

Access to Justice for Persons with Disabilities in Kenya: Progress and Challenges

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Executive Summary

This report examines Kenya's legal and institutional landscape regarding the protection and enforcement of the right to access to justice for persons with disabilities. The report assesses Kenya's compliance with its obligations in terms of the right to access to justice for persons with disabilities under the United Nations (UN) Convention on the Rights of Persons with Disabilities (CRPD), and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa (ADP). Kenya ratified the CRPD in 2008 and the ADP in 2021.

The report highlights both progress and persistent gaps in the country's legal and institutional frameworks, with a focus on the role of key actors — particularly the courts — in addressing challenges to access to justice for persons with disabilities. It is based on comprehensive desktop research, including the analysis of Kenyan laws, government guidance and policy documents, Kenyan court decisions, and key publications. The research also involved interviews with judges and disability rights experts.

The Constitution of Kenya (2010) includes a standalone provision on the rights of persons with disabilities, and, in addition, prohibits discrimination on the basis of disability. The recent enactment of the Persons with Disabilities Act (2025) — which features key provisions on equality and non-discrimination, legal capacity and access to justice — marks a significant step forward in the legal recognition and guarantee the right of persons with disabilities to access justice in Kenya. Despite these positive developments, however, deficiencies and inconsistencies in other key legislation continue to hinder access to justice for persons with disabilities.

- The Legal Aid Act (2016), for example, does not explicitly include persons with disabilities in the list of persons eligible to receive legal aid services.¹
- The Mental Health (Amendment) Act (2022) retains provisions that allow for substituted decision-making and involuntary detention, practices that are inconsistent with the rights guaranteed to persons with disabilities under the CRPD and the ADP.
- Kenya's Penal Code Act (Cap.63) and the Criminal Procedure Code (CPC) Act (Cap.75) substantially restrict access to justice for persons with intellectual and/or psychosocial disabilities by depriving such persons of their right to legal capacity, legal standing and of their fair trial rights. The Penal Code allows the designation of an accused person with disability as being of "unsound mind". As a result of this designation, they are stripped of their right to legal capacity and denied the right to defend themselves. Similarly, Sections 162–167 of the Criminal Procedure Code contain discriminatory provisions against accused persons with intellectual and/or psychosocial disabilities, leading to their being declared unfit to stand trial, or their being found incapable to present a defence, or to verdicts of "guilty but insane".

These provisions violate international human rights law and standards, including, in particular, the rights of persons with disabilities guaranteed under the CRPD and the ADP, both of which enshrine the right of persons with disabilities to legal capacity and unequivocally prohibit deprivation of liberty based on disability. In addition, they severely undermine the rights of persons with disabilities to due process and equal treatment before the law. Rulings pursuant to Sections 162–167 of the Criminal Procedure Code, in particular, may lead to indefinite detention "at the President's pleasure", often without judicial review or oversight, with some individuals held in mental health institutions for over a decade.

Since 2016, Kenyan courts have questioned the constitutionality of provisions in the Criminal Procedure Code that mandate the detention of persons with disabilities at the President's pleasure. In *Hassan Hussein Yusuf v. Republic* (2016), for instance, the High Court at Meru (Meru County) held that such detentions amounted to cruel, inhuman and degrading treatment and were, therefore, unconstitutional. This precedent was followed by other High Court decisions, including, *Republic v. SOM* (2018) and *Kimaru & 17 others v. Attorney General & another* (2022), both of which reaffirmed the unconstitutionality of vesting the President with authority to detain at his/her pleasure undermined the principle of judicial independence and violated the rights to dignity, liberty and fair trial of persons with disabilities. The position of the Courts, however, remains unclear, as some decisions — notably those in *Republic v. Edwin Njihia Waweru* (2019) and *Republic v. Ibrahim Kamau Irungu* (2019) — have continued to uphold and apply these same provisions, explicitly rejecting contrary rulings of the Courts.

In addition to these inconsistencies in Kenya's jurisprudence, the courts which have ruled sections 162–167 unconstitutional have often largely focused on the unconstitutionality in respect of vesting the President — an executive authority — with this power, without fully addressing the broader human rights deficits within Sections 162–167 of the Criminal Procedure Code. This is particularly so with regard to the use of "guilty but insane" verdicts and "unfitness to stand trial" findings, which have often resulted in the indefinite detention of persons with intellectual and/or psychosocial disabilities in mental health facilities or prisons. Moreover, while in some of the abovementioned cases the Courts directed the Legislature to amend the impugned provisions of the Criminal Procedure Code, the Legislature has been very slow to act. It therefore appears that despite

¹ Section 36 of the Legal Aid Act, 2016, lists citizens of Kenya, children, refugees, victims of human trafficking, internally displaced persons, and stateless persons as persons eligible for legal aid services.

several rulings declaring sections 162–167 of the Criminal Procedure Code unconstitutional, they remain in force at the time of writing and continue to be applied.

Apart from Kenya's criminal justice system, the country's civil justice framework also denies persons with intellectual and/or psychosocial disabilities the right to legal capacity through applying a regime of substituted decision-making, including through the mandatory involvement of court-appointed guardians. The Civil Procedure Act (Chapter 21) and the Civil Procedure Rules feature provisions under which persons with intellectual and/or psychosocial disabilities may be denied their right to legal capacity, and that authorize such a court-appointed "guardian" or "next friend"² to substitute for them and purport to act on their behalf in civil proceedings. These provisions strip individuals of their autonomy, thereby undermining their ability to make decisions about their lives and limiting their access to justice.

Addressing these systemic barriers across both the criminal and civil justice systems is essential to fulfilling Kenya's obligations under the CRPD and ADP. There is an urgent need for comprehensive legal reform in order to ensure the full and equal recognition of persons with disabilities as members of society and recognize their right to legal capacity and to participate in all legal proceedings on an equal basis with others.

Kenya has undertaken some important steps to enhance access to justice for persons with disabilities, including ensuring accessible court infrastructure, providing sign language interpretation, Braille, guide assistance and prioritizing cases involving persons with disabilities. However, implementation of the country's obligations under the CRPD and ADP remains inadequate. While newly built courts in Kenya include accessibility features such as ramps, lifts and adapted washrooms, most older court buildings remain largely inaccessible. Renovations have been slow and inconsistent, often forcing judges to relocate hearings to ground-floor spaces. Other challenges include:

- shortages of sign language interpreters trained to accommodate diverse local languages;
- minimal procedural accommodations provided for persons with intellectual and/or psychosocial disabilities; and
- the judiciary's continued reliance on non-governmental organizations or court users' committees for support.

While such external support can complement State efforts, the provision of procedural accommodations and the obligation to ensure effective supports are available lies with the State itself in terms of the CRPD and ADP.

While the Kenyan judiciary has affirmed the duty of courts to implement reasonable accommodation measures in cases involving persons with disabilities — and some courts have indeed recognized this obligation — challenges persist. These include the failure to clearly assign responsibility to the court for providing necessary support, and the apparent assumption that the individuals concerned must arrange such support on their own. Additionally, in judgments where reasonable accommodation has been acknowledged, courts have primarily relied on domestic law, without referencing Kenya's international obligations under the CRPD and ADP. This omission creates a risk of inconsistency and non-compliance with Kenya's legal obligations under international human rights law, not least in the conflation between the reasonable accommodation and procedural accommodation standards.

Until the recently enacted Persons with Disabilities Act (2025), which explicitly recognizes the duty to provide procedural and age-appropriate accommodations, Kenya lacked a clear and comprehensive legal framework supporting the provision of procedural accommodation for persons with disabilities in accessing justice. While existing laws, such as the Sexual Offences Act of 2006 and the Prevention of Torture Act of 2017, provided some protections for vulnerable witnesses, including persons with disabilities, these provisions were fragmented and limited in scope to criminal proceedings. Kenya is among the few countries globally with laws recognizing the role of intermediaries in facilitating access to justice for persons with disabilities. The use of intermediaries is guaranteed by the Constitution, the Sexual Offences Act 2006, the Prevention of Torture Act 2017 and court decisions, such as *MM v. Republic (2014)*. Despite this recognition, implementation remains inconsistent due to a lack of standardized procedures, insufficient State-led training and the absence of accreditation frameworks for intermediaries. These shortcomings have limited the practical effectiveness of intermediaries, thus reinforcing the need for reforms so as to ensure that such services be consistently available, whenever necessary to all persons with disabilities, whether in their capacity as witnesses, complainants or accused persons.

The new Persons with Disabilities Act, therefore, marks a significant step forward by guaranteeing the provision of procedural and age-appropriate accommodations across all judicial proceedings involving persons with disabilities. However, the effective implementation of this right now depends on the prompt issuance of rules

² A "next friend" is a person who files a suit in the name of a person with disability. Under the Civil Procedure Rules, "any person who is of sound mind and has attained [the age of] majority may act as a next friend." See Civil Procedure Rules, Order 32 - Rules 1, 4, and 15.

by the Chief Justice in terms of section 28(3) of the Act to ensure consistent application of procedural accommodations throughout the justice system.

The timely adoption of these rules is particularly critical due to their potential for clarifying the scope of procedural accommodations and for ensuring their consistent application — including with respect to the use of intermediaries, the provision of reasonable accommodation, and other forms of support. Encouragingly, at the African Regional Conference on Access to Justice for Persons with Disabilities, held in Nairobi in May 2025 — just days after the Persons with Disabilities Act was passed — the Chief Justice of Kenya committed to fast-tracking the adoption of these rules and to enhancing access to justice for persons with disabilities. The Chief Justice’s timely action is essential to address current inconsistencies and to operationalize the commitments made under the new Persons with Disabilities Act, the Constitution, and pursuant to Kenya’s international law obligations, under the CRPD and ADP.

Recommendations

Legislature

1. Urgently amend Sections 162-167 of the CPC and the relevant provisions of the Penal Code to remove discriminatory provisions and align the criminal law and procedure with the Constitution, CRPD and ADP.
2. Reform the Civil Procedure Act and Rules to recognize the full legal capacity of persons with intellectual and/or psychosocial disabilities. The latter should be allowed to participate in civil justice proceedings through supported decision-making frameworks consistent with the CRPD and ADP.
3. Amend the Legal Aid Act to explicitly recognize persons with disabilities as beneficiary groups. Revise the Legal Aid (General) Regulations to broaden the definition of “civil matters” to include legal aid services in non-court settings, such as proceedings in mental health facilities, rehabilitation centres, and other institutions where persons with disabilities may be held or receive services.
4. Enact the Kenya Sign Language Bill (2023) to provide statutory guarantees for the availability and quality of sign language interpretation in legal proceedings and to mandate its application in all relevant sectors of the justice system.

Executive

1. In collaboration with the Judiciary, ensure full accessibility of all court facilities, including the modification of old court buildings to meet accessibility standards.
2. Ensure adequate budgetary allocations and the creation of designated posts to support the provision of accessible services within the justice system, including qualified sign language interpreters, assistive technologies, and necessary infrastructure.
3. Ensure adequate funding and institutional support for the operationalization of procedural accommodations and intermediary services in the justice system, including the development of training programs, accreditation frameworks, and the implementation of Court Rules that will be enacted under the Persons with Disabilities Act, 2025.
4. The National Legal Aid Service should develop alternative eligibility criteria for persons with disabilities that move beyond means testing. The CRPD and ADP require State parties to provide accessible legal aid at all levels of the justice system.

Judiciary

1. Issue practice guidance to courts to support persons with disabilities and to avoid reliance on the provisions of the Criminal Procedure Code found unconstitutional by the High Court.
2. Until the necessary legal reforms are enacted, the judiciary should exercise its inherent powers to ensure access to justice and direct the provision of legal aid where needed to uphold the right to a fair trial and equality before the law of persons with disabilities.
3. Ensure the availability of Kenyan Sign Language interpreters and other local language variations. Take steps to reduce reliance on NGOs or other *ad hoc* arrangements.
4. Develop standard operating procedures for virtual participation of persons with disabilities in court proceedings, ensuring, in particular, prior assessment of support needs and arrangements for real-time interpretation or assistance.
5. Improve the accessibility of judicial technology systems for persons with disabilities, including aligning them with international web accessibility standards.
6. The Chief Justice should:
 - (a) In a timely manner, take all necessary steps to adopt Rules, as mandated under Section 28(3) of the Persons with Disabilities Act, 2025, to operationalize procedural accommodations and intermediary support, ensuring clarity and consistency across the justice system.

- (b) Ensure the active involvement of persons with disabilities and their representative organizations in the development of the Court Rules.
- (c) Ensure that the Rules harmonize existing legal frameworks related to reasonable accommodation and procedural accommodation.
- (d) Ensure that Rules clearly distinguish intermediary support from substituted decision-making and align with international human rights standards.
- (e) Establish rights-based standards for identifying, training and accrediting qualified intermediaries.

General

- The Kenya Judiciary and the Attorney-General's Office, in consultation with organizations of persons with disabilities, should develop and implement continuous capacity-building programs on the rights of persons with disabilities targeting all justice sector actors.

I. Introduction

The CRPD³ and the ADP⁴ require State parties to ensure that persons with disabilities may enjoy their right to access to justice on an equal basis with others.⁵ Article 13 (1) of the CRPD reads as follows:

“States Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages.”

The ADP provides similar guarantees, while, also enjoining State parties to provide gender-appropriate accommodations so as to ensure effective access to justice for all.⁶ The Protocol further underscores the importance of making customary law processes inclusive and ensuring they are not used to deny persons with disabilities their right to access to justice.⁷

The human rights guarantee under the CRPD and ADP establish both substantive and procedural protections in respect of access to justice rights for persons with disabilities. Substantively, States must guarantee equal access to justice for persons with disabilities, ensuring their participation at all stages of legal processes on an equal basis with others. Procedurally, States are required to provide accommodations and support, tailored to the specific needs of persons with disabilities, in order to ensure their effective access to justice. Such accommodations and support may include modifications to systems, processes, practices and facilities within justice systems. States are also obligated to provide training for justice sector actors and law enforcement personnel, including police and prison staff, on how to ensure effective access to justice for persons with disabilities.⁸ Alongside the specific provisions on access to justice in the CRPD and the ADP, other human rights that are also relevant to ensuring access to justice for persons with disabilities include the right to equality before the law and equal protection of the law without discrimination,⁹ the right to equal recognition as a person before the law,¹⁰ the right to liberty and security of the person,¹¹ and the right to accessibility.¹²

Article 12 of the CRPD and Article 7 of the ADP recognize the right to equal recognition as a person before the law for persons with disabilities. One of the core components of this right is the “right to enjoy legal capacity on an equal basis with others in all aspects of life.”¹³ The ADP defines legal capacity as “the ability to hold rights and duties and to exercise those rights and duties.”¹⁴ The CRPD Committee in its “General Comment No. 1 (2014) - Article 12: Equal recognition before the law”¹⁵ clarified that legal capacity involves two elements: the capacity to hold rights and duties (legal standing) and the capacity to exercise those rights and duties (legal agency).¹⁶ Legal standing essentially allows an individual to be recognized as a person before the law with rights and obligations. In contrast, legal agency involves the ability to act on those rights and have those actions recognized by the law.¹⁷

The CRPD Committee also distinguished between legal capacity and mental capacity. Mental capacity refers to “the decision-making abilities of a person, which naturally vary from one individual to another and can be

³ The Convention on the Rights of Persons with Disabilities (CRPD) was adopted by the UN General Assembly on 12 December 2006 and entered into force on 3 May 2008. Kenya ratified the CRPD on 19 May 2008. For the status of ratification of the Convention, see <https://indicators.ohchr.org/>.

⁴ The Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Persons with Disabilities in Africa (ADP) came into force on 3 May 2024. Kenya ratified the Protocol on 15 November 2021.

⁵ The right to access to justice is closely connected to the right to equality before courts and tribunals, the right to an effective remedy and to the right to a fair trial, and, more generally, to the right to equal protection of the law and non-discrimination guaranteed under existing core international human rights instruments, such as the Universal Declaration of Human Rights (Articles 7, 8 and 10); the International Covenant on Civil and Political Rights ((Articles 2(3), 3, 14 and 26); the International Convention on the Elimination of All Forms of Racial Discrimination (Articles 5(a) and 6); the Convention on the Elimination of All Forms of Discrimination against Women (Article 15); the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Articles 13 and 14); the Convention on the Rights of the Child (Articles 2, 37(d), and 40); the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families ((Articles 1, 7, 16, 17, 18, 19, 24, 26(c), and 83). Regional human rights treaties also provide similar guarantees: the European Convention on Human Rights (Articles 5(3), 6, and 13); American Convention on Human Rights (Articles 7(6), 8, 24, and 25); African Charter on Human and Peoples’ Rights ((Articles 2, 3 and 7); African Charter on the Rights and Welfare of the Child (Articles 3 and 17); and the Protocol to the African Charter on Human and Peoples Rights on the rights of Women in Africa (Articles 2, 3, 8, and 25).

⁶ Article 13 (1) of ADP.

⁷ Ibid, Article 13 (2).

⁸ Article 13 (2) of the CRPD and Article 13 (3) of the ADP.

⁹ Article 5 of the CRPD and Articles 5 and 6 of the ADP.

¹⁰ Article 12 of the CRPD and Article 7 of the ADP.

¹¹ Article 14 of the CRPD and Article 9 of the ADP.

¹² Article 9 of the CRPD and Article 15 of the ADP.

¹³ Article 12 (2) of the CRPD.

¹⁴ Article 1 of the ADP.

¹⁵ The CRPD Committee, General Comment No.1 (2014), Article 12: Equal Recognition before the Law, CRPD/C/GC/1, 19 May 2014.

¹⁶ Ibid, § 12.

¹⁷ Ibid, § 14.

affected by factors such as environmental and social conditions.”¹⁸ In simpler terms, mental capacity relates to how a person makes decisions, which is subjective and varies from person to person, while legal capacity is an objective right granted to all individuals. The key legal point here is that both the CRPD and the ADP prohibit restricting a person's legal capacity (an objective right) based on mental capacity (a subjective condition). Therefore, restricting the legal capacity of a person with intellectual and/or psychosocial disability based on an actual or perceived lack of mental capacity is discriminatory and violates the right to "enjoy legal capacity on an equal basis with others",¹⁹ among other rights.

Article 14 of the CRPD and Article 9 of the ADP guarantee the right to liberty and security of persons with disabilities. This right prohibits both the unlawful or arbitrary deprivation of liberty in general or specifically on the grounds of disability, including intellectual and/or psychosocial disabilities.²⁰ The CRPD Committee clearly outlines in its Guidelines on the Right to Liberty and Security of Persons with Disabilities²¹ that:

"Article 14 does not permit any exceptions whereby persons may be detained on the grounds of their actual or perceived impairment. However, legislations of several States parties, including mental health laws, still provide instances in which persons may be detained on the grounds of their actual or perceived impairment, provided that there are other reasons for their detention, including that they are deemed dangerous to themselves or to others. This practice is incompatible with Article 14 as interpreted by the jurisprudence of the CRPD Committee. It is discriminatory in nature and amounts to arbitrary deprivation of liberty."²²

The Committee further notes that:

"Involuntary commitment of persons with disabilities on health care grounds contradicts the absolute ban on deprivation of liberty on the basis of impairment (article 14 (1)(b)) and the principle of free and informed consent for health care (article 25)."²³

As such, any legislation that permits the deprivation of liberty and the subsequent institutionalization,²⁴ including in mental health facilities, of persons with disabilities without their free and informed consent violates Article 14 of the CRPD.

This report primarily focuses on Kenya's implementation of the CRPD, while also highlighting relevant provisions of the ADP. It examines the measures Kenya has taken to fulfil its obligations under the CRPD to ensure that persons with disabilities are able to fully enjoy their right to access to justice. The report highlights positive developments in legal reforms Kenya has undertaken, as well as the challenges that the country has faced in its quest to ensure full and effective access to justice for persons with disabilities.

The report has adopted a comprehensive desktop research methodology, which involved reviewing key resources, such as Kenyan laws, government reports, judicial decisions and key publications. Additionally, key informant interviews were conducted with judges and disability rights experts. The interviews conducted provided valuable insights into the progress made and the persistent gaps in ensuring access to justice for persons with disabilities in Kenya. There were also significant efforts to engage with lawyers and organizations of persons with disabilities. In addition, the report also draws on the recently published continental study conducted by the ICJ examining the compliance of nine African countries, including Kenya, in upholding the rights of persons with disabilities.²⁵

The report is organized into eight sections, beginning with this introduction.

Section II examines the legal reforms Kenya has implemented to uphold the rights of persons with disabilities, particularly following the adoption of the 2010 Constitution.

¹⁸ Ibid, § 13.

¹⁹ Article 12 (2) of the CRPD and 7 (1) of ADP.

²⁰ CRPD, Article 14 (1) (b).

²¹ The CRPD Committee, Guidelines on Article 14 of the Convention on the Rights of Persons with Disabilities: The Right to Liberty and Security of Persons with Disabilities, 2015.

²² Ibid, § 6.

²³ Ibid, § 10.

²⁴ According to the CRPD Committee, "institutionalization is a discriminatory practice against persons with disabilities contrary to Article 5 of the Convention. It involves de facto denial of the legal capacity of persons with disabilities, in breach of Article 12. It constitutes detention and deprivation of liberty impairment, contrary to article 14 [of the CRPD]." CRPD Committee, Guidelines on Deinstitutionalization, including in emergencies, CRPD/C/5, 10 October 2022, § 6.

²⁵ ICJ, 'An Opportune Moment: Realizing the Rights of Persons with Disabilities in Africa: ICJ's study of nine sub-Saharan African States' implementation of the Convention on the Rights of Persons with Disabilities,' May 2025, available at: <https://www.icj.org/wp-content/uploads/2025/05/An-Opportune-Moment-Realizing-the-Rights-of-Persons-with-Disabilities-in-Africa.pdf>.

Section III highlights the national institutional frameworks relevant to the implementation of the rights of persons with disabilities, highlighting which authorities carry a specific mandate to enforce and promote these rights.

Section IV assesses efforts to remove barriers to access to justice for persons with disabilities within the criminal justice system; it focuses on court rulings on the constitutionality of the provisions of the Criminal Procedure Code that limit the legal capacity of persons with intellectual and/or psychosocial disabilities to be tried in court for a crime they are accused of and to defend themselves against criminal charges.

