

ANALYSIS OF THE LEGAL FRAMEWORK ON ACCESS TO JUSTICE FOR PERSONS WITH MENTAL DISABILITIES IN KENYA

^{1*}Richard Akomo Otene & ²Dr. Charles A. Khamala

^{1,2}Law School, Mount Kenya University

Publication Date: September 2026

ABSTRACT

Purpose of Study: The study examined the legal framework governing access to justice for persons with intellectual and psychosocial disabilities in Kenya.

Problem Statement: Access to justice is a fundamental human right and an essential component of the rule of law. In Kenya, persons with intellectual and psychosocial disabilities continue to experience barriers that may limit their ability to access, participate in and obtain effective remedies from the justice system. Although the Constitution of Kenya, the Mental Health Act, the Evidence Act, the Penal Code and other legal instruments provide various safeguards, concerns remain regarding legal capacity, discrimination, communication, legal representation, reasonable accommodation and effective participation in judicial proceedings.

Methodology: The study adopted a qualitative research design and relied primarily on doctrinal legal research. Data was obtained through a systematic review and analysis of primary and secondary legal materials, including the Constitution of Kenya, relevant statutes, judicial decisions, international and regional human rights instruments, government policies, institutional reports, academic literature and other relevant publications. The collected information was analysed thematically through interpretation and comparison of legal provisions, judicial decisions and human rights standards.

Results: The study found that Kenya had established a constitutional and statutory basis for protecting the rights of persons with disabilities and ensuring access to justice. However, gaps remained between the formal legal protections and their practical implementation. Persons with intellectual and psychosocial disabilities continued to face barriers associated with stigma and discrimination, inadequate reasonable accommodation, communication difficulties, limited access to legal assistance, questions concerning legal capacity and insufficient awareness among justice-sector actors.

Recommendation: The study recommends strengthening the legal framework, enhancing reasonable accommodation within justice institutions, improving access to legal aid and support services, strengthening the capacity of justice-sector personnel, and promoting measures that protect the legal capacity, dignity, autonomy and effective participation of persons with intellectual and psychosocial disabilities.

Keywords: *Access to Justice, Intellectual and Psychosocial Disabilities, Legal Capacity, Reasonable Accommodation, Supported Decision-Making, CRPD, Mental Health Act, Kenya*

INTRODUCTION

Every democratic society is built on the fundamental constitutional right of access to justice.¹ But in spite of this admirable purpose, persons with mental problems have to traverse a maze of difficulties within the complicated legal system.² When compared to the growing incidence and changing character of mental illness cases, which affect people of all ages and affect vulnerable youngsters in particular, this unsettling fact assumes a more solemn tone.³ The combination of international human rights duties, disability and health regulations, constitutional protections, and enduring real-world obstacles brought on by stigma, a lack of resources, and procedural procedures may allow people with mental disorders to obtain justice in Kenya.⁴ Apart from the State's obligation to "ensure access to justice for all persons" (Article 48), the 2010 Kenyan Constitution includes a comprehensive Bill of Rights that forbids discrimination and preserves the values of fair hearing, privacy, and dignity all of which are particularly significant to individuals with mental disabilities.⁵

Statistics from reliable sources, like the World Health Organization (WHO) and the Kenya Mental Health Policy (2015–2030), provide a comprehensive picture of the state of mental health in Kenya. Over 1.9 million persons in this nation, which is the fourth most populated in Africa, suffer from mental health concerns. The study also reveals a striking statistic: up to 25% of outpatients seeking primary care exhibit symptoms of mental illness, indicating a widespread and urgent social issue.⁶ According to official statistics, at least one in four Kenyans will experience the challenges of mental illness at some time in their life, which supports these alarming findings.

In Kenya, a complicated network of socioeconomic problems, such as poverty, unemployment, and fast urbanization, has contributed to a rise in mental health problems. These problems worsen stress and anxiety and upend established support networks. Kenya has also accepted international agreements requiring governments to remove obstacles to justice for people with disabilities. Most significantly, Kenya committed to ensuring equal legal recognition, access to justice, and reasonable accommodations for people with disabilities, including those with psychosocial and intellectual disabilities, when it ratified the UN Convention on the Rights of Persons with Disabilities (CRPD) in 2008. Notwithstanding these assurances, Kenya's policies and practices on mental health and disabilities have long been disjointed and, in many important ways, out of date.

While the main emphasis of this study is the legal concept of mental impairment, social and clinical perspectives also contribute to a comprehensive explanation. A right to effective access to justice is expressly recognized by more recent legal initiatives, such as the revised Persons with Disabilities Act (2025). Similar to this, policy tools like the Kenya Mental Health Policy (2015–2030) outline changes to the healthcare system that increase access to mental health treatments and include rights-based care. However, it is still difficult and unequal between counties to translate these good formal changes into court processes, police investigations,

¹ *Okiya Omtatah Okoiti v Communication Authority of Kenya & 8 others* [2018] eKLR

² <https://icj-kenya.org/news/access-to-justice-responding-to-justice-needs-for-persons-with-mental-disabilities/> Accessed 16-06-2024

³ Ministry of Health, Taskforce on Mental Health, "Kenya Mental Health Policy 2015 – 2030" (2024)

