over 50 years originated from contracts in the United States in the 1970's to meet the construction industry's desire for a dispute review mechanism that is prompt, informal, impartial and cost effective particularly for dams, water management and underground construction contracts.²² A study undertaken in the United States in 1974 by the National committee on Tunnelling Technology resulted in the publication of a report titled 'Better Contracting for Underground Construction' which brought to fore the undesirable consequences of claims, disputes and litigation and led to the establishment of a Dispute Resolution Board.²³

Resolution of disputes in construction contracts had traditionally been adjudicated by the engineer before reference to arbitration or litigation, whenever the matter was unresolved.²⁴ However, due to the perceived lack of independence of the engineer, who is the agent of the employer, by virtue of being appointed and paid by the employer, Dispute Boards gained traction and have emerged as preferable in resolving construction disputes compared to the engineer.²⁵

The use of dispute boards has since grown in popularity worldwide and has successfully been used in many construction contracts, including in Kenya. ²⁶

²² Dispute Resolution Board Foundation, 'Dispute Board Manual: A guide to Best Practices and Procedures' (Spark 2019) pg 1-5.

²³ Ibid

²⁴ William Godwin, 'The 2017 FIDIC Contracts' (1st Edn John Wiley & Sons 2020) pg. 195-196

²⁵ Ibid

²⁶ Nigel Grout, 'Users Guide to Dispute Boards under 1999 and 2017 editions of FIDIC conditions of contract + 2005, 2006 and 2010 MDB Harmonised editions' pg.2, <https://nigelgrout.com/wp-content/uploads/2021/09/Users-Guide-to-Dispute-Boards.pdf>, accessed 10/4/2025

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2.0 Use of dispute boards in public projects in Kenya

Infrastructure development in Kenya, like in the rest of the Africa continent, plays a significant role in progress and is a critical enabler for productivity and sustainable economic growth.²⁷ Many infrastructure projects have been implemented in transportation, energy, housing, water, sanitation and information communication and technology (ICT) sectors to contribute to human development, poverty reduction, and the attainment of the Millennium Development Goals (MDGs).²⁸

The construction industry in Kenya has been vibrant and has been experiencing rapid growth. In 2019, the Kenya Association of Manufacturers (KAM) reported that Kenya's construction industry contributed 5.6% to Kenya's GDP.²⁹ During the same year, statistics from the Kenya National Bureau of Statistics (KNBS) indicated a 13.8% increase in the Compounded Annual Growth Rate (CAGR) from USD 3.1 billion in 2015 to USD 5.2 billion in 2019. This growth was attributed to increased spending of resources in the construction industry including largescale public projects such as the roads, hospitals, dams, water and sanitation systems and the standard gauge railway.³⁰

²⁷ According to the African Development Bank, Investment in infrastructure accounts for over half of the recent improvement in economic growth, <https://www.afdb.org/en/knowledge/publications/tracking-africa%E2%80%99s-progress-in-figures/infrastructure-development> accessed 10/4/2025

²⁸ Ibid

²⁹ See report by KAM on Mining, Building and construction sector, <https://kam.co.ke/wp-content/uploads/2021/04/Buildind-and-Construction-sector-2020.pdf> accessed 10/4/2023

³⁰ According to the 2021 Economic Survey by the Kenya National Bureau of Statistics

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However, this growth presented a challenge because expenditure was carried out without adequate fiscal space resulting in non-payment of contractors, pending bills and suspension of projects and hence, disputes.³¹

Most public sector contracts in Kenya's construction industry have for long time adopted the FIDIC suite of Contracts.³² The introduction of the dispute adjudication board in the 1999 suites of contract implied that all contracts utilizing this form of contract, and later versions have provisions for Dispute Board which provide the process of appointment of the members, the referral of dispute to the Dispute Board, adjudication of the dispute and rendering advice or a binding decision on the dispute.³³ It also provides to the Parties a mechanism for redress through amicable settlement or arbitration whenever a Party is dissatisfied with the decision of the Dispute Board.