Section V explores the legal restrictions placed on persons with disabilities' exercise of their right to legal capacity in civil litigation.

Sections VI and VII examine, respectively, the accessibility of legal services and accommodations available to ensure persons with disabilities are able to fully exercise their right to access to justice.

Finally, section VIII presents the key findings of the report and corresponding recommendations.

II. Progress made in terms of Legal Reform

The Constitution of Kenya, 2010

Kenya made commendable strides in legally recognizing the rights of persons with disabilities with the enactment of its 2010 Constitution, which includes a chapter dedicated to human rights guarantees.²⁶

The Constitution was promulgated two years after Kenya became a party to the CRPD in 2008. The United Disabled Persons of Kenya, the national umbrella body representing organizations of persons with disabilities, and other disability rights advocates formed a disability caucus that participated in the constitutional review process.²⁷ The involvement of organizations of persons with disabilities in the constitutional drafting and review process was a key factor for the entrenchment of disability rights in the Constitution.²⁸ Notably, Article 54 of the Constitution emphasizes the rights of persons with disabilities. It reads as follows:

- (1) *A person with any disability is entitled*
 - *to be treated with dignity and respect and to be addressed and referred to in a manner that is not demeaning;*
 - *to access educational institutions and facilities for persons with disabilities that are integrated into society to the extent compatible with the interests of the person;*
 - *to reasonable access to all places, public transport, and information;*
 - *to use Sign language, Braille or other appropriate means of communication; and*
 - *to access materials and devices to overcome constraints arising from the person's disability.*
- (2) *The State shall ensure the progressive implementation of the principle that at least five percent of the members of the public in elective and appointive bodies are persons with disabilities.*

The right to equality and freedom from discrimination, guaranteed under Article 27 of the Constitution, specifically includes the right to equal protection and equal benefit under the law, and prohibits any differentiation based on disability.²⁹ Non-discrimination is recognized as one of the national values and principles of governance that are binding upon 'all persons'.³⁰ This means that persons with disabilities are entitled to equal recognition as persons before the law and are entitled to legal protection on the basis of equality with all other persons. Article 28 of the Constitution recognizes and protects the inherent dignity of every person, underlining the importance of respecting and safeguarding the rights for all individuals. Together, Articles 27 and 28 lay the foundational principles of equality and dignity, which are crucial for the protection of persons with disabilities.

The Constitution has also entrenched specific guarantees relating to the right to access to justice for persons with disabilities. Article 22(1) grants every person the right to bring legal proceedings before a court if their rights or fundamental freedoms have been denied, violated, or threatened. Article 48 ensures universal access to justice, prohibiting the State from imposing unreasonable court fees that hinder access to justice. Additionally, Article 50 outlines fair trial guarantees, including the right to have the support of an intermediary

²⁶ The Constitution of Kenya (the Constitution), 2010, Chapter Four, Articles 19-57.

²⁷ National Council for Persons with Disabilities, Disability Landscape in Kenya, January 2024, p.17.

²⁸ Ibid.

²⁹ Article 27 of the Constitution.

³⁰ Ibid, Article 10 (1).

when communicating with the courts in the context of legal proceedings, a crucial component when persons with disabilities interact with the justice system and participate in judicial processes.³¹

In addition to recognizing a wide range of human rights, the Constitution also acknowledges general rules of international law and affirms that any treaty or convention ratified by the country is part of the law of the land.³² In 2021, the Supreme Court of Kenya interpreted this to mean that international law is recognized as a source of law in the country.³³ Among other things, this entails that, when dealing with cases that require the application of a rule of international law — either because there is no domestic law on the matter or because there is a gap in the law — the courts in Kenya can refer to and apply international law directly.³⁴ The Supreme Court also emphasized that international law and standards can serve as a tool for interpreting or clarifying constitutional provisions.³⁵ As a result, international human rights standards, such as those contained in the CRPD and the ADP, as well as the jurisprudence and general comments of the CRPD Committee, may thus be recognized and applied by Kenya's legal system.

However, certain provisions of the Constitution discriminate against and exclude persons with intellectual and/or psychosocial disabilities. Specifically, the constitutional provisions on voting and elections refer to such individuals as persons of "unsound mind" and bar them from voting or standing for elective offices.³⁶

The Persons with Disabilities Act 2025

The Persons with Disabilities Act, 2025 (2025 Act)³⁷ repealed the 2003 Act, which had been the principal legislation governing the rights of persons with disabilities in the country.³⁸ While the 2003 Act was acknowledged as the first significant effort to address the needs of persons with disabilities,³⁹ it had been criticized for not adequately recognizing several human rights of persons with disabilities, as guaranteed under the Constitution, CRPD and ADP.⁴⁰

The recently introduced 2025 Act affirms the rights of persons with disabilities to equality before the law,⁴¹ their right to legal capacity on an equal basis with others,⁴² their human dignity,⁴³ their right to access to information and communications technologies and systems,⁴⁴ and their right to access to justice.⁴⁵ Importantly, the Act takes a more progressive approach to accessibility. While the CRPD primarily frames accessibility as a duty of States,⁴⁶ the 2025 Act — and similarly, the ADP⁴⁷ — explicitly recognizes accessibility as a substantive right. It entitles persons with disabilities to a barrier-free and disability-friendly environment, including access to buildings, transportation, information, and assistive technologies.⁴⁸ Additionally, the Act underscores the right to accessibility as a fundamental precondition to enabling persons with disabilities to live independently and fully participate in all aspects of life.⁴⁹

With regard to access to justice, the 2025 Act reaffirms the guarantees under Article 13 of both the CRPD and ADP as follows:

"Every person with disability has a right to effective access to justice on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, at investigative and other preliminary stages."⁵⁰

³¹ Ibid, Article 50 (7).

³² Ibid, Article 2(5) and (6), which reads that:

"Article 2 – Supremacy of this Constitution.

(5) The general rules of international law shall form part of the law of Kenya.

(6) Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution."

³³ The Supreme Court of Kenya, *Mitu-Bell Welfare Society v. Kenya Airports Authority & 2 others; Initiative for Strategic Litigation in Africa (Amicus Curiae)* (Petition 3 of 2018) [2021] KESC 34 (eKLR) (11 January 2021) (Judgment), § 132.

³⁴ Ibid.

³⁵ Ibid.

³⁶ Articles 83(1)(b), 99(2)(e), and 193(2)(d) of the Constitution.

³⁷ The Persons with Disabilities Act No. 4 of 2025.

³⁸ The Persons with Disabilities Act No.14 of 2003.

³⁹ Wilson Macharia, 'Access to Justice for Persons with Disabilities in Kenya: From Principles to Practice' (University of Western Cape and Susan Mutambasere, University of Pretoria 2019) 37.

⁴⁰ G Onyango, 'A Socio-Legal Critique of the Legal Framework for the Promotion of Rights of Persons with Disabilities in Kenya' (2012) 18–19.

⁴¹ The Persons with Disabilities Act, 2025, Sec. 6.

⁴² Ibid, Sec. 7.

⁴³ Ibid, Sec. 16.

⁴⁴ Ibid, Sec. 26.

⁴⁵ Ibid, Sec. 28.

⁴⁶ Article 9 of the CRPD.

⁴⁷ Article 15 of the ADP.

⁴⁸ Ibid, Sec. 30 (1).

⁴⁹ Ibid, Sec. 30 (2).

⁵⁰ Ibid, Sec. 28 (1).

Like the repealed 2003 Act,⁵¹ the 2025 Act requires the Attorney-General, in consultation with the National Council for Persons with Disabilities (the Council) and the Law Society of Kenya, to develop regulations to provide free legal aid services to persons with disabilities.⁵² It also mandates the Chief Justice to establish rules exempting persons with disabilities from court fees in certain matters or legal cases and to ensure the provision of free sign language interpretation, Braille services, and sighted assistance.⁵³ Additionally, the Chief Justice is also required to ensure that all legal suits involving persons with disabilities be handled expeditiously, with due consideration of their specific disabilities and circumstances.⁵⁴

Despite similar provisions in the 2003 Act, neither the required regulations nor the court rules were adopted in the two decades since its enactment.⁵⁵ Therefore, it remains to be seen whether, pursuant to the 2025 Act, the relevant offices will now fulfil these obligations under the new law. Encouragingly, at the African Regional Conference on Access to Justice for Persons with Disabilities, organized by the ICJ and held in May 2025 in Nairobi — just days after the 2025 Act was passed — the Chief Justice of Kenya pledged to expedite the adoption of the required court rules and thus enhance access to justice for persons with disabilities.⁵⁶

The Legal Aid Act 2016

The Legal Aid Act of 2016 is another vital piece of legislation adopted by the Kenyan parliament that directly relates to the right of persons with disabilities to access to justice.⁵⁷ The Act broadly aims to enforce the constitutionally-guaranteed right to a fair trial.⁵⁸ It seeks to provide support systems aimed at upholding due process rights, thereby making court processes accessible, particularly for marginalized groups.⁵⁹

Despite the foregoing, however, the Act fails to explicitly refer to persons with disabilities as beneficiaries.⁶⁰ That said, the definition of "marginalized groups," in the Act references Article 260 of the Constitution, which in turn, refers to Article 27(4), which includes persons with disabilities. While the omission has been noted as a limitation, the Act has been recognized for enhancing access to justice for persons with disabilities.⁶¹ The implementation of the Act and its Regulations⁶² have led to the strengthening of legal aid desks in judicial and police stations that persons with disabilities may access and from which they may get support.⁶³

The Legal Aid Act guarantees legal aid services in criminal and civil matters.⁶⁴ However, regulations adopted under the Act limit the scope of "civil matters" to court proceedings exclusively, thus potentially excluding the provision of free legal aid for persons with disabilities in other settings, such as mental health facilities or care and rehabilitation centres in which persons with disabilities may be institutionalized.⁶⁵ Additionally, the Act and its regulations base eligibility for legal assistance on a means test, except in the case of matters of public interest.⁶⁶ This approach deviates from international law principles, which require States to provide legal assistance to persons with disabilities in all legal proceedings.⁶⁷

The CRPD Committee, in its concluding observations following its review of State parties' reports under the Convention, has affirmed that States are obliged to ensure access to legal aid at all stages of legal proceedings, in all areas of law, and at all levels of the judiciary.⁶⁸ On the other hand, regarding matters outside formal judicial proceedings, the Special Rapporteur on the Rights of Persons with Disabilities has emphasized that

⁵¹ Persons with Disabilities Act No.14 of 2003, Sec. 38.

⁵² The Persons with Disabilities Act, 2025, Sec. 28 (2).

⁵³ Ibid, Sec. 28 (3) (a).

⁵⁴ Ibid, Sec. 28 (3) (b).

⁵⁵ Nevertheless, in 2009, Kenya adopted five sets of regulations that provide guidance on other aspects of the Persons with Disabilities Act 2003. These are: the Persons with Disabilities (Access to Employment, Services and Facilities) Regulations, the Persons with Disabilities (Cost, Care, Support and Maintenance) Regulations, the Persons with Disabilities (Registration) Regulations, the Persons with Disabilities (National Development Fund for Persons with Disabilities) (Conduct of Business and Affairs of the Board of Trustees) Regulations, and the Persons with Disabilities (Income Tax Deductions and Exemptions) Order. See Persons with Disabilities Act Subsidiary Legislation, 2009, available at: <http://kenyalaw.org:8181/exist/kenyalex/sublegview.xql?subleg=CAP.%20133#doc-2>.

⁵⁶ Honorable Chief Justice Martha Koome, Keynote Address during the Africa Regional Conference on Access to Justice for Persons with Disabilities, held at Ole Sereni Hotel, Nairobi – 14th May 2025, available at: https://www.youtube.com/watch?v=w8LSuKZszN4&embeds_referring_euri=https%3A%2F%2Fwww.icj.org%2F&source_ve_path=MjM4NTE.

⁵⁷ The Legal Aid Act No.6 of 2016.

⁵⁸ Ibid, preamble.

⁵⁹ Ibid, Sec. 2.

⁶⁰ Ibid, Sec. 36.

⁶¹ Paul Ochieng Juma and Morris Mbondenyei 'Access to Legal Aid for Accused Persons with Disabilities in Kenya's Criminal Justice System: An Outcomes-based Approach' (2025) *Journal of African Law*. <https://doi.org/10.1017/S0021855325100612>, 5.

⁶² The Legal Aid (General) Regulations, 2022.

⁶³ Interview with a judge at the Court of Appeal of Kenya at Mombasa, 20 June 2024.

⁶⁴ The Legal Aid Act No.6 of 2016, Sec. 35 (2).

⁶⁵ The Legal Aid (General) Regulations, 2022, Sec. 6.

⁶⁶ The Legal Aid Act No.6 of 2016, Sec. 36(3) and (4)(g); and The Legal Aid (General) Regulations, 2022, Secs. 4 and 15.

⁶⁷ Paul Ochieng Juma and Morris Mbondenyei 'Access to Legal Aid for Accused Persons with Disabilities in Kenya's Criminal Justice System: An Outcomes-based Approach' (2025) *Journal of African Law*. <https://doi.org/10.1017/S0021855325100612>, 5.

⁶⁸ For example, see Concluding Observations on the Initial Report of Estonia, CRPD/C/EST/CO/1, 5 May 2021, § 26; and Concluding observations on the combined second and third periodic reports of Belgium, CRPD/C/BEL/CO/2-3, 30 September 2024, §§ 26-27.

States are required to provide free legal aid services for persons with disabilities who cannot afford them, particularly in cases involving loss of liberty, such as institutionalization and involuntary hospitalization.⁶⁹

The 2025 Act mandates the provision of legal aid to persons with disabilities in matters involving human rights violations or deprivation of property, cases involving capital punishment, cases that may be prescribed by regulations issued by the Attorney-General, and any other matters.⁷⁰

The Mental Health (Amendment) Act 2022

In 2022, Kenya enacted the Mental Health (Amendment) Act, which amended the 1989 Mental Health Act. The latter was largely based on the medical model of disability.⁷¹ The 1989 Act allowed the denial of the right to legal capacity for persons with intellectual and/or psychosocial disabilities, permitted involuntary treatment and institutionalization, and established a substituted decision-making regime where courts could appoint a guardian to purportedly act on behalf of and manage the affairs of a person with disability.⁷² In contrast, the Mental Health Amendment Act 2022 adopts a human rights-based approach to mental health care.⁷³ It introduces significant changes that recognize and protect the rights of persons with intellectual and/or psychosocial disabilities.

Notably, the Act ensures equality and equal recognition for persons with disabilities, including their right to legal capacity,⁷⁴ endorses a supported decision-making regime,⁷⁵ and adopts consent-based medical treatment and care frameworks.⁷⁶ Despite these features, however, the Mental Health (Amendment) Act still retains some provisions that are antithetical to human rights standards, for example, those that allow for substituted decision-making in certain circumstances,⁷⁷ and involuntary admission, detention, seclusion, and restraint of persons with intellectual and/or psychosocial disabilities in mental health facilities based on the opinion of mental health professionals.⁷⁸

With regard to supported decision-making, the Act defines a “supporter” as:

“A person appointed under Section 3(I) by the person with mental illness to make decisions *on behalf of* the person with mental illness according to the will and preference of the person with mental illness.” (emphasis added)

The terms “on behalf of”, which are used in this and other provisions of the Act, clearly allow and promote substituted decision-making. The Kenya National Commission on Human Rights (KNCHR) has developed a detailed analysis of the Mental Health (Amendment) Act, identifying further specific provisions that are inconsistent with the CRPD.⁷⁹

In addition to the Mental Health (Amendment) Act, the Persons Deprived of Liberty Act 2015 also recognizes limitations on the right to liberty when there is a need for “psychiatric treatment of persons with mental or sensory disabilities.”⁸⁰ Despite the CRPD Committee’s recommendation in 2015 that Kenya repeal such provisions, as they effectively entail the deprivation of legal capacity and institutionalization on the basis of disability, the country has yet to do so.

Moreover, certain aspects of the provisions entrenched in Kenya’s legislation, including some Articles of the Constitution, have retained derogatory and discriminatory references,⁸¹ revealing shortcomings in terms of embracing the CRPD’s human rights-based approach. These limitations underscore the need for continued

⁶⁹ The Special Rapporteur on the Rights of Persons with Disabilities, International Principles and Guidelines on Access to Justice for Persons with Disabilities, 2020, Principle 6.

⁷⁰ The Persons with Disabilities Act, 2025, 13 May 2025, Sec. 28 (2).

⁷¹ The medical model of disability views disability primarily as a problem within the individual, caused by physical, mental or sensory impairments, and the focus is on diagnosis, treatment, and rehabilitation to “fix” or “cure” the individual to fit into society. In contrast, the human rights model of disability views disability as a social construct, emphasising that barriers in society (physical, attitudinal, legal) interact with impairments to disable people. It is therefore not impairments alone that constitute a disability. In contrast to the medical model, the human rights model proposes changing societal structures and barriers to ensure full inclusion and equal rights for persons with disabilities. See CRPD Committee, General Comment No.6 (2018) on equality and non-discrimination, CRPD/C/GC/G, 26 April 2018, §§ 8 and 9.

⁷² The Mental Health Act No.10 of 1989, Secs. 16, 17, and 26.

⁷³ The Mental Health (Amendment) Act No.27 of 2022, Sec. 4 (2A (e) and 2B), Sec. 6 (3) and (3A).

⁷⁴ Ibid, Sec. 6 (3K).

⁷⁵ Ibid, Sec. 6 (3I and 3J).

⁷⁶ Ibid, Sec. 6 (3B) & 15 (9F).

⁷⁷ Ibid, Sec.6 (3I (5)).

⁷⁸ Ibid, Sec. 15 (9E), 22.

⁷⁹ KNCHR, an analysis of the Mental Health Amendment Act, 2022, available at <https://www.knchr.org/Portals/0/AN%20ANALYSIS%20OF%20THE%20MENTAL%20HEALTH%20%28AMENDMENT%29%20ACT%2C%20%202022.pdf>.

⁸⁰ The Persons Deprived of Liberty Act 2015, Sec. 4 (e).

⁸¹ Articles 83(1)(b), 99(2)(e), and 193(2)(d) of the Constitution disqualify persons with “unsound mind” from being registered as voters or running for national or county assemblies. Beyond the derogatory references, the restriction effectively limits the political rights of persons with intellectual and/or psychosocial disabilities.

reform to ensure the full protection of the rights and autonomy of persons with disabilities as required by the CRPD and ADP.

III. Institutional Frameworks for Implementation of Disability Rights

Kenya has statutory bodies mandated to enforce and promote the rights of persons with disabilities. The Persons with Disabilities Act 2003 established the National Council for Persons with Disabilities (the Council), which has been operational since 2004.⁸² The 2025 Act has retained the institution while expanding its mandate to include:⁸³

- Advice on enforcement of standards related to accessibility, reasonable accommodation and non-discrimination for persons with disabilities;
- Advice on formulation and development of policy and legal framework, administrative actions, measures, guidelines, standards and strategies on various matters of concern for persons with disabilities;
- Advice on systemic collection, analysis, and use of national statistics and disaggregated data on issues relating to persons with disabilities;
- Providing information and technical assistance to organizations working on the rights, habilitation and rehabilitation of persons with disabilities;
- Public awareness-raising and education on the rights of persons with disabilities;
- Registering persons with disabilities and institutions, associations, and organizations that provide services for the rehabilitation and welfare of persons with disabilities; and
- Providing assistive devices, appliances, and other equipment to persons with disabilities.⁸⁴

With respect to access to justice, the Council is mandated to collaborate with the Chief Justice and the Attorney-General to promote access to justice for persons with disabilities, including through the development of necessary judicial rules and regulations governing the provision of legal services to persons with disabilities.⁸⁵

Organizationally, the Council is required to be chaired by a person drawn from organizations of persons with disabilities and appointed by the President of Kenya.⁸⁶ Additionally, it must include at least five other members with disabilities, each representing different categories of disabilities, nominated by organizations of persons with disabilities.⁸⁷ This structure is crucial for ensuring participation in leadership and adequate representation of persons with disabilities.

The National Legal Aid Service established by the Legal Aid Act is another relevant institution in this context.⁸⁸ This government agency is responsible for establishing and managing a national legal aid scheme, administering the Legal Aid Fund, and for issuing guidelines for the provision of legal aid.⁸⁹ A board that includes a representative nominated by the National Council of Persons with Disabilities governs the National Legal Aid Service.⁹⁰ The Attorney-General appoints the representative upon recommendation by the Council. Having a representative of persons with disabilities on the National Legal Aid Service board has been essential for ensuring that the interests of persons with disabilities are thoroughly considered in the activities of the National Legal Aid Service.⁹¹

⁸² The Persons with Disabilities Act 2003, Secs.3-10; National Council for Persons with Disability (NCPD), 'Disability Landscape Analysis: A Comprehensive Landscape Analysis of Disability at the County and National Levels in Kenya for Informed Policy and Full Social Inclusion', January 2024, p.5.

⁸³ The Persons with Disabilities Act, 2025, Secs. 36-55.

⁸⁴ Ibid, Secs. 35 and 38.

⁸⁵ Ibid, Secs. 28 (2) and 38 (a).

⁸⁶ Ibid, Sec. 41(1) (a).

⁸⁷ Ibid, Sec. 41 (1) (e).

⁸⁸ The Legal Aid Act No.6 of 2016, Sec. 5.

⁸⁹ Ibid, Sec.7.

⁹⁰ Ibid, Sec.9(1)(k).

⁹¹ Interview with a member of the National Legal Aid Service Board, 22 July 2024.

IV. Addressing Legal Barriers in the Criminal Justice System

i. Outdated criminal law provisions affecting persons with intellectual and/or psychosocial disabilities

Kenya's criminal justice system follows the common law system, which originated from and is grounded in British colonial laws.