⁴ <[https://www.who.int/publications/i/item/special-initiative-for-for-mental-health-\(2019-2023\)](https://www.who.int/publications/i/item/special-initiative-for-for-mental-health-(2019-2023))> Accessed 15-06-2024

⁵ International Commission of Jurists, "Promoting Inclusion And Responding To Justice Needs For Persons With Mental Disabilities: An Access To Justice Manual For Persons With Mental Disabilities" (2021)

⁶ Mental Disabilities: An Access To Justice Manual For Persons With Mental Disabilities" (2021)

correctional procedures, forensic evaluations, and legal assistance for individuals with mental disorders.⁷

In Kenya, people with mental impairments still encounter major barriers to seeking justice, even with the existence of legal frameworks. People with mental impairments are marginalized as a result of social stigma and false beliefs about mental illness, which has an impact on how they engage with the legal system. People with mental impairments, for example, are often excluded from judicial proceedings because they are thought to be incapable of making judgments.

STATEMENT OF THE PROBLEM

The Kenyan Constitution guarantees the basic right to justice. However, obstacles often prevent people with psychosocial or intellectual impairments from exercising their rights to the fullest extent possible. Several laws continue to limit legal competence and permit substituted decision-making based only on disability grounds, which is against international norms, particularly those stated in Article 12 of the Convention on the Rights of Persons with Disabilities (CRPD). In order to bring Kenya's legal system into compliance with regional and international norms, the Mental Health Act was first passed in 2003. However, it has been tough to execute owing to the lack of essential rules and policies and the limited participation of legislative authorities. Two enduring obstacles for people with intellectual and mental impairments are the denial of rights in all spheres of life and the exclusion from participatory decision-making, which are made worse by this legal and administrative vacuum.

These systemic problems need a thorough evaluation of the legal system's ability to defend the rights of people with mental illnesses. Limited legal ability, a lack of enabling legislation, and a lack of legislative attention are the main issues and driving forces behind this research. By examining current barriers and proposing ideas to improve Kenya's legal system, this research aims to advance fair and authentic access to justice for people with intellectual and psychosocial impairments.

The purpose of this study is to critically analyze the existing legal framework on access to justice for persons with mental disabilities in Kenya, identify the gaps and challenges in its implementation, and propose recommendations for reform that would ensure equal and fair treatment for all persons, regardless of their mental condition. In order to eliminate the structural obstacles that prevent people with mental disorders from accessing justice, this issue requires immediate attention.⁸

OBJECTIVES OF THE STUDY

- i. To examine the Kenyan legal framework governing access to justice for persons with intellectual and psychosocial disabilities.
- ii. To examine the practical barriers that persons with intellectual and psychosocial disabilities face in accessing and participating in the justice system in Kenya.
- iii. To assess the extent to which Kenya's legal framework on access to justice for persons with intellectual and psychosocial disabilities conforms to applicable international and regional human rights standards.
- iv. To propose legislative, policy and institutional measures for strengthening access to justice for persons with intellectual and psychosocial disabilities in Kenya.

⁷ Ibid

⁸ Constitution of Kenya 2010, Art 48.

THEORETICAL FRAMEWORK

This study draws on two key theories: Natural Law Theory and Social Contract Theory. Both theories provide a foundational understanding of justice, rights, and the social obligations of the state, which are critical to analyzing the legal framework for persons with mental disabilities in Kenya.

Natural Law Theory

Aristotle (384–322 BC) asserted that, unlike popular belief, there is a universally applicable natural justice. According to Aristotle, the rule of law ought to foster virtue and enjoyment. According to the Natural Law Theory, all human laws need to be based on these universal moral precepts as everyone has intrinsic moral rights that reason can recognize. Legal realists like Oliver Wendell Holmes Jr. and critics like John Austin and HLA Hart contested the link between morality and the law, arguing that human enactment, not moral content, is what gives laws their force.

Natural Law Theory offers a moral basis for recognizing and defending the inherent rights of people with intellectual and psychosocial impairments within the context of this investigation. According to the Natural Law Theory, all reasonable laws must be based on universal moral principles that are inherent in human nature and that reason may learn. By claiming that each person has inherent moral value and dignity, it undermines legal frameworks that limit people's freedom and defends advancements that encourage supported rather than replaced decision-making. Kenyan laws must represent justice based on reason and regard for human dignity as the theory's focus on universality and moral equality is consistent with international human rights norms.

Social Contract Theory

By arguing that people agree to give up certain liberties in return for the preservation of their remaining rights, the Social Contract Theory explores the beginnings of society and the rationale for the state's power. Thomas Hobbes thought that in order to preserve peace and order, an absolute sovereign had to be established since nature is violent and chaotic. John Locke, on the other hand, envisioned a natural law-based society in which people established governments to protect property, liberty, and life.

The Social Contract Theory offers a crucial conceptual framework for evaluating the state's duty to protect the rights of people with intellectual and psychosocial impairments in the context of this investigation. This supports the idea that upholding the equality, autonomy, and dignity of every person—including those with mental illnesses—is essential to the government's legitimacy. This framework emphasizes how Kenya's legal system must embrace inclusive strategies that value each person's potential and involvement and change discriminatory laws to allow alternative decision-making in order to give justice and protection in line with the social contract's tenets.⁹

LITERATURE REVIEW

Historical Overview of Mental Disability and the Right to Access Justice

In the past, mental health concerns and the rights of people with intellectual and psychosocial impairments have often been disregarded. The colonial background of the British legal system, which produced laws that still influence how people with mental disabilities engage with the legal system in Kenya and other nations, is the cause of this historical neglect.