FIDIC Conditions of Contract provide for Parties the procedure for referral disputes of any kind to a Dispute Board for decision.³⁴ The dispute may relate to the Contract or the execution of the Works, including any dispute as to any certificate, determination, instruction, opinion, or valuation of the Engineer. The clause also provides that the decision of the Dispute Board is binding on both parties and requires the parties to promptly give effect to it unless and until it shall be revised in an amicable settlement or an arbitral award. ³⁵

³¹ Joakim Bwana, The Sunday Standard, Road projects stall over Sh173b pending bills, says Chirchir.

<https://www.standardmedia.co.ke/counties/article/2001505644/road-projects-stall-over-sh173b-pending-bills-says-chirchir> accessed 10/4/2025.

³² Charret Donald, Fidic Contracts in Africa and Middle East – A Practical Guide to Application (Informa Law from Routledge,2024) pg.213-214

³³ See generally the provisions for FIDIC Conditions of Contract (Red, yellow or silver book)

³⁴ Ibid

³⁵ Ibid

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FIDIC contracts recommend the establishment of the Dispute Boards as a mandatory requirement in construction contracts. ³⁶Dispute Board been included as one of the five Golden Principles that FIDIC deems to be the fundamental and inviolable features of a FIDIC Contract.³⁷ When a Dispute Board clause is provided in a FIDIC Contract, a Party cannot unilaterally elect to avoid the Dispute Board process and proceed to arbitration.

Dispute Boards, being a creation of the contract, are therefore extensively provided in most construction contracts in Kenya.

3.0 Challenges facing dispute boards in public sector contracts in Kenya.

Despite being provided in most construction contracts, and the many advantages in avoiding and resolving disputes the use of Dispute Boards in public projects in Kenya is limited to some projects funded by multilateral development banks for several reasons. ³⁸

First, there is reluctance and lack of commitment from the contracting Parties to appoint the Dispute Board due to poor contract management practice.³⁹ Soon after the signing of the contract, the parties are at the ‘honey-moon stage’ and neither party is thinking about disputes. The Contractor is hesitant to push for establishment of the Dispute Board, usually, to project a good relationship to the public sector party (Employer). The Employer on the other hand would rather

³⁶ Nigel Grout, ‘Users Guide to Dispute Boards under 1999 and 2017 editions of FIDIC conditions of contract + 2005, 2006 and 2010 MDB Harmonised editions’ pg.2, <https://nigelgrout.com/wp-content/uploads/2021/09/Users-Guide-to-Dispute-Boards.pdf>, accessed 10/4/2025

³⁷ Ibid

³⁸ Such as the World Bank which requires that Dispute Boards are appointed as a precedent to commencement of the contract.

³⁹ Cyril Chern, Chern on Dispute Boards: Practice and Procedure (2nd edn, Wiley Blackwell 2011) pg 22-23

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have any disputes resolved by the Engineer who traditionally is his agent and perceives that if a Dispute Board is set up, costly disputes will be brought up by an overzealous claim-seeking contractor.⁴⁰ The project sponsor, whether public or external financier, hardly intervenes and therefore the establishment of the Dispute Board is not done in accordance with the Contract and is only considered after a dispute has occurred.⁴¹

Further, during the contract drafting stage, it is common for the public sector Party, to either use earlier version of FIDIC form of contract or omit the Dispute Board clauses, ostensibly to avoid quick resolution of disputes especially where it intends to avoid liability arising from its unfulfilled obligations.⁴²

Secondly, there is no adequate institutionalized legislative and policy framework for use of ADR in Kenya.⁴³ No legal requirement exists for Parties to a construction contract to establish dispute boards. Further, unlike arbitration, Dispute Boards are not supported by legislation. Parties therefore opt to settle their disputes through other mechanisms such as mediation or arbitration because of the certainty that the outcome will be enforceable by courts.⁴⁴

⁴⁰ The Engineer is usually appointed by the Employer and plays a role as the agent of the Employer in the contract. In many cases in public sector contracts, the Engineer decisions are influenced by the Employer.

⁴¹ Public sector projects are usually funded by the government or development partners/MDBs.