Generally, colonial laws and systems in Africa approached intellectual and/or psychosocial disability through the lens of the medical model. For example, they regarded involuntary treatment and incarceration in mental asylums as the main legal means of purportedly caring for individuals with "mental illnesses".⁹² Colonial mental health laws distinguished between "normal" and "abnormal" people. Those labelled "abnormal" were characterized as "persons of unsound mind", perceived as dangers to themselves and the public, and were confined in mental institutions as a way of purportedly ameliorating their conditions.⁹³ Moreover, colonial criminal laws also established procedures that allowed the courts to declare "persons of unsound mind" who were accused of crimes, as "criminally insane". These individuals were deemed unfit to stand trial and were subjected to involuntary detention and treatment in mental asylums, which often included restraint and seclusion.⁹⁴

While Kenya has made strides in reforming its mental health legislation, outdated penal and criminal procedure laws rooted in colonial rules still govern the management of persons with intellectual and/or psychosocial disabilities who interact with the criminal justice system as accused persons, victims (complainants), or witnesses.⁹⁵ The sections of the CPC that deprive accused persons with intellectual and/or psychosocial disabilities of their legal standing and commit them to a mental hospital were enacted in 1959, prior to Kenya's independence in 1963.⁹⁶ As Paul Juma aptly noted, "The concept of unfitness declarations [pursuant to which an accused person was deemed unfit to stand trial] was transplanted to Kenya by force through colonization."⁹⁷

The Penal Code (Code), for example, declares the general principle that every individual is presumed to be of sound mind, while allowing for the contrary to be proved:

"Every person is presumed to be of sound mind and to have been of sound mind at any time which comes in question, until the contrary is proved".⁹⁸

The Code recognizes far-reaching exceptions to this rule with respect to a person who is purportedly affected by a mental health condition:

"A person is not criminally responsible for an act or omission if at the time of doing the act or making the omission he is through any disease affecting his mind incapable of understanding what he is doing, or of knowing that he ought not to do the act or make the omission; but a person may be criminally responsible for an act or omission, although his mind is affected by disease, if such disease does not in fact produce upon his mind one or other of the effects above mentioned in reference to that act or omission."⁹⁹

The Code, therefore, identifies "mental illness" as a condition that can negate the presumption of sound mind, which, in turn, may lead to distinct legal considerations and potentially severe consequences for the individual. Laws of this kind specifically require justice actors to discriminate against persons with psychosocial and/or intellectual disabilities on the basis of their disability, contrary to the CRPD and the ADP.

Apart from the Penal Code, the CPC also contains a range of discriminatory provisions in Sections 162, 163, 164, 166 and 167. These provisions — which are featured in a section titled "Procedure in Case of the Lunacy or other Incapacity of an Accused Person" — explicitly discriminate against individuals with intellectual and/or psychosocial disabilities in their interactions with Kenya's criminal justice system. Specifically, Section 162 mandates as follows:

⁹² Paul Ochieng Juma and Charles Ngwena, 'Decolonizing African Mental Health Laws: A Case for Kenya' (2024) 68 *Journal of African Law* 73.

⁹³ *Ibid.*

⁹⁴ *Ibid.*

⁹⁵ *Ibid.*

⁹⁶ Article 48 Initiative, Trust Arthur's Dream Autism Trust and Southern Africa Litigation Centre, 'The Interaction between the Criminal Justice System and Persons with Intellectual and Psychosocial Disabilities in Nairobi, Kenya' (2021) Research Report.

⁹⁷ Paul Ochieng Juma, 'Access to justice for persons with psychosocial disabilities: A comparative analysis of participation in the Kenyan criminal justice system' (Routledge, 2025) (forthcoming), chapter one, 6.

⁹⁸ Section 11 of the Penal Code Act (Cap.63).

⁹⁹ *Ibid.*, Section 12.

Section 162 - Inquiry by court as to the soundness of mind of accused

- (1) When in the course of a trial or committal proceedings the court has reason to believe that **the accused is of unsound mind and consequently incapable of making his defence**, it shall inquire into the fact of unsoundness.
- (2) If the court is of the opinion that the accused is of unsound mind and consequently incapable of making his defence, it shall **postpone further proceedings in the case**.
- (3) If the case is one in which bail may be taken, the court may release the accused person on sufficient security being given that he will be properly taken care of and prevented from doing injury to himself or to any other person, and for his appearance before the court or such officer as the court may appoint in that behalf.
- (4) If the case is one in which bail may not be taken, or if sufficient security is not given, **the court shall order that the accused be detained** in safe custody in such place and manner as it may think fit **and shall transmit the court record or a certified copy thereof to the Minister for consideration by the President**.
- (5) Upon consideration of the record **the President may by order under his hand addressed to the court direct that the accused be detained in a mental hospital or other suitable place of custody**, and the court shall issue a warrant in accordance with that order; and the warrant shall be sufficient authority for the detention of the accused **until the President makes a further order** in the matter or until the court which found him incapable of making his defence orders him to be brought before it again in the manner provided by sections 163 and 164.¹⁰⁰

The section assumes that persons with intellectual and/or psychosocial disabilities are *ipso facto* incapable of defending themselves. When a court deems an accused person “of unsound mind”, their trial is postponed indefinitely. This effectively denies them their right to have the criminal charges against them determined in “a fair and public hearing by a competent, independent and impartial tribunal established by law”¹⁰¹ culminating in the court rendering a public verdict about their alleged criminal liability. They are also deprived of their right to be presumed innocent until proved guilty according to law, along with the other key elements of their right to a fair trial and due process of law.¹⁰² Instead of ensuring these rights, the court is granted the authority to order their detention without trial, after which the matter rests on the President’s discretion, allowing for their indefinite detention in a mental hospital or another place of custody.

As a result, these provisions violate Kenya’s legal obligations under the CRPD and ADP, which stipulates that persons with disabilities have the right to legal capacity on an equal basis with others in all aspects of life.¹⁰³ Moreover, the process effectively removes judicial oversight and procedural safeguards, and may enable arbitrary detention and lead to the institutionalization of the accused person without a clear legal review mechanism. As a result, the Section violates the rights to access justice, the right to a fair trial, and the right to liberty and security of person with disabilities, as recognized under the CRPD¹⁰⁴ and ADP,¹⁰⁵ among others.¹⁰⁶

Similarly, when an individual with a psychosocial and/or intellectual disability is charged with a crime, the CPC outlines and enables procedures that can override their legal capacity to defend themselves against the charges and potentially lead to their indefinite detention in a mental health facility:

Section 166 - Defence of lunacy adduced at trial

- (1) Where an act or omission is charged against a person as an offence, and it is given in evidence on the trial of that person for that offence that **he was insane so as not to be responsible for his acts or omissions** at the time when the act was done or the omission made, then if it appears to the court before which the person is tried that he did the act or made the omission charged but was insane at the time he did or made it, **the court shall make a special finding to the effect that the accused was guilty of the act or omission charged but was insane** when he did the act or made the omission.
- (2) When a special finding is so made, **the court shall report the case for the order of the President** and shall meanwhile order the accused to be kept in custody in such place and in such manner as the court shall direct.

¹⁰⁰ Section 162 of the CPC (emphasis added).

¹⁰¹ Article 14 (1) of the International Covenant on Civil and Political Rights (ICCPR). Also, see Article 7 of the African Charter on Human and Peoples’ Rights (ACHPR).

¹⁰² Article 14 (3) of the ICCPR sets out the minimum guarantees for anyone charged with a criminal offence. These include the right to be informed promptly of the nature and cause of the charges, the right to have adequate time and facilities to prepare a defence, the right to be tried without undue delay, the right to be present at trial and to defend oneself in person or through a legal counsel of one’s choice, and the right to legal assistance.

¹⁰³ Article 12 (2) of the CRPD.

¹⁰⁴ Articles 13 and 14 of the CRPD.

¹⁰⁵ Articles 13 and 9 of the ADP.

¹⁰⁶ Articles 9 and 14 of the ICCPR, and Articles 6 and 7 of the ACHPR.

- (3) **The President may order the person to be detained** in a mental hospital, prison or other suitable place of safe custody.
- (4) The officer in charge of a mental hospital, prison or other place in which a person is detained by an order of the President under subsection (3) shall make a report in writing to the Minister for the consideration of the President in respect of the condition, history and circumstances of the person so detained, **at the expiration of a period of three years from the date of the President's order and thereafter at the expiration of each period of two years from the date of the last report.**
- (5) On consideration of the report, the President may order that the person so detained be discharged or otherwise dealt with, subject to such conditions as to his remaining under supervision in any place or by any person, and to such other conditions for ensuring the safety and welfare of the person in respect of whom the order is made and of the public, as the President thinks fit.
- (6) Notwithstanding the subsections (4) and (5), a person or persons thereunto empowered by the President may, at any time after a person has been detained by order of the President under subsection (3), make a special report to the Minister for transmission to the President, on the condition, history and circumstances of the person so detained, and the President, on consideration of the report, may order that the person be discharged or otherwise dealt with, subject to such conditions as to his remaining under supervision in any place or by any person, and to such other conditions for ensuring the safety and welfare of the person in respect of whom the order is made and of the public, as the President thinks fit.
- (7) The President may at any time order that a person detained by order of the President under subsection (3) be transferred from a mental hospital to a prison or from a mental hospital, or from any place in which he is detained or remains under supervision to either a prison or a mental hospital.”¹⁰⁷

This provision also presumes that persons with intellectual and/or psychosocial disability are incapable of standing trial. It then grants courts the authority to enter “a special finding to the effect that the accused was guilty of the act or omission charged but was insane,” pursuant to which the person concerned is denied a trial, and with that, the attendant procedural rights. Thus, the Court may decide that the accused was nonetheless guilty as charged, albeit insane. The Court may then order the accused to be held in safe custody pending a decision by the President upon review of the court record. The President may order that a defendant be detained in a mental hospital or another designated place of custody, where they will remain until further orders are issued by either the judiciary or the executive. The same procedure applies if the accused person with intellectual and/or psychosocial disabilities is found guilty.

As with Section 162, Section 166 of the CPC violates the right to legal capacity, the right to a fair trial, the right to access to justice, and the right to liberty and security of person with disabilities, as recognized under the CRPD and ADP, among others.

Section 167 of the CPC also authorizes detention at the “President’s pleasure” of an accused person whose intellectual and/or psychosocial disability is not established but whom the court nevertheless determines is unable to understand the court’s proceedings:

Section 167. Procedure when accused does not understand proceedings

- (1) If the accused, **though not insane, cannot be made to understand the proceedings—**
 - in cases tried by a subordinate court, the court shall proceed to hear the evidence, and, if at the close of the evidence for the prosecution, and, if the defence has been called upon, of any evidence for the defence, the court is of the opinion that the evidence which it has heard would not justify a conviction, it shall acquit and discharge the accused, but **if the court is of the opinion that the evidence which it has heard would justify a conviction it shall order the accused to be detained during the President’s pleasure;** but every such order shall be subject to confirmation by the High Court;
 - in cases tried by the High Court, the Court shall try the case and at the close thereof shall either acquit the accused person or, **if satisfied that the evidence would justify a conviction, shall order that the accused person be detained during the President’s pleasure.**
- (2) A person ordered to be detained during the President’s pleasure shall be liable to be detained in such place and under such conditions as the President may from time to time by order direct, and whilst so detained shall be deemed to be in lawful custody.”¹⁰⁸

Overall, the CPC mandates procedures that involve declaring defendants or accused persons with intellectual and/or psychosocial disabilities as either purportedly incapable of defending themselves against the criminal

¹⁰⁷ Section 166 of the CPC (emphasis added).

¹⁰⁸ Ibid, Section 167 (emphasis added).

charges they face or altogether unfit to stand trial. Either declaration deprives persons with disabilities of a range of rights, including their rights to freedom from discrimination, to legal capacity, to a fair trial and, potentially, of their right to liberty and security of person.¹⁰⁹ These provisions also constitute a direct infringement of the right to access justice for persons with intellectual and/or psychosocial disabilities.¹¹⁰ Additionally, the involuntary detention and treatment under the CPC constitutes unlawful deprivation of liberty.

In practice, these procedures often result in the indefinite detention of individuals at the President's pleasure, sometimes lasting for over ten years, without review by the court or any other authority.¹¹¹ Such detention is a direct violation of the right to liberty and security of persons of persons with disabilities, as well as the right to live independently and be included in the community as guaranteed under the CRPD.¹¹²

While the CPC does not explicitly mandate it, the Criminal Procedure Bench Book published by the Kenyan Judiciary in 2018 recommends that it is good practice for the court to set a mentioned date to monitor the status of an accused person who has been detained by an order of the President.¹¹³ While the Bench Book does not clearly define what "a mentioned date" means in this context, in its guidance on Section 166, it suggests that the court may set a specific date within a year of the President's detention order to review the progress of the case.¹¹⁴ In other words, it recommends that detention be reviewed at least once within a year from the date the President issues the order. Albeit this recommendation was a positive step, it has been merely suggested as a "good practice" and does not have the effect of altering the flawed legal procedures set out under the CPC.

ii. Success to a degree: court judgments on access to justice

Following persistent advocacy by organizations of persons with disabilities and other human rights organizations for legal reform toward the full recognition of the right to legal capacity and the right of persons with disabilities to access justice,¹¹⁵ Kenyan courts have begun questioning the constitutionality of the above-stated CPC provision. Especially those provisions that mandate the involuntary detention and treatment of persons with intellectual and/or psychosocial disabilities at the discretion of the President. Courts have raised concern about the contested CPC provisions¹¹⁶ and have occasionally attempted to circumvent them;¹¹⁷ judgments challenging the constitutionality of those provisions began to surface in 2016. Courts have specifically taken issue with the provisions that grant the President discretionary powers to determine the extent of detention for accused persons with intellectual and/or psychosocial disabilities.

The Constitution of Kenya empowers the High Court to protect and enforce the Bill of Rights.¹¹⁸ This mandate includes the authority to determine whether a right or fundamental freedom has been denied, violated, infringed upon or threatened.¹¹⁹ This mandate positions the High Court to serve as a guardian of people's human rights.¹²⁰ Also, the High Court is vested with the authority to interpret the Constitution, determine whether any law is inconsistent with it, and declare invalid "any law that denies, violates, infringes upon, or threatens a right or fundamental freedom."¹²¹

¹⁰⁹ CRPD Committee, 'Guidelines on Article 14 of the Convention on the Rights of Persons with Disabilities: The Right to Liberty and Security of Persons with Disabilities', 2015, § 16.

¹¹⁰ CRPD Committee, 'Guidelines on Deinstitutionalization, including in Emergencies', CRPD/C/5, 10 October 2022, § 56.

¹¹¹ Interview with a judge at the High Court of Kenya at Meru, 4 July 2024.

¹¹² CRPD Committee, 'Guidelines on Deinstitutionalization, including in Emergencies', CRPD/C/5, 10 October 2022, § 58.

¹¹³ The Kenya Judiciary, Criminal Procedure Bench Book, 2018, p. 105 (§ 171).

¹¹⁴ Ibid, p. 139 (§ 112).

¹¹⁵ For instance, see KNCHR, 'Briefing Paper on How to Implement Article 12 of the Convention on Rights of Persons with Disabilities Regarding Legal Capacity in Kenya,' 2012, available at: <https://www.knchr.org/Portals/0/GroupRightsReports/Briefing%20Paper%20on%20Legal%20Capacity-Disability%20Rights.pdf>; KNCHR, 'From Norm to Practice: A Status Report on Implementation of the Rights of Persons with Disabilities in Kenya,' 2014, available at: https://www.knchr.org/Portals/0/EcosocReports/From%20Norm%20to%20Practice_Status%20Report%20on%20the%20Implementation%20of%20the%20Rights%20of%20PWDs%20in%20Kenya.pdf?ver=2018-06-06-182335-003; and Mental Disability Advocacy Centre, 'The Right to Legal Capacity in Kenya,' 2014, available at: <http://www.rodra.co.za/images/countries/kenya/research/MDAC%20Kenya%20Legal%20Capacity%202014.pdf>.

¹¹⁶ The Kenya Judiciary, Criminal Procedure Bench Book, 2018, p.140, citing *R v. Samson Otieno Munyoro*, High Court at Kisumu Criminal Case No.6 of 2011 (unreported); also see, *Republic v. Karisa Masha*, Criminal Case 22 of 2008, in the High Court of Kenya at Mombasa, 20 February 2013, eKLR along with the Appellate Court's decision on the same, *Karisa Masha v. Republic*, Criminal Appeal No. 78 of 2014, in the Court of Appeal of Kenya at Mombasa, 4 February 2015, eKLR.

¹¹⁷ J Osongo Ambani, Kevin Kipchirchir and Alex Tamei, 'Emerging Judicial Jurisprudence on Mental Health in Kenya's Criminal Justice System' in J Osongo Ambani and Humphrey Sipalla (eds), *Mental health and the criminal justice system* (Kabarak University Press 2023) 104–109.

¹¹⁸ The Constitution of Kenya, Sec. 23.

¹¹⁹ Ibid, Sec.23(1).

¹²⁰ Morris Kiwinda Mbonenyi and John Osogo Ambani, *The New Constitutional Law of Kenya: Principles, Government and Human Rights*. (LawAfrica 2012) 154.

¹²¹ The Constitution of Kenya, Secs. 23(3)(d) and 165 (3) (b and d). Section 23(3) in particular reads:

"(3) In any proceedings brought under Article 22, a court may grant appropriate relief, including—

a. *Judgments challenging the constitutionality of the CPC provisions*

In *Hassan Hussein Yusuf v. Republic (Hassan)*, the High Court of Kenya at Meru County issued the first judgment in 2016 on the constitutionality of detaining a person with intellectual and/or psychosocial disability at the President's pleasure. The appellant was initially tried and convicted by the Principal Magistrate's Court for breaking into a building and committing a felony.¹²² At the sentencing stage, after the appellant had been tried and convicted, the trial magistrate found him to be of "unsound mind" and consequently ordered his detention in prison at the President's pleasure under section 167(1) of the CPC.¹²³

On appeal against the conviction and sentence by the Principal Magistrate's Court, the High Court considered the constitutionality of imprisoning a defendant with an intellectual and/or psychosocial disability at the President's pleasure. The Court found such detention to be unconstitutional, with the presiding Judge, Justice Kiarie Waweru Kiarie, holding that Section 167 of the CPC — mandating detention of a persons with intellectual and/or psychosocial disability at the President's pleasure — was discriminatory as it prescribed detention in prison, instead of a health facility, and because of its failure to define a detention period. The Judge explained that "keeping a sick person in prison for an indeterminate period is cruel, inhuman, and degrading treatment", contrary to Article 25(a) of the Constitution of Kenya.¹²⁴ According to the Judge, the order under Section 167(1) of the CPC was a form of punishment whose indefinite nature was contrary to the provisions of Article 29 of the Constitution.¹²⁵ Consequently, the Judge found Section 167 of the CPC to be *unconstitutional* to the extent that it offended the said articles of the Constitution.¹²⁶

Regrettably, however, while the High Court deemed indefinite detention in prison at the President's pleasure to be contrary to the Constitution, in its own order, the Court applied a medicalized approach to disability. It directed that a psychiatrist should re-evaluate the defendant's mental health condition for treatment purposes, as opposed to assessing his support needs with a view to enabling his effective participation regarding the possibility of treatment in a medical facility. Ultimately, the Court ruled that the defendant would remain in a medical facility until such time when he would be certified as being neither a danger to himself nor the public.

In the same year, Justice Kiarie Waweru Kiarie delivered a related judgment in *BKJ v. Republic*, addressing the same legal issues and reaching similar conclusions regarding Section 167 of the CPC.¹²⁷ In *BKJ*, however, he went further and underscored the duty of the legislature to act swiftly and align Section 167 with the Constitution.¹²⁸ Still, in both cases, the court incorrectly equated disability with sickness and relied solely on the Constitution as opposed to the CRPD.

Following these decisions, other judges have also questioned the constitutionality of the abovementioned CPC provisions. In the case of *HM v. Republic*, for instance, the High Court at Meru County reasoned that, ordering the detention of a defendant with an intellectual and/or psychosocial disability in a prison at the President's pleasure could potentially lead to their indefinite detention or result in a period of detention longer than the minimum sentence that could be imposed upon conviction for the crime which they were alleged to have committed.¹²⁹ In addition, if found that there was no clear stipulation of when or if the President's discretion (i.e., effectively the power of indefinite detention at the President's pleasure) may be exercised. The Court

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- (a) a declaration of rights;
 - (b) an injunction;
 - (c) a conservatory order;
 - (d) a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24;
 - (e) an order for compensation; and
 - (f) an order of judicial review."

¹²² *Hassan Hussein Yusuf v. Republic*, Criminal Appeal No.59 of 2014, in the High Court of Kenya at Meru, 10 May 2016, eKLR.

¹²³ *Ibid*, p.3.

¹²⁴ Article 25 of the Constitution – Fundamental rights and freedoms that may not be limited.

Despite any other provision in this Constitution, the following rights and fundamental freedoms shall not be limited—

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

¹²⁵ Article 29 of the Constitution – Freedom and security of the person.

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

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

¹²⁶ *Hassan Hussein Yusuf v Republic*, Criminal Appeal No.59 of 2014, in the High Court of Kenya at Meru, 10 May 2016, eKLR, p.4 (emphasis added).

¹²⁷ *BKJ v. Republic*, Criminal Appeal No.16 of 2015, Judgement in the High Court of Kenya at Meru, 10 May 2016, eKLR.

¹²⁸ *Ibid*, p.4.

¹²⁹ *HM v. Republic*, the H.C.C.R.A No. 17 of 2017, Judgement in the High Court of Kenya at Meru, 9 November 2017, eKLR, p.6.

found that such an order of detention was an excessive sentence, undermining the human dignity of individuals with disabilities as protected by Article 28 of the Constitution:

"The lengthy incarceration of such convicts erodes their human dignity provided under Article 28 of the Constitution. ... Having the appellant detained for a period which might be longer than the minimum sentence under Section 7 of the Sexual Offences Act is unlawful."¹³⁰

However, in this case, the Court again equated "mental illness" with a lack of legal capacity and, in turn, with a lack of criminal responsibility.¹³¹ This reasoning reflects a medical approach to disability as it assumes that the fact that a person may have a mental health condition would automatically negate their legal capacity. Additionally, the judgment did not engage with the CRPD.