⁹ McCormick, Peter. "Social Contract: Interpretation and Misinterpretation." *Canadian Journal of Political Science / Revue Canadienne de Science Politique* 9, no. 1 (1976): 63–76.

The 1843 M'Naghten case, ruled by the Central Criminal Court of England and Wales, is a notable decision that highlights the colonial legacy in Kenya's legal system. It continues to influence how people with intellectual and psychosocial disabilities are treated by Kenya's criminal justice system. The case resulted in the development of the M'Naghten principles, which state that if a person has a mental illness that impairs their ability to understand the nature of their conduct or to choose between good and wrong, they may be free from criminal liability.

People with disorders have always been denied full access to justice in Kenya, according to the country's legal history. Current legislation and institutional conduct are still influenced by the stigmatizing language and regulations of the colonial past, which sustain systemic discrimination and provide inadequate protections for those with psychosocial and intellectual disabilities. In addition to enacting legislation, important institutions such as law enforcement, penal services, and mental health facilities must also start focused awareness campaigns and capacity-building initiatives to support real transformation. These actions are crucial to achieving true inclusion and protecting everyone's rights, regardless of handicap.¹⁰

Overview of the Legal Framework within Kenya

The International Commission of Jurists (ICJ) Kenya has conducted an assessment of Kenya's system for protecting the rights and welfare of people with disabilities, identifying both significant advancements and enduring difficulties. The 2010 Kenyan Constitution, which expressly forbids discrimination and ensures equality before the law for people with disabilities, serves as the foundation for this evaluation. Article 260 of the Constitution defines disability broadly and inclusively, including a variety of conditions that significantly limit one or more significant activities of daily life. Despite these essential safeguards, flaws in statutory implementation and insufficient enforcement mechanisms often impede the real enforcement and enjoyment of these rights.

The Mental Health Act, which addresses the protection, care, and treatment of individuals with mental impairments, serves as the foundation for Kenya's legal framework in this regard. The ICJ Kenya highlights serious shortcomings in the application of mental health legislation in spite of these safeguards. The judiciary is involved in interpreting and upholding laws that protect the rights of people with disabilities, as seen by cases such as *Republic v. SOM*. But according to ICJ Kenya, court rulings by themselves are inadequate without meaningful legislative changes and practical implementation plans.¹¹

Challenges Faced by Persons with Mental Conditions within Kenya's Justice System

The many obstacles that people with mental illnesses encounter in Kenya's criminal justice system point to underlying problems that prevent them from receiving fair treatment and access to the legal system. The author lists a number of these obstacles, including issues with legal capacity, procedural language, bias, ignorance of one's rights, being exposed to unjustified force, receiving no therapy while in custody, and reintegration challenges after release.

Legal competency is the first and most crucial concern. Despite international agreements and constitutional protections for equal rights, persons with mental health issues often have their legal competence diminished or ignored entirely. Under rules like the Mental Health Act, substituted decision-making—where someone else makes choices without their input remains

¹⁰ Flaschner, Franklin N. "Legal Rights of the Mentally Handicapped: A Judge's Viewpoint." *American Bar Association Journal* 60, no. 11 (1974): 1371–75.

¹¹ *Ibid*

common. This violates Article 12 of the CRPD, which encourages supported decision-making methods, and compromises their autonomy and right to take part in judicial procedures.

The link between criminality and mental health is also problematic. Due to their conditions, people with mental problems commit minor infractions like disruptions and indecent acts at a disproportionately high rate. To sum up, solving these issues calls for an all-encompassing strategy that involves social awareness efforts to fight stigma and prejudice, court professional training programs, and legislative changes. Kenya might move closer to a more inclusive and fair criminal justice system that respects the rights and dignity of every person, regardless of their mental health condition, by following international norms like the CRPD and making sure that sufficient support networks are in place.¹²

METHODOLOGY

This study critically examined laws, court rulings, constitutional clauses, and international legal texts pertaining to the rights of people with intellectual and mental impairments using a qualitative doctrinal legal research technique. The methodology is grounded on library-based research and draws from primary materials, including the Persons with Disabilities Act, the Mental Health Act, the 2010 Kenyan Constitution, and pertinent international agreements such as the Convention on the Rights of Persons with Disabilities (CRPD).