⁴² For example, Works of Civil Engineering Construction 4th Ed 1987 Red Book does not provide for Dispute Boards

⁴³ Muigua Karuiki, 'Legitimizing Alternative Dispute Resolution in Kenya: Towards a Policy and Legal Framework' pg. 3, <http://kmco.co.ke/wp-content/uploads/2018/08/legitimising-alternative-dispute-resolution-mechanisms-in-kenya.pdf> accessed 10/4/2025

⁴⁴ Mediation settlement can be registered with courts for orders of enforcement. Arbitral awards are enforceable by courts

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Where a Party refuses to comply with the decision of the dispute board, the successful Party encounters difficulty in enforcing the decision because of lack of legislation.⁴⁵ The decision of the dispute board is intended to be binding on both Parties, who are required to promptly give effect to it unless and until it is revised through amicable settlement or an arbitral award.⁴⁶ In practice, the decisions are seldom complied with promptly necessitating intervention through courts.⁴⁷ This further delays the resolution of disputes, increases project costs, affects the progress of work and strains the relationship between the Parties.⁴⁸ One of the main reasons for non-compliance of the decision of the dispute board by the Employer is the inadequate cash flow to promptly settle the awarded cost (Usually between 14-28 days). In government projects, bureaucratic processes make it impractical to promptly settle the award because additional funds in most cases must be allocated through appropriation by the Legislature.⁴⁹ Further, the project sponsor or multi-lateral development banks consider cost claims attributable to the Employer as ineligible expenses and hence they do not pay. Many public sector employees in many instances also do not have the confidence to make decisions to

⁴⁵ Nazzini, R & Macedo M R 2024, 'Dispute Boards International Survey: A Study on the Worldwide Use of Dispute Boards over the Past Six Years' (King's College London). <https://doi.org/10.18742/pub01-203> accessed 24/8/2025 .

According to the survey, enforcement of decisions is barrier to the effectiveness of dispute boards and where the enforcement action has been taken, the most common method reported involved some form of arbitration proceedings or litigation. Unlike arbitration there is no law supporting the enforcement of dispute board decisions in Kenya.

⁴⁶ See generally the provisions for FIDIC Conditions of Contract (Red, yellow or silver book)

⁴⁷ See the cases of *SBI v Kenya National Highways Authority*, ML HCCC No. E075 of 2020 [2020] eKLR and *Sogea-Satom SAS v National Irrigation Authority Formerly National Irrigation Board* (Commercial Case E320 of 2022) [2023] KEHC 22767 (KLR). Notice of dissatisfaction was issued and the decision of the dispute board was challenged in court.

⁴⁸ Ibid

⁴⁹ See generally the Kenya' Public Finance Management Act N0. 18 of 2012

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pay costs arising from the Dispute Board decisions, unless compelled by courts for fear of adverse recommendations from future audits.

Third, the success of the dispute board depends on the knowledge, experience and the expertise of the dispute board members as well as the employers' and contractors' personnel.⁵⁰ Based on the number of construction contracts in Kenya and considering the limited use of Dispute Boards, there is a shortage of Dispute Board practitioners.⁵¹ Parties resort to hiring external lawyers, hence escalating costs and turning the dispute board process in many instances into processes akin to arbitration proceedings when they become 'too involved' in the process.⁵² This discourages the Parties from pursuing the disputes through dispute boards.⁵³

Finally, despite its success in many jurisdictions globally, there is insufficient empirical information and data on the impact of use of Dispute Boards in Kenya's construction industry. Studies on the effectiveness of dispute boards conducted by the Dispute Resolution Board indicate that Dispute Boards are highly effective

⁵⁰ Chapman H.J, 'Dispute Boards' pg.1,<https://www.fidic.org/sites/default/files/25%20Dispute%20Boards.pdf>, accessed 10/4/2025

⁵¹ FIDIC encourages member associations to create lists of persons suitable for serving on a Dispute Adjudication Board (DAB) established under a contract using FIDIC Conditions of Contract that call for a DAB. At present, Association of Consulting Engineers of Kenya (ACEK) which associate member of FIDIC does not have a list of DAB members.