Relatedly, in *Joseph Melikino Katuta v. Republic*, while endorsing the precedent set in *Hassan*, the High Court at Voi County held that, "section 167(1) of the CPC is clearly unconstitutional as it contravenes a person's right to liberty as enshrined in Article 29(a) of the Constitution of Kenya." It reasoned that depriving individuals of their freedom without just cause through prolonged and potentially indefinite detention violated their right to liberty.¹³²

Republic v. SOM is another case in which the High Court at Kisumu County considered the constitutionality of the CPC provisions.¹³³ Unlike the previous cases, which challenged sections of the CPC on human rights grounds, this case and the ultimate decision in it focused more on how the relevant provisions of the CPC usurped the judiciary's discretion to impose lawful sentences and, by transferring this power to the President, the legislature was undermining the court's independence as enshrined in Article 160 of the Constitution.¹³⁴ The High Court reasoned as follows:

"The vesting of discretion on the President on how the accused is to be treated after conviction is inimical to the fundamental duty of the judiciary to determine the guilt of the accused and determine the terms upon which he or she serves the sentence. The fact that the statute provides for a periodic review by the President upon advice of executive functionaries goes further to buttress this key point."¹³⁵

As a result, the Court declared Section 166 of the CPC unconstitutional to the extent that it takes away the function of the judiciary to determine sentences and grants such discretionary power to the President.¹³⁶

For the first time, the Court also connected the violations against persons with disabilities to the human rights guaranteed under Article 54 of the Constitution and the CRPD:

"The constitutional underpinning of the rights of persons with disability cannot be gainsaid. Central to these rights is the right to be treated with dignity guaranteed under Article 28 and 54(1)(a) of the Constitution. Article 54(1)(a) of the Constitution buttresses the right of a person with disability, 'to be treated with dignity and respect and to be addressed and referred to in a manner that is not demeaning.' Kenya is also a signatory to the Convention on the Rights of Persons with Disabilities which is now part of Kenyan law by dint of Article 2(6) of the Constitution."¹³⁷

In addition, the Court found that Section 166 of the CPC violated the right to a fair trial, as it allowed the President, rather than the court, to conduct the review of the nature and extent of the sentence.¹³⁸

However, instead of striking down the impugned section entirely and ordering the legislature to align the procedure with the Constitution and Kenya's international human rights obligations, the Court opted for a narrow reinterpretation of Section 166, concluding that:

¹³⁰ Ibid, Article 28 of the Constitution states that "every person has inherent dignity and the right to have that dignity respected and protected."

¹³¹ Ibid, p.4.

¹³² *Joseph Melikino Katuta v. Republic*, Criminal Appeal No. 12 of 2016, Judgement in the High Court of Kenya at Voi, 20 July 2017, eKLR, p.2.

¹³³ *Republic v. SOM*, Criminal Case No. 6 of 2011, Ruling on Sentence in the High Court of Kenya at Kisumu, 30 April 2018, eKLR.

¹³⁴ Ibid, § 7. Article 160 (1) of the Constitution of Kenya states:

"In the exercise of judicial authority, the Judiciary, as constituted by Article 161, shall be subject only to this Constitution and the law and shall not be subject to the control or direction of any person or authority."

¹³⁵ *Republic v. SOM*, § 11.

¹³⁶ Ibid, § 19.

¹³⁷ Ibid, § 6.

¹³⁸ Ibid, §§ 13 and 14.

“the defect in section 166 of the CPC is that the review is carried out by the President rather than the court hence the reference to ‘President’ shall be read to mean, ‘the Court.’ The effect of this is to ensure that the accused is brought before the court periodically so as that the court may review the matter and if necessary call for and take necessary expert and other evidence before making an appropriate order within the framework of a definite period of detention imposed by the Court.”¹³⁹

Following this conclusion, the Court directed the accused, who had been found “guilty but insane”, to be committed to a mental health institution for a term of 15 years, subject to regular periodic reviews by the court.¹⁴⁰

The court’s approach in this case raises significant concerns. By merely adjusting the application of Section 166 of the CPC, instead of mandating its repeal or amendment, the judgment risks perpetuating a procedure that fundamentally violates the rights of persons with intellectual and/or psychosocial disabilities. The judicial oversight procedure that the Court suggested might also not be a viable solution as it could lead to legal uncertainty and is subject to inconsistencies in enforcement, especially given the absence of clear legislative guidance and the discretion left to individual judges. A more principled and rights-based approach, consistent with Kenya’s constitutional and international human rights law obligations, would have been to strike down Section 166 and mandate the legislature to enact a procedure that fully aligns with both constitutional and international human rights law and standards.

Having said that, with its judgments, as mentioned above, the High Court has emphasized the inherent violations of constitutionally recognized human rights of persons with intellectual and/or psychosocial disabilities. It has also raised concerns regarding judicial independence. Some judgments have declared the provisions of the CPC mandating detention at the President’s pleasure to be unconstitutional. However, read together, these decisions have left other problematic aspects of the CPC provisions unchanged. In particular, the decisions that allowed for the indefinite detention of defendants deemed to be a danger to themselves or the public, as well as those allowing the detention of individuals found “guilty but insane” in mental health institutions, continue to infringe upon the rights of persons with disabilities.

Detention or any other form of deprivation of liberty based on disability—whether in prisons, mental health facilities, or rehabilitation centres—constitutes institutionalization and violates the right to liberty and security of person guaranteed under the CRPD,¹⁴¹ ADP,¹⁴² and ICCPR.¹⁴³ Such detention, whether justified on the grounds of being a danger to oneself or others, or following a “guilty but insane” verdict, is also a discriminatory practice and runs counter to human rights law, which prohibits discrimination and requires that any deprivation of liberty be lawful, necessary, and proportionate.¹⁴⁴ Additionally, as emphasized in Principle 13 of *The 8 March Principles for a Human Rights-Based Approach to Criminal Law*, criminal law sanctions must be consistent with human rights standards, including being non-discriminatory and proportionate to the gravity of the offence, and custodial sentences should only be imposed as a last resort.¹⁴⁵

Additionally, as detailed in the subsection below, the findings in the judgments of the High Court did not effectively address the issue of detention at the President’s pleasure. In the case of *Republic v. SOM*, the High Court cast doubt on the constitutional validity of Section 166 of the CPC, yet it did not explicitly mandate the legislature to amend the procedure so as to align it with the Constitution and Kenya’s international human rights law obligations. On the other hand, in *BKJ v. Republic*, the High Court underscored the legislature’s duty to ensure that Section 167 of the CPC conforms with the Constitution. However, this section was neither struck down nor amended. Consequently, in the absence of legislative action on the part of the legislature, some judges have continued to apply the contested provisions of the CPC.

b. Fragmentation of jurisprudence

The line of jurisprudence based on *SOM*’s case has not always been followed by courts in Kenya. In *Republic v. Edwin Njihia Waweru (Njihia)* (2019), for instance, the defendant, who had been found “guilty but insane,” cited the *Republic v. SOM* case and urged the court to conduct the review upon sentencing itself, as opposed

¹³⁹ Ibid, § 14; Also see § 19 (b). As the Court noted in its judgment, Section 7(1) of the Sixth Schedule to the Constitution of Kenya allows courts to reinterpret existing laws, such as the CPC, with such modifications, adaptations, qualifications, and exceptions that are necessary to bring them into conformity with the Constitution. Section 7(1) of the Sixth Schedule of the Constitution of Kenya.

¹⁴⁰ Ibid, § 19 (c).

¹⁴¹ CRPD Committee, ‘Guidelines on Deinstitutionalization, including in Emergencies’, CRPD/C/5, 10 October 2022.

¹⁴² Article 9 of the ADP.

¹⁴³ Articles 9 of the ICCPR; also see Article 6 of the ACHPR.

¹⁴⁴ Articles 5 (1 and 2) and 14(1)(b) of the CRPD; Articles 5 (1 and 2) and 9 (4) of the ADP; Articles 2(1), 9, and 26 of the ICCPR; and Article 2 and 6 of the ACHPR.

¹⁴⁵ ICJ, ‘The 8 March Principles for a Human Rights-Based Approach to Criminal Law Proscribing Conduct Associated with Sex, Reproduction, Drug Use, HIV, Homelessness and Poverty,’ 2024, available at: https://www.icj.org/wp-content/uploads/2023/03/Principles-Report_English.pdf.

to the President.¹⁴⁶ The presiding judge, however, disagreed with the position taken in the *SOM* case, arguing that detention at the President's pleasure is an executive prerogative as opposed to a judicial function.¹⁴⁷ Justice Lesiit, the presiding judge, reasoned that this "power of mercy" was one whereby the law¹⁴⁸ gives the executive the responsibility "to make a determination whether a person need not suffer the punishment imposed against him by the court, and may remit such punishment for some reason, in certain cases".¹⁴⁹

For Justice Lesiit, therefore, the power granted to the President was not judicial in nature and its allocation to the executive did not undermine the authority of the courts to pass lawful sentences.¹⁵⁰ To balance matters and avoid the risk of indefinite detention of the defendant, Justice Lesiit indicated that it would be "expedient" and "judicious" to impose a determinate sentence after delivering a verdict of "guilty but insane" under Section 166 of the CPC. The judge further held that the record should then be forwarded to the President, who has the authority to periodically review the case and grant mercy as deemed appropriate.¹⁵¹

The position in *Njihia* was reiterated in the case of *Republic v. Ibrahim Kamau Irungu* (2019) (*Irungu*).¹⁵² As in the earlier case, the accused argued that parts of Section 166 of the CPC had been declared unconstitutional on account of usurping the judicial function of imposing sentences.¹⁵³ The defendant further submitted that the indeterminate sentence envisaged under Section 166 was discriminatory, as it was based on the accused person's disability.¹⁵⁴ In addition, he argued that the provision violated the right to a fair trial under Article 25 of the Constitution.¹⁵⁵ The defence urged the court to pass a determinate sentence and take on the power of conducting reviews provided under Section 166.¹⁵⁶ In response, the prosecution contended that, since the contested section of the CPC had not been amended, the court was still bound to follow the letter of the law.¹⁵⁷

Justice Lesiit upheld her position in the *Njihia* case discussed above, emphasizing that the President's power of mercy did not usurp any judicial function. As such, she again departed from the findings in *Republic v. SOM*, which had attempted to align Section 166 of the CPC with the Constitution by replacing the word "President" with "Court".¹⁵⁸ Justice Lesiit clarified, however, that "awarding indeterminate sentences and leaving it upon the executive to determine the nature of sentence to be served by a convict is interfering with a judicial function and is wholly undesirable."¹⁵⁹ It is to avoid this undesirable effect that Justice Lesiit accepted the need to realign Section 166 so as to allow courts to issue determinate sentences on persons found "guilty but insane". Justice Lesiit confirmed this reasoning in the *Republic v. Anthony Wainaina Ng'ang'a* (2021).¹⁶⁰ The High Court in Naivasha County also followed Justice Lesiit's approach in its 2020 decision, *Republic v. JKN*, holding that:

"the proper way to proceed after convicting an accused as 'guilty but insane', is to take such action as will ensure the full and fair trial rights of the accused are complied with. [...] such rights can only be properly complied with if the court finally concludes the case before it with the issuance of a sentence; the sentence must be determinate so as to give finality [...] and that a report be forwarded to the executive branch to enable it to take such constitutional action under Article 133 of the Constitution as it may deem appropriate, to exercise the power of mercy."¹⁶¹

In the cases discussed above, the counsels for defendants referenced *HM v. Republic* and *Republic v. SOM* to argue that detention at the President's pleasure under Sections 166 and 167 had been declared unconstitutional. In *Irungu*, the defendant further asserted that detention at the President's pleasure was discriminatory as it was grounded on an accused person's disability. Overall, the arguments of the counsels for defendants in both cases primarily centred on contesting the President's discretion as a usurpation of a judicial function without addressing the broader infringement on the accused person's human rights resulting from these procedures. They did not, however, assert that the special finding of "guilty but insane" violated

¹⁴⁶ *Republic v. Edwin Njihia Waweru*, Criminal Case 78 of 2015, Ruling on Sentence at the High Court of Kenya at Nairobi, 23 July 2019, eKLR, §§ 5 and 6.

¹⁴⁷ *Ibid*, para 14.

¹⁴⁸ The judge referred to the Power of Mercy Act No. 21 of 2011, specifically citing Section 2, which outlines the President's authority to grant mercy to convicted individuals, which includes "any criminal prisoner sentenced by a court or court martial, as well as persons detained in prison under sections 162 to 167 of the Criminal Procedure Code (Cap 75)."

¹⁴⁹ *Republic v. Edwin Njihia Waweru*, Criminal Case 78 of 2015, Ruling on Sentence at the High Court of Kenya at Nairobi, 23 July 2019, eKLR, § 15.

¹⁵⁰ *Ibid*, §§ 15-20.

¹⁵¹ *Ibid*, § 23.

¹⁵² *Republic v. Ibrahim Kamau Irungu*, Criminal Case No.7 of 2018, Ruling on Sentence at the High Court of Kenya at Nairobi, 25 July 2019, eKLR.

¹⁵³ *Ibid*, §§ 6 and 13.

¹⁵⁴ *Ibid*, § 9.

¹⁵⁵ *Ibid*, § 8.

¹⁵⁶ *Ibid*, §§ 7 and 10.

¹⁵⁷ *Ibid*, § 11.

¹⁵⁸ *Ibid*, §§ 19-27.

¹⁵⁹ *Ibid*, § 30.

¹⁶⁰ *Republic v. Anthony Wainaina Ng'ang'a*, Criminal Case No. 60 of 2014, Ruling on Sentence at the High Court of Kenya at Nairobi, 7 May 2021, eKLR, § 18.

¹⁶¹ *Republic v. JKN*, Criminal Case No. 6 of 2017, Ruling at the High Court of Kenya at Naivasha, 30 April 2020, eKLR, §§ 16 and 21.

the right to legal capacity, access to justice, fair trial and liberty, and could result in the involuntary detention and institutionalization of persons with intellectual and/or psychosocial disabilities under Sections 166 and 167 of the CPC. Had these rights—recognized under the Constitution, the CRPD and ADP, among others—been raised and fully litigated, the courts’ analysis and reasoning might have taken a different course, potentially leading to a more comprehensive adjudication of the matters.

c. Perpetuating uncertainty

After a period of uncertainty caused by conflicting High Court judgments, the Court of Appeal of Kenya had the opportunity in *Mwachia Wakesho v. Republic* (2021)¹⁶² to address and clarify contested issues and to establish a clearer precedent. The case arose as an appeal from a High Court decision that had rejected the appellant’s claim of temporary insanity. The High Court had found that, at the time of the offence, the accused was not suffering from any mental health condition that would have prevented him from understanding his actions or their wrongfulness, and it had subsequently convicted him of the charges and sentenced him.¹⁶³ After reviewing the evidence, however, the Court of Appeal found that, at the material time of the commission of the offence, the appellant “was suffering from a disease which affected his mind and made him incapable of understanding what he was doing or knowing that what he was doing was wrong.”¹⁶⁴ As a result, the Court of Appeal concluded that the lower court ought to have made a special finding of “guilty but insane”.¹⁶⁵

Regarding the legal consequences of such a determination, the Court of Appeal noted the divergent opinions in the various judgments of the High Court discussed above but refrained from explicitly ruling on the constitutionality of the procedures established by the CPC. Nevertheless, in its *obiter dicta*, the Court noted that Section 166 was “clearly unsatisfactory and in dire need of reform”.¹⁶⁶ Commenting further on the need for specific reforms, the Court of Appeal made two key observations. First, it pointed out that the verdict of “guilty but insane” presented a legal paradox in light of the principle of criminal responsibility, which requires that “for a person to be criminally liable, it must be established beyond reasonable doubt that he or she committed the offence or omitted to act voluntarily and with a blameworthy mind.”¹⁶⁷ The Court then suggested that, in cases where an accused person suffers from a mental health condition at the time of the offence, the appropriate verdict that should be entered is one of “not guilty by reason of insanity.”¹⁶⁸ Second, the Court of Appeal noted that the right to a fair trial, as guaranteed by Article 50(2) of the Constitution, entitled an accused person to effective participation at all levels of the criminal trial.¹⁶⁹ In light of this, the Court found Section 166 of the CPC to be in violation of Article 50(2) of the Constitution.¹⁷⁰

These *obiter* remarks by the Court of Appeal, albeit not decisive findings, are important and will be subjected to further detailed examination below. For now, despite its refusal to make a legal determination on the constitutionality of the CPC’s provisions, the Court’s comments clearly and pertinently underscore the need for Kenya’s legal framework to be revised. Nevertheless, the Court of Appeal’s final order in the case was problematic and may even mark a step backwards in the protection of the rights of persons with disabilities. This is because the Court overturned the conviction and sentence handed by the lower court and entered a special verdict of “guilty but insane.”¹⁷¹ It then ordered the appellant, who had already spent more than nine years in custody, to be institutionalized and treated in a mental health hospital until a psychiatrist determined that he was no longer a danger to society or himself.¹⁷² In other words, the Court specifically applied Section 166 of the Criminal Procedure Code, while overlooking the procedures it sets out and without offering any explanation for failing to do so.¹⁷³

d. Pivotal judgment on unconstitutionality

Subsequent judgments continued to question the constitutional validity of the abovementioned Sections of the CPC. For instance, in a 2021 decision, the High Court at Meru County referenced the *Hussan Hussein Yusuf v. Republic* judgment in coming to the conclusion that sentencing an individual to detention at the President’s

¹⁶² *Mwachia Wakesho v. Republic*, Criminal Appeal No. 8 of 2016, Judgement of the Court of Appeal at Mombasa, 3 December 2021, eKLR.

¹⁶³ *Ibid.*, §§ 14-15.

¹⁶⁴ *Ibid.*, § 46.

¹⁶⁵ *Ibid.*, § 51.

¹⁶⁶ *Ibid.*, § 56.

¹⁶⁷ *Ibid.*, § 57.

¹⁶⁸ *Ibid.*

¹⁶⁹ *Ibid.*, § 58.

¹⁷⁰ *Ibid.*

¹⁷¹ *Ibid.*, § 59.

¹⁷² *Ibid.*

¹⁷³ Ambani, Kipchirchir and Tamei (n 91) 120.

pleasure is unlawful as it contravenes the Constitution's prohibition of cruel, inhuman and degrading treatment.¹⁷⁴

In 2022, the High Court at Nairobi handed down a pivotal judgment with wide-ranging implications in the case of *Kimaru & 17 others v. Attorney General & another (Kimaru)*.¹⁷⁵ The case stemmed from a group petition filed by 18 individuals who had been detained in various prisons in Kenya at the President's pleasure after a special finding of "guilty but insane" had been made against them.¹⁷⁶ In contrast with previous judgments, where in most cases courts themselves had raised the issue of the constitutionality of Sections 166 and 167 of the CPC *proprio motu*, the petitioners in this case directly challenged the constitutionality of these sections, including Section 162, particularly in relation to detention at the President's pleasure.¹⁷⁷ The petitioners requested the Court to declare the impugned sections unconstitutional, asserting that they were inconsistent with Articles 25, 27(1), 27(4), 28, 29, 50, 54 and 160 (1) of the Constitution.¹⁷⁸ They further requested that all individuals imprisoned pursuant to these provisions should have their cases referred back to their respective trial courts for review.¹⁷⁹ Additionally, the petitioners urged the Court to declare that those who had since recovered be released immediately, while others be placed in mental institutions for further psychiatric evaluation and recommendation to the courts, if necessary.¹⁸⁰

The petitioners argued for these remedies on the basis that the impugned Sections of the CPC resulted in inhuman and degrading treatment of persons with disabilities and were discriminatory, as they subjected prisoners with intellectual and/or psychosocial disabilities to differential treatment based solely on their disabilities.¹⁸¹ To buttress their case, the Petitioners urged the court to consider Kenya's legal obligations under international human rights instruments, including the International Covenant on Civil and Political Rights (ICCPR), the African Charter on Human and Peoples' Rights (ACHPR), and the United Nations Standard Minimum Rules for the Treatment of Prisoners (the Mandela Rules).¹⁸² Notably, the petitioners do not appear to have relied on the CRPD, although this remains unclear because their submissions are not publicly available. The Kenya National Human Rights Commission (KNHRC), which intervened as an interested party in the case, argued that imposing indeterminate sentences or punishments on accused persons with disabilities violated their rights to a fair trial, freedom from cruel, inhuman and degrading treatment, and freedom from discrimination based on their status.¹⁸³ The KNHRC also argued that the sections of the CPC in question violated the fundamental constitutional principles of the separation of powers and the independence of the judiciary, contending that giving the President the power to determine sentences usurped the domain of the judiciary.¹⁸⁴

In their respective submissions, both the petitioners and the KNHRC limited their challenge to the discretion granted to the President under the impugned sections of the CPC.¹⁸⁵ They did not challenge the entire procedural legal framework that effectively denies accused persons with intellectual and/or psychosocial disabilities their rights to legal capacity to stand trial, to access justice, to a fair trial and to liberty. As a result, the issue framed by the Court for determination—and its ultimate disposition—was narrowly focused on whether detention at the President's pleasure violated constitutional rights and undermined the principle of separation of powers enshrined in the Constitution.

The High Court began its analysis by reviewing previous judgments that had already declared the relevant sections of the CPC unconstitutional.¹⁸⁶ Given that those sections had previously been the subject of litigation and had been addressed, the High Court observed that the current petition "does not raise any novel issue, save that it seeks to achieve a uniform application of the law in the whole country."¹⁸⁷ Here, by stating that the petition "does not raise any novel issue," the Court also effectively narrowed the issues for determination and chose not to engage with the broader unresolved issues involving the constitutional validity of denying legal capacity and forced institutionalization as mandated by the CPC. As a result, the High Court missed the opportunity of addressing the abovementioned uncertainties and of establishing a more comprehensive legal precedent.

¹⁷⁴ *John Mutuira v Republic*, Criminal Appeal No. E127 of 2021, Judgement of the High Court of Kenya at Meru, 02 December 2021, eKLR.

¹⁷⁵ *Isaac Ndegwa Kmaru & 17 others v. Attorney General & another; Kenya National Human Rights and Equality Commission (Interested Party)*, Constitutional and Human Rights Petition No. 226 of 2020, Judgment of the High Court at Nairobi (Milimani Law Courts), 1 February 2022, eKLR.

¹⁷⁶ *Ibid*, §§ 5-27.

¹⁷⁷ *Ibid*, §§ 37 and 38.

¹⁷⁸ *Ibid*, § 39 (a and b).