Journal articles, textbooks, reports, and legal commentaries are a few examples of secondary materials that are analyzed to provide academic analysis and interpretative insights into the existing legal system and its application. Because of its focus on theory and norms, the research does not utilize surveys or interviews to gather empirical data. In order to improve the study, Chapter Four uses a comparative strategy to look at best practices from a few chosen countries, such as Canada, India, and South Africa. These case studies illustrate reform concepts that might influence Kenya's legal and institutional strategies. Using legal interpretation techniques such as gap analysis, systemic interpretation, and textual analysis, the study also assesses how well Kenyan laws conform to international human rights responsibilities and inclusive justice ideals.¹³

FINDINGS AND DISCUSSION

Kenyan Legal Framework Governing Access to Justice for Persons with Intellectual and Psychosocial Disabilities

Kenyan domestic legislation is evaluated using laws like the Persons with Disabilities Act, 2025, which requires the state and private sectors to remove barriers to participation; the Mental Health Act, 2023, which governs the care and legal capacity of individuals with psychosocial disabilities; the Legal Aid Act, 2016, which ensures that those living in poverty have access to state-funded legal representation; and procedural laws like the Judicature Act, the Civil Procedure Act, the Criminal Procedure Code, and the Evidence Act, which affect how people participate in proceedings.¹⁴

International Law Framework

The main international foundation for defending the rights of people with disabilities is the Convention on the Rights of Persons with Disabilities (CRPD), which Kenya ratified on May 19, 2008. Even if Kenya has not ratified the Optional Protocol, ratification creates legally binding obligations in accordance with Article 2(6) of the Constitution. Article 12 challenges

¹² *Ibid*

¹³ *Republic v S O M* [2018] eKLR.

¹⁴ Duncan Okoth-Okombo, 'Disability Rights in Kenya: Past, Present, and Future' (2016) 4 African Disability Rights Yearbook 63.

domestic provisions in the Mental Health Act and the Penal Code that allow the denial of legal ability on the grounds of "unsoundness of mind." It emphasizes assisted decision-making over substituted decision-making and acknowledges legal competence on par with others. In order to facilitate effective participation in court proceedings, states are required under Article 13 of the CRPD to provide age-appropriate and procedural accommodations, including accessible information, evidentiary modifications, and interpretation services.

The CRPD sets a new benchmark for Kenya by advocating for a transition away from welfare-based or custodial institutions and toward a rights-based system that upholds equality, autonomy, and dignity. Funding accessible justice facilities, aligning domestic legislation with international norms, and providing judges, magistrates, law enforcement, and prison officials with comprehensive training to meet the needs of people with disabilities and guarantee their full participation in society are all necessary for full compliance.¹⁵

After ratifying the ICESCR on May 1, 1972, Kenya took on the duty of guaranteeing that the rights protected by the Covenant are exercised without discrimination in accordance with Article 2(2). Even if it isn't mentioned specifically, disability is covered under "other status," which requires positive treatment for disadvantaged groups. Disproportionate discrimination against individuals with disabilities continues, according to Kenya's Combined Second to Fifth Report to the Committee on Economic, Social, and Cultural Rights. This illustrates the discrepancy between the actual lives of people with intellectual and mental impairments and Kenya's declared obligations under the ICESCR.¹⁶

On May 1, 1972, Kenya ratified the ICCPR. While Article 2 implicitly recognizes disability under the non-discrimination principles, Article 14 ensures equality before courts and tribunals, and Article 16 underlines the right to recognition before the law. Furthermore, Article 9 protects the individual's security and freedom, which is essential in preventing the arbitrary institutionalization of those suffering from psychological disorders. However, as seen by the continued use of alternative frameworks for decision-making and difficulties guaranteeing equitable access to justice, Kenya has not yet aligned its domestic legal system with the revolutionary spirit of the ICCPR.¹⁷

State parties are required to work toward the abolition of all kinds of discrimination against women, including those exacerbated by disabilities, under CEDAW, which Kenya signed in 1984. However, persisting financial constraints, restricted access to justice, and gender-based violence continue to disproportionately affect Kenyan women with disabilities. This emphasizes the need of addressing the dual vulnerability faced by women with disabilities via an intersectional approach.¹⁸ Children, especially those with disabilities, have the right to be heard in all processes that impact them, according to Article 12 of the CRC. Kenya implemented some of the CRC's provisions via the Children Act after ratifying it in 1990. However, as children with intellectual impairments are still not sufficiently represented or engaged in legal and administrative processes, substitute counsel is often required to get outcomes.¹⁹

¹⁵ Janet E. Lord and Michael Ashley Stein, 'The Domestic Incorporation of Human Rights Law and the United Nations Convention on the Rights of Persons with Disabilities' (2008) 83 Washington Law Review 449.

¹⁶ *Ibid*

¹⁷ Stone R, *Textbook on Civil Liberties and Human Rights* (9th edn, OUP 2012)

¹⁸ Children Act 2022

¹⁹ *Ibid*

African Charter on Human and Peoples' Rights (ACHPR)

In 1992, Kenya ratified the ACHPR. While Article 18(4) expressly calls for particular protection for the elderly and handicapped, Article 16(1) ensures the right to the best possible health. However, the ACHPR's transformational potential is undermined by the slow rate of change and the lax implementation of current laws. In reality, systematic exclusion still affects people with intellectual and psychosocial impairments in Kenya, especially when it comes to access to justice and healthcare.²⁰

Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa

Being the first document to adequately address disability rights in Africa, this Protocol marks a significant advancement in regional human rights legislation. It safeguards liberty, nondiscrimination, personal security, equality before the law, and freedom from torture and cruel treatment. The rights of people with intellectual and psychosocial impairments, who are presently mostly excluded from the mainstream rights discourse, would be greatly advanced by its effective domestication.²¹