⁵² Albert Bates A Jr. and R. Zachary Torres-Fowler R Z, 'Dispute Boards: A Different Approach to Dispute Resolution'
<https://www.troutman.com/a/web/234443/Bates-Torres-Fowler-Dispute-Boards-Chapter-Intl-Mediation-04-202.pdf> accessed 24/8/2025

Dispute boards are informal nature and dispute board members mainly interact with technical teams. The direct involvement of counsels can inadvertently escalate the dispute and cause the parties to take more entrenched positions inevitably making compromise more difficult to obtain.

⁵³ Ibid

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with 85-98% of recommendations/decisions have not gone on to further arbitration or litigation, delivering substantial cost and time savings. However, the studies were conducted mainly North America, South America, Asia, and Europe⁵⁴. The data would inform Parties decision to adopt Dispute Boards.

4.0 Opportunities for dispute boards in public sector contracts in Kenya

It is noted that despite the attitude of the parties, Dispute Boards are increasingly being adopted in large scale contracts mainly due to the requirements of the project sponsors and the increasing awareness of the Parties on the success of the Dispute Boards in avoiding and resolving disputes in other contracts.⁵⁵ The adoption of the later versions of FIDIC forms of contracts that require appointment of the Dispute Boards at the commencement of projects is also impacting positively on the adoption of Dispute Boards.⁵⁶ Actors in Kenya's construction industry are gradually realizing that the Dispute Board is an expeditious and cost-effective mechanism of avoiding or resolving disputes when compared to arbitration or litigation.⁵⁷

With the increasing need for Dispute Boards, there is increasing need for more training and mentorship opportunities for Dispute Board members and Party representatives through bodies such as the Chartered Institute of Arbitrators and the Dispute Resolution Board Foundation.⁵⁸

⁵⁴ Based on data from the Dispute Resolution Board Foundation, <https://www.drb.org/db-faqs>

⁵⁵ This is based on the author's knowledge while working in public sector contracts.

⁵⁶ See generally FIDIC 2017 Suite

⁵⁷ Ibid

⁵⁸ The Chartered institute of Arbitrators and the Dispute Board Resolution Foundation regularly conducts training on Adjudication and Dispute Boards

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Kenya is also developing the National ADR Policy which is intended to actualize the ideals of the Constitution through a robust framework for strengthening, guiding and supporting the coordinated growth of ADR practice and uptake.⁵⁹ Once approved the policy will form the basis for legislative proposals on ADR which will aid in breaching legislative gaps limiting the adoption of Dispute Boards.⁶⁰

Kenya's courts have in recent cases held that the decision of the Dispute Board is "binding on the parties" and imposes on the parties an obligation to give it effect promptly, notwithstanding dissatisfaction of any of the Parties with the intention of staying decision and seeking to refer it to arbitration.⁶¹ These decisions have set a precedent on the attitude of courts towards the enforcement of the Dispute Board decisions and resonate well with decisions made in other jurisdictions. The position of the courts has given legitimacy to Dispute Boards and hence confidence to the parties to appoint and use the Dispute Boards.

Conclusion

This paper has explored the use of dispute boards in public sector contracts in Kenya and discussed the challenges and opportunities. Disputes Boards were found to be useful in expeditious and cost-effective in resolving construction disputes because they can be appointed early in the project and can acquaint themselves with any issues that may give rise to disputes. It was also observed that Dispute Boards can make frequent visits to the site during the implementation

⁵⁹ Articles 1, 10, 48, 67(2)(f), 113, 159(2) and 189(4), Developed through sessional paper no. 4 of 2024

⁶⁰ Ibid

⁶¹ See the cases of *SBI v Kenya National Highways Authority*, ML HCCC No. E075 of 2020 [2020] eKLR and *Sogea-Satom SAS v National Irrigation Authority Formerly National Irrigation Board (Commercial Case E320 of 2022)* [2023] KEHC 22767 (KLR)

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of the contract or as the parties may agree and are available to the parties to offer any advice or opinion relevant to the contract.