¹⁷⁹ *Ibid*, § 39 (c).

¹⁸⁰ *Ibid*, § 39 (d).

¹⁸¹ *Ibid*, §§ 39 (b) and 78-84.

¹⁸² *Ibid*, §§ 85 & 85.

¹⁸³ *Ibid*, § 110.

¹⁸⁴ *Ibid*, §§ 88-107.

¹⁸⁵ *Ibid*, §§ 37-39, and 86-114.

¹⁸⁶ *Ibid*, §§ 48 and 49.

¹⁸⁷ *Ibid*, § 49.

The High Court in the present case thus confirmed its alignment with the reasoning and reaffirmed the position taken in earlier decisions that declared Sections 166 and 167 unconstitutional by stating that:

“the subject of the constitutionality of the impugned sections has been severally litigated. I have carefully considered the decisions of the Learned Judges of the High Court.

I will, therefore, not attempt to re-invent the wheel. However, I must put my position clear on the subject issue. Without a second thought, I throw my weight behind the position and finding that indeed the impugned sections are unconstitutional.¹⁸⁸

The Court also clarified that the discretionary power granted to the President under the CPC sections is related to the procedural aspects of the trial—as it “runs from the time a person is charged before a Court of law until the conviction, but awaiting sentence”¹⁸⁹—and thus violates the independence of the judiciary and the doctrine of separation of power:

“When the Executive has legal access to undertake and discharge judicial functions of the Judiciary, then there can be no more threat to the doctrine of separation of powers and the independence of the Judiciary than that. That can only be the height of the sequestration of the Judiciary.”¹⁹⁰

In the end, in its disposition, the Court issued detailed orders which, among other things, declared that:

“Detaining of persons with mental challenges who were facing criminal trials or who had been tried and special findings made that such persons were ‘guilty but insane’ in prisons at the president’s pleasure pursuant to sections 162 (4) and (5), 166 (2), (3), (4), (5), (6) and (7) and 167 (1) (a), (b), (2), (3) and (4) of the Criminal Procedure Code or under any other law constituted a threat to the doctrine of separation of powers and the independence of the Judiciary.

Sections 162(4) and (5), 166 (2), (3), (4), (5), (6) and (7) and 167(1)(a), (b), (2), (3) and (4) of the Criminal Procedure Code or any other law providing for the detaining of any person with mental challenges who faced a criminal trial or had been tried and a special finding made that such a person was ‘guilty but insane’ at the president’s pleasure contravened articles 25(a), 27(1), (2), (4), 28, 29(d) and (f), 50, 51(1) and (2), 159(2)(a), (b) and (d) and 160(1) of the Constitution. Such provisions are hereby declared unconstitutional, null and void.”¹⁹¹

The Court also barred other courts in Kenya from making orders of detention at the President’s pleasure against any person facing a criminal trial who is found to have “mental challenges” or who has been tried and found “guilty but insane.”¹⁹² It further prohibited prison facilities from accepting or detaining individuals under such orders.¹⁹³ The Court also stated that any person who was being held under such orders had to be taken back before the committing court for appropriate orders, taking into account their mental state and the time already spent in detention.¹⁹⁴ It directed that the judgment be communicated to the Speaker of the National Assembly of Kenya and instructed the Speaker to take steps to align the impugned sections of the CPC with the Constitution.¹⁹⁵ The Speaker was then required to report on the status of implementation of the judgment within 12 months.¹⁹⁶ However, as of writing this report – nearly three years later – the impugned sections remain neither amended nor removed from the law books.¹⁹⁷

iii. Uncertainties in the High Court judgments

The High Court has exercised its constitutional interpretation mandate in the cases mentioned above, particularly where judges declared unconstitutional the procedure in the CPC that mandates the detention of persons with intellectual and/or psychosocial disabilities at the President’s pleasure. Those judgments established the unconstitutionality of the impugned CPC provisions citing violations of human rights and freedoms guaranteed under the Constitution. These include the right to human dignity (Article 28),¹⁹⁸ to liberty

¹⁸⁸ Ibid, §§ 118 and 119.

¹⁸⁹ Ibid, § 126.

¹⁹⁰ Ibid, § 121.

¹⁹¹ Ibid, § 153 (a and b).

¹⁹² Ibid, § 153 (d and f).

¹⁹³ Ibid, § 153 (e).

¹⁹⁴ Ibid, § 153 (h and i).

¹⁹⁵ Ibid, § 153 (k and l).

¹⁹⁶ Ibid.

¹⁹⁷ See Kenya Law, ‘Criminal Procedure Code,’ available at: <https://www.kenyalaw.org/lex/actview.xql?actid=CAP.%2075>, last visited on 8 April 2025.

¹⁹⁸ *HM v. Republic*, the H.C.C.R.A No. 17 of 2017, Judgement in the High Court of Kenya at Meru, 9 November 2017, eKLR.

(Article 29(a)),¹⁹⁹ the prohibition of torture (Article 29(d)), the prohibition of cruel, inhuman or degrading treatment or punishment (Article 29(f)),²⁰⁰ and the right to a fair trial (Article 50).²⁰¹ In the *Republic v. SOM* case, the High Court specifically declared Section 166 of the CPC unconstitutional for violating Article 160 of the Constitution by removing the judiciary's role in sentencing and granting that power to the President.²⁰² This finding was later affirmed by other High Court decisions, such as the one in *Kimaru*.²⁰³

The question then arises as to why some High Court judges in cases with similar circumstances have seemingly taken different positions and failed to adhere to the precedent established by the judgments that declared the CPC provisions unconstitutional. As a matter of constitutional principle, a judge is not at liberty to simply disregard or override a declaration of constitutional invalidity by another judge, unless the issue is properly before the court for reconsideration. Otherwise, when judges depart from constitutional declarations made by another judge without proper grounds, it opens the door for appeals to higher courts.²⁰⁴

While there is no definitive answer, this inconsistency may be explained by reference to Kenya's legal system, which follows a common law tradition.²⁰⁵ A key feature of this system is the doctrine of *precedent* (also known as *stare decisis*), which promotes consistency and predictability in judicial decision-making. Under this doctrine, lower-level courts—such as the High Court—are required to follow the decisions of higher level or appellate courts—such as the Court of Appeal and the Supreme Court when deciding on the same or similar legal issues. Courts may also consider and may sometimes depart from decisions of courts of equal jurisdiction—such as different divisions of the High Court. While there may not be a formal binding effect of one high court judgment over another, high court judges are generally expected to follow one another's reasoning to maintain consistency in the law and the principle that like cases should be treated alike.²⁰⁶ Departures from this principle may require strong justification, such as that a previous authority was clearly wrong or the facts in the new case were materially different. An expectation of adherence to precedent is particularly important in matters involving constitutional interpretation or when a law has been declared unconstitutional, and the judgment of unconstitutionality has not been overturned on appeal. In such cases, adherence to the reasoning in previous judgments is essential in upholding legal certainty and the rule of law.

The Constitution of Kenya does not specifically address the role of judicial precedent or the doctrine of *stare decisis*, except for decisions handed down by the Supreme Court, which are binding on all lower courts.²⁰⁷ However, it is generally understood that, due to Kenya's adherence to the common law system, lower courts are bound to follow the decisions of higher courts.²⁰⁸ Specifically, High Court judgments are considered binding on magistrates' courts.²⁰⁹ Appellate courts are also expected to follow their own previous decisions.²¹⁰ As a court exercising appellate jurisdiction,²¹¹ the High Court is expected to follow its own decisions, subject to those exceptions where departure from precedent is allowed.

A review of the High Court cases, where the court departed from earlier judgments declaring parts of the CPC provisions unconstitutional, reveals that judges generally regarded those previous decisions as having only persuasive authority. For example, in *Njihia*, Justice Lesiit noted that counsel relied on the "persuasive case" of the *Republic v. SOM*, which had declared parts of Section 166 unconstitutional.²¹² Similarly, in *Republic v. Ibrahim Kamau*, the same judge stated that she was "persuaded" by the reasoning in *AOO v. AG*, particularly the finding that awarding indeterminate sentences and leaving the matter to the executive to determine the nature of sentence to be served encroaches on judicial functions.²¹³ However, in the same case, the judge appeared unpersuaded by the argument that Section 166 of the CPC violated judicial independence. Therefore,

¹⁹⁹ *Joseph Melikino Katuta v. Republic*, Criminal Appeal No. 12 of 2016, Judgement in the High Court of Kenya at Voi, 20 July 2017, eKLR.

²⁰⁰ *Hassan Hussein Yusuf v. Republic*, Criminal Appeal No.59 of 2014, in the High Court of Kenya at Meru, 10 May 2016, eKLR.

²⁰¹ *Republic v. SOM*, Criminal Case No. 6 of 2011, Ruling on Sentence in the High Court of Kenya at Kisumu, 30 April 2018, eKLR.

²⁰² *Ibid.*

²⁰³ *Isaac Ndegwa Kmaru & 17 others v. Attorney General & another; Kenya National Human Rights and Equality Commission (Interested Party)*, Constitutional and Human Rights Petition No. 226 of 2020, Judgment of the High Court at Nairobi (Milimani Law Courts), 1 February 2022, eKLR, § 153.

²⁰⁴ See Articles 163 (4) and 164 (3) of the Constitution, which provide the jurisdiction of the Supreme Court and the Court of Appeal, respectively, to hear appeals from the Court of Appeal and the High Court.

²⁰⁵ Kenya Law Reporting, available at: <http://www.kenyalaw.org/kl/index.php?id=124>, last visited on 9 April 2025; and Njoroge Regeru, "The Doctrine of Judicial Precedent (*Stare Decisis*): A Critical Appraisal of Recent Decisions Made by the High Court and the Supreme Court of Appeal of Kenya", LLM Thesis done at the University of Nairobi, 2012 (unpublished), available at: <https://erepository.uonbi.ac.ke/handle/11295/8393>, p.35.

²⁰⁶ Frederick Schauer, 'Precedent' (1987) 39 Stanford Law Review 571.

²⁰⁷ Article 163 (7) of the Constitution.

²⁰⁸ Kenya Law Reporting, available at: <http://www.kenyalaw.org/kl/index.php?id=124>, last visited on 9 April 2025.

²⁰⁹ *Ibid.*

²¹⁰ *Ibid.*

²¹¹ Article 165 (3) (e) of the Constitution.

²¹² *Republic v. Edwin Njihia Waweru*, Criminal Case 78 of 2015, Ruling on Sentence at the High Court of Kenya at Nairobi, 23 July 2019, eKLR, § 5.

²¹³ *Republic v. Ibrahim Kamau Irungu*, Criminal Case No.7 of 2018, Ruling on Sentence at the High Court of Kenya at Nairobi, 25 July 2019, eKLR, § 30.

it appears that previous judgments, even where they involve declarations of unconstitutionality, are mainly considered as persuasive as opposed to binding.

While this approach is problematic in and of itself, the current problems are further compounded by another factor. In Kenya, a declaration that a law is unconstitutional – rendering it null and void – does not automatically lead to its removal from the statute books. This explains why, for instance, the High Court in *BKJ v. Republic* emphasized the duty of the legislature to amend Section 167 of the CPC to ensure its alignment with the Constitution.²¹⁴ Similarly, in *Kimaru*, the High Court directed parliament to make the necessary amendments, but no legislative action has been taken to date. To ensure the protection of human rights and maintain a consistent application of the rule of law, once a provision is found to be inconsistent with the Constitution and is declared unconstitutional, it should have no place in Kenya’s statute book and should cease to have any effect or application. In practice, however, removing such provisions from the law book requires a formal amendment process initiated through the normal legislative amendment procedure. Until such process is undertaken, and the necessary amendments are enacted, the impugned provisions seem to be treated as part of the law and may continue to be applied. This contributes to ongoing uncertainty, as different high court judges may continue to interpret these provisions in divergent ways.

Apart from interpretation, another concern arises with respect to the level of inconsistency in the reasoning of the High Court. Different judges cite different constitutional provisions to support their findings of unconstitutionality of the abovementioned CPC provisions. In *Hassan*, for example, the High Court relied on Articles 25(a) and 29 of the Constitution, which prohibit torture and cruel, inhuman, or degrading treatment or punishment, to declare the relevant CPC provisions unconstitutional. In *HM v. Republic*, the High Court invoked Article 28 of the Constitution, which guarantees the right to human dignity, arguing that detention at the President’s pleasure violated personal dignity. In *Joseph Melikino Katuta v. Republic*, the High Court relied on Article 29(a) guaranteeing the right to liberty, asserting that Section 167 of the CPC causes prolonged detention. In *Republic v. SOM*, the High Court found the CPC procedures unconstitutional due to a violation of the right to fair trial under Article 25.

Notably, no single judgment provides a comprehensive examination of all the rights of persons with disabilities affected by the procedures mandated by the CPC. It should, however, be acknowledged that, in most of the cases, the courts themselves raised the issue of the constitutionality of Sections 166 and 167 of the CPC, even though the petitioners had not directly challenged these sections. It was only in *Kimaru* – where the petitioners explicitly challenged the constitutionality of the CPC provisions, citing various constitutional rights, including the right to equality and freedom from discrimination (Article 27) and the right of persons with disabilities (Article 54) – that the High Court found the impugned sections of the CPC to be in violation of multiple constitutionally guaranteed human rights, albeit it did not delve into the specific inquiry of how the violations occurred.

Disappointingly, the courts have largely neglected to engage with the provisions of the CRPD in their reasoning and findings. Only in *Republic v. SOM* did the High Court attempt to connect the rights violations caused by the impugned CPC provisions with the rights of persons with disabilities as guaranteed under the CRPD. Arguably, had the courts engaged more thoroughly with the CRPD and its related jurisprudence on the matter, the prospects of avoiding inconsistency would have been greater.

iv. Further reform required

From the foregoing discussion, it is evident that Kenyan courts have focused on the parts of the impugned CPC provisions that mandate detention at the President’s pleasure. This, however, does not fully address the problems that those provisions pose to persons with disabilities in accessing justice. Even if courts were to take over the President’s role in this regard, the application of the law would still result in accused persons with intellectual and/or psychosocial disabilities being committed to mental health facilities in violation of their rights, including to a fair trial and to liberty and security of person on the basis of equality with others.

Furthermore, the decisions of the courts so far have not provided any clarity in respect of the procedure that should be followed in implementing the CPC. In *Hassan*, for example, the High Court at Meru ordered that the defendant be held and treated in a medical facility until a psychiatrist determined that the person concerned was no longer a danger to himself or the public.²¹⁵ In the *Wakesho* case, the Court of Appeal issued a similar order regarding the appellant, who had already spent more than nine years in custody.²¹⁶ Meanwhile, in *HM v.*

²¹⁴ *BKJ v. Republic*, Criminal Appeal No.16 of 2015, Judgement in the High Court of Kenya at Meru, 10 May 2016, eKLR.

²¹⁵ *Hassan Hussein Yusuf v. Republic*, Criminal Appeal No.59 of 2014, Judgement in the High Court of Kenya at Meru, 10 May 2016, eKLR, §

²¹⁶ *Mwachia Wakesho v. Republic*, Criminal Appeal No. 8 of 2016, Judgement of the Court of Appeal at Mombasa, 3 December 2021, eKLR, § 59.

*Republic*²¹⁷ and *Joseph Melikino Katuta v. Republic*,²¹⁸ the High Courts at Meru and Voi Counties ordered the release of the defendants, holding that the period already served at the President's pleasure was excessive. The Courts did not engage with the discriminatory nature of the detention itself. Going in a different direction, the High Court in *Republic v. SOM* ordered, after committing the person to a mental health institution for fifteen years, that there should be periodic reviews by the court every two years.²¹⁹ In *Kimaru*, the High Court in Nairobi barred courts from issuing orders for detention at the President's pleasure, but did not provide guidance on the alternative procedure that should be followed in such cases going forward.

Therefore, these judgments did not establish a clear-cut procedure for handling these type of cases in the future by courts, resulting in some level of confusion and ambiguity among judges and legal practitioners.²²⁰ In addition, while these court interventions are promising, the failure to decisively determine an approach to the procedure and a willingness by some judges to continue to apply provisions that lead to institutionalization of persons with disabilities on the basis of their disability are of serious concern. The inconsistencies in the courts' approach to this issue are not minor. For example, in *Lucy Wanjiru Muhia v. Republic*, a 2022 case decided a week after *Kimaru*, the applicant, who had been in custody for over ten years, requested the court to annul her custodial sentence at the President's pleasure and, instead, reduce it to the time she had already served.²²¹ Despite recognizing that Section 166 of the CPC was unconstitutional, the High Court rejected the review request, arguing that the order made under Section 166(1) of the CPC was final and beyond the court's jurisdiction to review.²²² Similarly, in *NMG v. Republic* (2023), the appellant, who had been declared "guilty but insane" and detained at the President's pleasure, sought a review of the sentence, claiming it was "harsh and excessive."²²³ The High Court in Nyeri County, which heard the case on appeal, cited the precedents that declared Section 166 of the CPC unconstitutional and overturned the sentence, but, nevertheless, referred the appellant to a doctor for a fresh mental assessment report.²²⁴

Under the Constitution of Kenya, declaring persons with disabilities unfit to stand trial or criminally responsible solely on the grounds of disability and subjecting them to involuntary institutionalization in mental health facilities constitutes a violation of their rights.²²⁵ Denying such individuals the capacity to stand trial or to participate in their own defence contravenes key constitutional guarantees, including principle of non-discrimination, and the rights to: equality before the law and equal protection of the law; the right to dignity; the right to access to justice; a fair trial; and legal capacity. Furthermore, committing accused persons to mental health institutions (institutionalization) solely based on their intellectual and/or psychosocial disability fails to respect their inherent dignity and undermines their rights to legal capacity and to access to justice.

Kenyan courts are legally obligated to ensure that the State complies with and be held accountable for its constitutional obligations in respect of the rights of persons with disabilities. Persons with disabilities, including those with intellectual and/or psychosocial disabilities have the right to legal capacity and should therefore be permitted to fully engage in all criminal justice processes and to be held accountable for their conduct.²²⁶

This right is further guaranteed in international legal frameworks, including the CRPD and ADP. As the following section elaborates, international law is clear that disability should never be used as a ground for denying individuals their right to legal capacity or for excluding them from the justice system's safeguards and protections to which they are entitled.

v. The question of criminal responsibility of persons with intellectual and/or psychosocial disabilities under the CRPD and ADP

In the context of criminal justice, the right to legal capacity involves having the competence to participate in all criminal justice processes and to bear responsibility for one's conduct and decisions. Declarations of unfitness or non-responsibility of accused persons on the grounds of disability restrict or completely deny their right to legal capacity, as they automatically deem them incompetent to participate in the proceedings. In this

²¹⁷ *HM v. Republic*, the H.C.C.R.A No. 17 of 2017, Judgement in the High Court of Kenya at Meru, 9 November 2017, eKLR.

²¹⁸ *Joseph Melikino Katuta v. Republic*, Criminal Appeal No. 12 of 20166, Judgement in the High Court of Kenya at Voi, 20 July 2017, eKLR.

²¹⁹ *Republic v. SOM*, Criminal Case No. 6 of 2011, Ruling on Sentence in the High Court of Kenya at Kisumu, 30 April 2018, eKLR, § 19.

²²⁰ Interview with a judge at the Environment and Land Law Court of Kenya at Machacos, 12 July 2024.

²²¹ *Lucy Wanjiru Muhia v. Republic*, Miscellaneous Criminal Application No. E326 of 2021, The High Court of Kenya at Nairobi, 7 February 2022, eKLR.

²²² *Ibid.*

²²³ *NMG v. Republic*, Criminal Appeal E003 of 2022, The High Court of Kenya at Nyeri, 26 January 2023, eKLR, § 5.

²²⁴ *Ibid.*, § 17.

²²⁵ The Constitution guarantees the right to equality, including equal protection of the law without discrimination (Article 27 (1) and (4)), the right to dignity (Article 28), specially the right of persons with disabilities to be treated with dignity and respect (Article 54 (1)(a); and the right to a fair trial (Article 50)).

²²⁶ Access to Justice Knowledge Hub, Implementing the Convention on the Rights of Persons with Disabilities in Criminal Justice Systems: A Briefing Paper, July 2022, 4.

regard, the UN Special Rapporteur on the Rights of Persons with Disabilities has emphasized that, to ensure the exercise of legal capacity and guarantee access to justice for persons with disabilities, States must:

“Repeal or amend all laws, regulations, policies, guidelines, and practice that establish and apply doctrines of ‘unfitness to stand trial’ and ‘incapacity to plead’, which prevent persons with disabilities from participating in legal processes based on questions about or determination of their capacity.”²²⁷

The jurisprudence of the CRPD Committee also establishes that declaring a person unfit to plead and subsequently placing them in custody without providing an opportunity to plead not guilty violates their right to enjoy legal capacity on an equal basis with others. In *Marlon James Noble v. Australia*, for example, the Committee found that Australia had violated the author’s right to legal capacity when he was deemed unfit to plead on account of his intellectual and/or psychosocial disability, as determined by a psychiatric assessment. Mr. Noble was subsequently subjected to a custodial order under the Australian Mentally Impaired Defendants Act, without being given the opportunity or appropriate support and accommodation to plead not guilty.²²⁸ Similarly, in *Doolan v. Australia*, the Committee stressed that a person’s disability must never be used as a basis for denying their legal capacity.²²⁹ In *Arturo Medina Vela v. Mexico*, the Committee further underscored that applying a special procedure that exempts persons with intellectual and/or psychosocial disabilities from criminal responsibility – without a justifiable ground and without ensuring procedural accommodations – constitutes discrimination under Article 5 of the Convention.²³⁰ The Committee also found that declaring a person “unfit to testify”, solely based on their disability, violated their right to legal capacity under Article 12 and access to justice under Article 13 of the CRPD. Relatedly, committing such persons to a rehabilitation facility, due to their disability, violates their right to liberty and security of the person under Article 14 of the CRPD.²³¹

Collectively, these decisions affirm the CRPD Committee’s authoritative position that all persons with disabilities must be afforded equal recognition before the law. This includes providing necessary support and accommodations to enable them to exercise their rights to legal capacity, to stand trial and/or participate in legal proceedings, and to access justice effectively.²³²

The CRPD Committee also addressed these issues in its Guidelines on the Right to Liberty and Security of Persons with Disabilities²³³ and its Guidelines on Deinstitutionalization, including in Emergencies,²³⁴ urging States to eliminate declarations of unfitness to stand trial or legal non-responsibility in their criminal justice systems. It has also made similar recommendations in its concluding observations to various State parties. In its review of Kenya’s initial report, for example, the Committee specifically urged the government to repeal Section 166 of the Criminal Procedure Code, which mandates the defence of “insanity.”²³⁵

The declaration of unfitness to stand trial and the insanity defence are often portrayed as a means of protecting individuals with intellectual and/or psychosocial disabilities. In the absence of adequate support for decision-making and better options that avoid their institutionalization, many persons with disabilities continue to rely on declarations of unfitness to stand trial and the insanity defence in criminal cases. The current, albeit severely limited, benefits of doing so for persons with disabilities have led to some concerns about the rationale behind their abolishment, particularly in the absence of improved protections.²³⁶

²²⁷ UN Special Rapporteur on the Rights of Persons with Disabilities, *International Principles and Guidelines on Access to Justice for Persons with Disabilities*, 2020, Principle 1, 1.2 (e).