The Constitution of Kenya, 2010

Intellectual and psychological impairments are specifically included in the term of "disability" under Article 260 of the 2010 Kenyan Constitution, which lays out the foundation for the protection of rights for people with disabilities. Article 27, which declares equality before the law and equal benefit of the law and forbids both direct and indirect discrimination on the basis of handicap, firmly establishes equality and nondiscrimination. Article 28 guarantees everyone the basic right to dignity, which includes protection against cruel treatment and acknowledgment of the intrinsic value of those with mental and intellectual impairments. The rights of people with disabilities are outlined in Article 54. Even while Article 50 lays out certain rights for a fair trial, including the right to be heard before an impartial judge, Article 48 expressly requires the State to provide access to justice. The Constitution is the cornerstone of Kenya's legal system regarding access to justice because of these clauses taken together.²²

Mental Health Act

Kenya's legislative framework for the protection, care, and treatment of individuals with mental health illnesses is established under the Mental Health Act. Importantly, people with mental diseases, psychopathic diagnoses, and impairments brought on by cognitive alcohol or drug abuse are all included in the definition of "person suffering from mental disorder" in section 2. Many have disputed this term as being out of date and insulting, citing issues with the stigmatizing language and its coherence with contemporary concepts of disability rights and dignity.²³

Section 26 gives judges the authority to impose guardianship and estate management orders on individuals with mental health disorders, often via the Public Trustee or close family members, with regard to property and individual rights. However, since people with mental illnesses are often unable to actively engage in choices that directly impact their lives and property, this legal system fosters substituted decision-making and presents severe impediments to their access to justice. The Mental Health Act perpetuates stigma, restricts legal competence, and

²⁰ *Ibid*

²¹ *Ibid*

²² Amita Dhanda, 'Legal Capacity in the Disability Rights Convention: Stranglehold of the Past or Lodestar for the Future?' (2007) 34 Syracuse Journal of International Law and Commerce 429.

²³ Michael Oliver, *The Politics of Disablement* (Palgrave Macmillan 1990).

exposes individuals with mental illnesses to processes that may not adequately safeguard their rights or voices from the perspective of access to justice. It demonstrates how Kenya's legal system and its international obligations under the CRPD, which strongly emphasize respect for autonomy, dignity, and involvement in decision-making, clash.²⁴

Persons with Disabilities Act, 2003

The Individuals with Disabilities Act, 2003, is a historic legislation in Kenya that attempts to safeguard and promote the rights of individuals with disabilities, especially those who have mental and intellectual impairments. Section 38 requires the Attorney General to create regulations that provide the free provision of legal aid to people with disabilities in cases when their rights have been infringed, their property is at danger of seizure, or they have committed capital offenses. The Act's promise to improve access to justice for those with mental disorders has not been fully realized, and it has not been routinely applied despite these progressive features. The NCPWD's efficacy is weakened by institutional hurdles, low awareness, and inadequate funding. Furthermore, the Act often prioritizes rehabilitation over empowerment and adopts a welfare-based strategy as opposed to a rights-based one. Thus, despite offering a helpful framework, the Act needs major revisions to conform to a human rights-based paradigm and has no effect on improving the substantive access to justice for people with mental disorders.²⁵

Criminal Procedure Code

The Director of Public Prosecutions (DPP) may choose to reopen the case under section 163 if it is subsequently found that a mentally ill inmate is capable of defending themselves. In order to avoid injustices from occurring because of incapacity or silence, Section 280 also permits courts to enter a plea of "not guilty" on behalf of an accused person who is unable to do so because of an illness. The marginalization of accused individuals with mental disorders is often sustained by the dependence on medical certification and executive permission, which denies them an equal voice in their trials. In addition, the CPC's stigmatizing and archaic use of the word "unsound mind" betrays a paternalistic mindset that goes against Kenya's constitutional values of equality and decency. Delays in trials brought on by medical examinations or presidential orders worsen unfairness and often result in lengthy incarceration.²⁶

Kenya National Commission on Human Rights Act, 2011

According to Article 59(4) of the Constitution, the Act creates the Kenya National Commission on Human Rights (KNCHR). Inmates in mental hospitals are guaranteed the opportunity to speak with the Commission in confidence under Section 51, and all communication is to be kept private. By providing a direct and secure avenue for people with psychosocial or intellectual problems to report infractions, this safeguard improves monitoring in mental health institutions.²⁷

Penal Code

The main criminal law code in Kenya is the Penal Code (Cap 63, Laws of Kenya). The concept of criminal responsibility is established by Section 11, which states that unless the opposite is shown, everyone is assumed to be competent and of sound mind to commit a crime. Section 12 restricts this presumption, however, by stating that an individual is not criminally

²⁴ Mental Health Act (n 1) s 16.

²⁵ Mental Health Act (Cap 248, Laws of Kenya).

²⁶ Amita Dhanda, 'Legal Capacity in the Disability Rights Convention: Stranglehold of the Past or Lodestar for the Future?' (2007) 34 Syracuse Journal of International Law and Commerce 429.