Despite the growing popularity globally, it was noted that the use of Dispute Boards in public-sector construction contracts in Kenya was limited. This is because of poor contract management practices and attitude of Parties towards Dispute Boards, inadequate institutionalized legislative and policy framework for its use, difficulty in enforcement of the decision of the dispute board, perceived cost, inadequate knowledge and awareness among actors in the construction industry and lack of empirical evidence on its effectiveness.

The paper found that despite the challenges, Dispute Boards presented numerous opportunities to Kenya's construction industry. Dispute Boards are increasingly being adopted in the public sector contracts due to requirements of project sponsors. There was also increasing awareness of the actors in the construction industry through training and mentorship and there was increasing adoption of later versions of FIDIC contract forms which made it mandatory for contracting Parties in the construction industry to appoint Dispute Boards. Further, the development of the proposed National ADR Policy and the position of the courts will continue to enhance acceptability of Dispute Boards and hence give confidence to use the Dispute Boards as an expeditious and cost-effective mechanism of avoiding and resolving disputes in their contracts.

From the foregoing, there is need to investigate the level of adoption of dispute boards within the construction industry.

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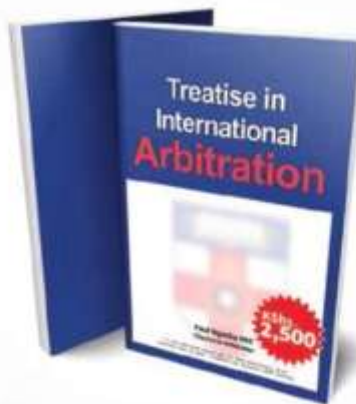
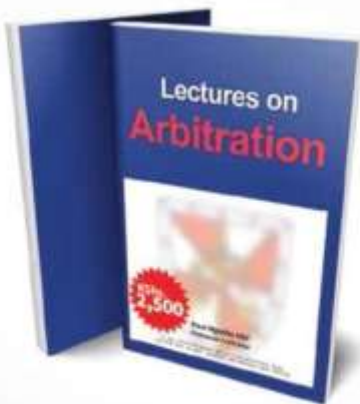
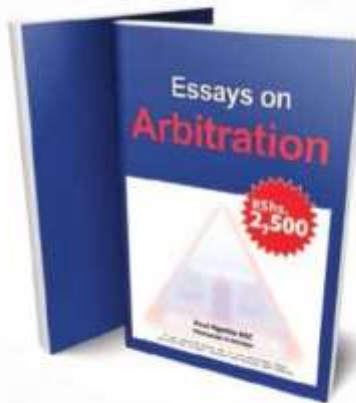
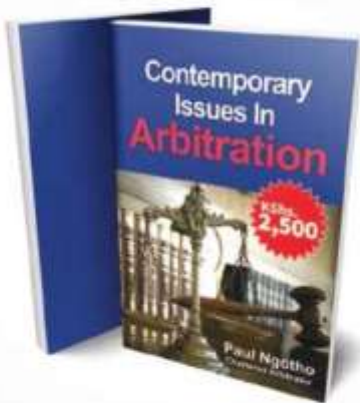
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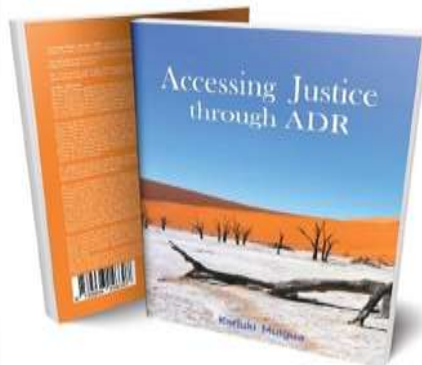
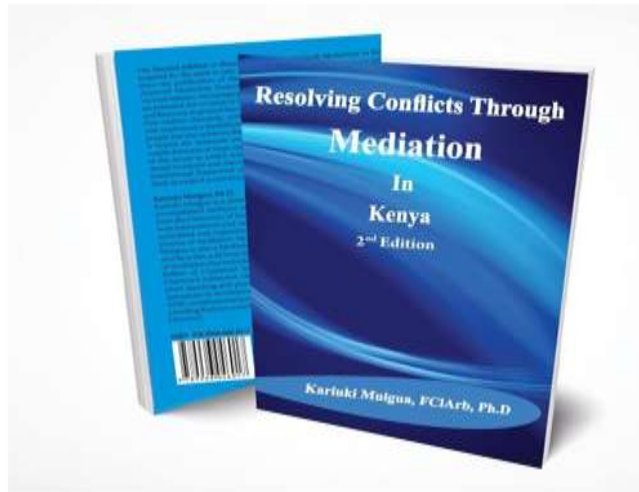