²²⁸ The CRPD Committee, *Marlon James Noble v. Australia*, Communication No. 7/2012, CRPD/C/16/D/7/2012, 10 October 2016, §§ 8.5 and 8.6.

²²⁹ The CRPD Committee, *Doolan v. Australia*, Communication No. 18/2013, CRPD/C/22/D/18/2013, 17 October 2019, § 8.6. Also see *Leo v. Australia*, Communication No. 17/2013, CRPD/C/22/D/17/2013, 18 October 2019, § 8.6.

²³⁰ The CRPD Committee, *Arturo Medina Vela v. Mexico*, Communication No. 32/2015, CRPD/C/22/D/32/2015, 15 October 2019, §§ 10.3–10.4

²³¹ *Ibid.*, §§ 10.6–10.8.

²³² The CRPD Committee, *Doolan v. Australia*, Communication No. 18/2013, CRPD/C/22/D/18/2013, 17 October 2019, § 8.6; *Leo v. Australia*, Communication No. 17/2013, CRPD/C/22/D/17/2013, 18 October 2019, § 8.6; and *Arturo Medina Vela v. Mexico*, Communication No. 32/2015, CRPD/C/22/D/32/2015, 15 October 2019, §§ 10.4 and 10.6.

²³³ The CRPD Committee, *Guidelines on Article 14 of the Convention on the Rights of Persons with Disabilities: The Right to Liberty and Security of Persons with Disabilities*, 2015, § 16.

²³⁴ The CRPD Committee, ‘Guidelines on Deinstitutionalization, including in Emergencies’, CRPD/C/5, 10 October 2022, § 56.

²³⁵ The CRPD Committee, *Concluding Observations on the Initial Report of Kenya*, CRPD/C/KEN/CO/1, 30 September 2015, paragraph 28 reads that:

“The Committee recommends that the State party:

- (a) Amend its legislation to prohibit involuntary placement, in particular, to repeal provisions of the Mental Health Act (1989), amend the Persons Deprived of Liberty Act 2015, which allows detention for the purpose of psychiatry treatment, and ensure that new legislation is fully compatible with article 14 of the Convention in all cases;
- (b) Repeal the provisions of the Criminal Procedure Code, Section 166, concerning the declaration of “insanity” and reaffirm the right to a fair trial of persons with disabilities, in accordance with the Convention.”

²³⁶ Ilias Bantekas, Michael Ashley Stein and Dēmētēs Anastasiou (eds), *The UN Convention on the Rights of Persons with Disabilities, a Commentary* (First edition, Oxford University Press 2018) 359.

The justification for abolishing unfitness legislation lies partly in the right to equality. Such laws and procedures target individuals with intellectual and/or psychosocial disabilities, allowing for their indefinite detention in the absence of a criminal conviction or even a fair hearing. The CRPD Committee has observed in a number of individual communications that such practices are discriminatory as they result in differential treatment of persons with disabilities, targeting only persons with intellectual and/or psychosocial disabilities, and restricting their rights when they are on trial.²³⁷ The procedures are rooted in the medical model of disability, as declarations of “unfitness to stand trial” are made solely on the basis of medical reports. Under this model, perceived or actual impairments are often viewed as legitimate grounds for restricting or denying rights.²³⁸ In contrast, the human rights model of disability, which the CRPD espouses, prohibits using disability as a legitimate ground for denying or restricting human rights.²³⁹

Moreover, the use of unfitness to stand trial declarations or the “insanity defence” does not result in the release of individuals from detention.²⁴⁰ Instead, it often leads to their diversion into detention and treatment facilities in the guise of protecting the public.²⁴¹ In many cases, individuals are detained far beyond the expiry of the sentence provided for the offences with which they were charged, albeit not convicted as a result of unfitness to stand trial declarations or the “insanity defence”. Reports indicate, for example, that Mathare National Teaching and Referral Hospital, which is Kenya’s largest mental health facility, has institutionalized some persons who were initially committed by court orders after being found unfit to stand trial, for periods of over 40 years.²⁴² Hospital officials have cited the lack of a clear legal framework for the discharge process, along with bureaucratic inefficiencies within the administrative and judicial systems, as key reasons for the prolonged detention of individuals – even after they have fully recovered.²⁴³ The Kenya National Commission on Human Rights has also reported conditions of overcrowding, along with evidence of torture and inhuman treatment within the institution.²⁴⁴ This proves that the CPC procedures not only violate the rights of persons with disabilities but also perpetuate their unjust confinement and involuntary treatment.

As was held in *Mwachia Wakesho v. Republic*,²⁴⁵ Section 166 of the CPC entails a conviction without the effective participation of the accused.²⁴⁶ When a person is declared unfit to stand trial, they are denied the opportunity to present their case, challenge the evidence against them, and defend themselves against the charges. This contravenes the principle that accused persons must be given an opportunity to be heard. Second, when the declarations lead to indefinite or prolonged detention without a clear timeline or periodic review, they violate the right to a timely resolution of the case, and, of course, their right to liberty. Third, individuals committed under these declarations may have limited or no access to legal recourse to challenge the lawfulness of their detention or the conditions of their confinement, in turn, undermining their right to appeal and to an effective remedy. These are all components of the right to access justice guaranteed under Article 13 (1) of the CRPD.

The CPC also authorizes courts to involuntarily detain and treat an accused person with a psychosocial and/or intellectual disability who is deemed unfit to stand trial, unable to proceed with the trial, or who is found “guilty but insane”. As a result, this procedure violates the right to liberty of persons with disabilities.

As discussed previously,²⁴⁷ deprivation of liberty and the subsequent institutionalization, including in mental health facilities, of persons with disabilities without their free and informed consent violates Article 14 of the CRPD and should be abolished. The CRPD Committee has expressed concern about the treatment of offenders with intellectual and/or psychosocial disabilities who have been deemed “unfit to stand trial”. In such cases, these individuals are often sentenced to forced treatment. In *Mikkelsen v. Denmark*, the Committee noted that sentencing individuals deemed “unfit to stand trial”, due to their disability, to a hospital or institution for psychiatric treatment constitutes a form of social control.²⁴⁸ The Committee emphasized that such practices

²³⁷ The CRPD Committee, *Medina Vela v. Mexico*, Communication No. 32/2015, CRPD/C/22/D/32/2015, 15 October 2019, § 10.4; *Doolan v. Australia*, Communication No. 18/2013, CRPD/C/22/D/18/2013, 17 October 2019, §§ 8.2-8.5; and *Leo v. Australia*, Communication No. 17/2013, CRPD/C/22/D/17/2013, 18 October 2019, §§ 8.2-8.4.

²³⁸ The CRPD Committee, General Comment No.6 (2018) on Equality and Non-Discrimination, CRPD/C/GC/4, 26 April 2018, § 9.

²³⁹ *Ibid.*, § 10.

²⁴⁰ Bantekas, Stein and Anastasiou (n 208) 359.

²⁴¹ *Ibid.*

²⁴² Mary Wangari and Edwin Mutai, “Mathari Hospital stuck with inmates’ jailed at pleasure of the President”, *Daily Nation*, 22 February 2025, available at: <https://nation.africa/kenya/news/mathari-hospital-stuck-with-inmates-jailed-at-pleasure-of-the-president--4937000>.

²⁴³ *Ibid.*

²⁴⁴ KNCHR, ‘Still Silenced: A Quality Rights Assessment of Selected Mental Health Facilities in Kenya,’ 2023, pp.24-33. Also see, The National Council on the Administration of Justice, ‘Report on the Status of Persons with Mental Illness in the Criminal Justice System in Kenya,’ 2023, available at: <https://library.knchr.org/cgi-bin/koha/opac-detail.pl?biblionumber=1208>; and Maureen Kinyanjui, ‘Audit reveals alarming overcrowding at Mathari Hospital,’ *The Eastleigh Voice*, 1 March 2025, available at: <https://eastleighvoice.co.ke/headlines/120843/audit-reveals-alarming-overcrowding-at-mathari-hospital>.

²⁴⁵ *Mwachia Wakesho v Republic*, Criminal Appeal No. 8 of 2016, Judgement of the Court of Appeal at Mombasa, 3 December 2021, eKLR.

²⁴⁶ *Ibid.*, § 58.

²⁴⁷ See Section I of this report.

²⁴⁸ The CRPD Committee, *Mikkelsen v. Denmark*, communication No. 61/2019, CRPD/C/D/61/2019, 4 October 2023, § 9.2.

should be replaced with proper criminal sanctions for offenders whose involvement in a crime has been proven. It specifically found that the procedures used to determine whether a person should be sentenced to treatment lacked the safeguards required in criminal proceedings. Therefore, the Committee found that sentencing individuals to forced psychiatric treatment was incompatible with Article 14 of the CRPD.²⁴⁹

In *Medina Vela v. Mexico*, the Committee highlighted that States may have a duty to provide compensation to individuals subjected to involuntary psychiatric treatment based on disability within the criminal justice system. In this regard, it stated as follows:

“The Committee recalls that article 14 (1) (b) of the Convention stipulates that the existence of a disability in no case justifies a deprivation of liberty. Similarly, under the United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court, committal on the basis of psychosocial or intellectual disability, whether real or perceived, is prohibited and States must take the necessary measures to prevent and provide compensation for involuntary committals and committals on grounds of disability.”²⁵⁰

Articles 12, 13 and 14 of the CRPD form part of Kenya’s law by virtue of Article 2 (5) and (6) of the Constitution. As a result, Kenya’s laws, policies and practices, including those under the CPC that deprive persons with disabilities of their rights in the context of them facing criminal charges, should be reformed as they violate their right to equal recognition as persons before the law, fair trial, liberty and security of person, among others.

To align the CPC with the CRPD, the first step is to recognize the full legal capacity of persons with intellectual and/or psychosocial disabilities in criminal proceedings. This requires repealing sections of the CPC that allow for declarations of unfitness to stand trial and the insanity defence, as these are inherently discriminatory and violate the rights of persons with intellectual and/or psychosocial disabilities. Instead of declaring individuals unfit to stand trial, the State must provide appropriate support and accommodations to assist them in understanding and effectively participating in criminal proceedings.²⁵¹ The law should recognize the right of accused persons with intellectual and/or psychosocial disabilities to defend themselves against criminal charges. It should also ensure that “disability-neutral” defences, such as mistake, necessity, duress, self-defence, and the absence of *mens rea* (i.e., the required mental state in the definition of the offence, such as intent, purpose, knowledge, recklessness, or criminal negligence), are available to all defendants with intellectual and/or psychosocial disabilities.²⁵²

V. Legal Capacity in Civil Proceedings

As noted earlier, one of the recommendations Kenya received from the CRPD Committee during its 2015 review was to repeal laws and practices that allow the deprivation of legal capacity based on disability.²⁵³ Among these laws are the Civil Procedure Act (Chapter 21)²⁵⁴ and the Civil Procedure Rules.²⁵⁵ The Civil Procedure Rules are subsidiary regulations enacted under Section 81 of the Civil Procedure Act, and they provide more detailed procedures governing civil proceedings before the courts.

These laws and regulations take away the legal capacity of persons with intellectual and/or psychosocial disabilities and restrict their access to justice in civil proceedings. Section 93 of the Civil Procedure Act takes away the legal capacity of persons with disabilities by allowing the appointment of “guardians” or “next friends” to substitute and purportedly act on their behalf. It provides as follows:

“In all suits to which any person with a disability is a party, any consent or agreement as to any proceeding shall, if given or made with the express leave of the court by the next friend or guardian for the suit, have the same force and effect as if such person were under no disability and had given such consent or made such agreement.”

²⁴⁹ Ibid, also see the CRPD Committee, Concluding observations on the initial report of Denmark, CRPD/C/DNK/CO/1, 30 October 2014, § 34.

²⁵⁰ The CRPD Committee, *Medina Vela v. Mexico*, Communication No. 32/2015, CRPD/C/22/D/32/2015, 15 October 2019, § 10.8.

²⁵¹ The CRPD Committee, Guidelines on Article 14 of the Convention on the Rights of Persons with Disabilities: The Right to Liberty and Security of Persons with Disabilities, 2015, § 16.

²⁵² Bantekas, Stein and Anastasiou (n 208) 359. Also, see Access to Justice Knowledge Hub, Implementing the Convention on the Rights of Persons with Disabilities in Criminal Justice Systems: A Briefing Paper, July 2022, pp. 14-17.

²⁵³ The CRPD Committee, Concluding Observations on the Initial Report of Kenya, CRPD/C/KEN/CO/1, 30 September 2015, § 24.

²⁵⁴ The Civil Procedure Code of Kenya (Chapter 21) was initially enacted in 1929.

²⁵⁵ Civil Procedure Rule (2010).

The Civil Procedure Rules, in various sections, use the derogatory term “persons of unsound mind” to refer to persons with intellectual and/or psychosocial disabilities.²⁵⁶ They also equate persons of “unsound mind” with minors and subjects them to the procedures that apply to children.²⁵⁷ In the context of civil proceedings, once the court declares a person to be of “unsound mind”, that individual loses the capacity to represent themselves or appoint a lawyer.²⁵⁸ The person cannot file a lawsuit in their own name; instead, the case must be filed by a representative who, in law, is referred to as “the next friend”.²⁵⁹ If this procedure is not followed and a lawsuit is filed without a “next friend,” the suit will be dismissed upon the defendant's application, and costs will be imposed.²⁶⁰ If the defendant is a person of “unsound mind”, the court must appoint a guardian before the proceedings can continue.²⁶¹ The procedure does not envisage the possibility of persons with disabilities choosing their representatives. It is the court that makes this decision, purportedly on their behalf, through an application by a third person.²⁶²

The Civil Procedure Rules outrightly deny legal capacity through their typical substituted decision-making regime.²⁶³ To date, courts in Kenya have not addressed the legality of these sections of the Civil Procedure Rules. However, numerous organizations have been vigorously advocating for their abolition, arguing for the adoption of a legal framework that fully respects the right to legal capacity by ensuring that individuals with intellectual and/or psychosocial disabilities be supported in making their own decisions.²⁶⁴

VI. Accessible Legal Services

The CRPD explicitly requires States to take appropriate measures to ensure that persons with disabilities have equal access to the physical environment, transportation, information and communication (including technologies and systems), and facilities and services open or provided to the public.²⁶⁵ Accessibility is also one of the core principles underpinning the CRPD.²⁶⁶ Crucially, the ADP explicitly goes further to recognize accessibility as a right.²⁶⁷ Accessibility is crucial in ensuring that persons with disabilities are in a position to enjoy their human rights on an equal basis with others. As the CRPD Committee highlighted, it is a “precondition for persons with disabilities to live independently and to participate fully and equally in society.”²⁶⁸

Both the CRPD and the ADP outline the essential aspects of accessibility, which are crucial to enabling persons with disabilities to enjoy their rights to full and effective participation in all aspects of life.²⁶⁹ Accordingly, States parties are required to identify and address barriers in respect of the physical environment, including by putting in place relevant legal frameworks or amending existing ones.²⁷⁰

Access to justice and accessibility are fundamentally interconnected. As the CRPD Committee stressed:

“There can be no effective access to justice if the buildings in which law-enforcement agencies and the judiciary are located are not physically accessible, or if the services, information and communication they provide are not accessible to persons with disabilities.”²⁷¹

²⁵⁶ See *ibid*, Order 4, Rule 1; Order 10, Rule 1; Order 27, Rule 10; and Order 32, Rule 15.

²⁵⁷ *Ibid*, Rule 15.

²⁵⁸ The Kenya National Commission on Human Rights (KNCHR), A Briefing Paper on Implementing Article 12 of the Convention on the Rights of Persons with Disabilities Regarding Legal Capacity in Kenya: A Study Carried out in Manderu and Taita Taveta Counties, 2016, p.18, available at: <https://www.knchr.org/Portals/0/Disability%20Publications/Implementing%20Article%2012%20of%20the%20CRPD%20Legal%20Capacity.pdf?ver=2018-06-03-174713-957>.

²⁵⁹ Civil Procedure Rule, Order 32, Rule 1.

²⁶⁰ *Ibid*, Order 32, Rule 2.

²⁶¹ *Ibid*, Order 32, Rules 3 and 4.

²⁶² *Ibid*, Order 32, Rule 3.

²⁶³ Macharia (n 21) 38–40.

²⁶⁴ KNCHR and the Open Society Initiative for Eastern Africa, “How to Implement Article 12 of the Convention on the Rights of Persons with Disabilities Regarding Legal Capacity in Kenya: A Briefing Paper”, pp.54-55, available at: <https://www.knchr.org/Portals/0/GroupRightsReports/Briefing%20Paper%20on%20Legal%20Capacity-Disability%20Rights.pdf?ver=2014-01-09-114052-403>; and the Disabled People's Organizations in Kenya, ‘Implementation of the UN Convention on the Rights of Persons with Disabilities in the Republic of Kenya,’ Submission to the CRPD Committee of the response to the List of Issues – LOI 2015, June 2015, pp.18-19, available at: https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=INT%2FCRPD%2FCSS%2FKEN%2F21296&lang=en;

²⁶⁵ Article 9 of the CRPD

²⁶⁶ *Ibid*, Article 3 (f).

²⁶⁷ Article 15 (1) of the ADP.

²⁶⁸ The CRPD Committee, General Comment No.2 (2014), Article 9: Accessibility, CRPD/C/GC/2, 22 May 2014, § 1.

²⁶⁹ Article 9 (1) of the CRPD and Article 15 (1) of the ADP.

²⁷⁰ The CRPD Committee, General Comment No.2 (2014), Article 9: Accessibility, CRPD/C/GC/2, 22 May 2014, § 28.

²⁷¹ *Ibid*, § 37.

In this regard, two key aspects of accessibility are prominent: access to physical infrastructure (including buildings and facilities) and access to services, information and communication systems. Overcoming barriers related to these aspects is vital in ensuring that persons with disabilities can fully and effectively participate in justice processes. Against this backdrop, the following sub-sections outline the measures Kenya has taken to ensure legal services are accessible to persons with disabilities.

i. Physical accessibility of courts

The Constitution of Kenya, under Article 54(c), specifically enshrines the right of persons with disabilities to reasonable access to all places, public transport and information. In addition to this constitutional guarantee, the Persons with Disabilities Act, 2025, contains a specific provision on accessibility. Section 30(1) states that:

“Persons with disabilities are entitled to a barrier-free and disability-friendly environment to enable them to have access to buildings, roads and other social amenities, and assistive devices and other equipment to promote their mobility.”

Section 22 of the repealed Persons with Disabilities Act, 2003 required all owners of public buildings to make their premises accessible to persons with disabilities, in line with standards specified by the Kenya National Council for Persons with Disabilities.²⁷² Particularly, adaptation or modification of old buildings were to be completed within five years from the date the section came into operation, which was officially set in motion in 2010 through Legal Notice No.182 of 2009, issued by the Minister for Gender, Children, and Social Development. The Persons with Disabilities Act, 2025, builds on this and mandates the implementation of minimum accessibility standards and guidelines for all facilities and services open or provided to the public, thus ensuring comprehensive accommodation for the diverse accessibility needs of persons with disabilities.²⁷³

Under both the repealed Persons with Disabilities Act, 2003 and the Persons with Disabilities Acts, 2025 the Council is empowered to issue an “adjustment order” to the owner of a premise or a provider of services or amenities to the public, when it considers that such premises, services, or amenities are inaccessible to persons with disabilities.²⁷⁴ This may be done when the Council determines that access for persons with disabilities is hindered by structural, physical, or administrative barriers.²⁷⁵ Failure to comply with an adjustment order is an offence that may result in imprisonment or pecuniary penalties.²⁷⁶ However, the Council has not issued any adjustment orders since it was granted this power in 2003.²⁷⁷ Overall, as reports indicate, the legislative framework for ensuring the accessibility of public facilities has not been effectively translated into action.²⁷⁸

Regarding the physical accessibility of courts in Kenya, the High Court in Nairobi underscored in the 2012 case of *Paul Pkiach Anupa and another v. Attorney General and another* that the right to access to justice under Article 48 of the Constitution includes physical access to courts, personnel, and related information, processes, and procedures.²⁷⁹ In this case, one of the petitioners, the Kenyan Paraplegic Organization, was represented by its Executive Director, Mr. Timothy Wanyoni Wetangula, a person with a disability and a wheelchair user. Mr. Wetangula complained about the significant challenges and embarrassment he faced due to the inaccessibility of the Milimani High Court’s building in Nairobi, which made it difficult for him to accompany his advocate. He testified that, after exiting the lift, he had to go up one mounted barrier, then down another elevation (steps or raised floor levels) and then turn right to reach the courtrooms. The lack of ramps in this area made mobility extremely difficult, if not impossible, for persons with disabilities. On one occasion, Mr. Wetangula attended the court but got stranded and required his advocate’s assistance to jump up the steps or floor levels, which caused him embarrassment. He noted that this inaccessibility had often prevented him and other members of his organization from attending important court proceedings.²⁸⁰ He also mentioned difficulties accessing the Constitutional and Human Rights Division Courts in the same building.