²⁷ Kenya National Commission on Human Rights Act 2011

responsible for an act or omission if they were mentally incapable of understanding what they were doing or knew that it was unlawful at the time of the action. The High Court ruled in *AOO & 6 others v. Attorney General* that section 167 was unconstitutional because it permitted the indefinite detention of people who were found guilty but mentally ill. The court ruled that this violated Articles 27 and 28 of the Constitution, which safeguard equality, dignity, and nondiscrimination. Even though the Penal Code itself still reflects colonial-era conceptions of mental illness that place a higher priority on containment than rights-based approaches, Kenyan jurisprudence, especially in cases like *A.O.O.*, demonstrates a judicial shift toward interpreting these provisions in a manner consistent with constitutional principles. This makes it a basis of criminal justice and a source of ongoing human rights issues for people with intellectual and psychosocial disability.²⁸

Practical Barriers that Persons with Intellectual and Psychosocial Disabilities Face in Accessing and Participating in the Justice System in Kenya

Addressing the widespread stigma that influences how these impairments are seen is also essential. In addition to socially marginalizing people, these viewpoints also affect how legal institutions react, affecting everything from interactions with the police to judges' evaluations of their dependability. To ensure inclusion, equality, and meaningful access to justice, intellectual and psychological impairments must be reframed as a component of human variety rather than as pathological aberrations.²⁹

Since it makes all other rights possible, access to justice is among the most fundamental human rights. The courts and laws are meaningless without this as there are no means of enforcing the law. Therefore, access to justice involves more than just being in court; it also involves actively participating and influencing results. Encouraging people with disabilities to actively engage in the legal system preserves their dignity and autonomy while also lending validity to the system as a whole.³⁰

Access to Physical Infrastructure

The architecture of courts, police stations, and other justice-sector buildings is one of the most obvious obstacles to justice for people with disabilities. Many Kenyan court facilities are still inaccessible despite the implementation of laws like the Persons with Disabilities Act. It is worthwhile to read the ruling in *Paul Pkiach Anupa v. Attorney General & Others*. Even though this case focuses on wheelchair users' physical access, it could nevertheless be educational for those with intellectual and psychological limitations. They are affected differently by the physical surroundings: a court that is scary, packed, or chaotic may make psychological stress, anxiety, or cognitive overload worse.

Information Availability

Justice is useless if people with intellectual and psychosocial impairments are unable to understand or speak during court proceedings, even if they are granted physical access to the court. People with intellectual impairments are often excluded from active engagement when user-friendly resources are not available, such as simplified language versions of documents describing processes. Governments across the globe are required under Article 21 of the CRPD to guarantee that people with disabilities may use any accessible communication method of their choosing to seek, receive, and share information on an equal footing with others.

²⁸ *Ibid*

²⁹ Amita Dhanda, 'Legal Capacity in the Disability Rights Convention: Stranglehold of the Past or Lodestar for the Future?' (2007) 34 *Syracuse Journal of International Law and Commerce* 429.

³⁰ *Ibid*

Meaningful involvement requires access to information, especially for those who may find it difficult to understand sophisticated legalese or who suffer from mental health issues that affect their ability to concentrate.³¹

Economic Barriers

A significant obstacle to justice is economic hardship, especially for people with disabilities, who make up a disproportionate number of the world's poor, according to international assessments. Even though Article 48 of the Constitution ensures access to justice in Kenya without paying exorbitant costs, and Article 50(2)(h) offers state-funded legal assistance in certain instances, legal aid is still not typically available in reality. Access has been increased by the Legal Aid Act of 2016, however institutional procedures are still inadequate, and people with intellectual and psychosocial disabilities are unaware of this. Therefore, distributive justice initiatives that provide state money to guarantee that individuals with intellectual and psychological impairments may genuinely exercise their right to seek remedies in court are necessary to overcome such impediments.³²

Barriers in the Production of Evidence

One of the biggest obstacles to justice for people with mental and intellectual disabilities is the standards of proof. Even though the Evidence Act provides very limited accommodations for those with mental or intellectual disability, it typically assumes that witnesses are competent. According to Section 125, anybody may testify unless the court determines that they are unable to understand the questions or provide thoughtful responses. This ambiguous phrasing gives judges a great deal of discretion, which might lead to the rejection of evidence from those who have intellectual or psychological issues. The Evidence Act does not specifically call for accommodations like accelerated questioning, the presence of support staff, or the use of extra communication channels, in contrast to the Sexual Offences Act 2006, which permits intermediaries for witnesses who are considered vulnerable.³³ Because of this, Kenya's narrow framework not only fails to meet its international commitments, but it also reinforces a structural lack of trust in the viewpoints of people with intellectual and mental health problems.³⁴

Conformity of Kenya's Legal Framework on Access to Justice for Persons with Intellectual and Psychosocial Disabilities with International and Regional Human Rights Standards

With an emphasis on the Convention on the Rights of Persons with impairments (CRPD) and its implementation instruments, this chapter assesses Kenya's adherence to regional and international human rights standards for people with intellectual and psychosocial impairments. By pointing up important areas of alignment and gaps that prevent access to justice, it evaluates how successfully Kenya's local laws, institutions, and judicial procedures convert international responsibilities into actual protection.³⁵

As the CRPD is incorporated into domestic law by Article 2(6) of the Constitution, its normative weight will act as a guide for legislative interpretation, administrative policy, and

³¹ Yash Ghai and Jill Cottrell Ghai, *The Constitution of Kenya: An Instrument for Change* (Katiba Institute 2011).

³² Oliver Lewis, 'Human Rights and the Perception of Persons with Disabilities: Historical, Cultural, and Legal Perspectives' (2004) 19(2) *Disability Studies Quarterly* 68

³³ Patrick McAuslan, *Bringing the Law Back In: Essays in Land, Law and Development* (Ashgate 2003).