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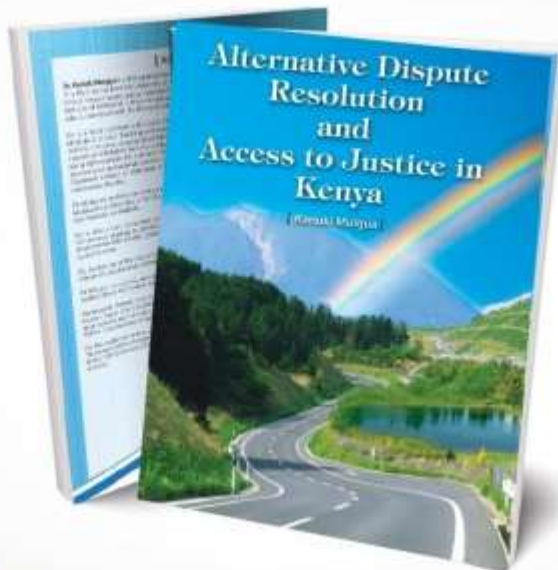
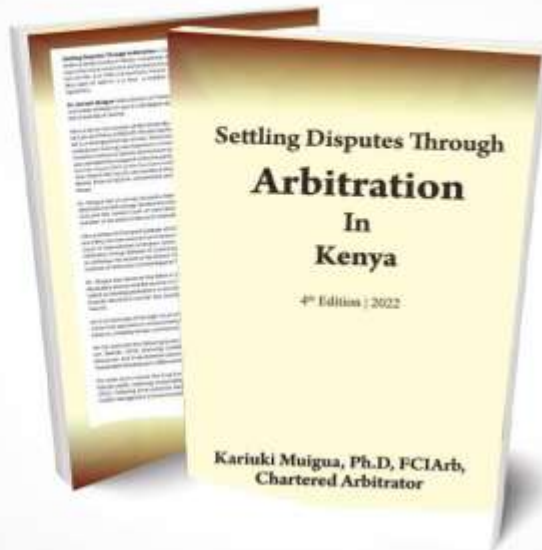
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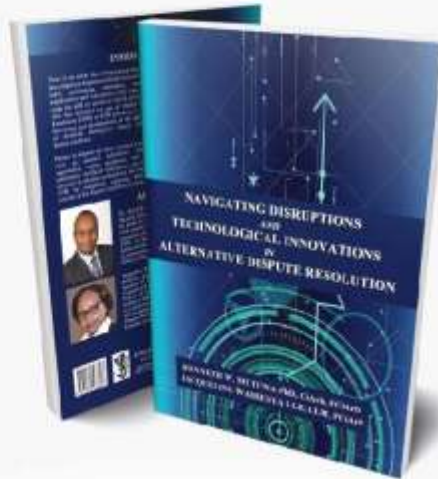


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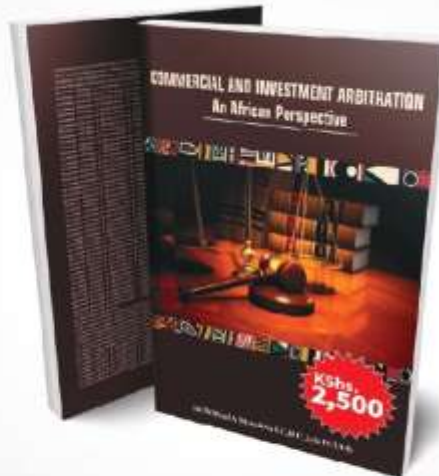
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