The petitioners requested that the court declare the Milimani Law Courtrooms and the Supreme Court Building in Nairobi were inaccessible to persons with disabilities. They also sought a declaration that all courts in Kenya be fitted with ramps to facilitate access for all persons with disabilities.²⁸¹

²⁷² The Persons with Disabilities Act 2003, Sec. 22.

²⁷³ The Persons with Disabilities Act 2025, Secs. 30(3) and 31.

²⁷⁴ Ibid, Sec.31(2); The Persons with Disabilities Act 2003, Sec. 24.

²⁷⁵ Ibid.

²⁷⁶ The Persons with Disabilities Act 2025, Secs. 31 (7).

²⁷⁷ UNPRPD, Situational Analysis of the Rights of Persons with Disabilities in Kenya (Report), November 2023, p.32.

²⁷⁸ For a fairly good analysis on the lack of implementation regarding accessibility standards, see United Disabled Persons of Kenya, ‘From Affirmation to Practice: Assessing a Decade of Implementing the Constitution of Kenya 2010 for Persons with Disabilities’, November 2020, pp.58-61.

²⁷⁹ *Paul Pkiach Anupa and another v. Attorney General and another*, Petition 93 of 2011, in the High Court at Nairobi (Milimani Law Courts), 7 November 2012, eKLR, § 64.

²⁸⁰ Ibid, §§ 5 and 6.

²⁸¹ Ibid, § 4.

Following an onsite visit by the presiding judge, conducted in the presence of the parties to the case, the High Court directed all parties, including the Kenya National Commission on Human Rights, which participated as *amicus curiae*, to file their field visit reports. Based on the visit and the KNCHR's submissions, the court confirmed the presence of physical barriers at the Milimani Law Court's Building, describing them as "a hindrance to justice seekers".²⁸² The court observed that:

"Access to the Entry Lobby of the Building is restrictive to people with wheelchairs since there is a step to the reception area;

The witness boxes in various courts are raised by a platform of 200mm from the general floor, which makes it difficult for the physically challenged, particularly those on wheelchairs, to access the stand;

The parking bays are set at a lower level to the general ground which poses a challenge to move to the raised ground over the concrete kerbstone; and

Some of the entrances to the courtrooms are not wide enough for wheelchairs."²⁸³

The High Court did not, however, make the declarations the petitioners requested. Nevertheless, citing Section 22 of the Persons with Disabilities Act, 2003, which had taken effect in 2010 and required owners of public buildings to make them accessible to persons with disabilities within five years, the court emphasized the duty of all State institutions to upgrade their facilities to comply with the Act and uphold the rights of persons with disabilities.²⁸⁴

In 2016, the Kenya Judiciary launched "The Disability Mainstreaming Policy", which requires the judiciary to implement progressive measures to make the physical environment in the courts accessible for both employees and clients with disabilities. To enhance accessibility, the Policy mandates taking measures such as the provision of lifts and ramps; appropriate signage and tactile markers; reserved parking for employees and clients with disabilities; redesigning of washroom facilities; and availing standby wheelchairs.²⁸⁵

This policy intervention is yielding some positive results. All newly built courts in Kenya now feature appropriate facilities such as ramps or lifts and accessible washrooms.²⁸⁶ Additionally, courtrooms and offices are often adapted to be accessible to persons with disabilities, and court premises often include reserved parking spaces for persons with mobility limitations.²⁸⁷ However, the challenge of adapting older court buildings persists, and the progress of modifications has been slow. Many of these buildings have not been modified to meet accessibility standards, although some have attempted to address the issue by installing ramps.²⁸⁸ As a result, when cases involve persons with disabilities who cannot access the upper floors, judges adapt by holding proceedings in available spaces on the lower floors.²⁸⁹ Additionally, persons with disabilities working in the justice sector receive support, such as screen readers, personal assistants, guides, and drivers. Furthermore, the government provides tax exemptions to help cover disability-related expenses.²⁹⁰

ii. Access to Services, Information and Communication Systems

Both the CRPD²⁹¹ and the ADP²⁹² require Kenya to provide public information to persons with disabilities in accessible formats and technologies appropriate for different disabilities in a timely manner and at no additional cost. The treaties also mandate the availability of information through various communication methods, such as sign languages, Braille, and alternative communication.²⁹³ These guarantees are critical to ensure the right to access to justice for people with disabilities. As underscored in the International Principles and Guidelines on Access to Justice for Persons with Disabilities, States must ensure the accessibility of information,

²⁸² Ibid, § 66.

²⁸³ Ibid.

²⁸⁴ Ibid, § 69.

²⁸⁵ The Judiciary Disability Mainstreaming Policy, 2016, <https://judiciary.go.ke/download/disability-mainstreaming-policy/>, p.19.

²⁸⁶ Interviews with a judge at the Court of Appeal of Kenya at Mombasa, 20 June 2024, with a judge at the High Court of Kenya at Nakuru, 4 July 2024, with a judge at the High Court of Kenya at Meru, 4 July 2024, and with a judge at the Employment and Labour Relations Court of Kenya at Nairobi, 25 July 2024.

²⁸⁷ Interview with a judge at the High Court of Kenya at Nakuru, 4 July 2024.

²⁸⁸ Interview with a judge at the Court of Appeal of Kenya at Mombasa, 20 June 2024.

²⁸⁹ Interview with a judge at the High Court of Kenya at Nakuru, 4 July 2024, and with a judge at the Employment and Labour Relations Court of Kenya at Nairobi, 25 July 2024.

²⁹⁰ Interview with a judge at the Court of Appeal of Kenya at Mombasa, 20 June 2024.

²⁹¹ Article 21 (a) of the CRPD.

²⁹² Article 24 (2) (a) of the ADP.

²⁹³ Article 21 (b) of the CRPD and Article 24 (2) (c) of the ADP.

communications and other services, including information and communications technology and systems used in the justice system.²⁹⁴

Article 7(3)(b) of the Constitution of Kenya obliges the State to “promote the development and use of Kenyan Sign language, Braille and other communication formats and technologies accessible to persons with disabilities.” Article 35 guarantees the right to access to information held by the State. Article 54(1)(c) requires the State to ensure reasonable access to information for persons with disabilities, while subsection (d) affirms their right to use Sign language, Braille, or other appropriate communication methods. The Persons with Disabilities Act, 2025, reinforces the constitutional guarantees by affirming that every person with a disability has the right to access to information and communication technologies and systems.²⁹⁵ In the context of access to justice, the Act mandates the Chief Justice to develop rules ensuring that persons with disabilities who attend court are provided, free of charge, with Kenyan Sign Language interpreters, Brail services, and accessible communication formats and technologies, physical guide assistance, and intermediaries.²⁹⁶ Furthermore, the Access to Information Act of 2016 obligates all “public entities” in Kenya to disclose or disseminate information with consideration for the needs of persons with disabilities.²⁹⁷ The definition of “public entity” includes any government-funded public office, including justice sector actors, such as courts and prosecutors’ offices.²⁹⁸

Regarding courts, the Judiciary Disability Mainstreaming Policy mandates the Judicial Service Commission to prioritize providing high-quality and expeditious services to “clients” of the judiciary, which includes any person who visits the judiciary premises or requires judicial services. Priority access to services must be provided, such as sign language interpretation, education for employees on assisting clients with disabilities, and ensuring that all information is available in formats and languages accessible to these clients.²⁹⁹

In its current form, the Kenya Sign Language Bill 2023³⁰⁰ contains provisions aimed at improving inclusion and participation for deaf and hard-of-hearing individuals in judicial proceedings.³⁰¹ Among others, the Bill recognizes the use of Kenyan Sign Language in legal proceedings. It also mandates that judicial officers ensure a competent, recognized sign language interpreter is available whenever a person with a disability intends to use sign language in any legal process.³⁰² If enacted, the Bill would provide an additional normative guarantee for the availability of sign language interpreters in courts.

Despite these clear legislative and policy frameworks, enforcement remains inadequate. For instance, there is a shortage of sign language interpreters within the judiciary, primarily because interpreters trained in formal Kenyan Sign Language may not be able to interpret the various languages spoken in different communities.³⁰³ To address the challenge, judges frequently seek assistance from court users’ committees or NGOs that collaborate with the judiciary to provide pertinent sign language interpreters, often free of charge or occasionally at a nominal cost.³⁰⁴ At times, individuals also arrange for their own sign language interpreter.³⁰⁵

When it comes to the digital accessibility of government services more broadly, the National Information and Communications Technology (ICT) Guidelines of 2020,³⁰⁶ and the Kenya Standards on Accessibility of ICT products and services,³⁰⁷ require the government to ensure equal treatment and full accessibility of the ICT environment for persons with disabilities. The Guidelines specifically require both public and private entities providing public services to take measures to offer information in accessible and usable formats for persons with disabilities.³⁰⁸ Importantly, they mandate that government departments and agency websites adhere to international web accessibility standards to ensure accessibility to persons with disabilities.³⁰⁹

²⁹⁴ The Special Rapporteur on the Rights of Persons with Disabilities, International Principles and Guidelines on Access to Justice for Persons with Disabilities, 2020, Principle 2.

²⁹⁵ The Persons with Disabilities Act, 2025, Sec. 26(2).

²⁹⁶ Ibid, Sec. 28(2)(b).

²⁹⁷ The Access to Information Act No.31 of 2016, Sec. 5 (2).

²⁹⁸ Ibid, Sec. 2 – see the definition for “public entity” which cross-references Article 260 of the Kenya Constitution.

²⁹⁹ The Judiciary Disability Mainstreaming Policy, 2016, pp.19-20.

³⁰⁰ The Kenya Sign Language Bill, Senate Bill No.9 of 2023, <https://www.parliament.go.ke/sites/default/files/2024-03/The%20Kenyan%20Sign%20Language%20Bill2023%20Senate%20Bill%20no9%20of%202023.pdf>. The Senate passed the Bill in February 2024; however, it has not yet been enacted into law.

³⁰¹ Ibid, Sec.6.

³⁰² Ibid.

³⁰³ Interview with a judge at the High Court of Kenya at Meru, 4 July 2024.

³⁰⁴ Interviews with a judge at the High Court of Kenya at Nakuru, 4 July 2024, and with a judge at the High Court of Kenya at Meru, 12 July 2024.

³⁰⁵ Interview with a judge at the Court of Appeal of Kenya at Mombasa, 20 June 2024.

³⁰⁶ Ministry of Information, Communications and Technology, ‘National Information, Communications and Technology (ICT) Policy, November 2019, <https://www.ict.go.ke/wp-content/uploads/2019/12/NATIONAL-ICT-POLICY-2019.pdf>.

³⁰⁷ Kenya Bureau of Standards, KS2952-1, 2022.

³⁰⁸ Ibid, p.17.

³⁰⁹ Ibid.

The Kenya Judiciary has increasingly integrated technology into its operations. The Practice Directions to Standardize Practice and Procedure in the High Court of Kenya required the establishment of an E-Support Centre at each High Court station to assist vulnerable litigants, including persons with disabilities, in accessing the ICT platform when needed.³¹⁰ However, the Practice Directions apply only to civil, not criminal cases.³¹¹ On 11 March 2024, it was announced that all courts would fully transition to digital systems.³¹² This means that all trial-related processes, from case filing to conclusion, will be conducted electronically. The shift aims to enhance accessibility and reduce barriers to access justice.³¹³ A virtual hearing system is also in place, allowing individuals to attend court proceedings remotely, regardless of their location.

Key informants interviewed for this research agree that the digitization of court systems has improved accessibility for persons with disabilities by enabling them to attend court hearings and proceedings remotely. This development has minimized the challenges posed by the intimidating atmosphere of traditional courtrooms, particularly to individuals with intellectual and/or psychosocial disabilities.³¹⁴ If an individual is unable to independently connect to and access virtual sessions, court registries in most areas are equipped to assist with their participation. This helps them to attend court sessions virtually from any nearby court.³¹⁵ If a sign language interpreter is needed, court administrators can also arrange for one from any location.³¹⁶ Similarly, if a person requires any other support, judicial officers will take note of this before sessions begin and bring it to the court's attention, which should enable the court to make appropriate orders.³¹⁷ According to some interviewees, this arrangement only happens in practice, but there exists no official protocol in this regard.

However, concerns remain about whether the technologies and systems adopted by the judiciary, while addressing some of the physical barriers, are fully accessible and inclusive for people with disabilities, especially those with visual, hearing and intellectual disabilities.³¹⁸ For example, the current technological systems are not yet designed to allow persons with visual or hearing disabilities to navigate them independently. They may require assistance with filling documents, logging in, and following court proceedings.³¹⁹ More generally, a study published by the Kenya ICT Action Network (KICTANet) in 2023 found that the Kenyan Judiciary website and digital services scored 59.7 percent in terms of compliance with international accessibility standards for persons with disabilities.³²⁰ This score reflects an average performance compared to other government offices indicating the existence of significant barriers to accessibility.³²¹

VII. Accommodation and Support Measures

i. Accommodations

The CRPD and ADP require both the provision of reasonable accommodations and necessary procedural accommodations to ensure that persons with disabilities are treated equally and may fully enjoy and exercise their rights.³²²

The duty to provide reasonable accommodation, as outlined by the CRPD Committee, is an *ex-nunc* obligation, meaning a duty that arises from the moment a person with a disability requires access to a non-accessible situation or environment in order to exercise their rights.³²³ As such, reasonable accommodation measures are reactive and individualized obligations, tailored to address the specific needs of each person with disability and

³¹⁰ The Practice Directions to Standardize Practice and Procedure in the High Court of Kenya, *The Kenya Gazette*, 14th January 2022, available at: <https://archive.gazettes.africa/archive/ke/2022/ke-government-gazette-dated-2022-01-14-no-7.pdf>, Section 6.

³¹¹ Paul Ochieng Juma, 'Access to justice for persons with psychosocial disabilities: A comparative analysis of participation in the Kenyan criminal justice system' (Routledge, 2025) (forthcoming), chapter five, 20.

³¹² The Judiciary, "All Courts Nationwide Go Digital", 11 March 2024, <https://judiciary.go.ke/judiciary-launches-e-filing-in-all-courts-data-tracking-dashboard-and-causelist-portal-portal/>.

³¹³ Ibid.

³¹⁴ Interviews with a judge at the Court of Appeal of Kenya at Mombasa, 20 June 2024; with a judge at the High Court of Kenya at Nakuru, 4 July 2024; with a judge at the Environment and Land Court of Kenya at Machacos, 12 July 2024, and with a judge at the High Court of Kenya at Meru, 4 July 2024.

³¹⁵ Interview with a judge at the Court of Appeal of Kenya at Mombasa, 20 June 2024, and with a judge at the Employment and Labour Relations Court of Kenya at Nairobi, 25 July 2024.

³¹⁶ Interviews with a judge at the Court of Appeal of Kenya at Mombasa, 20 June 2024, and with a judge at the Environment and Land Court of Kenya at Machacos, 12 July 2024.

³¹⁷ Interview with a judge at the High Court of Kenya at Nakuru, 4 July 2024.

³¹⁸ Interviews with a judge at the High Court of Kenya at Meru, 12 July 2024, and with a judge at the Environment and Land Court of Kenya at Machacos, 12 July 2024.

³¹⁹ Interview with a judge at the Employment and Labour Relations Court of Kenya at Nairobi, 25 July 2024.

³²⁰ KICTANet, "Scorecard: Accessibility of Government Websites to Persons with Disabilities," Policy Brief No.15, June 2015, available at: <https://www.kictanet.or.ke/downloads/>.

³²¹ Ibid, p.5.

³²² Articles 2, 5 (3), and 13 (1) of the CRPD; Articles 1, 3 (g), and 13 (1) of ADP.

³²³ Committee on the Rights of Persons with Disabilities, General Comment No.6, § 24 (b).

the specific barriers they face when exercising their right to access justice.³²⁴ The duty to provide reasonable accommodation is immediate where it does not impose a disproportionate or undue burden on the duty-bearer. Non-compliance with the obligation may constitute a violation of the right to non-discrimination.³²⁵

In contrast, the duty to provide procedural accommodations for persons with disabilities in their efforts to access justice is immediate. Failure to provide such accommodations cannot be excused by raising arguments about reasonableness or the heavy burden placed on a duty-bearer in providing such accommodations.³²⁶ Procedural accommodations, which include adjustments and assistance or support for persons with disabilities, must be provided to ensure their effective participation in judicial processes and proceedings on an equal basis with others.³²⁷ Such measures might include, for instance, include reforms to evidence laws, such as allowing persons with intellectual and/or psychosocial disabilities to testify through the use of pre-recorded statements.³²⁸ They also includes the provision of individualized assistance – including through the availability of support persons, such as interpreters and intermediaries – to ensure that a person with disability can participate effectively in legal proceedings.³²⁹

a. Reasonable accommodation

According to the Persons with Disabilities Act, 2025, the denial of reasonable accommodation is recognized as a form of discrimination on the basis of disability,³³⁰ and the Act establishes it as a criminal offence.³³¹ In addition, the Criminal Procedure Bench Book adopted in 2018 by the Kenya Judiciary draws on broader constitutional guarantees, such as Article 27 (right to equality and non-discrimination), Article 28 (right to dignity), Article 48 (right to access to justice), and Article 54 (rights of persons with disabilities), to affirm the duty of courts to implement reasonable accommodation measures when handling cases involving persons with disabilities.³³² The Bench Book states that:

“The court must be guided by the principle of reasonable accommodation of persons with disabilities, which requires necessary and appropriate modification and adjustments to ensure to persons with disabilities the enjoyment or exercises on an equal basis with others all the human rights and fundamental freedoms.”³³³

This proactive approach and the judiciary's commitment to upholding the rights of persons with disabilities to be provided with reasonable accommodation in judicial proceedings are commendable and establish a crucial positive framework for ensuring a fair hearing for persons with disabilities.

For example, in the case of *Republic v. Elijah Weru Mathenge*, the High Court in Nairobi addressed the challenge of how to proceed with the trial of an accused who developed a speech-related disability during the proceedings and was the sole person who could give evidence in his own defence.³³⁴ Initially, the accused had verbally denied the charges against him, but while in custody, he lost his ability to speak, but could still communicate through writing. Recognizing the unique nature of the case before it, the court suggested a combination of methods to accommodate the accused and ensure that his right to a fair trial was upheld. The different options the court suggested were:

- The recording of the accused's statement in answer to pre-prepared questions in examination-in-chief by his counsel and in cross-examination by the prosecutor; or
- By signs and gestures like nodding his head in affirmation to a question and shaking his head in negation to a question put to him by his counsel in examination-in-chief or in cross-examination by the prosecutor; or
- By getting an intermediary, “if he is able”, who does not have any interest in the case, and who is able to understand his method of communication.³³⁵ This option, in particular, is, however, problematic as it implies that the responsibility to obtain an intermediary lies with the individual, without indicating that the court has a duty to provide one when necessary.

³²⁴ Ibid.

³²⁵ CRPD, Article 5 (3).

³²⁶ Committee on the Rights of Persons with Disabilities, General Comment No.6, § 25 (d); Bantekas, Stein and Anastasiou (n 208) 393.

³²⁷ The Special Rapporteur on the Rights of Persons with Disabilities, International Principles and Guidelines on Access to Justice for Persons with Disabilities, 2020, Principle 5.

³²⁸ Bantekas, Stein and Anastasiou (n 208) 396.

³²⁹ See the CRPD Committee, concluding observations on the initial report of Indonesia, CRPD/C/IDN/CO/1, 12 October 2022, § 33; and Concluding observations on the initial report of Jamaica, CRPD/C/Jam/CO/1, 20 May 2022, § 27. In both instances, the Committee urged the States parties to implement procedural adjustments, including the provision of individualized assistance, to ensure that persons with disabilities can effectively participate in legal proceedings.

³³⁰ The Persons with Disabilities Act, 2025, Sec. 2 – see the definition of “discrimination on the basis of disability.”

³³¹ Ibid, Sec.62(2)(k).

³³² The Kenya Judiciary, Criminal Procedure Bench Book, 2018, pp.26, and 77-79.

³³³ Ibid, p.78.

³³⁴ *Republic v Elijah Weru Mathenge*, Criminal Case No. 106 of 2013, The High Court of Kenya at Nairobi, 17 January 2017, eKLR.

³³⁵ Ibid, p.4.

Additionally, the court permitted the use of a specially written oath, administered by a court assistant by reading to the accused, who was then asked to affirm by nodding his head.³³⁶ In order to ensure efficient handling of the evidence of the accused without disrupting other cases before it, the court scheduled a special sitting to hear him. The court relied on Articles 54(d) and 50(c) of the Constitution of Kenya to justify the suggested reasonable accommodation measures. Article 54(d) guarantees individuals with speech-related disabilities the right to use sign language or other appropriate means of communication, while Article 50(c) ensures an accused person has adequate time and facilities to prepare their defence.

This case exemplifies reasonable accommodation, as the court proposed reactive, individualized measures in response to the accused's disability that developed during the proceedings. The proposed accommodations—particularly, the use of gestures or written communication—were tailored to the specific circumstance of the accused. Nonetheless, the court's suggestion that the accused himself secure an intermediary raises concern. While the focus of the case remains primarily on reasonable accommodation, the provision of an intermediary is, in fact, a matter of procedural accommodation, which places a duty on the justice system to ensure such supports are available as a standard component of the right to access to justice and, in this particular case, of the right to a fair trial, including the right to defend oneself against criminal charges.

In *Macharia Kiama v. Republic*, the High Court in Nyeri overturned the lower court's conviction and sentencing, noting that, while a Kenyan Sign Language interpreter was provided, the trial court had failed to confirm whether the accused had actually learned and understood sign language.³³⁷ In this case, the accused, who had a hearing disability, was unrepresented during the trial at the lower court. He had difficulties following the interpretation and did not ask any questions to the prosecution witnesses. The High Court concluded that this omission might have been due to the inability of the accused person to understand sign language. According to the Court, the trial and conviction amounted to a miscarriage of justice as the accused person was not able to participate effectively.³³⁸

Similarly, in *SK v. Republic*, the High Court in Migori criticized the trial court for sentencing a person with visual disability without the provision of necessary assistance to address his challenges and ensure effective participation in the trial process, thereby violating his right to a fair trial.³³⁹ The High Court relied on Article 54 of the Constitution and Section 21 of the Persons with Disabilities Act, 2003, which guaranteed persons with disabilities the right to assistive devices.³⁴⁰ According to the Court, once it is determined that an accused person has a visual disability, they must be provided with the necessary assistance to enable their effective participation in the proceedings.³⁴¹

In all the cases mentioned above, the courts made their decisions based on the Constitution and other domestic legislation without referencing Kenya's obligations under the CRPD or the ADP. This omission creates the potential for the inadequate implementation of international law obligations, or the application of domestic law in a manner that creates a conflict with Kenya's international obligations.

b. Procedural accommodations

Kenya previously lacked clear and broadly applicable legal provisions on procedural accommodations for persons with disabilities in accessing justice. However, the Persons with Disabilities Act, 2025 addresses this gap by explicitly recognizing the right to access to justice "on an equal basis with others, including through the provision of **procedural** and age-appropriate accommodations."³⁴² The guarantee applies to all judicial proceedings— whether civil or criminal – involving persons with disabilities.