³⁴ *Ibid*, Article 12

³⁵ Gerard Quinn and Theresia Degener, *Human Rights and Disability: The Current Use and Future Potential of United Nations Human Rights Instruments in the Context of Disability* (UN 2002).

judicial reasoning. Therefore, theoretically, Kenya's constitutional framework offers a solid foundation for bringing domestic laws into compliance with international norms. The Constitution's principles of equality, dignity, and nondiscrimination have not always been upheld, despite their enormous advantages. The acknowledgment of legal capacity and protection against cruel treatment are the two main objectives of the CRPD. The requirements highlight issues that Kenya's current legal system only partly resolves.³⁶

South Africa

The Republic of South Africa's 1996 Constitution's dignity provisions, which are immediately enforceable and have affected both judicial and administrative operations, provide a solid rights-based basis. The Mental Health Care Act of 2002 is a significant piece of legislation in this field that substituted a more complex rights-based framework for previous paternalistic limitations. The statute provides opportunities to contest arbitrary detention or needless medical procedures by guaranteeing access to legal counsel. Disability discrimination is specifically prohibited under the Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA), which also mandates that public and private entities take proactive steps to provide reasonable accommodations. Physical obstacles against arbitrary or permanent institutionalization are provided by mental health review boards, regular court inspections, and statutory rights to legal counsel.³⁷

Uganda

Uganda started a reform process to eliminate these gaps by modernizing its legal system and incorporating disability rights into a rights-based framework. Colonial-era regulations that saw mental health through the prism of institutional control and public order underwent a dramatic change with the passage of the Mental Health Act of 2018. The Persons with Disabilities Act, which was passed in 2020, significantly solidified Uganda's rights environment. Uganda, however, serves as a reminder that legal reform is not enough on its own. Reforms run the danger of becoming just symbolic in the absence of adequate funding, institutional training, and systemic capacity development. In order to guarantee that rights are appropriately implemented in practice, Kenya may therefore learn from Uganda not just the principles of progressive legislation but also the significance of talent development, resource allocation, and sustainability planning.³⁸

England & Wales (United Kingdom)

By creating a rights-based legal framework that aimed to integrate protection with respect for autonomy, dignity, and participation, the Mental Capacity Act of 2005 represented a crucial turning point. In *P v. Cheshire West and Chester Council*, the Supreme Court established the so-called "acid test" to determine whether someone is robbed of their liberty. The example of England and Wales may teach Kenya the value of combining explicit law with institutional protections. A paradigm for how legal systems may preserve autonomy while providing protection is provided by the least restrictive intervention principle, the duty to give aid before substituting judgment, and the assumption of ability. The lesson is that if rights are to be really realized, legislation must be modified in tandem with institutional resources, sustained financing, and streamlined processes.³⁹

³⁶ *Ibid* Art 13.

³⁷ *Ibid*

³⁸ *Ibid*

³⁹ *Ibid*

India

Significant legislative and regulatory changes have recently been made in India with the goal of enhancing the rights of people with intellectual and psychological disabilities. The Rights of Persons with Disabilities Act 2016 (RPwD Act), which superseded the Persons with Disabilities Act of 1995, is the most noteworthy piece of law. A significant change in the regulation of mental health is represented by the addition of the Mental Healthcare Act of 2017 to the RPwD Act. Kenya may learn from the Indian example how effective it is to combine innovative legislation with rigorous judicial oversight and engaged civil society involvement. Only then will legal rights transcend formal recognition and transform into useful assurances that enhance the quality of life and access to justice for individuals with intellectual and psychosocial disabilities.⁴⁰

CONCLUSION

Even while Kenya's 2010 Constitution and relevant laws, such the Persons with Disabilities Act and the Mental Health Act, show a considerable level of conformity to international norms, implementation is still lacking. Inadequate procedural accommodations, substitute decision-making, and ongoing discrimination are all blatant examples of CRPD and the realities faced by people with disabilities. The chapter therefore draws attention to the discrepancy between policy and reality, demonstrating that official acknowledgment of rights has not always resulted in efficient legal protection or enforcement.

This chapter's analysis of Kenya's legal system on the access to justice of individuals with psychosocial and intellectual impairments has shown both advancements and enduring deficiencies. Older legislation like the Mental Health Act and parts of the Penal Code still reflect antiquated, custodial policies that limit legal competence and reinforce stigma, even if the 2010 Kenyan Constitution and the Persons with Disabilities Act proclaim equality and dignity. All things considered, Kenya's framework respects disability rights in theory but falls short in reality. Harmonizing legislation, bolstering supported decision-making, and guaranteeing inclusive, accessible judicial procedures that turn constitutional promises into actual safeguards are all necessary to achieve complete compliance with the CRPD.

This comparative assessment has mapped Kenya's compliance with regional and international human rights norms for individuals with intellectual and psychological impairments, as well as using institutional and regulatory models from South Africa, Uganda, the United Kingdom, and India. Only by adopting such an integrated strategy would Kenya be able to close the gap between its legislative commitments under the CRPD, ICCPR, ICESCR, and African regional accords and the practical realities of access to justice. In this way, the promise of equal legal recognition and real access to justice for those with mental and intellectual disabilities may become concrete and enduring.