In addition, the Sexual Offences Act of 2006 provides for the protection of "vulnerable witnesses", which includes persons with disabilities, through a range of procedural accommodations. This includes permitting a person with an intellectual and/or psychosocial disability to provide testimony under a special arrangement from within a witness protection box, "through an intermediary", or by having the court conduct proceedings in a closed session if necessary.³⁴³ The Act also permits an intermediary to: convey the "general purport of any question" to the witness; request a break; and inform the court if a witness becomes fatigued or stressed during the proceedings.³⁴⁴

The Sexual Offences Rules of Court allow courts to accept a recorded statement from a vulnerable witness as their evidence-in-chief or part of it.³⁴⁵ Courts can also hold a special sitting to examine evidence, in full or in

³³⁶ Ibid.

³³⁷ *Macharia Kiama v Republic*, Criminal Appeal No.17 of 2016, in the High Court of Kenya at Nyeri, 4 March 2019, eKLR.

³³⁸ Ibid, p.8.

³³⁹ *SK v Republic*, Criminal Appeal No.36 of 2019, in the High Court of Kenya at Migori, 23 December 2019, eKLR, §§ 12-22.

³⁴⁰ The Persons with Disabilities Act, 2003, Sec. 21.

³⁴¹ *SK v Republic*, Criminal Appeal No.36 of 2019, in the High Court of Kenya at Migori, 23 December 2019, eKLR, §§ 16-18.

³⁴² The Persons with Disabilities Act, 2025, Sec. 28(1) (emphasis added).

³⁴³ The Sexual Offences Act No.3 of 2006, Sec. 31 (3).

³⁴⁴ Ibid, Sec.31(7)(c).

³⁴⁵ The Sexual Offences Rules of Court, 2014, Rule 14 (1).

part, involving a vulnerable witness.³⁴⁶ Additionally, the Rules permit judges and magistrates to conduct proceedings *in camera*, restricting access to the press, media, or public during a trial or parts of it, in order to protect the privacy of a victim or vulnerable witness.³⁴⁷ Similar procedures are also provided in the Prevention of Torture Act No.12 of 2017. The Act establishes protection for vulnerable witnesses, which includes persons with “mental disability”, in criminal proceedings involving acts of torture or other cruel, inhuman or degrading treatment or punishment.³⁴⁸

As previously noted, the Persons with Disabilities Act, 2025, mandates the Chief Justice to make rules that ensure access to justice for persons with disabilities.³⁴⁹ The prompt adoption of these rules is crucial to ensure a consistent application of procedural accommodations, which are now guaranteed in various acts, across all judicial proceedings.

ii. Intermediaries

One of the procedural accommodation mechanisms that States are required to avail to support persons with disabilities and ensure their effective participation in court proceedings is access to justice intermediaries. These intermediaries assist persons with disabilities in following judicial proceedings and communicating effectively with the court, thereby upholding their right to access to justice. The UN Special Rapporteur on the Rights of Persons with Disabilities defines justice intermediaries as:

“persons who work, as required, with justice system personnel and persons with disabilities to ensure effective communication during legal proceedings. They support persons with disabilities to understand and make informed choices, making sure that things are explained and talked about in ways that they can understand and that appropriate accommodations and support are provided.”³⁵⁰

In principle, intermediaries are neutral third parties who assist persons with disabilities to communicate with court officials and judges effectively. They assist persons with disabilities in understanding, following, and participating in judicial processes, as well as providing evidence in court. They do not replace or speak on behalf of the persons with disabilities.³⁵¹

Intermediaries should not be imposed on the person with a disability.³⁵² Instead, the individual must actively consent to their assistance.³⁵³ Also, intermediary services should be made available to persons with disabilities, when needed, in any judicial or quasi-judicial proceedings and at any stage of the judicial process, whether the person with a disability is a complainant, witness, suspect or defendant.³⁵⁴

Kenya is one of the few countries that has adopted specific laws to regulate the role of intermediaries.³⁵⁵ The Constitution of Kenya recognizes the right to use an intermediary as an essential aspect of the right to a fair hearing. As Article 50(7) explicitly acknowledges, “[in] the interest of justice, a court may allow an intermediary to assist a complainant or an accused person to communicate with the court.” In addition, Article 54(1)(d) of the Constitution, which addresses the rights of persons with disabilities, also affirms their right to use appropriate means of communication. This provision can be interpreted to include the use of intermediaries, as intermediaries serve as a means to facilitate communication.

The Sexual Offences Act 2006 also allows intermediaries to assist vulnerable witnesses, who include persons with disabilities. However, the Act defines intermediaries differently as individuals authorized by a court, based on their expertise or experience, who provide evidence on behalf of a vulnerable witness. In this context, intermediaries include parents, relatives, psychologists, counsellors, guardians, children’s officers and social workers.³⁵⁶ As such, instead of support and assistance, the Act envisages intermediaries who may substitute and purport to speak on behalf of a person with disability. The provision risks imposing a substituted decision-making regime and may violate the rights of persons with disabilities.

³⁴⁶ Ibid, Rule 14 (2).

³⁴⁷ Ibid, Rule 2(2).

³⁴⁸ Prevention of Torture Act No.12 of 2017, Sec. 16 (1)(2) and (4).

³⁴⁹ See Section II of this report, specifically the sub-section titled ‘Persons with Disabilities Act 2025’.

³⁵⁰ The Special Rapporteur on the Rights of Persons with Disabilities, International Principles and Guidelines on Access to Justice for Persons with Disabilities, 2020, p.9.

³⁵¹ Paul Ochieng Juma ‘Right to self-representation for people with mental disabilities in Kenya’s courts’ (2019) 7 African Disability Rights Yearbook 81-95 <http://doi.org/10.29053/2413-7138/2019/v7a4>, 92.

³⁵² Ibid.

³⁵³ Access to Justice Knowledge Hub, Implementing the Convention on the Rights of Persons with Disabilities in Criminal Justice Systems: A Briefing Paper, July 2022, 12.

³⁵⁴ Justice Intermediary Starter Kit, ‘Report on Intermediaries for Justice around the Globe’, 2020, available at: <https://justiceintermediary.org/wp-content/uploads/report-on-intermediaries-for-justice.pdf>, p.7.

³⁵⁵ Ibid, p.12.

³⁵⁶ Sexual Offences Act No.3 of 2006, Sec.2.

While the definition poses a risk, Section 31 of the Act offers some mitigation. This section empowers the court to direct the appointment of an intermediary once it determines that a person is a vulnerable witness. The intermediary's role is then to convey the general purport of any question to the vulnerable witness, serve as a channel through which the witness provides evidence, and request the court for a recess in the event the witness requires rest during the proceedings.³⁵⁷ In addition, the Sexual Offences Rules of Court 2014 clarify that an intermediary shall not instruct a vulnerable witness regarding the giving of evidence³⁵⁸ or interfere with the evidence of the vulnerable witness.³⁵⁹ If an intermediary disagrees with the opinion of a vulnerable witness, the latter's view will take precedence.³⁶⁰ The Rules also require the Court to inform a vulnerable witness and consider their opinion before appointing an intermediary.³⁶¹

Similarly, under the Prevention of Torture Act 2017, vulnerable witnesses, including those with intellectual and/or psychosocial disabilities, can provide evidence through an intermediary in criminal cases involving torture or other forms of cruel, inhuman or degrading treatment or punishment. The Act restricts the intermediary's function to assisting a witness in understanding the question put to them, facilitating communication of evidence, and requesting a break where necessary during proceedings.³⁶²

Under both the Sexual Offences and the Prevention of Torture acts, intermediaries may be appointed either at the request of the prosecutor, witness, or on the court's own motion.³⁶³ It is also important to note that the intermediary schemes under both laws are limited to witnesses and do not statutorily extend to accused persons. However, in the 2018 Criminal Procedure Bench Book, the Kenyan Judiciary, citing Article 50(7) of the Constitution, acknowledges the role intermediaries may play in respect to complainants (victims), witnesses and accused persons in other criminal cases beyond those covered under the Sexual Offences Act or the Prevention of Torture Act.³⁶⁴ In *MM v. Republic*, the Court of Appeal has also affirmed that the use of an intermediary in a criminal trial may be integral to the rights of both the complainant (victim) and the accused.³⁶⁵

Despite these enabling normative frameworks, the implementation of the intermediary system is reportedly inconsistent, with no standardized procedure for the appointment of qualified intermediaries.³⁶⁶ Additionally, there is a lack of formal State training and guidelines for the accreditation of intermediaries.³⁶⁷ The limited training opportunities that do exist are often arranged by organizations of persons with disabilities, notably the Kenya Association of the Intellectually Handicapped (KAIH).³⁶⁸

Kenyan courts have also made efforts to clarify some issues that are not explicitly stated in the law. For instance, in *MM v. Republic*, the Court of Appeal clarified that, procedurally, it is the duty of the prosecution to identify vulnerable witnesses and apply to the court to have them declared as such before an intermediary is appointed.³⁶⁹ Once such an application has been made, the trial court must determine whether the victim or witness would face undue stress and suffering without this support.³⁷⁰ Before appointing an intermediary, the trial court must ensure that the intended intermediary is either an expert, has specialized knowledge, or has a relationship with the witness.³⁷¹ Furthermore, the Court of Appeal underlined that an intermediary must be appointed, whether upon the prosecution's request or the court's own initiative, before the testimony of a vulnerable witness is heard.³⁷²

In *Isaac Okuku alias Zakayo v. Republic*, the High Court at Busia also noted that, when an intermediary is needed for a witness with a "mental impairment or disability", the trial court must first inquire and satisfy itself that the person is "mentally disabled".³⁷³ This inquiry may involve the use of a psychiatric assessment or review before drawing conclusions on whether a person is a vulnerable witness.³⁷⁴ The court outlined these steps to justify the use of an intermediary, ensure justice, and uphold the accused person's right to a fair trial.³⁷⁵

³⁵⁷ Sexual Offences Act No.3 of 2006, Sec.31(7).

³⁵⁸ The Sexual Offences Rules of Court, 2014, Rule 7 (10).

³⁵⁹ Ibid, Rule 7 (8)(b).

³⁶⁰ Ibid, Rule 6 (4).

³⁶¹ Ibid, Rule 7 (2 - 5) and (12).

³⁶² Prevention of Torture Act No.12 of 2017, Sec. 16 (7).

³⁶³ Ibid, Sec. 16 (5); and Sexual Offences Act No.3 of 2006, Sec.31(4)(c).

³⁶⁴ The Kenya Judiciary, Criminal Procedure Bench Book, 2018, pp.84-86.

³⁶⁵ *MM v Republic*, Criminal Appeal No.41 of 2013, in the Court of Appeal at Nairobi, 18 July 2014, eKLR, p.4.

³⁶⁶ Justice Intermediary Starter Kit, 'Report on Intermediaries for Justice around the Globe', 2020, available at: <https://justiceintermediary.org/wp-content/uploads/report-on-intermediaries-for-justice.pdf>, pp.50-54.

³⁶⁷ Paul Juma, 'Right to Self-Representation for People with Mental Disabilities in Kenya's Courts' (2019) 7 African Disability Rights Yearbook 81.

³⁶⁸ Ibid; Lizzy Muthoni Kibira and Kevin Kipchirchir, 'Between Arrest and Sentence: Treatment of Persons with Intellectual and Psychosocial Disabilities in Kenya's Criminal Justice System' in J Osongo Ambani and Humphrey Sipalla (eds), *Mental health and the criminal justice system* (Kabarak University Press 2023).

³⁶⁹ *MM v Republic*, Criminal Appeal No.41 of 2013, in the Court of Appeal at Nairobi, 18 July 2014, eKLR, p.5.

³⁷⁰ Ibid, pp.5-6.

³⁷¹ Ibid.

³⁷² Ibid.

³⁷³ *Isaac Okuku alias Zakayo v Republic*, Criminal Appeal No.36 of 2013, in the High Court of Kenya at Busia, 13 October 2014, eKLR.

³⁷⁴ Ibid, §§ 7 & 8.

³⁷⁵ Ibid, § 5.

In *Republic v. Patrick Mutisya Muthiani*, the respondent's counsel argued that the complainant, who was a child with a "mental disability", should not testify through an intermediary because she lacked the capacity to give evidence on account of her condition.³⁷⁶ Counsel also questioned the neutrality of the proposed intermediary, who had lived with the complainant for over a year and might have influenced her testimony. The High Court, while reviewing the magistrate's decision to deny the appointment of an intermediary, agreed that the complainant was a vulnerable witness. However, the court ordered a second psychiatric assessment to determine the type of assistance the intermediary should provide during the complainant's testimony.³⁷⁷ Regarding neutrality, the Court held that any potential influence the intermediary had on the complainant would be addressed during cross-examination by the defence.³⁷⁸

Given the risks associated with inconsistencies, lack of clarity, substituted decision-making and limited statutory authority to resort to intermediaries for witnesses, it is imperative for the Chief Justice to promptly exercise the mandate granted under Section 28(3) of the Persons with Disabilities Act, 2025, and adopt comprehensive rules on the use of intermediaries.

VIII. Key Findings and Recommendations

Kenya has made some commendable progress in strengthening its legislative commitments, most notably through the 2010 Constitution, which guarantees the rights of persons with disabilities, specifically under Article 54. The enactment of the Persons with Disabilities Act, 2025, confirms and guarantees the right to equality, non-discrimination, legal capacity and access to justice. The country has also ratified both the CRPD and ADP, reaffirming its commitment to realizing the rights of persons with disabilities. Despite these important legislative advances, significant legal and procedural gaps remain that continue to undermine the ability of persons with disabilities, particularly those with intellectual and/or psychosocial disabilities, to fully and equally exercise their right to access to justice.

These gaps are reflected in the outdated or inconsistent provisions of the Penal Code, the Criminal Procedure Code, and other key legislation, including the Constitution, that retain derogatory terms to refer to persons with disabilities. While the Legal Aid Act and the Mental Health (Amendment) Act represent a step in the right direction, they are not fully aligned with the standards set by the CRPD and ADP.

The following are the key areas of concern identified in this report, along with recommended actions to ensure equal access to justice for persons with disabilities:

a. Denial of legal capacity in the criminal justice system

Findings

- The Penal Code and CPC contain discriminatory provisions that deny persons deemed "of unsound mind" or found "guilty but insane" the right to legal capacity and the right to stand criminal trial or participate in criminal proceedings. These laws enable substituted decision-making and allow courts to impose orders of detention "at the President's pleasure," which violate the rights of persons with disabilities.
- A number of High Court judgments -- declaring sections of the CPC relating to detention "at the President's pleasure" unconstitutional - represent an important step forward. However, progress has been undermined by inconsistent jurisprudence. Notably, the judgments that have found such sections unconstitutional have only partially addressed the broader human rights concerns they raise. Moreover, despite explicit judicial calls for legislative amendment or repeal, the impugned sections of the CPC remain in force, as Parliament is yet to act on these recommendations.

Recommendations

- **Legislature:** urgently amend Sections 162-167 of the CPC and the relevant provisions of the Penal Code to remove discriminatory provisions and align the criminal law and procedure with the Constitution, CRPD and ADP.

³⁷⁶ *Republic v Patrick Mutisya Muthiani*, Miscellaneous Criminal Application No.207 of 2015, in the High Court of Kenya at Nairobi, 14 October 2015, eKLR.

³⁷⁷ Ibid.

³⁷⁸ Ibid, p.2.

- **Judiciary:** Issue practice guidance to courts to support persons with disabilities and to avoid reliance on the provisions of the Criminal Procedure Code found unconstitutional by the High Court.

b. Denial of legal capacity in the civil justice context

Finding

- The Civil Procedure Act (Chapter 21) and the Civil Procedure Rules use derogatory terms to refer to persons with intellectual and/or psychosocial disabilities. These laws also restrict their right to legal capacity through substituted decision-making regimes, such as mandatory court-appointed guardians. These procedures are discriminatory and violate the dignity, autonomy and limit the right to access to justice for persons with disabilities.

Recommendation

- **Legislature:** Reform the Civil Procedure Act and Rules to recognize the full legal capacity of persons with intellectual and/or psychosocial disabilities. The latter should be allowed to participate in civil justice proceedings through supported decision-making frameworks consistent with the CRPD and ADP.

c. Deficiencies in the legal aid framework

Findings

- The Legal Aid Act does not explicitly recognize persons with disabilities as beneficiaries. It also restricts the scope of legal aid in civil matters primarily to formal court proceedings, excluding legal aid in non-court settings, such as those proceedings concerning individuals institutionalized in mental health facilities or rehabilitation centres.
- Under the Legal Aid Act, eligibility for legal aid is primarily determined based on a means test, except in public interest matters, which fails to reflect international human rights standards.

Recommendations

- **Legislature:** Amend the Legal Aid Act to explicitly recognize persons with disabilities as beneficiary groups. Revise the Legal Aid (General) Regulations to broaden the definition of “civil matters” to include legal aid services in non-court settings, such as proceedings in mental health facilities, rehabilitation centres, and other institutions where persons with disabilities may be held or receive services.
- **The National Legal Aid Service:** Develop alternative eligibility criteria for persons with disabilities that move beyond means testing. The CRPD and ADP obligate State parties to provide accessible legal aid at all levels of the justice system.
- **Judiciary:** Until the necessary legal reforms are enacted, the judiciary should exercise its inherent powers to ensure access to justice and direct the provision of legal aid where needed to uphold the right to a fair trial and equality before the law.

d. Physical accessibility, access to services and communications systems

Findings

- While most newly built courts in Kenya include features such as ramps, lifts, accessible washrooms, and reserved parking for persons with physical disabilities, older court buildings remain largely inaccessible. In these courts, judges often have to adapt by relocating hearings to ground-level spaces.
- There is a significant shortage of qualified sign language interpreters in the judiciary. Many interpreters are not trained to accommodate local language variations, forcing courts to rely on NGOs, court users’ committees, or self-arranged interpreters.

- The judiciary's digitization, through virtual hearings and online case management, has improved physical access and convenience. However, these systems are not yet fully accessible to persons with visual or hearing disabilities.
- Although some court registries provide assistance to persons with disabilities needing help connecting to virtual court sessions or securing interpreters, there are no uniform protocols to ensure this be done consistently.

Recommendations

- **Legislature:** Enact the Kenya Sign Language Bill (2023) to provide statutory guarantees for the availability and quality of sign language interpretation in legal proceedings and to mandate its application in all relevant sectors of the justice system.
- **Executive:**
 - (a) In collaboration with the Judiciary, ensure full accessibility of all court facilities, including the modification of old court buildings to meet accessibility standards.
 - (b) Ensure adequate budgetary allocations and the creation of designated posts to support the provision of accessible services within the justice system, including qualified sign language interpreters, assistive technologies, and necessary infrastructure.
- **Judiciary:**
 - (a) Ensure the availability of Kenyan Sign Language interpreters and other local language variations. Take steps to reduce reliance on NGOs or other *ad hoc* arrangements.
 - (b) Develop standard operating procedures for virtual participation of persons with disabilities in court proceedings, ensuring, in particular, prior assessment of support needs and arrangements for real-time interpretation or assistance.
 - (c) Improve the accessibility of judicial technology systems for persons with disabilities, including aligning them with international web accessibility standards.

e. Accommodations and support measures

Findings

- Courts in Kenya have occasionally recognized the need for reasonable accommodations; however, these decisions primarily rely on domestic law and often fail to reference Kenya's obligations under the CRPD and ADP, among other international instruments binding on Kenya and other international standards. This risks inconsistent application and limited alignment with international standards.
- Before the recent enactment of the Persons with Disabilities Act 2025, the legal framework supporting procedural accommodations was unclear and limited in scope.
- Kenya's legal framework supports the use of intermediaries; however, implementation is hindered by the absence of standardized procedures, training programs and accreditation systems.

Recommendations

- **Executive:** Ensure adequate funding and institutional support for the operationalization of procedural accommodations and intermediary services in the justice system, including the development of training programs, accreditation frameworks, and the implementation of the Rules under the Persons with Disabilities Act, 2025.
- **Judiciary:**
 - (a) The Chief Justice should, in a timely manner, take all necessary steps to adopt Rules, as mandated under Section 28(3) of the Persons with Disabilities Act, 2025, to operationalize procedural accommodations and intermediary support, ensuring clarity and consistency across the justice system.

- (b) Ensure that the Rules harmonize existing legal frameworks related to reasonable accommodation and procedural accommodation.
- (c) Ensure that the Rules clearly distinguish intermediary support from substituted decision-making and align with international human rights standards.
- (d) Establish rights-based standards for identifying, training and accrediting qualified intermediaries.
- (e) Ensure the active involvement of persons with disabilities and their representative organizations in the development of the Court Rules.

f. Capacity building and awareness-raising

Finding

- Ensuring equal access to justice for persons with disabilities requires more than legislative reforms. It demands a sustained commitment to capacity-building and awareness-raising across the justice system. Judges, court staff, legal practitioners, law enforcement officials and other justice sector actors must be adequately trained to understand disability rights, accommodations and supports, and the principles of supported decision-making as outlined in the CRPD and ADP. Without systematic efforts to build capacity, discriminatory practices may persist despite formal legal guarantees.

Recommendation

- The Kenya Judiciary and the Attorney-General's Office, in consultation with organizations of persons with disabilities, should develop and implement continuous capacity-building programs on the rights of persons with disabilities, targeting all justice sector actors.

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January 2025

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