RECOMMENDATIONS

The updating and harmonization of laws dealing to people with mental and intellectual impairments is Kenya's most important reform topic. Despite the 2010 Constitution's promises of equality and nondiscrimination, Kenya still has antiquated and sometimes discriminatory legislation such as the Evidence Act, Mental Health Act, and Penal Code. Recognizing the legal ability of people with mental conditions should be a top priority for reforms. Supported frameworks for decision-making that empower people while preventing exploitation need to take the place of substituted decision-making. Rights in court procedures, such as the right to

⁴⁰ CPPR, 'The Mental Healthcare Act 2017: An Inclusive Approach', Centre for Public Policy Research.

counsel, the right to take part in trials, and the right to reasonable accommodations to improve understanding and communication, should be clearly defined by statute.

For individuals with psychosocial and intellectual impairments to effectively translate law provisions into meaningful access to justice, institutional reform is necessary. For judges, magistrates, prosecutors, and law enforcement, specialized training on mental health, trauma-informed practices, and disability rights is essential. Accountability and public trust would be further ensured by the creation of independent oversight organizations to look into claims of abuse, discrimination, or procedural irregularities.

Initiatives for social inclusion and public awareness must go hand in hand with institutional and legislative changes. Campaigns for public education are crucial to eradicating stigma and increasing understanding of the rights of those with mental disorders and disabilities.

If judges, magistrates, prosecutors, defense lawyers, and court clerks are to be equipped to handle cases involving people with intellectual and mental disabilities, it is imperative that legal professionals' ability be developed. Modules on CRPD human rights standards, disability rights legislation, how to handle evidence for witnesses with cognitive impairments, and trauma-informed approaches to procedural justice should all be included in training programs.

Without concurrent support for mental health and rehabilitative therapy, legal access alone is inadequate. Kenya should make sure that mental health therapies are included into the legal system. This include assisting community reintegration programs for people with disabilities who are engaged in the judicial system, providing psychological assistance on-site during trials, and rehabilitating defendants. These services lessen the chance of trauma and enable active involvement in court procedures. Integrating mental health services within the legal system guarantees complete access by striking a balance between therapeutic and social assistance and legal safeguards.

REFERENCES

- Ayoo BN, 'Disability Rights in Kenya: Implementing the CRPD' (2017) 25 African Journal of International and Comparative Law 149.
- Barry B, *Justice as Impartiality* (Oxford University Press 1995).
- Bartlett P and Sandland R, *Mental Health Law: Policy and Practice* (5th edn, Oxford University Press 2021).
- Bickenbach JE, *Physical Disability and Social Policy* (University of Toronto Press 1993).
- Cooper J, *Law, Rights and Disability* (Jessica Kingsley 1999).
- Dhanda A, 'Legal Capacity in the Disability Rights Convention' (2007) 34 Syracuse Journal of International Law and Commerce 429.
- Ghai Y and Cottrell J, *Constitutional Law of Kenya* (2nd edn, Strathmore University Press 2016).
- International Commission of Jurists, *Access to Justice: Responding to Justice Needs for Persons with Mental Disabilities* (ICJ-Kenya 2021).
- International Commission of Jurists, *Promoting Inclusion and Responding to Justice Needs for Persons with Mental Disabilities: Access to Justice Manual* (ICJ-Kenya 2021).

- Juma PO and Mbondenyei M, 'Access to Legal Aid for Accused Persons with Disabilities in Kenya's Criminal Justice System' (2025) *Journal of African Law*.
- Kamundia E, 'Choice, Support and Inclusion: Implementing Article 19 of the CRPD in Kenya' (2012) 18 *East African Journal of Human Rights & Democracy* 41.
- Kenya National Commission on Human Rights, *Objects of Pity or Individuals with Rights: The Right to Education for Children with Disabilities* (KNCHR 2007).
- Lewis O, 'Protecting the Rights of People with Mental Disabilities' (2002) 9 *European Journal of Health Law* 293.
- Lord JE and Stein MA, *Advancing the Human Rights of Persons with Disabilities* (Martinus Nijhoff 2013).
- Murungi LN, 'The Place of the Rights of Persons with Disabilities in Kenya's Constitutional Reform Discourse' (2013) 29 *South African Journal on Human Rights* 142.
- Ngugi J, 'Mental Disability and Criminal Justice in Kenya: Revisiting the Insanity Defence' (2019) 7 *Strathmore Law Journal* 55.
- Oliver M, *The Politics of Disablement* (Palgrave Macmillan 1990).
- Parry JW, 'Mental and Physical Disability Rights: The Formative Years and Future Prospects' (1996) 20 *Mental and Physical Disability Law Reporter* 627.
- Quinn G and Degener T, *Human Rights and Disability: UN Instruments in Context* (United Nations 2002).
- Sandel MJ, *Justice: What's the Right Thing to Do?* (Farrar, Straus and Giroux 2009).
- Shakespeare T, *Disability Rights and Wrongs Revisited* (2nd edn, Routledge 2014).
- Stein MA and Stein PJS, *Disability, Human Rights and the Limits of Humanitarianism* (Routledge 2018).
- World Health Organization, *Special Initiative for Mental Health (2019–2023)* (2023).